Judgments of the Israel Supreme Court:

Fighting Terrorism within the Law

Volume Two
2004-2005

Contents

Introduction

This volume is a compilation of several important cases heard by the Supreme Court of Israel on terrorism, security activities and Israeli policy in the West Bank. The previous volume of "Judgments of the Israel Supreme Court: Fighting Terrorism within the Law," reported on cases from 1997 to 2004. This successor volume contains cases from 2004 and 2005.

The years 2004 and 2005 were significant in the development of Israel's security policy. First, Israel disengaged from the Gaza Strip, removing Jewish settlements and its army presence in the area. Second, these years saw a marked increase in the building of a security fence meant to impede terrorist movement into Israel from the West Bank. Diplomatic efforts were undertaken; a summit was held between Israeli Prime Minister Ariel Sharon and Palestinian President Mahmoud Abbas in Sharm el-Sheik, Egypt, on February 8, 2005. Finally, Israel continued implementing steps to protect its citizens from terrorist attacks.

These events led to a number of important cases to be presented in the Israeli High Court of Justice. This volume provides a sample of these decisions. The Beit Sourik (June 2004) and Alfei Menasheh (September 2005) cases analyze the legal requirements and rationale behind the security fence. In the Bethlehem Municipality (February 2005) case, the Court explored conflicting rights related to safe access to Rachel's Tomb in Bethlehem. The Early Warning (October 2005) case looked at the involvement of local residents in terrorist apprehensions. The Almagor (February 2005) case dealt with the legality of the prisoner release action negotiated in the Sharm el-Sheik summit. The final case (December 2005) examined administrative detention of a Hamas militant caught on his way to commit a suicide bombing.

The High Court of Justice is one of the roles assumed by the Israeli Supreme Court. In this function the Court reviews the activities of public authorities, including the security forces, to ensure they are in line with the law (see section 15(4)(2) of the Basic Law: The Judiciary). This judicial review is exercised as a first instance. This means that the High Court of Justice is the

first court to address the case, and it is not a court of appeal. The High Court of Justice is also the last instance. There is no appeal on the Court's rulings, as it is the highest judicial instance in Israel.

Usually the panel is composed of three justices, but for petitions of particular importance, a larger panel with an odd number of justices may preside (to date, up to 15). The High Court of Justice need not adjudicate every dispute brought before it. It has the discretion to establish *locus standi* (who have the right to initiate a proceeding) and to decide whether a dispute is justiciable (if it is an appropriate case for the Court to address). Over the years the Court has demonstrated a flexible approach regarding *locus standi* and justiciable doctrines. It has been willing to hear petitions brought by public organizations with no personal interests in the dispute which clearly set out the principle issues of the dispute. The Court has also frequently shown readiness to adjudicate military and security cases. This flexibility forms the basis for the numerous judicial decisions of the Court centering on the war on terror.

The High Court of Justice is ever busy adjudicating petitions lodged against public bodies operating in the State of Israel. In addition, it hears petitions by residents of the West Bank and Gaza Strip brought against the activities of the Israel Defense Forces and other security bodies in these areas, as well as petitions brought by public organizations (with no personal interests) against these operations. The Court's authority to preside over these cases stems from the view that the security forces operating in the West Bank and Gaza Strip are also public bodies which are subject to the law. This policy, which was crystallized after the Six Day War of 1967, allows Palestinian residents to petition the Israeli Supreme Court and subjects the operations of Israel in the territories to judicial review. Most of the judgments presented in this booklet are an expression of this judicial review.

Israel's Security Fence

HCJ 2056/04 **Beit Sourik Village Council**

v.

1. The Government of Israel
2. Commander of the IDF Forces in the West Bank

The case of *Beit Sourik* has its origins in September 2000, when the second intifada broke out. Since that date, armed Palestinian groups planned and executed numerous terrorist attacks in Israel, the West Bank and the Gaza Strip. In thousands of attacks, especially suicide terror bombings, groups such as Hamas, Islamic Jihad and the Fatah killed more than 1,000 Israelis and wounded thousands more. The attacks that took place within Israel were mostly committed by terrorists crossing into Israel unhindered and illegally from the West Bank. In response, Israel took countermeasures geared up to stop attacks.

In the wake of lost life and hardened emotions, the Israeli government decided on June 23, 2002 to build a barrier – a security fence – between the West Bank and Israel. The barrier serves as a temporary measure to provide security against the thousands of armed attacks, however it severely affects the lives of many Palestinians.

Many petitioners challenged the building of the barrier – both in general and in specific sections. One of the first petitions challenged the building of a barrier in the area of Beit Sourik, a Palestinian village located on the western side of the West Bank. The Court delayed all other decisions on what come to be known as The Fence Cases pending the general guidance of *Beit Sourik*.

In June 2004, the Court handed down *Beit Sourik*, the seminal ruling reviewing the legality and proportionality of the fence under international and Israeli law. This case announced the legal standards by which the Court will judge the future cases.

The Court rejected the view that security considerations are outside court review. “The military is the expert regarding the military value of the separation fence,” the Court admitted, but “we are experts regarding its humanitarian aspects.”

The Court considered two questions in its review: first, does the military have the authority under law to build a barrier in and around the West Bank; second, whether the route of the barrier unjustly violates the human rights of the inhabitants of the West Bank.

To this case, the Court applied the international law of belligerent occupation and the law of armed conflict, or international humanitarian law, including the Fourth Geneva Convention and the Hague Regulations.

Under these legal doctrines, the Court found that the military is authorized, under established international conventions, to build a barrier in the occupied territory that protects the security of both Israelis and Palestinians. Notwithstanding this ruling, the military would have no authority to build a fence for political purposes. Therefore, the only justified purpose of the fence is the security purpose. Specifically, the international law of belligerent occupation, codified in the Hague Regulations, gives the occupying military the right and the duty to ensure security. The Court accepted the claim of the state that the barrier was meant for security purposes and was not motivated by political considerations of land annexation.

The Court went on to scrutinize the specific route of the fence around Beit Sourik by examining the proportionality of the infringment subject to a three test – requiring the military to show that the fence rationally served the declared security purpose, that the path chosen minimized the infringment upon human rights, and that the remaining infringment of human rights was justified by the benefit.

Thus, the Court established the legal standard governing future challenges to the route of the barrier. As the opinion makes clear, the Court found that part of the route of the barrier injured the rights of local Palestinians without a sufficiently justified security need. The court ordered a rerouting of the fence.

Beit Sourik had an immediate and major effect on the Israeli government's proposed barrier and upon its eventual route. On February 20, 2005, several

months after the decision, the government ordered that the security fence be built in such a way as to minimize "the effect on the daily lives of Palestinians, according to the standards outlined in *Beit Sourik*." Numerous petitioners sought orders finding parts of the barrier disproportionate, and several have prevailed, altering the route of the fence.

At the same time that the Israeli Supreme Court decided *Beit Sourik*, the International Court of Justice at the Hague considered the matter of the barrier as well, reaching a different conclusion. In the case of *Alfei Menashe* (HCJ 7957/04), the next case in this volume, given on September 15, 2005, the Israeli Court explains how the ICJ reached a different conclusion using different legal and factual bases.

HCJ 2056/04 **Beit Sourik Village Council**

v.

1. The Government of Israel
2. Commander of the IDF Forces in the West Bank

The Supreme Court Sitting as the High Court of Justice
[February 29, 2004; March 11, 2004; March 17, 2004; March 31, 2004; April 16, 2004; April 21, 2004; May 2, 2004]

Before President A. Barak, Vice-President E. Mazza, and Justice M. Cheshin

Petition for an *Order Nisi*.
For Petitioners – Mohammed Dahla
For Respondents – Anar Helman, Yuval Roitman

JUDGMENT

President A. Barak

The Commander of the IDF Forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before us is whether the orders and the fence are legal.

Background

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

From respondents' affidavit in answer to *order nisi* we learned that, a short time after the failure of the Camp David talks, the Israeli-Palestinian conflict

reached new heights of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks took place both in the area and in Israel. They were directed against citizens and soldiers, men and women, elderly and infants, ordinary citizens and public figures. Terror attacks were carried out everywhere: on public transport, in shopping centers and markets, in coffee shops and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rockets, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8,200 attacks were carried out in the area.

The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6,000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.

In HCJ 7015/02 *Ajuri v. IDF Commander*, at 358, I described the security situation:

> Israel's fight is complex. Together with other means, the Palestinians use guided human bombs. These suicide bombers reach every place that Israelis can be found (within the boundaries of the State of Israel and in the Jewish communities in Judea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. The forces fighting against Israel are terrorists: they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including inside holy sites; they are supported by part of the civilian population, and by their families and relatives.

2. These terror acts have caused Israel to take security precautions on several levels. The government, for example, decided to carry out various military operations, such as operation "Defensive Wall" (March 2002) and operation "Determined Path" (June 2002). The objective of these military actions was to incapacitate the Palestinian terrorist infrastructure and to prevent terror attacks. *See* HCJ 3239/02 *Marab v. IDF Commander in the West Bank*, at 355; HCJ 3278/02 *Center for Defense of the Individual v. IDF Commander*, at 389. These combat operations – which were not regular police operations, but embody all the characteristics of armed conflict – did not provide a sufficient answer to the immediate need to stop the terror. The Ministers' Committee on

National Security considered a series of proposed steps intended to prevent additional terror acts and to deter potential terrorists from committing such acts. *See Ajuri*, at 359. Despite all of these measures, the terror did not come to an end. The attacks did not cease. Innocent people paid with both life and limb. This was the background behind the decision to construct the separation fence.

The Decision to Construct the Separation Fence

3. The Ministers' Committee for National Security reached a decision (on April 14, 2002) regarding the deployment in the "Seamline Area" between Israel and the area. *See* HCJ 8532/02 *Ibraheem v. Commander of the IDF Forces in the West Bank*. The purpose behind the decision was "to improve and strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into Israel." The IDF and the police were given the task of preventing the passage of Palestinians into the State of Israel. As a temporary solution, it was decided to erect an obstacle in the three regions found to be most vulnerable to the passage of terrorists into the State of Israel: the Umm El-Fahm region and the villages divided between Israel and area (Baka and Barta'a); the Qalqilya-Tulkarm region; and the Greater Jerusalem region. It was further decided to create a team of Ministers, headed by the Prime Minister, which would examine long-term solutions to prevent the infiltration of Palestinians, including terrorists, into Israel.

4. The Government of Israel held deliberations on the "Seamline Area" program (June 23, 2002). The armed services presented their proposal to erect an obstacle on the "Seamline." The government approved stage 1 of the project, which provided a solution to the operational problem of terrorist infiltration into the north of the country, the center of the country and the Jerusalem area. The obstacle that was approved began in the area of the village of Salam, adjacent to Meggido junction, and continued until the trans-Samaria road. An additional obstacle in the Jerusalem area was also approved. The entire obstacle, as approved, was 116 km long. The government decision provided:

> (3) In the framework of stage 1 – approval of the security fences and obstacles in the "Seamline Area" and in Greater Jerusalem, for the purpose of preventing the penetration of terrorists from the area of Judea and Samaria into Israel.

(4) The fence, like the other obstacles, is a security measure. Its construction does not mark a national border or any other border.

….

(6) The precise and final location of the fence will be established by the Prime Minister and the Minister of Defense … the final location will be presented before the Ministers' Committee on National Security or before the government.

5. The Ministers' Committee on National Security approved (August 14, 2002) the final location of the obstacle. The Prime Minister and the Minister of Defense approved (December 2002) stage 2 of the obstacle from the village of Salam due east towards the Jordan River, 60 km long, and an extension, a few kilometers long, from Mount Avner (adjacent to El-Mouteelah village) in the southern Gilboa mountain range to the village of Tayseer.

6. The Ministers' Committee on National Security decided (on September 5, 2003) to construct stage 3 of the obstacle in the Greater Jerusalem area (except in the Ma'ale Adumim area). The length of this obstacle is 64 km. The government, on October 1, 2003, set out its decision regarding stages 3 and 4 of the obstacle:

A. The Government reiterates its decision regarding the importance of the "Seamline Area" and emphasizes the security need for the obstacle in the "Seamline Area" and in "Greater Jerusalem."

B.

C. Therefore:

D.

1. We approve the construction of the obstacle for the prevention of terror activities according to the stages and location as presented today before us by the armed forces (the map of the stages and location of the fence is on file in the government secretariat).

2.

3. The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seamline Area," is a security measure for the prevention of terror attacks and does not mark a national border or any other border.

4.

5. Local changes, either of the location of the obstacle or of its implementation, will be brought before the Minister of Defense and the Prime Minister for approval.

6.

7. The Prime Minister, the Minister of Defense, and the Finance Minister shall calculate the budget necessary for implementation of this decision as well as its financial schedule. The computation shall be brought before the government for approval.

8.

9. In this framework, additional immediate security steps for the defense of Israelis in Judea and Samaria during the period of construction of the obstacle in the "Seamline Area" shall be agreed upon.

10.

11. During the planning, every effort shall be made to minimize, to the extent possible, the disturbances to the daily lives of the Palestinians due to the construction of the obstacle.

12.

The location of this fence, which passes through areas west of Jerusalem, stands at the heart of the dispute between the parties.

The Separation Fence

7. The "Seamline" obstacle is composed of several components. In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50 – 70 meters. Due to constraints, a narrower obstacle, which includes only the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons. In the area relevant to this petition, the fence is not being replaced by a concrete wall. Efforts are being made to minimize the width of the area of which possession will be taken *de facto*. Various means to help prevent infiltration will be erected along the length of the obstacle. The IDF and the border police will patrol the separation

fence, and will be called to locations of infiltration, in order to frustrate the infiltration and to pursue those who succeed in crossing the security fence. Hereinafter, we will refer to the entire obstacle on the "Seamline" as "the separation fence."

The Seizure Proceedings

8. Parts of the separation fence are being erected on land which is not privately owned. Other parts are being erected on private land. In such circumstances – and in light of the security necessities – an order of seizure is issued by the Commander of the IDF Forces in the area of Judea and Samaria (respondent 2). Pursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land. After the order of seizure is signed, it is brought to the attention of the public, and the proper liaison body of the Palestinian Authority is contacted. An announcement is relayed to the residents, and each interested party is invited to participate in a survey of the area affected by the order of seizure, in order to present the planned location of the fence. A few days after the order is issued, a survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized.

After the survey, a one week leave is granted to the landowners, so that they may submit an appeal to the military commander. The substance of the appeals is examined. Where it is possible, an attempt is made to reach understandings with the landowners. If the appeal is denied, leave of one additional week is given to the landowner, so that he may petition the High Court of Justice.

The Petition

9. The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. These lands are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighborhoods of Ramot and Giv'at Ze'ev, which are located west and northwest of Jerusalem. Petitioners are the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable. Over

42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified.

10. Petitioners' argument is that the orders are illegal in light of Israeli administrative law, and in light of the principles of public international law which apply to the dispute before us. First, petitioners claim that respondent lacks the authority to issue the orders of seizure. Were the route of the separation fence to pass along Israel's border, they would have no complaint. However, this is not the case. The route of the separation fence, as per the orders of seizure, passes through areas of Judea and Samaria. According to their argument, these orders alter the borders of the West Bank with no express legal authority. It is claimed that the separation fence annexes areas to Israel in violation of international law. The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to Israel. As such, there is no legal basis for the construction of the fence, and the orders of seizure which were intended

to make it possible are illegal. Second, petitioners argue that the procedure for the determination of the route of the separation fence was illegal. The orders were not published and were not brought to the knowledge of most of the affected landowners; petitioners learned of them by chance, and they were granted extensions of only a few days for the submission of appeals. Thus, they were not allowed to participate in the determination of the route of the separation fence, and their arguments were not heard.

11. Third, the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. Their right to property is violated by the very taking of possession of the lands and by the prevention of access to their lands. In addition, their freedom of movement is impeded. Their livelihoods are hurt and their freedom of vocation is restricted. Beyond the difficulties in working the land, the fence will make the trade of farm produce difficult. The fence detracts from the educational opportunities of the local children, and throws local family and community life into disarray. Freedom of religion is violated, as access to holy places is prevented. Nature and landscape features are defaced. Petitioners argue that these violations are disproportionate and are not justified under the circumstances. The separation fence route reflects collective punishment, prohibited by international law. Thus, respondent neglects the obligation, set upon his shoulders by international law, to make normal and proper life possible for the inhabitants of Judea and Samaria. The security considerations guiding him cannot, they claim, justify such severe injury to the local inhabitants. This injury does not fulfill the requirements of proportionality. According to their argument, despite the language of the orders of seizure, it is clear that the fence is not of a temporary character, and the critical wound it inflicts upon the local population far outweighs its benefits.

The Response to the Petition

12. Respondents, in their first response, argued that the orders of seizure and the route through which the separation fence passes are legal. The separation fence is a project of utmost national importance. Israel is in the midst of actual combat against a wave of terror, supported by the Palestinian population and leadership. At issue are the lives of the citizens and residents of Israel, who are threatened by terrorists who infiltrate into the territory of Israel. Additionally at issue are the lives of Israeli citizens residing in the area. As such, the construction of the separation fence system must be completed as quickly as possible.

The separation fence has already proved its efficacy in areas where it has been erected. It is important that the fence will also be erected in the region of petitioners' villages. Respondents claim that a number of terror attacks against Jerusalem and against route no. 443, which connects Jerusalem and the city of Modi'in, have originated in this area. The central consideration in choosing the route of the separation fence was the operational-security consideration. The purpose of the fence is to prevent the uncontrolled passage of residents of the area into Israel and into Israeli towns located in the areas. The separation fence is also intended to prevent the smuggling of arms, and to prevent the infiltration of Palestinians, which will likely lead to the establishment of terror cells in Israel and to new recruits for existing cells. Additionally, the forces acting along the obstacle, and Israeli towns on both sides of it, must be protected. As dictated by security considerations, the area of the separation fence must have topographic command of its surroundings. This is in order to allow surveillance and to prevent attacks upon the forces guarding it. To the extent possible, a winding route must be avoided. In addition, a "security zone" is required to provide warning of possible terrorist infiltration into Israel. Thus, in appropriate places, in order to make pursuit possible in the event of infiltration, the fence must pass through the area. An additional security consideration is the fact that, due to construction of the obstacle, attempted attacks will be concentrated on Israeli towns adjacent to the fence, which also must be protected.

13. Respondents explain that, in planning the route of the separation fence, great weight was given to the interests of the residents of the area, in order to minimize, to the extent possible, the injury to them. Certain segments of the fence are brought before the State Attorney for prior examination and, if necessary, before the Attorney-General as well. An effort is being made to lay the obstacle along property that is not privately owned or agriculturally cultivated; consideration is given to the existing planning schemes of Palestinian and Israeli towns; an effort is being made to refrain from cutting lands off from their owners. In the event of such a cutoff, agricultural gateways will allow farmers access to their lands. New roads will be paved which will provide for the needs of the residents. In cases where damage cannot be avoided, landowners will be compensated for the use of their seized lands. Efforts will be made to transfer agricultural crops instead of cutting them down. Prior to seizure of the land, the inhabitants will be granted the opportunity to appeal. Respondents assert that they are willing to change the route in order to minimize the damage. Respondents declare, in addition, that

they intend to erect permanent checkpoints east of certain villages, which will be open 24 hours a day, every day of the year, and which will allow the preservation of the fabric of life in the area. It has also been decided to improve the road system between the villages involved in this petition, in order to tighten the bonds between them, and between them and Ramallah. Likewise, the possibility of paving a road to enable free and speedy passage from the villages to Ramallah is being examined. All these considerations were taken into account in the determination of the route. The appeals of local inhabitants injured by the route are currently being heard. All this, claim respondents, amounts to a proper balance between consideration for the local inhabitants and between the need to protect the lives of Israeli citizens, residents, and soldiers.

14. Respondents claim that the process of seizure was legal. The seizure was brought to the knowledge of petitioners, and they were given the opportunity to participate in a survey and to submit appeals. The contractors responsible for building the obstacle are instructed to move (as opposed to cutting down) trees wherever possible. This is the current practice regarding olive trees. Some buildings, in cooperation with landowners to the extent possible, are taken down and transferred to agreed locations. Respondents argue that the inhabitants did not always take advantage of the right to have their arguments heard.

15. Respondents' position is that the orders of seizure are legal. The power to seize land for the obstacle is a consequence of the natural right of the State of Israel to defend itself against threats from outside her borders. Likewise, security officials have the power to seize lands for combat purposes, and by the laws of belligerent occupation. Respondents do not deny the need to be considerate of the injury to the local population and to keep that injury proportionate; their claim is that they fulfill these obligations. The respondents deny the severity of the injury claimed by petitioners. The extent of the areas to be seized for the building of the fence, the injury to agricultural areas, and the injury to trees and groves, are lesser – by far – than claimed. All the villages are connected to water systems and, as such, damage to wells cannot prevent the supply of water for agricultural and other purposes. The marketing of agricultural produce will be possible even after the construction of the fence. In each village there is a medical clinic, and there is a central clinic in Bidu. A few archeological sites will find themselves beyond the fence, but these sites are neglected and not regularly visited. The educational

needs of the local population will also be taken into account. The respondents also note that, in places where the separation fence causes injury to the local population, efforts are being made to minimize that injury. In light of all this, the respondents argue that the petitions should be denied.

The Hearing of the Petition

16. Oral arguments were spread out over a number of hearings. During this time, the parties modified the formulation of their arguments. In light of these modifications, the respondents were willing to allow changes in certain sections of the separation fence. In certain cases the route was changed *de facto*. Thus, for example, it was changed next to the town of Har Adar, and next to the village of Beit Sourik. This Court (President A. Barak, Vice-President (ret.) T. Or, and Vice-President E. Mazza) heard the petition (on February 29, 2004). The remainder of the hearing was postponed for a week in order to allow the sides to take full advantage of their right to have their arguments heard and to attempt to reach a compromise. We ordered that no work shall be undertaken on the separation fence in the area relating to the petition until the next hearing.

The next hearing of the petition was on March 17, 2004. The petitioners submitted a motion to file additional documents, the most important of which was an affidavit prepared by members of the Council for Peace and Security, which is a registered organisation of Israelis with a security background, including high ranking reserve officers, among them Major General (res.) Danny Rothchild, who serves as president of the Council, Major General (res.) Avraham Adan (Bren), Commissioner (emeritus) Shaul Giv'oli, who serves as the general manager of the Council, and Colonel (res.) Yuval Dvir. The affidavit was signed by A. Adan, S. Giv'oli and Y. Dvir. The council, which sees itself as a nonpartisan organisation, was, it argued, among the first to suggest a separation fence as a solution to Israel's security needs. The affidavit included detailed and comprehensive comments regarding various segments of this route, and raised its reservations from a security perspective. The claims in the affidavit were serious and grave. After reading them, we requested (on March 17, 2004) the comments of the second Respondent, the Commander of IDF Forces in the area of Judea and Samaria, Lieutenant-General Moshe Kaplinsky.

17. This Court (President A. Barak, Vice-President E. Mazza, and Justice M. Cheshin) resumed the hearing of the petition (on March 31, 2004). Just

prior to reconvening, we granted (on March 23, 2004) the petitioners' motion to amend their petition to include additional orders ("Tav"s) issued by the respondent: Tav/110/03 (concerning the area located north of the Beit Daku village in the Giv'at Ze'ev area); Tav/104/03 and Tav/105/03 (concerning areas located southeast of the town of Maccabim and south of the village of Beit Lakia). After hearing (on March 31, 2004) the parties' arguments, we decided to issue an *order nisi*, to the extent relevant to the villages and the petitioners, and to narrow the application of the temporary injunction, such that it would not apply to the segment between Beit Ajaza and New Giv'on, and the segment between the Beit Chanan riverbed and the ascent to Jebel Muktam. We further decided to narrow the injunction, such that the respondent would refrain from making irrevocable changes in the segment north of Har Adar, and in the segment between the villages of A-Tira and Beit Daku. We have noted the respondent's announcement that if it turns out that the building of the obstacle at these locations was illegal, proper compensation will be granted to all injured parties [see order of March 31, 2004]. We continued to hear the arguments of the parties (on April 16, April 21, and May 2, 2004). The petitioners submitted an alternate route for construction of the separation fence. Additional affidavits were submitted by the Council for Peace and Security and by the respondent. An advisory opinion on the ecological effects of the route of the fence was submitted for review. Pursuant to our request, detailed relief models representing the topography of the area through which the obstacle passes were submitted. The relief models showed the route of the obstacle, as set out by the respondent, as well as the alternate routes proposed by the petitioners. In addition, a detailed aerial photograph of these routes was submitted.

18. Members of the Council for Peace and Security have joined as *amici curiae*. Pursuant to the agreement of the parties, an additional affidavit (of April 15, 2004) was submitted by (Major General (res.)) D. Rothchild, who serves as the president of the council, as well as by A. Adan, S. Giv'oli and Y. Dvir, and was joined to the petition, without decicling whether or not their position was identical to the petitioners'. In the opinion of the council members, the separation fence must achieve three principle objectives: it must serve as an obstacle to prevent, or at least delay, the entry of terrorists into Israel; it must grant warning to the armed forces in the event of an infiltration; and it must allow control, repair, and monitoring by the mobile forces posted along it. In general, the fence must be far from the houses of the Palestinian villages, not close to them. If the fence is close to villages, it is more susceptible to attack on the forces patrolling it. Building the fence in the manner set out by the respondent will require the

building of passages and gateways, which will create friction; infringment on the rights of the local population will increase their bitterness and the danger to security. A route located near local houses will make it difficult to distinguish between terrorists and innocent inhabitants. Thus, the separation fence must be for away from the Palestinian homes, and the route transferred accordingly, to the border of the area of Judea and Samaria. In their opinion, the argument that the fence must be built away from Israeli towns in order to provide response time in case of infiltration, can be overcome by the reinforcement of the obstacle near Israeli towns. Distancing the planned route from Israeli towns in order to seize distant hilltops with topographical control is unnecessary, and has serious consequences on the length of the separation fence, its functionality, and its vulnerability. In an additional affidavit (from April 18, 2004), the members of the Council for Peace and Security stated that the desire of the commander of the area to prevent direct flat-trajectory weapons fire on the separation fence harms it from a security perspective. Due to this desire, the fence passes through areas that, though they have topographical control, are superfluous, leading to unnecessary injury to the local population and increasing the friction with it, without preventing fire upon the fence.

19. The petitioners, pointing to the affidavits of the Council for Peace and Security, argue that the route of the separation fence is disproportionate. The route does not serve the security objectives of Israel, as it is adjacent to the houses of the Palestinians, which will endanger the state and its soldiers who are patrolling along the fence, as well as increasing the general danger to Israel's security. In addition, the proposed route does not minimize the injury to the local population, as it is possible to move the route farther away from the petitioners' villages and closer to Israel. In addition, it shall be possible to overcome the concern regarding infiltration attempts by reinforcing the fence.

20. The respondent recognized the security and military experience of those who signed the affidavit. However, he emphasized that the responsibility for protecting the residents of Israel from security threats remains on his shoulders and on those of the security officials. The disagreement is between experts on security. In regard to such a disagreement, the opinion of the expert who is also responsible for security bears the greater weight. The respondent accepts that the border between Israel and Judea and Samaria must be taken into consideration when establishing the route of the separation fence, in order to minimize the injury to the residents of the area and to the fabric of their lives. He argues, however, that the border is a political border

and not a security border. The security objective of the fence is not solely to separate Israel from the residents of the area of Judea and Samaria, it must also ensure a security zone to enable pursuit of terrorists who infiltrate the separation fence and enter Israel. The route of the fence must prevent fire incidents by the Palestinians, it must protect the soldiers guarding the fence, and must also take into account topographical considerations. In light of all of the above, it is proper, under appropriate circumstances, to change the route of the separation fence within the areas of Judea and Samaria. The military commander concedes that moving the separation fence within the proximity of the houses of Palestinians is likely to cause difficulties, but this is only one of the considerations which must be taken into account. Reinforcement of the fence adjacent to Israeli towns does not provide a solution to the danger from snipers, and does not prevent infiltration into them. Likewise, such a step does not take into consideration the engineering issues of moving the route of the fence. Regarding the route of the fence itself, the respondent notes that after examining the material, he is willing to change part of the route. This is especially relevant regarding the route adjacent to the town of Har Adar and east of it, adjacent to the villages of Beit Sourik and Bidu. The remainder of the route proposed by the petitioners does not provide an appropriate solution to the security needs that the fence is intended to provide.

21. The parties presented arguments regarding the environmental damage of the separation fence. The petitioners submitted, for our review, expert opinion papers (dated April 15, 2004), which warn of the ecological damage that will be caused by the separation fence. The separation fence route will damage animal habitats and will separate animal populations from vegetation, damaging the ecosystem in the area. The longer and wider the route of the fence, the more severe the damage. Therefore, it is important to attempt to shorten the route of the fence, and to avoid unnecessary curves. The building of passageways for small animals into the fence, such as pipes of 20-30 cm. diameter, should be considered. The fence will also mar virgin landscape that has remained untouched for millennia. The respondents replied with an opinion paper prepared by an expert of the Nature and Parks Authority. It appears, from his testimony, that there will indeed be ecological damage, but the damage will be along any possible route of the fence. It would have been appropriate to maintain passageways in the separation fence for small animals, but that proposal was rejected by the security agencies and is, in any case, irrelevant to the question of the route. From the testimony it also appears that representatives of the Nature and Parks Authority are involved in the planning of the fence route, and efforts are being made to minimize ecological damage.

22. A number of residents of Mevasseret Zion, which is adjacent to the Beit Sourik village, requested to join as petitioners in this petition. They claim that the fence route should be immediately adjacent to the Green Line, in order to allow residents of the Beit Sourik village to work their land. In addition, they claim that the gates which will allow the passage of farmers are inefficient, as they will obstruct access to the fields, and they will violate the farmers' dignity. Furthermore, they point out the decline of relations between them and the Palestinian population in the area which, as a consequence of the desire to construct the separation fence on their land, has turned from a tranquil population into a hostile one. On the opposing side, Mr. Efraim Halevy requested to join as a respondent in the petition. He argues that moving the route of the fence adjacent to the Green Line will endanger the residents of Mevasseret Zion. It will bring the route closer to the houses and schools in the community. He also points out the terrorist activity which has taken place in the past in the Beit Sourik area. Thus, the alternate route proposed by the petitioners should be rejected. He claims that this position reflects the opinions of many residents of Mevasseret Zion. After reading the motions, we decided to accept them, and we considered the arguments they presented.

The Normative Framework

23. The general starting point of all parties – which is also our starting point – is that Israel holds the area in belligerent occupation (*occupatio bellica*). *See* HCJ 619/78 *"El Tal'ia" Weekly v. Minister of Defense*; HCJ 69/81 *Abu Ita v. Commander of the Area of Judea and Samaria*; HCJ 606/78 *Ayoob v. Minister of Defense*; HCJ 393/82 *Jam'iat Ascan Elma'almoon Eltha'aooniah Elmahduda Elmaoolieh v. Commander of the IDF Forces in the Area of Judea and Samaria*. In the areas relevant to this petition, the military administration, headed by the military commander, continues to apply. *Compare* HCJ 2717/96 *Wafa v. Minister of Defense* (application of the military administration in "Area C"). The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter – the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. [hereinafter – the Fourth Geneva Convention]. The question of the application of the Fourth Geneva Convention has come up more than once in this Court.

See HCJ 390/79 *Duikat v. Government of Israel*; HCJ 61/80 *Haetzni v. State of Israel*, at 597. This question is not before us now, since the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review. *See* HCJ 698/80 *Kawasme v. Minister of Defense*; *Jam'iyat Ascan*, at 794; *Ajuri*, at 364; HCJ 3278/02 *Center for the Defense of the Individual v. Commander of the IDF Forces in the West Bank Area*, at 396. *See also* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 Israel Yearbook on Human Rights 262 (1971).

24. Together with the provisions of international law, "the principles of the Israeli administrative law regarding the use of governing authority" apply to the military commander. *See Jam'iyat Ascan*, at 793. Thus, the norms of substantive and procedural fairness (such as the right to have arguments heard before expropriation, seizure, or other governing actions), the obligation to act reasonably, and the norm of proportionality apply to the military commander. *See Abu Ita*, at 231; HCJ 591/88 *Taha v. Minister of Defense*, at 52; *Ajuri*, at 382; HJC 10356/02 *Hess v. Commander of the IDF Forces in the West Bank*. Indeed, "[every] Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law." *Jam'iyat Ascan*, at 810.

25. This petition raises two separate questions. The first question: is the military commander in Judea and Samaria authorized by the law to construct the separation fence in Judea and Samaria? An affirmative answer to this question raises a second question concerning the location of the separation fence. Both questions were raised before us in the petitions, in the response, and in the parties' arguments. The parties, however, concentrated on the second question; only a small part of the arguments before us dealt with the first question. The question of the authority to erect the fence in the area is complex and multifaceted, and it did not receive full expression in the arguments before us. Without exhausting it, we too shall occupy ourselves briefly with the first question, dealing only with the arguments raised by the parties, and will then move to focus our discussion on the second question.

Authority to Erect the Separation Fence

26. The petitioners rest their assertion that the military commander does not have authority to construct the fence on two claims. The first is that the military commander does not have the authority to order construction

of the fence since his decision is founded upon political – and not military – considerations.

27. We accept that the military commander cannot order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to "annex" territories to the State of Israel. The purpose of the separation fence cannot be to draw a political border. In the *Duikat* case, this Court discussed whether it is possible to seize land in order to build a Jewish civilian town, when the purpose of the building of the town is not the security and defense needs of the area (as it was in *Ayoob*), but rather based upon a Zionist perspective of settling the entire land of Israel. This question was answered by this Court in the negative. The Vice-President of this Court, Justice Landau, quoted the Prime Minister (the late Mr. Menachem Begin), regarding the right of the Jewish people to settle in Judea and Samaria. In his judgment, Justice Landau stated:

> The view regarding the right of the Jewish people, expressed in these words, is built upon Zionist ideology. However, the question before this Court is whether this ideology justifies the taking of the property of the individual in an area under control of the military administration. The answer to that depends upon the interpretation of article 52 of the Hague Regulations. It is my opinion that the needs of the army mentioned in that article cannot include, by way of any reasonable interpretation, national security needs in broad meaning of the term.

In the same spirit I wrote, in *Jam'iyat Ascan*, at 794, that

> The military commander is not permitted to take the national, economic, or social interests of his own country into account . . . even the needs of the army are the army's military needs and not the national security interest in the broad meaning of the term.

In *Jam'iyat Ascan,* we discussed whether the military commander is authorized to expand a road passing through the area. In this context I wrote, at 795:

> The military administration is not permitted to plan and execute a system of roads in an area held in belligerent occupation, if the objective is only to construct a "service road" for his own country. The planning and execution of a system of roads in an occupied territory can be done for military reasons . . . the planning and execution of

a system of roads can be done for reasons of the welfare of the local population. This planning and execution cannot be done in order to serve the occupying country.

Indeed, the military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the military commander's authority. *See Jam'iyat Ascan*, at 800. The passage of time, however, cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

28. We examined petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns. As we have seen in the government decisions concerning the construction of the fence, the government has emphasized, numerous times, that "the fence, like the additional obstacles, is a security measure. Its construction does not express a political border, or any other border." (decision of June 23, 2002). "The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seamline Area," is a security measure for the prevention of terror attacks and does not mark a national border or any other border." (decision of October 1, 2003).

29. The Commander of the IDF Forces in the area of Judea and Samaria (respondent no. 2), Major General M. Kaplinsky, submitted an affidavit to the Court. In his affidavit he stated that "the objective of the security fence is to help contend with the threat of Palestinian terror. Specifically, the fence is intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns located in the area. Based on this security consideration we determined the topographic route of the fence." (affidavit of April 15, sections 22-23). The commander of the area detailed his considerations for the choice of the route. He noted the necessity that the fence pass through territory that topographically controls its surroundings in order to

allow surveillance of it. Therefore its route needs to be as flat as possible, and a "security zone" needs to be established which will delay infiltration into Israel. These are security considerations *par excellence*. In an additional affidavit, Major General Kaplinsky testified that "it is not a permanent fence, but rather a temporary fence erected for security needs." (affidavit of April 19, 2004, section 4). We have no reason not to give this testimony less than full weight, and we have no reason to doubt the sincerity of the military commander.

30. The petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but rather by political considerations. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line," that is to say, on the armistice line between Israel and Jordan after the War of Independence. We cannot accept this argument. The determining factor is the security merits of the route not the political merits, without regard for the location of the Green Line. The members of the Council for Peace and Security, whose affidavits were brought before us by agreement of the parties, do not recommend following the Green Line. They do not even argue that the considerations of the military commander are political. Rather, they dispute the proper route of the separation fence based on security considerations themselves.

31. We set aside seven sessions for the hearing of the petition. We heard the explanations of officers and workers who handled the details of the fence. During our hearing of the petition, the route of the fence was altered in several locations. The respondents were open to our suggestions. Thus, for example, adjacent to the town of Har Adar, they agreed to move the fence passing north of the town to the security zone closer to it, and distance it from the lands of the adjacent village of El Kabiba. We have no reason to assume that the objective is political rather than security-based. Indeed, the petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, the petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the area, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his understanding.

32. The petitioners' second argument is that the construction of the fence in the area is based, in a large part, on the seizure of land privately owned

by local inhabitants, and that this seizure is illegal. Furthermore, they claim that the military commander has no authority to construct the obstacle. We cannot accept this argument. We found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal them. Regarding the central question raised before us, our opinion is that the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. *See* articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention. He must, of course, provide compensation for his use of the land. *See* HCJ 606/78 *Ayoob v. Minster of Defense*; HCJ 401/88 *Abu Rian v. Commander of the IDF Forces in the Area of Judea and Samaria; Timraz.* Indeed, on the basis of the provisions of the Hague Convention and the Geneva Convention, this Court has recognized the legality of land and house seizure for various military needs, including the construction of military facilities (HCJ 834/78 *Salama v. Minister of Defense*), the paving of detour roads (HCJ 202/81 *Tabib v. Minister of Defense; Wafa*), the building of fences around outposts (*Timraz*), the temporary housing of soldiers (HCJ 290/89 *Jora v. Commander of IDF Forces in Judea and Samaria*), the ensuring of unimpaired traffic on the roads of the area (Abu *Rian*), the construction of civilian administration offices (HCJ 1987/90 *Shadid v. Commander of IDF Forces in the Area of Judea and Samaria*), the seizing of buildings for the deployment of a military force, (HCJ 8286/00 *Association for Civil Rights in Israel v. Commander of the IDF Forces in the Area of Judea and Samaria*). Of course, regarding all these acts, the military commander must consider the needs of the local population. Assuming that this condition is met, there is no doubt that the military commander is authorized to take possession of land in areas under his control. The construction of the separation fence falls within this framework. The infringement of property rights is insufficient, in and of itself, to take away the authority to build it. It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent that it is done out of military necessity, is within the authority of the military commander. Of course, the route of the separation fence must take the needs of the local population into account. That issue, however, concerns

the route of the fence and not the authority to erect it. After reaching this conclusion, we must now contend with the second question before us – the question that constituted the main part of the arguments before us. This question is the legality of the location and route of the separation fence. We will now turn to this question.

The Route of the Separation Fence

33. The focus of this petition is the legality of the route chosen for construction of the separation fence. This question stands on its own, and it requires a straightforward, real answer. It is insufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, and which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. *See* Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 Law Q. Rev., 363, 364 (1917); Y. Dinstein, The Law of War 210 (1983). He must act within the law which grants his authority in a situation of belligerent occupation. What is the content of this law?

34. The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and its citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population:

> The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.

Dinstein, *Legislative Authority in the Administered Territories*, 2 Iyunei Mishpat 505, 509 (1973)

This Court has emphasized, in case law dating back to the Six Day War, that "together with the right to administer comes the obligation to provide for the well being of the population." HCJ 337/71 *Al-jamaya Al-masihiye L'alararchi Elmakdasa v. Minister of Defense*, at 581 (Sussman, D.P.).

> The obligations and rights of a military administration are defined, on the one hand, by its own military needs and, on the other hand, by the need to ensure, to the extent possible, the normal daily life of the local population.

HCJ 256/72 *Jerusalem District Electric Company v. Defense Minister*, at 138 (Landau, J.).

> This doctrine … does not have to result in the restriction of the power to tax, *if this power is necessary for the well being of the area and due to its needs*, since a proper balance between those considerations and the needs of the ruling army is a central and constant consideration of a military administration.

Abu Ita, at 270 (Shamgar, V.P.) (emphasis in the original).

In *J'mayat Ascan*, at 794, I myself similarly wrote, more than twenty years ago, that:

> The Hague Regulations revolve around two central axes: the one – ensuring of the legitimate security interests of the holder of a territory held in belligerent occupation; the other – ensuring of the needs of the local population in the territory held in belligerent occupation.

In HCJ 72/86 *Zaloom v. The IDF Commander for the Area of Judea and Samaria,* at 532, I held:

> In using their authority, the respondents must consider, on the one hand, security considerations and, on the other hand, the interests of the civilian population. They must attain a balance between these different considerations.

See also Marab, at 365. Similarly:

> The obligation of the military administration, defined in regulation 43 of the Hague Regulations, is to preserve the order and the public life of the local population, but to do so while properly balancing between the interests of the population in the territory, and the military and security needs of soldiers and citizens located in the territory.

HCJ 2977/91 *Thaj v. Minister of Defense*, at 474 (Levin, J.).

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

Hess, at paragraph 8 (Procaccia, J.).

35. This approach of this Court is well anchored in the humanitarian law of public international law. This is set forth in Regulation 46 of the Hague Regulations and Article 46 of the Fourth Geneva Convention. Regulation 46 of the Hague Regulations provides:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Article 27 of the Fourth Geneva Convention provides:

> 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 …. However, 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.

These rules are founded upon a recognition of the value of man and the sanctity of his life. *See Physicians for Human Rights*, at para. 11. Interpreting Article 27 of the Fourth Geneva Convention, Pictet writes:

> Article 27 . . . occupies a key position among the articles of the Convention. It is the basis of the Convention, proclaiming as it does the principles on which the whole "Geneva Law" is founded. It proclaims the principle of respect for the human

> person and the inviolable character of the basic rights of individual men and women ... the right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers, it includes, in particular, the right to physical, moral and intellectual integrity – one essential attribute of the human person.

The rules in Regulation 46 of the Hague Regulations and in Article 27 of the Fourth Geneva Convention cast a double obligation upon the military commander: he must refrain from actions that injure the local inhabitants. This is his "negative" obligation. He must take the legally required actions in order to ensure that the local inhabitants shall not be injured. This is his "positive" obligation. *See Physicians for Human Rights.* In addition to these fundamental provisions, there are additional provisions that deal with specifics, such as the seizure of land. *See* Regulation 23(g) and 52 of the Hague Regulations; Article 53 of the Fourth Geneva Convention. These provisions create a single tapestry of norms that recognizes both human rights and the needs of the local population, as well as recognizing security needs from the perspective of the military commander. Between these conflicting norms, a proper balance must be found. What is that balance?

Proportionality

36. The problem of balancing between security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including reasonableness and good faith. *See* B. Cheng, General Principles of Law as Applied By International Courts and Tribunals (1987); T. Meron, Human Rights and Humanitarian Norms as Customary Law (1989); S. Rosenne, The Perplexities of Modern International Law 63 (2002). One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation; second, it is a central standard in Israeli

administrative law which applies to the area under belligerent occupation. We shall now briefly discuss each of these.

37. Proportionality is recognized today as a general principle of international law. *See* Meron, at 65; R. Higgins, Problems and Process: International Law and How We Use It 219 (1994); Delbruck, *Proportionality*, 3 Encyclopedia of Public International Law 1140, 1144 (1997). Proportionality plays a central role in the law regarding armed conflict. During such conflicts, there is frequently a need to balance between military needs and humanitarian considerations. *See* Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 391 (1993); Garden, *Legal Restraints on Security Council Military Enforcement Action*, 17 Mich. J. Int'l L. 285 (1996); Dinstein, *Military Necessity*, 3 Encyclopedia of Public International Law 395 (1997); Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality ?,* 23 Loy. L. A. Int'l & Comp. L. Rev. 329 (2001); Roberts, *The Laws of War in the War on Terror*, 32 Isr. Yearbook of Hum. Rights. 1999 (2002). Proportionality is a standard for balancing. Pictet writes:

> In modern terms, the conduct of hostilities, and, at all times the maintenance of public order, must not treat with disrespect the irreducible demands of humanitarian law.
>
> From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war):
>
> Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy.

J. S. Pictet, Developments and Principles of International Humanitarian Law 62 (1985). Similarly, Fenrick has stated:

> [T]here is a requirement for a subordinate rule to perform the balancing function between military and humanitarian requirements. This rule is the rule of proportionality.

Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare,* 98 Military L. Rev. 91, 94 (1982). Gasser repeats the same idea:

> International humanitarian law takes into account losses and damage as incidental consequences of (lawful) military operations … The criterion is the principle of proportionality.

Gasser, *Protection of the Civilian Population*, The Handbook of Humanitarian Law in Armed Conflicts 220 (D. Fleck ed., 1995).

38. Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law. *See* Segal, *The Cause of Action of Disproportionality in Administrative Law,* HaPraklit 50 (1990); Zamir, *The Administrative Law of Israel Compared to the Administrative Law of Germany*, 2 Mishpat U'Mimshal 109, 130 (1994). At first a principle of our case law, then a constitutional principle, enshrined in article 8 of the Basic Law: Human Dignity and Freedom, it is today one of the basic values of the Israeli administrative law. *See* HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, at 435; HCJ 3477/95 *Ben-Atiyah v. Minister of Education, Culture & Sports*; HCJ 1255/94 *Bezeq v. Minister of Communications,* at 687; HCJ 3643/97 *Stamka v. Minister of Interior*; HCJ 4644/00 *Tavori v. The Second Authority for Television and Radio;* HCJ 9232/01 *"Koach" Israeli Union of Organizations for the Defense of Animals v. The Attorney-General*, at 261; D. Dorner, *Proportionality*, *in* 2 The Berenson Book 281 (A. Barak & C. Berenson eds., 1999). The principle of proportionality applies to every act of the Israeli administrative authorities. It also applies to the use of the military commander's authority pursuant to the law of belligerent occupation.

39. Indeed, both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing between the authority of the military commander in the area and the needs of the local population. Indeed, the principle of proportionality as a standard restricting the power of the military commander is a common thread running through our case law. *See* Segal, *Security Authority, Administrative Proportionality and Judicial Review*, 1 Iyunei Mishpat 477 (1993). Thus, for example, this Court examined, by use of the standard of proportionality, the authority of the military commander regarding "an order assigning a place of residence." *See Ajuri;* HCJ 9552/03 *Abed v. Commander of the IDF Forces in the West Bank*; HCJ 9586/03 *Sualmeh v. Commander of the IDF Forces in the Judea and Samaria Region*. The standard of proportionality was likewise used to examine his authority to surround towns and position checkpoints on the access roads to and from them, in order to frustrate terror. *See* HCJ 2847/03 *Alauna v. Commander of the IDF Forces in Judea and Samaria*; HCJ 2410/03 *Elarja v. Commander of the IDF Forces in Judea and Samaria*. The same applied to injury to the property of residents due to combat activities of the

IDF (HCJ 9252/00 *El Saka v. State of Israel*); the establishment of entry routes for Israelis into the area and its declaration as "closed military territory" (HCJ 9293/01 *Barakeh v. Minister of Defense*); the means employed to protect the safety of worshippers and their access to holy places (*Hess*); the demolition of houses for operational needs (HCJ 4219/02 *Joosin v. Commander of the IDF Forces in the Gaza Strip*); such demolition for deterrence purposes (HCJ 5510/92 *Turkman v. Defense Minister*, at 219; HCJ 1730/96 *Sabih v. Commander of the IDF Forces in the Area of Judea and Samaria*, at 364; HCJ 893/04 *Farj v. Commander of the IDF Forces in the West Bank*); the living conditions of detained suspects in the area (HCJ 3278/02 *Center for Defense of the Individual v. Commander of the IDF Forces in the West Bank Area*; HCJ 5591/02 *Yassin v. Commander of Kziot Military Camp*); the authority to arrest for investigation purposes and to denial a meeting between a detainee and an attorney (*Marab*); siege on those hiding in holy places (HCJ 3451/02 *Almandi v. Minister of Defence*, at 36); and the regulation of record keeping and identification of residents of the area (HCJ 2271/98 *Abed v. Interior Minister*).

The Meaning of Proportionality and its Elements

40. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it. This principle is a general one, and requires application. As such, both in international law, which deals with different national systems – from both the common law family (such as Canada) and the continental family (such as Germany) – as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality. *See* J. Schwarze, European Administrative Law 687 (1992); N. Emiliou, The Principle of Proportionality in European Law; A Comparative Study (1996); The Principle of Proportionality in the Laws of Europe (1999).

41. The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which it is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test. According to the second subtest, the means used by the administrative body which cause

injury to the individual must do so using the least harmful means. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. This is the "proportionate means" test (or proportionality "in the narrow sense"). The test of proportionality "in the narrow sense" is commonly applied with "absolute values," by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the administrative act is tested *vis-à-vis* an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.

42. It is possible to say that the means used by an administrative authority are proportionate only if all three subtests are satisfied. Satisfaction of one or two of these subtests is insufficient. All three of them must be satisfied simultaneously. Not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a "zone of proportionality" must be recognized (similar to a "zone of reasonableness"). Any means chosen by the administrative body that is within the zone of proportionality is proportionate. *See Ben-Atiyah*, at 13; HCJ 4769/95 *Menachem v. Minister of Transportation*, at 258.

43. This principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation. Thus, for example, in *Ajuri*, the question arose whether restricting the area in which one is allowed to live – in that case, the transfer of local inhabitants from the area of Judea and Samaria to the Gaza Strip – was proportionate. Regarding the proportionality test, as applied in that case, I wrote:

> Like the use of any other means, the means of restricting the area in which one is allowed to live must also be used proportionately. The individual's offense must be proportionate to the means employed by the authorities … an appropriate link is necessary between the objective of preventing danger from the person whose living

> area is restricted, and the danger if this means is not employed … it is necessary that the injury caused by the means employed be minimal; it is also necessary that the means of restricting the living area be of proper proportion to the security benefit to the area.

Id., at 373.

The Proportionality of the Route of the Separation Fence

44. The principle of proportionality applies to our examination of the legality of the separation fence. This approach is accepted by the respondents. It is reflected in the government decision (of October 1, 2003) that "during the planning, every effort shall be made to minimize, to the extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle." The argument that the damage caused by the separation fence route is proportionate was the central argument of the respondents. Indeed, our starting point is that the separation fence is intended to realize a security objective which the military commander is authorized to achieve. The key question regarding the route of the fence is: Is the route of the separation fence proportionate? The proportionality of the separation fence must be decided by the three following questions, which reflect the three subtests of proportionality. First, does the route pass the "appropriate means" test (or the "rational means" test)? The question is whether there is a rational connection between the route of the fence and the goal of the construction of the separation fence. Second, does it pass the test of the "least injurious" means? The question is whether, among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the separation fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence. According to the "relative" examination of this test, the separation fence will be found disproportionate if an alternate route for the fence is suggested that has a smaller security advantage than the route chosen by the respondent, but which will cause significantly less damage than that original route.

The Scope of Judicial Review

45. Before we examine the proportionality of the route of the separation fence, it is appropriate that we define the character of our examination. Our

starting point is the assumption, which the petitioners did not manage to negate, that the government decision to construct the separation fence is motivated by security, and not political, considerations. As such, we work under the assumption – which the petitioners also did not succeed in negating – that the considerations of the military commander based the route of the fence on military considerations that, to the best of his knowledge, are capable of realizing this security objective. In addition, we assume – and this issue was not even disputed in the case before us – that the military commander is of the opinion that the injury to local inhabitants is proportionate. On the basis of this factual foundation, there are two questions before us. The first question is whether the route of the separation fence, as determined by the military commander, is well-founded from a military standpoint. Is there another route for the separation fence which better achieves the security objective? This constitutes a central component of proportionality. If the chosen route is not well-founded from the military standpoint, then there is no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest); if there is a route which better achieves the objective, we must examine whether this alternative route inflicts a lesser injury (the second subtest). The second question is whether the route of the fence is proportionate. Both these questions are important for the examination of proportionality. However, they also raise separate problems regarding the scope of judicial review. My colleague Justice M. Cheshin has correctly noted:

> Different subjects require, in and of themselves, different methods of intervention. Indeed, acts of state and acts of war do not change their character just because they are subject to the review of the judiciary, and the character of the acts, according to the nature of things, imprints its mark on the methods of intervention.

HCJ 1730/96 *Sabih v. Commander of IDF forces in the Area of Judea and Samaria*, at 369.

We shall examine, therefore, the scope of intervention for each of the two questions before us, separately.

The Military Nature of the Route of the Separation Fence

46. The first question deals with the military character of the route. It examines whether the route chosen by the military commander for the separation fence achieves its stated objectives, and whether there is no alternative route

which achieves this objective better. It raises problems within the realm of military expertise. We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours – to the extent that we have an opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander would have set out the route as this military commander did. President Shamgar dealt with this idea, noting:

> It is obvious, that a court cannot "slip into the shoes" of the deciding military official … In order to substitute the discretion of the commander with the discretion of the Court, we examine the question whether, in light of all of the facts, the employment of the means can be viewed as reasonable.

HCJ 1005/89 *Aga v. Commander of the IDF Forces in the Gaza Strip Area*, at 539. Similarly, in *Ajuri,* I wrote:

> The Supreme Court, sitting as the High Court of Justice, reviews the legality of the military commander's discretion. Our point of departure is that the military commander, and those who obey his orders, are civil servants holding public positions. In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion …. It is true, that "the security of the state" is not a "magic word" which makes judicial review disappear. Thus, we shall not be deterred from reviewing the decisions of the military commander … simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the "zone of reasonableness."

Id., at 375; *see also* HCJ 619/78 *"Al Tal'ia" Weekly v. Defense Minister*, at 512; *Jam'iat Ascan*, at 809; *Barake*, at 16.

47. The petition before us is unusual, as opinions were submitted by the Council for Peace and Security. These opinions deal with the military aspect of the separation fence. They were given by experts in the military and security fields, whose expertise was also recognized by the commander of

the area. We stand, therefore, before contradictory military opinions regarding the military aspects of the route of the separation fence. These opinions are based upon contradictory military views. Thus, for example, it is the view of the military commander that the separation fence must be distanced from the houses of Jewish towns, in order to ensure a security zone which will allow pursuit after terrorists who have succeeded in passing the separation fence, and that topographically controlling territory must be included in the route of the fence. In order to achieve these objectives, there is no escaping the need to build the separation fence within close proximity to the houses of the local inhabitants. In contrast, the view of military experts of the Council for Peace and Security is that the separation fence must be distanced from the houses of local inhabitants, since proximity to them endangers security. Topographically controlling territory can be held without including it in the route of the fence. In this state of affairs, are we at liberty to adopt the opinion of the Council for Peace and Security? Our answer is negative. At the foundation of this approach is our long-held view that we must grant special weight to the military opinion of the official who is responsible for security. Vice-President M. Landau J. dealt with this point in a case where the Court stood before two expert opinions, that of the Major General serving as Coordinator of IDF Activity in the Territories and that of a reserve Major General. Thus wrote the Court:

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

HCJ 258/79 *Amira v. Defense Minister*, 92.

Justice Vitkon wrote similarly in *Duikat*, in which the Court stood before a contrast between the expert opinion of the serving Chief of the General Staff regarding the security of the area, and the expert opinion of a former Chief of the General Staff. The Court ruled, in that case, as follows:

> In security issues, where the petitioner relies on the opinion of an expert in security affairs, and the respondent relies on the opinion of a person who is both an expert and also responsible for the security of the state, it is natural that we will grant special weight to the opinion of the latter.

HCJ 390/79 *Duikat v. Government of Israel*.

Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion – the details of which we shall explain below – that the petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

The Proportionality of the Route of the Separation Fence

48. The second question examines the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the military field; rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander. In the framework of this question we are dealing not with military considerations, but rather with humanitarian considerations. The question is not the proportionality of different military considerations. The question is the proportionality between the military consideration and the humanitarian consideration. The question is not whether to prefer the military approach of the military commander or that of the experts of the Council for Peace and Security. The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court. I dealt with this issue in *Physicians for Human Rights*, stating:

> Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity. Therefore, we assume that the military activity that took place in Rafah was necessary from a military standpoint. The question before us is whether this military activity satisfies the national and international standards that determine the legality

> of that activity. The fact that the activity is necessary on the military plane, does not mean that it is lawful on the legal plane. Indeed, we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise.

Id, paragraph 9.

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

From the General Approach to the Specific Petition

49. The key question before us is whether the route of the separation fence is proportionate. The question is: is the injury caused to local inhabitants by the separation fence proportionate, or is it possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence which is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence. We shall examine the legality of the orders along the route of the fence from west to east (See the appendix to this decision for a map of the region.) This route starts east of the town of Maccabim and the Beit Sira village. It continues south to the town of Mevo Choron, and from there continues east to Jerusalem. The route of the fence continues to wind, and divides the Israeli towns from the Palestinian villages adjacent to it. It climbs Jebel Muktam in order to ensure Israeli control of it. As such, it passes the villages of Beit Likia, Beit Anan, and Chirbet Abu A-Lahm. After that, it advances east, separating Ma'aleh HaChamisha and Har Adar from the villages of Katane, El Kabiba, and Bidu. The fence continues and circles the village of Beit Sourik, climbing northward until it reaches route 443, which is a major traffic route connecting Jerusalem to the center of the country. In its final part, it separates the villages Bidu, Beit Ajaza, and Beit Daku from Har Shmuel, New Giv'on, and Giv'at Ze'ev.

Order no. Tav/105/03

50. This order concerns the route beginning east of the town of Maccabim and west of the village of Beit Sira, and ending northeast of the town of Mevo Choron. This segment was not the subject of substantial dispute by the parties. The respondent informed us that the northern tip of the route, which is subject to this order, as well as the southern tip, were changed (see map submitted to us by the parties, of March 31 2004). Thus, the injury to the cultivated lands proximate to it was reduced. The petitioners raised no arguments regarding the route itself, and the village of Beit Sira was not joined as a petitioner. Members of the Council for Peace and Security did not mention this order in their affidavits. In light of all this, to the extent that it relates to this order, the petition is denied.

Order Tav/104/03; Order Tav/103/03; Order Tav/84/03 (The Western Part of the Order)

51. These orders apply to more than ten kilometers of the fence route. This segment of the route surrounds the high mountain range of Jebel Muktam. This ridge topographically controls its immediate and general surroundings. It towers over route 443 which passes north of it, connecting Jerusalem to Modi'in. The route of the obstacle passes from southwest of the village of Beit Likia, southwest of the village of Beit Anan, and west of the village of Chirbet Abu A-Lahm. The respondent explains that the objective of this route is to keep the mountain area under Israeli control. This will ensure an advantage for the armed forces, who will topographically control the area of the fence, and it will decrease the capability of others to attack those traveling on route 443.

52. The petitioners painted a severe picture of how the fence route will damage the villages along it. As far as the Beit Anan village (population: 5,500) is concerned, 6,000 dunams of village land will be affected by the fact that the obstacle passes over them. 7,500 dunams of land will end up beyond the fence (6,000 dunams of which are cultivated land). Ninety percent of the cultivated land seized and affected is planted with olive and fruit trees. 18,000 trees will be uprooted. 70,000 trees will be separated from their owners. The livelihood of hundreds of families will be hurt. This damage is especially severe in light of the high unemployment rate in that area (approaching 75%). As far as the Beit Likia village is concerned (population: 8,000), 2,100 dunams

will be affected by the route of the obstacle. Five thousand dunams will end up beyond the fence (3,000 dunams of which are cultivated land).

53. The respondents dispute this presentation of the facts. They argue that the extent of damage is less than that described by the petitioners. As for the village of Beit Anan, 410 dunams (as opposed to 600) will be seized, and 1,245 cultivated dunams will end up on the other side of the obstacle (as opposed to 6,000). The respondents further argue that 3,500 trees will be uprooted (as opposed to 18,000). However, even according to the respondent, the damage to the villages is great, despite certain changes which the respondents made during the hearing of the petition in order to relieve the situation of the local inhabitants.

54. The petitioners attached the affidavit of the Council for Peace and Security (signed by Major General (res.) D. Rothchild, Major General (res.) A. Adan (Bren), Commissioner (ret.) S. Giv'oli, and Colonel (res.) Y. Dvir), which relates to this segment. According to the affidavit, the seizure of Jebel Muktam does not fit the principles set out for the building of the fence. Effective light weapon fire from Jebel Muktam upon route 443 or upon any Israeli town is not possible. Moving the obstacle three kilometers south, adjacent to the Green Line, will place it upon topographically controlling territory that is easy to defend. They argue that not every controlling hill is necessary for the defense of the separation fence. Jebel Muktam is one example of that. Moreover, the current route will necessitate the construction and maintenance of agricultural gates, which will create superfluous and dangerous friction with the local population, embittered by the damage inflicted upon them. The petitioners presented two alternate proposals for the route in this area. One passes next to the border of the area of Judea and Samaria. This route greatly reduces the damage to the villages of Beit Likia and Beit Anan. The route of the other proposal passes near the Green Line, south of the route of the first proposal. This route does not affect the lands of these villages or the lands of the village of Chirbet Abu A-Lahm.

55. The respondent stated, in his response to the affidavit of members of the Council for Peace and Security, that it was not his intention to change the route of the fence that goes through this area. He claims that IDF forces' control of Jebel Muktam is a matter of decisive military importance. It is not just another topographically controlling hill, but rather a mountain looking out over the entire area. He reiterated his stance that the current route will decrease the possibility of attack on travelers on route 443, and that erecting

the obstacle upon the mountain will prevent its taking by terrorists. The respondent surveyed the relevant area, and came to the conclusion that the route proposed by the petitioners is considerably topographically inferior, and will endanger the forces that will patrol along the fence. In order to reduce the injury to the local inhabitants, the military commander decided that agricultural gates be built. One daytime gate will be built south of Beit Likia. Another daytime gate will be built three kilometers from it (as the crow flies), north of Beit Anan. Specific requests by farmers will be examined on their merits. Owners of land seized will be compensated, and olive trees will be transferred rather than uprooted. The route has even taken into consideration buildings built illegally by Palestinian inhabitants in the area, since there was not enough time to take the legal steps necessary for their demolition. We were further informed that it was decided, during the survey which took place onsite with the participation of the petitioners' counsel, to make a local correction in the route of the obstacle, adjacent to the village of Chirbet Abu A-Lahm, which will distance the obstacle from the houses of the village. We originally prohibited (on February 29, 2004) works to erect the separation fence in the part of the route to which the abovementioned orders apply. During the hearing (on March 31, 2004), we ordered the cancellation of the temporary injunction with respect to the segment between the Beit Chanan riverbed and the ascent to Jebel Muktam.

56. From a military standpoint, there is a dispute between experts regarding the route that will realize the security objective. As we have noted, this places a heavy burden on the petitioners, who ask that we prefer the opinion of the experts of the Council for Peace and Security over the approach of the military commander. The petitioners have not carried this burden. We cannot – as those who are not experts in military affairs – determine whether military considerations justify laying the separation fence north of Jebel Muktam (as per the stance of the military commander) or whether there is no need for the separation fence to include it (as per the stance of petitioners' and the Council for Peace and Security). Thus, we cannot take any position regarding whether the considerations of the military commander, who wishes to hold topographically controlling hills and thus prevent "flat-trajectory" fire, are correct, militarily speaking, or not. In this state of affairs, there is no justification for our interference in the route of the separation fence from a military perspective.

57. Is the injury to the local inhabitants by the separation fence in this segment, according to the route determined by the respondent, proportionate?

Our answer to this question necessitates examination of the route's proportionality, using the three subtests. The first subtest examines whether there is a rational connection between the objective of the separation fence and its established route. Our answer is that such a rational connection exists. We are aware that the members of the Council for Peace and Security claim, in their expert opinion, that such a connection does not exist, and that the route proposed by them is the one that satisfies the "rational connection" test. As we stated, we cannot accept this position. By our very ruling that the route of the fence passes the test of military rationality, we have also held that it realizes the military objective of the separation fence.

58. The second subtest examines whether it is possible to attain the security objectives of the separation fence in a way that causes less injury to the local inhabitants. There is no doubt – and the issue is not even disputed – that the route suggested by the members of the Council for Peace and Security causes less injury to the local inhabitants than the injury caused by the route determined by the military commander. The question is whether the former route satisfies the security objective of the security fence to the same extent as the route set out by the military commander. We cannot answer this question in the affirmative. The position of the military commander is that the route of the separation fence, as proposed by members of the Council for Peace and Security, grants less security than his proposed route. By our very determination that we shall not intervene in that position, we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants. In this state of affairs, our conclusion is that the second subtest of proportionality, regarding the issue before us, is satisfied.

59. The third subtest examines whether the injury caused to the local inhabitants by the construction of the separation fence stands in proper proportion to the security benefit from the the security fence in its chosen route. This is the proportionate means test (or proportionality "in the narrow sense"). Concerning this topic, Professor Y. Zamir wrote:

> The third element is proportionality itself. According to this element, it is insufficient that the administrative authority chose the proper and most moderate means for achieving the objective; it must also weigh the benefit reaped by the public against the damage that will be caused to the citizen by this means under the circumstances of the case at hand. It must ask itself if, under these circumstances, there is a proper

> proportion between the benefit to the public and the damage to the citizen. The proportion between the benefit and the damage – and it is also possible to say the proportion between means and objective – must be proportionate.

Zamir, *id.*, at 131.

This subtest weighs the costs against the benefits. *See Stamka*, at 776. According to this subtest, a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made given the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves "family honour and rights" (Regulation 46 of the Hague Regulations). All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. The question before us is: does the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand in reasonable (proper) proportion to the security benefit from the construction of the fence along that route?

60. Our answer is that the relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falahin) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft repeated proposals on that matter. The separation is not hermetic: the military commander announced that two gates will be constructed connecting each

of the two villages to its lands, by using a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.

61. These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination. It was presented before us. It is based on military control of Jebel Muktam, without "pulling" the separation fence to that mountain. Indeed, one must not forget that, even after the construction of the separation fence, the military commander will continue to control the area east of it. In the opinion of the military commander – which we assume to be correct, as the basis of our review – he will provide less security in that area. However, the security advantage reaped from the route as determined by the military commander, in comparison to the proposed route, does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route. Indeed, the real question in the "relative" examination of the third proportionality subtest is not the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander's position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands). Our answer to this question is that the military commander's choice of the route of the separation fence is disproportionate. The gap between the security provided by the military commander's approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from

their lands, and a fence which does not separate the two (or which creates a separation which is smaller and easier to live with). Indeed, we accept that security needs are likely to cause an injury to the lands of the local inhabitants and to their ability to use them. International humanitarian law on the one hand, and the basic principles of Israeli administrative law on the other, require making every possible effort to ensure that injury will be proportionate. Where construction of the separation fence demands that inhabitants be separated from their lands, access to these lands must be ensured, in order to minimize the damage to the utmost possible.

62. We have reached the conclusion that the route of the separation fence, which separates the villages of Beit Likia and Beit Anan from the lands which provide the villagers with their livelihood, is not proportionate. This determination affects order Tav/103/03, which applies directly to the territory of the mountain itself, and leads to its annulment. This determination also affects order Tav/104/03 which applies to the route west of it, which turns in towards the village of Beit Likia, in order to reach the mountain. The same goes for the western part of order Tav/84/03, which descends from the mountain in a southeasterly direction. The eastern part of the latter order was of no significant dispute between the parties, but as a result of the annulment of the aforementioned orders, it should be examined anew.

Order no. Tav/107/30 (Until the Hill Northeast of Har Adar)

63. This order applies to the part of the fence route which begins south of the village of Katane and ends up east of the town of Har Adar. Its length is about four and a half kilometers. It separates between Har Adar and the villages of Katane (population: approximately 1,000), El Kabiba (population: 2,000), Bidu (population: 7,500) and Beit Sourik (population: 3,500). The petitioners argue that the route of this segment of the fence will cause direct injury to 300 dunams of the village of Katane. 5,700 dunams of the lands of the village will end up on the other side of the fence (4,000 of them cultivated lands). They further argue that 200 dunams of the land of the village of El Kabiba will be directly injured by the fence passing through them. 2,500 dunams will end up on the other side of the fence (of which 1,500 dunams are cultivated land). Indeed, then, the separation fence causes severe injury to the local inhabitants. The fence cuts the residents of the villages off from their lands, and makes their access to them – access upon which the livelihood of many depends – difficult. Study of the map attached by the respondents (response of March 10, 2004)

reveals that along this part of the route, two gates will be built. One gate can only be used by pedestrian traffic. It is located at the western edge of this part of the route (south of the village of Katane). A second gate is a daytime gate located south of the hill which topographically controls the town of Har Adar from the northwest, and west of the village of Bidu. Respondent argues that the gates will allow the passage of farmers to their lands. Compensation will be paid to those whose lands are seized. Thus a proper balance will be struck between security needs and the needs of the local population.

64. After submission of the petition and examination of the arguments raised in it, the respondents changed the route of the separation fence in this area. This part of the route, which passes north of Har Adar, will be closer to the security systems already existing in that town. The respondents stated that, as a result of this correction, the solution to security problems will be an inferior one, but they will reduce the injury to the local population and provide a reasonable level of security. The petitioners, however, claim that these changes are insufficient. The stance of the Council for Peace and Security, as per its first affidavit (signed by Major General (res.) Avraham Adan (Bren), Commissioner (res.) Shaul Giv'oli and Colonel (res.) Yuval Dvir), is that the separation fence should be integrated into the existing fence of the town of Har Adar. Moving the fence to a location adjacent to the village of Katane (west of Har Adar) will cause severe injury to the local inhabitants and will suffer all of the same aforementioned problems of a fence located in close proximity to houses of Palestinians. Placing the fence side by side with the existing security systems west of Har Adar will not increase the danger of gunfire upon Har Adar, as it is already possible to fire upon it from the adjacent villages. Moreover, the current route, which passes next to Palestinian buildings, will endanger the forces patrolling along it, and will increase the concerns regarding false alarms.

65. The military commander argued, in response, that it is impossible to make a change in the route in the area of the village of Katane. From the operational standpoint, the proposal will allow terrorists free access all the way to the houses at the western edge of Har Adar. Nor can a change be made in the route from the engineering standpoint, as the patrol road that shall pass along the fence will be so steep that it will not allow for the movement of vehicles. Regarding the part of the route which passes north of Har Adar, the respondent agrees that it will be possible to integrate it with the existing defense perimeter of Har Adar (partially, in the area of the pumping facility of the town). The respondents are not prepared to make any additional changes

to the remainder of the route in this segment. The military commander argues, in addition, that the proposal of the Council for Peace and Security regarding the part of the route which passes east of Har Adar cannot be accepted. That proposal would leave a hill located northeast of the town, which topographically controls it and the surroundings, outside of the defended area. Nonetheless, he testified that, after meetings with the petitioners and members of the Council for Peace and Security, it was decided that slight changes would be made in the segment which passes alongside the northeast hill. As a result, the obstacle will be distanced further from the road and from the homes of the local inhabitants in the area (see para. 60 of military commander's affidavit of April 15, 2004). The respondent also stated that order of seizure Tav/37/04, which amends the route accordingly, has already been issued. In our decision (of March 31, 2004), we held that the respondents shall refrain from making irreversible changes in the segment north of Har Adar.

66. From the military standpoint, there is a dispute between the military commander (who wishes to distance the separation fence from Har Adar) and the experts of the Council for Peace and Security (who wish to bring the fence closer to Har Adar). In this disagreement on military issues – and according to our approach, which gives great weight to the position of the military commander responsible for the security of the area – we accept the security stance of the military commander. Against this background, the question arises: is this part of the route of the separation fence proportionate?

67. Like the previous order we considered, this order before us also passes the two first subtests of proportionality (rational connection; the least injurious means). The key question here concerns the third subtest (proportionality in the narrow sense). Here too, as in the case of the previous order, the injury by the separation fence to the lives of more than 3,000 farmers in the villages of Katane and El-Kabiba is severe. The rights guaranteed them by the Hague Regulations and the Fourth Geneva Convention are violated. The delicate balance between the military commander's obligation to provide security and his obligation to provide for the local inhabitants is breached. The fence separates between the inhabitants of Katane and El-Kabiba and their lands east and west of Har Adar, while instituting a licensing regime for passage from one side of the fence to the other. As a result, the farmer's way of life is infringed upon most severely. The regime of licensing and gates, as set out by the military commander, does not solve this problem. The difficulties we mentioned regarding the previous order apply here as well. As we have

seen, it is possible to lessen this damage substantially if the route of the separation fence passing east and west of Har Adar is changed, reducing the area of agricultural lands lying beyond the fence. The security advantage (in comparison to the possible alternate route) which the military commander wishes to achieve is not proportionate to the severe injury to the farmers (according to the route proposed by the military commander). On this issue, attempts to find an appropriate solution were made during the hearing of the petition. These attempts must continue, in order to find a route which will fulfill the demands of proportionality. As a result of such a route, it may be that there will be no escaping some level of injury to the inhabitants of Katane and El-Kabiba, which should be reduced to the utmost extent possible. As such, since the parties must continue to discuss this issue, we have not seen fit to make a final order regarding Tav/107/03.

The Eastern Tip of Order no. Tav/107/03 and Order no. Tav/108/03

68. This order applies to the five and a half kilometer long segment of the route of the obstacle which passes west and southeast of the villages of Beit Sourik (population: 3,500) and Bidu (population: 7,500). A study of this part of the route, as published in the original order, reveals that the injury to these villages is great. From the petitioners' data – which was not negated by the respondents – it appears that 500 dunams of the lands of the village of Beit Sourik will be directly damaged by the positioning of the obstacle. 6,000 additional dunams will remain beyond it (5,000 dunams of which are cultivated land), including three greenhouses. Ten thousand trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 olive trees, 25,000 fruit trees and 5,400 fig trees, as well as from many other agricultural crops. These numbers do not capture the severity of the damage. We must take into consideration the total consequences of the obstacle on the way of life in this area. The original route as determined in the order leaves the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely stifle daily life. The fate of the village of Bidu is not much better. The obstacle surrounds the village from the east and the south, and infringes upon lands west of it. From a study of the map attached by the respondents (to their response of March 10, 2004) it appears that, on this segment of the route, one seasonal gate will be established south of the village of Beit Sourik. In addition, a checkpoint will be positioned on the road leading eastward from Bidu.

69. In addition to the parties' arguments before us, a number of the residents of the town of Mevasseret Zion, south of the village of Beit Sourik, asked to present their position. They pointed out the good neighborly relations between Israelis and Palestinians in the area and expressed concern that the route of the fence, which separates the Palestinian inhabitants from their lands, will bring an end to those relations. They argue that the Palestinians' access to their lands will be subject to a series of hindrances and violations of their dignity, and that this access may even be prevented completely. On the other hand, Mr. Efraim Halevi asked to present his position, which represents the opinion of other residents of the town of Mevasseret Tzion. He argues that moving the route of the fence southward, such that it approaches Mevasseret Tzion, will endanger its residents.

70. As with the previous orders, here too we take the route of the separation fence determined by the military commander as the basis of our examination. We do so, since we grant great weight to the stance of the official who is responsible for security. The question which arises before us is: is the damage caused to the local inhabitants by this part of the separation fence route proportionate? Here too, the first two subtests of the principle of proportionality are satisfied. Our doubt relates to the satisfaction of the third subtest. On this issue, the fact is that the damage from the segment of the route before us is most severe. The military commander himself is aware of this fact. During the hearing of the petition, a number of changes in the route were made in order to ease the situation of the local inhabitants. He mentioned that these changes provide an inferior solution to security problems, but will reduce the injury to the local inhabitants, and will grant a reasonable level of security. However, even after these changes, the injury still remains very severe. The rights of the local inhabitants are violated. Their way of life is completely undermined. The obligations of the military commander, pursuant to the humanitarian law enshrined in the Hague Regulations and the Fourth Geneva Convention, are not being satisfied.

71. The Council for Peace and Security proposed an alternate route, whose injury to the agricultural lands is much smaller. It is proposed that the separation fence be distanced both from the east of the village of Beit Sourik and from its west. Thus, the damage to the agricultural lands will be substantially reduced. We are convinced that the security advantage achieved by the route, as determined by the military commander, in comparison with the alternate route, is in no way proportionate to the additional injury to the

lives of the local inhabitants caused by this order. There is no escaping the conclusion that, for reasons of proportionality, this order before us must be annulled. The military commander must consider the issue again. He must create an arrangement which will avoid this severe injury to the local inhabitants, even at the cost of a certain reduction of the security demands. The proposals of the Council for Peace and Security – whose expertise is recognized by the military commander – may be considered. Other routes, of course, may be considered. This is the military commander's affair, subject to the condition that the location of the route free the village of Beit Sourik (and to a lesser extent, the village of Bidu) from the current chokehold and allow the inhabitants of the villages access to the majority of their agricultural lands.

Order no. Tav/109/103

72. This order applies to the route of the separation fence east of the villages of Bidu, Beit Ajaza and Beit Daku. Its length is approximately five kilometers. As we take notice of its southern tip, its central part, and its northern part, different parts of it raise different problems. The southern tip of the order directly continues from the route of order no. Tav/108/03, to the area passing west of the town of Har Shmuel. This part of the fence passes east of the village of Bidu, and it is the direct continuation of the part of the separation fence considered by us in the framework of order no. Tav/108/03. The fate of this part of order no. Tav/109/03 is the same fate as that of order no. Tav/108/03. As such, the separation fence will be moved eastward, so that the inhabitants of the village of Bidu will be able to continue the agricultural cultivation of the part of their lands east of this part of the fence.

73. The central part of the separation fence in this order passes west of the town of Har Shmuel and east of the village of Bidu, until it reaches New Giv'on, which is east of it, and the village of Beit Ajaza which is west of it. The separation fence separates these two towns. The route causes injury to the agricultural lands of the village of Bidu and to the access to them. The route also infringes upon the lands of the village of Beit Ajaza. We were informed that 350 dunams of the lands of this village will be damaged by the construction of the obstacle. 2,400 dunams of the lands of the village will be beyond it (2,000 dunams of them cultivated land). In addition, the route cuts off the access roads that connect the villages to the urban center of Ramallah and to East Jerusalem. In the affidavit of the Council for Peace and Security

(of April 4, 2004), it was mentioned that the current route will allow the local inhabitants to reach Ramallah only via a long and difficult road. The petitioners proposed that the route of the fence pass adjacent to the town of Har Shmuel, to the road connecting the Ramot neighborhood to Giv'at Ze'ev, and to the southern part of the town of New Giv'on. Thus, free access to the agricultural lands in the area will be possible. The petitioners also proposed pressing the route up against the western part of New Giv'on, and thus distancing it a bit from the village of Beit Ajaza.

74. The route proposed by the petitioners is unacceptable to the respondent. He argues that it does not take into account the palpable threat of weapons fire upon Israeli towns and upon the road connecting Ramot with Giv'at Ze'ev. Neither does it consider the need to establish a security zone which will increase the preparation time available to the armed forces in the event of an infiltration. The respondent argues that pushing the separation fence up against the Israeli towns will substantially endanger those towns. The military commander is aware of this, and therefore testified before us that a gate will be established at that location in order to allow the inhabitants' passage to their lands. East of the village of Bidu, a permanent checkpoint will be established, which will be open 24 hours a day, 365 days a year, in order to allow the preservation of the existing fabric of life in the area and ease the access to the villages. Furthermore, it was decided to take steps which will improve the roads connecting the villages to one another, in order to allow the continued relations between these villages, and between them and Ramallah. In addition, the respondent is examining the possibility of paving a road which will allow free and fast access from the villages to the direction of Ramallah. In his affidavit (of April 20, 2004), the respondent testified (paragraph 22 of the affidavit) that, until the completion of said road, he will not prevent passage of the inhabitants of the villages in this petition to the direction of Ramallah; rather, access toward the city will be allowed, according to the current arrangements.

75. According to our approach, great weight must be given to the military stance of the commander of the area. The petitioners did not carry their burden and did not convince us that we should prefer the petitioners' military stance (supported in part by the expert opinion of members of the Society for Peace and Security) over the stance of the commander of the area. We assume, therefore, that the position of the commander of the area, as expressed in this part of order no. *Tav/109/03*, is correct, and it forms the basis for our examination.

76. Is the damage caused to the local inhabitants by this part of the route of the separation fence proportionate? Like the orders we considered up to this point, the question is: is the security advantage gained from the route, as determined by the commander of the area, compared to other possible alternate routes, proportionate to the additional injury to the local inhabitants caused by this route, compared to the alternate routes? Here, as well, the same scenario we have already dealt with reappears. The route of the fence, as determined by the military commander, separates local inhabitants from their lands. The proposed licensing regime cannot substantially solve the difficulties raised by this segment of the fence. This constitutes a severe violation of the rights of the local inhabitants. The humanitarian provisions of the Hague Regulations and of the Fourth Geneva Convention are not satisfied. The delicate balance between the security of the area and the lives of the local inhabitants, for which the commander of the area is responsible, is upset. There is no escaping, therefore, the annulment of the order, to the extent that it applies to the central part of the fence. The military commander must consider alternatives which, even if they result in a lower level of security, will cause a substantial (even if not complete) reduction of the damage to the lives of the local inhabitants.

77. We shall now turn to the northern part of order no. Tav/109/03. The route of the fence at this part begins in the territory separating New Giv'on from the village of Beit Ajaza. It continues northwest to the eastern part of the village of Beit Daku. In our decision (of March 31, 2004), we determined that the respondents shall refrain from making irreversible changes in the segment between Beit Tira and North Beit Daku. There is no dispute between the parties regarding the part of the fence which separates New Giv'on and Beit Ajaza. This part of the fence is legal. The dispute arises regarding the part of the separation fence which lies beyond it.

78. The petitioners argue that this part of the route of the separation fence severely injures the local inhabitants of the village of Beit Daku. The data in their arguments show that 300 dunams of village lands will be directly affected by the passage of the obstacle through them. 4,000 dunams will remain beyond the obstacle (2,500 of them cultivated). The affidavit submitted by the Council for Peace and Security states that the route of the obstacle should be moved a few hundred meters northeast of the planned location, in order to reduce the effect on local inhabitants. The petitioners presented two alternate routes for the obstacle in this segment. One route passes through the area intended for expansion of the town of Giv'at Ze'ev known by the nickname of "The

Gazelles' Basin," where a new neighborhood is already being built. A second alternate route draws the obstacle closer to its present route, northeast of it.

79. The respondent objects to the route proposed by the petitioners and by the Society for Peace and Security. He explains that there is great importance to the control of a high hill located east of the village of Beit Daku. This hill topographically controls New Giv'on, Giv'at Ze'ev and "The Gazelles' Basin." The route of the fence was planned such that it would not obstruct the road connecting the villages of Beit Daku and Beit Ajaza. In addition, the route passes over hill ridges which are of relatively moderate gradient, whereas the other ridges which descend from it are steep. In the respondent's opinion, moving the fence northwest of its current route will allow terrorist activity from the high hill, and thus endanger the Israeli towns and the army forces patrolling along the obstacle. In addition, the fact that the route proposed by the petitioners is steeper raises complex engineering problems, that will be solved by multiple bends in the route that will seriously damage the crops located at the foot of the hill.

80. As with other segments of the separation fence, here too we begin with the assumption that the military and security considerations of the military commander are reasonable, and that there is no justification for our intervention. The question before us, therefore, is: is the route of the separation fence, which actualizes these considerations, proportionate? The main difficulty is the severe injury to the local inhabitants of Beit Daku. The fence separates them from considerable parts (4,000 dunams, 2,500 of which are cultivated) of their lands. Thus, a disproportionate injury is caused to the lives of the people in this location. We accept – due to the military character of the consideration – that the high hill east of the village of Daku must be under IDF control. We also accept that "The Gazelles' Basin" is a part of Giv'at Ze'ev and needs defense just like the rest of that town. Despite the above, we are of the opinion that the military commander must map out an alternate arrangement – one that will both satisfy the majority of the security considerations and also mitigate, to the utmost extent possible, the separation of the local inhabitants of the village of Daku from their agricultural lands. Such alternate routes were presented before us. We shall not take any stand whatsoever regarding a particular alternate route. The military commander must determine an alternative which will provide a fitting, if not ideal, solution for the security considerations, and also allow proportionate access of Beit Daku villagers to their lands.

Order no. Tav/110/03

81. This order continues the route of the separation fence northwest of Beit Daku. This part starts out adjacent to the east part of the village of A-Tira, and ends up at route 443, east of Beit Horon. The village of A-Tira is not a party to the petition before us, and we will not deal with its inhabitants. Insofar as it affects the lands of Beit Daku, this order must go the way of Tav/109/03, which we have already discussed.

Overview of the Proportionality of the Injury Caused by the Orders

82. Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the segment of the separation fence which is the subject of this petition. The length of the segment of the separation fence to which these orders apply is approximately forty kilometers. It causes injury to the lives of 35,000 local inhabitants. 4,000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

83. During the hearings, we asked the respondent whether it would be possible to compensate the petitioners by offering them other lands in exchange for the lands that were taken to build the fence and the lands that they will be separated from. We did not receive a satisfactory answer. This petition concerns farmers that make their living from the land. Taking the petitioners' lands obligates the respondent, under the circumstances, to attempt to find

other lands in exchange for the lands taken from the petitioners. Monetary compensation may only be offered if there are no substitute lands.

84. The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabbala and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.

85. The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

Epilogue

86. Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we ourselves are being judged. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen its power and its spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. I discussed this point in HCJ 5100/94 *The Public Committee against Torture in Israel v. The Government of Israel*, at 845:

> We are aware that this decision does 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 before it. A democracy must sometimes fight with one arm tied behind its back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of its security stance. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.

The result is that we reject the petition against order no. Tav/105/03. We accept the petition against orders Tav/104/03, Tav/103/03, Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.

The respondents shall pay 20,000 NIS in petitioners' costs.

Vice-President E. Mazza
I concur.

Justice M. Cheshin
I concur.

Held, as stated in the opinion of President A. Barak.
June 30, 2004.

HCJ 7957/04

1. **Zaharan Yunis Muhammad Mara'abe**
2. **Morad Ahmed Muhammad Ahmed**
3. **Muhammad Jamil Mas'ud Shuahani**
4. **Adnan Abd el Rahman Daud Udah**
5. **Abd el Rahim Ismail Daud Udah**
6. **Bassem Salah Abd el Rahman Udah**
7. **The Association for Civil Rights in Israel**

v.

1. **The Prime Minister of Israel**
2. **The Minister of Defense**
3. **The Commander of IDF Forces in the Judea and Samaria Area**
4. **The Separation Fence Authority**
5. **The Alfei Menashe Local Council**

Two months after the Court handed down *Beit Sourik*, five Palestinian villages claimed that the security barrier was entirely illegal, this time citing the Advisory Opinion of the International Court of Justice ("ICJ") which determined that the fence lacks a valid self-defense rationale. The petition also claimed that the specific portion of the barrier in the area of Alfei Menashe was illegal, citing *Beit Sourik* (HCJ 2056/04) as precedent.

The barrier at issue created a peninsula around the Jewish settlement of Alfei Menashe, with its 5,400 people, connecting it to the "Israeli side." The peninsula, however, swept up five Palestinian villages of 1,200 total people, whose primary ties were with the towns of Qalqilya and Habala, beyond the fence.

The Court reiterated its point from *Beit Sourik*: as a force governed by the law of "belligerent occupation," the Israeli military has the power to preserve the security of the people in the area, of the state, and of its citizens. A fence built with this motivation – security – has a lawful purpose under international law and may be upheld, if proportional.

Given the background of terrorist violence from the neighboring community of Qalqiliya against Israelis, the Court found a legitimate security purpose to the fence because it presented a "significant obstacle" to the "terrorist

infrastructure" – limiting its ability to attack Israelis. Having approved the security purposes, the Court turned to evaluating the fence's proportionality.

The Court evaluated the effect of the counterterrorist operation on the "fabric of life" in the region: the infringement upon education, health, employment, movement, and social ties. Reviewing evidence from the government, the villages, and human rights groups, the Court catalogued the effect of the fence as built, concluding it amounted to a "chokehold."

As a much less injurious alternative, the Court held, the fence could provide sufficient security if built entirely around Alfei Menashe with a secure access road out. The Court did not mandate this solution, but required that the government change the route "within a reasonable period of time" and reconsider "the various alternatives for the separation fence … which injure the fabric of life of the village residents less."

Much of *Alfei Menashe* is dedicated to explaining why the advisory opinion of the ICJ on the barrier does not control over the legal approach in *Beit Sourik*. The Israeli Supreme Court pointed out that as an advisory opinion, the ICJ's decision does not have *res judicata* effect within another jurisdiction. Nevertheless, the Court insisted, it is a worthy interpretation of international law deserving appropriate consideration.

International decisions such as those from the Hague are given substantial weight by the Court, and are considered binding on the legal issues they address, as pointed out by Supreme Court President Barak. In general, the ICJ and Israel have similar normative legal frameworks based upon international custom, conventions, and treaties.

The ICJ concluded that the barrier in its entirety is unlawful based on the assumption that Israel built the barrier in its sovereign capacity as a self defense measure. Self defense, the ICJ held, is not a valid rationale to take military action against a threat emanating from occupied territory.

The Israel Supreme Court explained that the ICJ failed to consider the argument that an occupying military force has obligations under the law of belligerent occupation – Article 43 of the Hague Regulations – to ensure security for its citizens and in the occupied area. Thus, even if the Hague decision is correct and Israel cannot build a barrier out of considerations of

self-defense on occupied territory, Israel can still build a barrier as a security measure against threats within that territory.

The Court pointed out that the ICJ did not have the benefit of sufficient factual or legal briefing before giving its advisory opinion. Specifically, it had no facts regarding the effect of preventing terror attacks against Israelis. The dissenting opinion at the ICJ stressed this point: without knowing the position of both sides of a legal conflict, it is not appropriate to make factual and legal assumptions. The Israeli Court's review of all the relevant factual background – with the benefit of full discovery and argument from committed advocates on both sides – suggests that this is not the case.

Israel's Court used detailed factual briefing in order to look at specific portions of the barrier and balance the benefit to security with the effect on local populations. The ICJ used a broad stroke to discuss the entire barrier.

Since its advisory opinion did not address the claim that Israel's security obligations under the law of belligerent occupation permit the building of a barrier, if proportional, and its factual determinations were made without the benefit of sufficient briefing, the ICJ's decision is not applicable.

HCJ 7957/04

1. Zaharan Yunis Muhammad Mara'abe
2. Morad Ahmed Muhammad Ahmed
3. Muhammad Jamil Mas'ud Shuahani
4. Adnan Abd el Rahman Daud Udah
5. Abd el Rahim Ismail Daud Udah
6. Bassem Salah Abd el Rahman Udah
7. The Association for Civil Rights in Israel

v.

1. The Prime Minister of Israel
2. The Minister of Defense
3. The Commander of IDF Forces in the Judea and Samaria Area
4. The Separation Fence Authority
5. The Alfei Menashe Local Council

The Supreme Court Sitting as the High Court of Justice
[September 12, 2004; March 31, 2005; June 21, 2005]

Before President A. Barak, Vice-President M. Cheshin, Justice D. Beinisch, Justice A. Procaccia, Justice E. Levy, Justice A. Grunis, Justice M. Naor, Justice S. Joubran & Justice E. Hayut

Petition for an *Order Nisi*
For Petitioners: Michael Sfard
Dan Yakir
Limor Yehuda
For Respondents no. 1-4: Anar Helman
Avi Licht
For Respondent 5: Baruch Heikin

President A. Barak

Alfei Menashe is an Israeli town in the Samaria area, situated approximately four kilometers beyond the Green Line. Pursuant to the military commander's orders, a separation fence was built surrounding the town from all sides with a road passage connecting the town to Israel. A number of Palestinian villages are included within the fence's perimeter. The separation fence cuts them off from the remaining parts of the Judea and Samaria area. An enclave of Palestinian villages on the "Israeli" side of the fence has been created. The petitioners are residents of the villages. They contend that the separation fence is not legal. Their claim is based upon the judgment in *The Beit Sourik Case* (HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel,* 58(5) P.D. 807). The petition also relies upon 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 IL M 1009 (2004)). The legality of the separation fence is the question before us.

A. The Background and the Petition

1. Terrorism and the Response to it

1. In September 2000 the second intifada broke out. A massive attack of terror acts descended upon Israel, and upon Israelis in the Judea, Samaria, and Gaza Strip areas (hereinafter – the area). Most of the terrorist attacks were directed toward civilians. They struck at men and women; at the elderly and the young. Entire families lost their loved ones. The attacks were designed to take human life. They were designed to spelling fear and panic. They were meant to obstruct the daily life of the citizens of Israel. Terrorism has turned into a strategic threat. Terrorist attacks were committed inside of Israel and in the area. They occurred everywhere, including on public transport, in shopping centers and markets, in coffee houses, and inside of houses and communities. The main targets of the attacks were the downtown areas of Israel's cities. Attacks were also directed at the Israeli communities in the area, and at the transportation routes. Terrorist organizations used a variety of means. These included suicide attacks ("guided human bombs"), car bombs, explosive charges, throwing of Molotov cocktails and hand

grenades, shooting attacks, mortar fire, and rocket fire. A number of attempts at attacking strategic targets ("mega-terrorism") have failed. Thus, for example, the intent to topple one of the Azrieli towers in Tel Aviv using a car bomb in the parking lot was frustrated (April 2002). Another attempt which failed was the attempt to detonate a truck in the gas tank farm at Pi Glilot (May 2003). Since the onset of these terrorist acts, up until mid July 2005, about one thousand attacks have been carried out within Israel. In Judea and Samaria, 9,000 attacks have been carried out. Thousands of attacks have been carried out in the Gaza Strip. More than one thousand Israelis have lost their lives in these attacks, of them 200 in the Judea and Samaria area. Many of the injured have become severely handicapped. On the Palestinian side, the armed conflict has also caused many deaths and injuries. We are flooded with bereavement and pain.

2. Israel took a series of steps to defend the lives of her residents. Military operations were carried out against terrorist organizations. These operations were intended to defeat the Palestinian terrorist infrastructure and prevent the reoccurrence of terrorist acts (*see* HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57(2) P.D. 349, hereinafter – *Marab*; HCJ 3278/02 *The Center for Defense of the Individual v. The Commander of IDF Forces in the West Bank Area*, 57(1) P.D. 385. These steps did not provide a sufficient answer to the immediate need to halt the severe terrorist attacks. Innocent people continued to pay with life and limb. I discussed this in *The Beit Sourik Case*:

> These terrorist acts committed by the Palestinian side have led Israel to take security steps of various levels of severity. Thus, the government, for example, decided to carry out various military operations, such as operation "Defensive Wall" (March 2002) and operation "Determined Path" (June 2002). The objective of these military actions was to defeat the Palestinian terrorist infrastructure and to prevent reoccurrence of terror attacks . . . These combat operations – which are not regular police operations, rather bear all the characteristics of armed conflict – did not provide a sufficient answer to the immediate need to stop the severe acts of terrorism. The Committee of Ministers on National Security considered a series of proposed steps intended to prevent additional acts of terrorism and to deter potential terrorists from committing such acts . . . Despite all of these measures, the terror did not come to an end. The attacks did not cease. Innocent people paid with both life and limb. This was the background behind the decision to construct the separation fence (Id., at p. 815).

Given this background, the idea of erecting a separation fence in the Judea and Samaria area, which would limit the ability of terrorists to strike at Israelis and ease the security forces' struggle against the terrorists, was formulated.

3. The construction of the separation fence was approved by the government on June 23, 2002. At the same time, phase A of the fence was approved. Its length was 116 km. It began in the area of the Salem village, adjacent to the Megiddo junction, and continued to the Trans-Samaria Highway adjacent to the Elkana community. An additional obstacle in the Jerusalem area (approximately 22 km long) was also approved. These were intended to prevent terrorist infiltration into the north and center of the country, and into the Jerusalem area. The government decision stated, *inter alia*,

> (3) In the framework of phase A – to approve construction of security fences and obstacles in the 'seamline area' and in the surroundings of Jerusalem, in order to decrease infiltrations by terrorists from the Judea and Samaria areas for the purpose of attacks in Israel.
>
> (4) The fence, like the other obstacles, is a security mean. Its construction does not reflect a political border, or any other border.
>
> (5) . . .
>
> (6) The exact and final route of the fence shall be determined by the Prime Minister and the Minister of Defense . . . the final route shall be presented to the Committee of Ministers on National Security or to the government.

Following this decision (December 2002), the construction of phase B of the fence was approved. That phase began at Salem village, heading east until the Jordan river (approximately 60 km). This phase also included an offshoot starting at Mt. Avner (adjacent to the village of Al Mutilla) in the southern Gilboa, heading south toward Thaisar village. Approximately one year later (on October 1, 2003), the government decided to construct phases C and D of the fence. Phase C included the fence between Elkana and the Camp Ofer military base, a fence east of the Ben Gurion airport and north of planned highway 45, and a fence protecting Israeli communities in Samaria (including Ariel, Emanuel, Kedumim, Karnei Shomron). Phase D included the area from the Etzion Bloc southward to the southern Hebron area. The government decision stated, *inter alia*:

(2) The obstacle built pursuant to this decision, like its other segments in the 'seamline area,' is a security means for preventing terrorist attacks, and does not reflect a political border, or any other border.

(3) Local alterations of the obstacle route or of construction necessary for the overall planning of the route, shall be brought for approval to the Minister of Defense and the Prime Minister.

(4) . . .

(5) . . .

(6) During the detailed planning, all efforts shall be made to minimize, to the extent possible, disturbance liable to be caused to the daily lives of Palestinians as a result of the construction of the obstacle.

The separation fence discussed in the petition before us relates to part of Phase A of the fence construction. The separation fence discussed in *The Beit Sourik Case* is part of Phase C of the fence construction. The length of the entire fence, including all four phases, is approximately 763 km. According to information relayed to us, approximately 242 km of fence have already been erected, and are in operational use. 28 km of it are built as a wall (11%). Approximately 157 km are currently being built, 140 km of which are fence and approximately 17 km are wall (12%). The building of 364 km of the separation fence has not yet been commenced, of which 361 km are fence, and 3 km are wall.

4. The separation fence is an obstacle built of a number of components. "In its center stands a 'smart' fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence, a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering tracks of those who pass the fence), a patrol road, a road for armored vehicles, and an additional fence. The average width of the obstacle, in its optimal form, is 50–70 meters. Due to constraints at certain points along the route, a narrower obstacle, which includes only part of the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle

> can reach a width of 100 meters, due to topographical conditions. . . Various means to help prevent infiltration will be erected along the length of the obstacle. The IDF and the border police will patrol the separation fence, and will be called to locations of infiltration, in order to frustrate the infiltration and to pursue those who succeed in crossing the security fence" (*The Beit Sourik Case,* at p. 818).

5. Parts of the separation fence are erected on private land. Under such circumstances, there is an administrative process of issuing an order of seizure and payment of compensation for the use of the land. An appeal may be launched against the seizure order to the military commander. If the appeal is rejected, the landowner is given a seven day period to petition the High Court of Justice. Since issuance of the orders, more than eighty petitions have been submitted to this Court. Approximately half were withdrawn in light of compromise between the parties. The other half are being heard before us. One of those petitions is the petition before us.

6. Since the decision to construct the fence, a constant and continual process of analysis and improvement has been taking place. This process intensified after the judgment in the *Beit Sourik Case* (given on June 30, 2004). As a result, some segments of the existing route were altered. The planned path of phases not yet constructed was changed. Where necessary, a government decision was passed, ordering an alteration of the route of the fence. Indeed, on February 20, 2005, the government decided to alter the fence route. The decision stated that it came about "after examining the implications of the High Court of Justice's ruling regarding continued work to construct the fence." The decision further stated:

> (a) The government places importance in the continued construction of the security fence, as a mean whose efficacy - in defending the State of Israel and its residents, and in preventing the negative influence a terrorist attack is liable to have on diplomatic moves - has been proven, while ensuring minimization, to the extent possible, of the affect on the daily lives of the Palestinians, according to the standards outlined in the ruling of the High Court of Justice.

This decision included additional segments of fence, whose legal examination had not yet been completed (in the area of western Samaria, Ma'aleh Edumim, and the Judean Desert). As a result of the government decision, special teams were established to examine the policy regarding the fence's crossing points and the permit regime. According to the data relayed

to us, part of the separation fence is inside of Israel or on the Green Line (approximately 150.4 km, which are 19.7% of the route). The part of the fence which is in the Judea and Samaria area leaves about 432 km^2, which are about 7.8% of the area of Judea and Samaria, on the "Israeli" (western) side of the fence. In this area live 8,900 Palestinian residents, who will live under a permit regime; and 19,000 Palestinian residents in the Etzion Bloc area, where such a regime will not apply and it will be possible to enter and exit freely, subject to security check, with no need to acquire permits or licenses of any kind. It is worth noting that this figure includes the Gush Etzion region (about 1.2% of the area of Judea and Samaria), the "fingers of Ariel" (about 2.0% of the area of Judea and Samaria) and Ma'aleh Edumim (approximately 1.2% of the area of Judea and Samaria). The administrative work and the legal examination regarding these areas is yet to be completed. Nor have Jerusalem's municipal territory or no-man's-land been included in these figures, since they are not in Judea and Samaria.

7. All territory left on the "Israeli" (western) side of the fence in the framework of Phase A – the area between the fence and the State of Israel (hereinafter – *the seamline area*) – were declared a closed military area, pursuant to Territory Closure Declaration no. S/2/03 (seamline area) (Judea and Samaria), 5764-2003 (of October 2, 2003), issued by the Commander of IDF Forces in the Judea and Samaria Area (hereinafter – *the declaration*). The seamline area in the phase A area is approximately 87 km^2, and about 5,600 Palestinians and 21,000 Israeli residents live in it. The declaration forbade entrance and presence in the seamline area, while determining that the rule does not apply to Israelis or people holding permits from the military commander to enter the seamline area and be present in it. The declaration determined, regarding permanent residents, that people whose permanent residence is in the seamline area will be permitted to enter the seamline area and be present in it, subject to the requirement that they hold a written permit from the military commander testifying to the fact that their permanent place of residence is in the seamline area, and subject to the conditions determined in the permit. The military commander issued a general permit to enter the seamline area to holders of foreign passports, to holders of work permits in an Israeli community within the seamline area, and for those who have a valid exit permit from the *area* into Israel. Within a half a year (May 27, 2004), the declaration was amended (Territory Closure Declaration no. S/2/03 (Seamline Area) (Judea and Samaria) (Amendment no. 1), 5764 – 2004). According to the amended declaration, the rule forbidding entrance and presence in the

seamline area does not apply to permanent residents in the seamline area or those holding a work permit from the military commander. A general permit, for entrance into the seamline area and presence in it for any purpose, was granted to residents of the State of Israel. Palestinians living in the seamline area were issued a "permanent resident card" testifying that they are permanent residents of the seamline area. The permits enable them to live in the seamline area and to move from it into the territories of the *area*, and back. Palestinians who are not permanent residents of the seamline area must acquire an entry permit. Such permits are granted for various reasons, including work, trade, agriculture, and education.

2. The Alfei Menashe Enclave

8. The Alfei Menashe enclave – the topic of the petition before us – is part of phase A of the fence. The decision regarding Phase A was reached on June 23, 2002. The construction of the fence was finished in August 2003. The fence surrounds Alfei Menashe (population – approximately 5,650) and five Palestinian villages (population – approximately 1,200): Arab a-Ramadin (population – approximately 250); Arab Abu-Farda (population – approximately 120); Wadi a-Rasha (population – approximately 120); Ma'arat a-Daba (population – approximately 250), and Hirbet Ras a-Tira (population – approximately 400) (*see* appendix). The fence which surrounds the enclave from the north is based, on its western side, upon the fence encircling the City of Qalqiliya (estimated population of 38,000 people) from the south. This part of the fence passes north of highway 55, which is the enclave's connection to Israel. The northern part of the fence surrounds Alfei Menashe, Abu-Farda, and Arab a-Ramadin. The Alfei Menashe enclave is unique for two reasons: First, it is based, in many places, upon the separation fence around the city of Qalqiliya and the villages of Habla and Hirbet Ras Atiyeh; second, the separation fence "brings" over to the "Israeli" (western) side not only Alfei Menashe, but also the five Palestinian villages.

9. There is one crossing and three agricultural gates in the fence surrounding the Alfei Menashe enclave, which connect the enclave to the *area*. The central connection between the enclave and the *area* is via "crossing 109," located on the northern side of the fence, on highway 55. Crossing 109 is close to the access point to the city of Qalqiliya, in the eastern fence surrounding Qalqiliya called DCO Qalqiliya. This point is not staffed, except in special cases, and it allows free passage between Qalqiliya and the *area*. Crossing 109

allows residents of the enclave to pass by foot and car, subject to a security check, to the *area* and the city of Qalqiliya at all hours of the day. There are three additional gates in the Alfei Menashe enclave fence, two of which are agricultural gates, through which one can pass by foot or car. The three gates are the Ras a-Tira gate (on the western side of the enclave, adjacent to the town of Hirbet Ras Atiyeh); the South Qalqiliya gate, and the Habla gate. At the time the petition was submitted, the three gates were generally opened three times a day for one hour. Now, the Ras a-Tira gate opens one hour after sunrise and is closed one hour before sunset. There is no change in the opening hours of the other gates. The enclave is connected, with territorial integrity, to Israel (with no checkpoint), and the crossing is made via highway 55, which connects Alfei Menashe to Israel. The road is mainly used by Israelis traveling to and leaving Alfei Menashe and by Palestinians with permits to enter Israel, or traveling within the boundaries of the enclave.

3. The Petition

10. The petition was submitted on August 31, 2004. The (original) petitioners are residents of the Ras a-Tira village (petitioners no. 1-3) and the Wadi a-Rasha village (petitioners no. 4-6). These two villages are located southwest of Alfei Menashe. In addition, the Association for Civil Rights in Israel also petitioned (petitioner no. 7). At a later phase the petitioners' counsel submitted a letter (of March 30, 2005) written by the five council heads of the villages in the enclave. The letter is addressed to the Court. It expresses support for the petition and verifies its content. At the same time, the petitioners' counsel informed us that the village council heads had granted him power of attorney to act in the name of the councils, as the petitioners in the petition.

11. The petitioners contend that the separation fence is not legal, and should be dismantled. They argue that the military commander is not authorized to give orders to construct the separation fence. That claim is based on the Advisory Opinion of the International Court of Justice at the Hague (hereinafter "ICJ"). The petitioners also contend that the separation fence does not satisfy the standards determined in *The Beit Sourik Case*. On this issue, petitioners argue that the fence is disproportionate and discriminatory. The respondents ask that the petition be rejected due to a number of preliminary arguments (undue delay, the "public" nature of the petition, and the lack of a prior plea to the respondents). On the merits of the case, the respondents argue that the military commander is authorized to erect a separation fence, as ruled

in *The Beit Sourik Case*. The Advisory Opinion of the International Court of Justice at the Hague has no implications in this regard, since it was based upon a factual basis different from that established in *The Beit Sourik Case*. The respondents also contend that the injury to the Palestinian residents satisfies the standards as determined in *The Beit Sourik Case.*

4. The Hearing of the Petition

12. The petition was heard soon after being submitted, by President A. Barak, Vice-President (*emeritus*) E. Mazza and Vice-President M. Cheshin (on September 12, 2004). The Alfei Menashe local council joined, at its request, as a respondent in the petition. Further hearing of the petition was postponed, in order to allow the state to formulate its stance. We noted that postponement of the petition does not prevent the respondents from doing all they can to ease the reality of daily life for the petitioners under the existing fence route. The hearing of the petition continued (on March 31, 2005) before President A. Barak, Vice-President M. Cheshin and Justice D. Beinisch (who replaced Vice-President E. Mazza, who retired). Subsequently, it was decided (on April 21, 2005) that the hearing of the petition would take place together with the hearing of HCJ 1348/05 and HCJ 3290/05 (regarding the separation fence around the city of Ariel), and that the hearing of all three petitions would take place before an expanded panel of nine Justices. The petition was thus heard before an expanded panel (on June 21, 2005). At the commencement of the hearing, it was stipulated that the court would view the hearing as if an *order nisi* had been granted. The petitioners presented arguments regarding the fence's injury to the various areas of life in the villages, and extensively discussed their legal arguments regarding the illegality of the fence. The respondents' arguments discussed the authority to build the fence and the steps that had been taken in order to ease the residents' lives. In addition, Colonel (res.) Dan Tirza (head of the administration dealing with the planning of the obstacle route in the seamline area) appeared before us, and surveyed the fence route and the considerations which the route planners confronted.

5. The Discussion Framework

13. The parties' arguments will be examined in five parts. In the first part we shall discuss the Supreme Court's caselaw regarding the military commander's authority, according to the law of belligerent occupation, to order the erection of the separation fence. This caselaw was developed by this Court in scores of

judgments that were handed down since the Six Day War. In the second part we shall discuss the way this law was applied, and concretely implemented, in *The Beit Sourik Case*. In the third part, we shall discuss the Advisory Opinion of the International Court of Justice at the Hague. In the fourth part we shall discuss the Advisory Opinion's effect upon the standards in *The Beit Sourik Case*, and its ramifications for the normative outline as determined by this Court, and the way this outline was implemented in *The Beit Sourik Case*. Finally, we shall examine whether the separation fence at the Alfei Menashe enclave satisfies the tests set out in the law.

B. The Normative Outline in the Supreme Court's Caselaw

1. Belligerent Occupation

14. The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the *area* is the military commander. The commander is not the sovereign in the territory held in belligerent occupation (*see The Beit Sourik Case*, at p. 832). His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: first, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation (*see* HCJ 1661/05 *The Gaza Coast Regional Council v. The Knesset et al.* (yet unpublished, paragraph 3 of the opinion of the Court; hereinafter – *The Gaza Coast Regional Council Case*). In the center of this public international law stand the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – *The Hague Regulations*). These regulations are a reflection of customary international law. The law of belligerent occupation is also laid out in the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*). The State of Israel has declared that it practices the humanitarian parts of this convention. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. We are aware that the Advisory Opinion of the International Court of Justice determined that *The Fourth Geneva Convention* applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned,

as the government of Israel accepts that the humanitarian aspects of *The Fourth Geneva Convention* apply in the *area*, we are not of the opinion that we must take a stand on that issue in the petition before us. In addition to those two sources of international law, there is a third source of law which applies to the State of Israel's belligerent occupation. That third source is the basic principles of Israeli administrative law, which is law regarding the use of a public official's governing power. These principles include, *inter alia*, rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality. "Indeed, every Israeli soldier carries in his pack the rules of customary public international law regarding the law of war, and the fundamental rules of Israeli administrative law" (HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area*, 37(4) P.D. 785, 810; hereinafter *The Jami'at Ascan Case*).

2. The Military Commander's Authority to Erect a Security Fence

15. Is the military commander authorized, according to the law of belligerent occupation, to order the construction of a separation fence in the Judea and Samaria area? In *The Beit Sourik Case* our answer was that the military commander is not authorized to order the construction of a separation fence, if the reason behind the fence is to serve a political goal of "annexing" territories of the area to the State of Israel and to determine Israel's political border. The military commander is authorized to order the construction of the separation fence if the reason behind its construction is a security and military one. Thus we wrote in *The Beit Sourik Case*:

> The military commander is not authorized to order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to "annex" territories in the *area* to the State of Israel. The purpose of the separation fence cannot be to draw a political border. . . . The authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the *area* has gone on for many years. This fact affects the scope of the military commander's authority. . . . The passage of time, however, cannot expand the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation (*Id.,* at pp. 829-830).

16. It is sometimes necessary, in order to erect a separation fence, to take possession of land belonging to Palestinian residents. Is the military commander authorized to do so? The answer is that if it is necessary for military needs, the military commander is authorized to do so. So we ruled in *The Beit Sourik Case*:

> . . . the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if that is necessary for the needs of the army. . . . He must, of course, provide compensation for his use of the land. Of course, . . . the military commander must also consider the needs of the local population. Assuming that these conditions are met, there is no doubt that the military commander is authorized to take possession of land in areas under his control. The construction of the separation fence falls within this framework, on the condition that it is necessary from a military standpoint. To the extent that the fence is a military necessity, infringement of private property rights cannot, in and of itself, negate the authority to build it. . . . Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers (*Id.*, at p. 832).

It is worth noting that construction of the separation fence is unrelated to expropriation or confiscation of land. The latter are prohibited by regulation 46 of *The Hague Regulations* (*see* HCJ 606/78 *Iyub v. The Minister of Defense*, 33(2) P.D. 113, 122; hereinafter – *The Iyub case*). Construction of the fence does not involve transfer of ownership of the land upon which it is built. The construction of the fence is done by way of taking possession. Taking of possession is temporary. The seizure order states a date of termination. Taking of possession is accompanied by payment of compensation for the damage caused. Such taking of possession – which is not related in any way to expropriation – is permissible according to the law of belligerent occupation (*see* regulations 43 and 52 of *The Hague Regulations*, and §53 of *The Fourth Geneva Convention*: *see The Iyub case,* at p. 129; HCJ 834/78 *Salame v. The Minister of Defense*, 33(1) P.D. 471, 472; *The Iyub case*, at p. 122; HCJ 401/88 *Abu Rian v. The Commander of IDF Forces in the Judea and Samaria Area*, 42(2) P.D. 767, 770; HCJ 290/89 *Jora v. The Military Commander of the Judea and Samaria Area*, 43(2) P.D. 116, 118; HCJ 24/91 *Timraz v. The Commander of IDF Forces in the Gaza Strip Area,* 45(2) P.D. 325, 333 – hereinafter *The Timraz Case*; HCJ 1890/03 *The Bethlehem Municipality v. The State of Israel – The Ministry of Defense* (yet unpublished) – hereinafter *The Bethlehem Municipality Case;* HJC 10356/02 *Hess v. Commander of the IDF Forces*

in the West Bank, 58 (3) P.D. 443, 456 – hereinafter *The Hess Case*; *see also* D. Kretzmer "The Advisory Opinion: The Light Treatment of International Humanitarian Law" 99 *A.J.I.L.* 88, 97 (2005) – hereinafter *Kretzmer*; N. Keidar "An Examination of the Authority of Military Commander to Requisition Privately Owned Land for the Construction of the Separation Barrier" 38 *Isr. L. Rev.* 247 (2005) – hereinafter *Keidar*). Pursuant to regulation 52 of *The Hague Regulations*, the taking of possession must be for "needs of the army of occupation." Pursuant to §53 of *The Fourth Geneva Convention*, the taking of possession must be rendered "absolutely necessary by military operation." G. Von Glahn discussed the legality of taking possession of land, stating:

> Under normal circumstances an occupier may not appropriate or seize on a permanent basis any immovable private property, but, on the other hand, a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity (G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 186 (1957)).

The key question is, of course, whether taking possession of land is rendered "absolutely necessary by military operation" (on this question *see* Imseis "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion," 99 *A.J.I.L.* 102 (2005), *and Keidar*, at p. 247). This issue is for the military commander to decide. J.S. Pictet discussed this point, stating:

> [It] will be for the Occupying Power to judge the importance of such military requirements (J.S. Pictet, *Commentary IV Geneva Convention - Relative to the Protection of Civilian Persons in Time of War* 302 (1958); hereinafter - *Pictet*).

Of course, the military commander's discretion is subject to judicial review by this Court (*see The Timraz Case*, at p. 335).

17. In *The Beit Sourik Case* and preceding case law, the Supreme Court held that the authority to take possession of land for military needs is anchored not only in regulations 43 and 52 of *The Hague Regulations* and in §53 of *The Fourth Geneva Convention*, but also in regulation 23(g) of *The Hague Regulations*. The Advisory Opinion of the International Court of Justice at the Hague determined that the second part of *The Hague Regulations*, in which regulation 23(g) is found, applies only during the time that hostilities

are occurring, and that therefore it does not apply to the construction of the fence (paragraph 124). The International Court of Justice added that the third part of *The Hague Regulations* – which includes regulations 43 and 52 – continues to apply, as it deals with military government (§125). This approach of the International Court of Justice cannot detract from this Court's approach regarding the military commander's authority to take possession of land for constructing the fence. This authority is anchored, as mentioned, in regulations 43 and 52 of *The Hague Regulations* and in §53 of *The Fourth Geneva Convention*. Regarding the principled stance of the International Court of Justice, we note the following two points: first, there is a view – to which Pictet himself adheres – by which the scope of application of regulation 23(g) can be widened, by way of analogy, to cover belligerent occupation (*see Pictet*, at p. 301; G. Schwarzenberger 2 *International Law as Applied by International Courts and Tribunals: the Law of Armed Conflict* 253, 314 (1968). Second, the situation in the territory under belligerent occupation is often fluid. Periods of tranquility and calm transform into dynamic periods of combat. When combat takes place, it is carried out according to the rules of international law. "This combat is not being carried out in a normative void. It is being carried out according to the rules of international law, which determine principles and rules for the waging of combat" (*see* HCJ 3451/02 *Almandi v. The Minister of Defense*, 56(3) P.D. 30, 34; *see also* HCJ 3114/02 *Barakeh, M.K. v. The Minister of Defense*, 56(3) P.D. 11, 16). In such a situation, in which combat activities are taking place in the area under belligerent occupation, the rules applicable to belligerent occupation, as well as the rules applicable to combat activities, will apply to these activities (*see The Marab Case*; HCJ 7015/02 *Ajuri v. The Commander of IDF forces in the West Bank*, 56(6) P.D. 352, *and* Watkin "Controlling the Use of Force: A Role of Human Rights Norms in Contemporary Armed Conflict" 98 *A.J.I.L.* 1, 28 (2004)). Regulation 23(g) of *The Hague Regulations* will apply in such a situation in territory under belligerent occupation, due to the combat activities taking place in it. The position of the state, as argued, is that the construction of the fence is part of Israel's combat actions. It is, according to the state's argument, a defensive act of erecting fortifications; it is intended to stop the advance of an offensive of terrorism; it is a defensive act which serves as an alternative to offensive military activity; it is an act absolutely necessary for the combat effort. As mentioned, we have no need to discuss this issue in depth, since the general authority granted the military commander pursuant to regulations 43 and 52 of *The Hague Regulations* and §53 of *The Fourth Geneva Convention* are sufficient, as far as construction

of the separation fence goes. We are thus able to leave the issue for decision at a later opportunity.

18. The rationale behind the military commander's authority to construct a separation fence for security and military reasons includes, first and foremost, the need to protect the army in the territory under belligerent occupation. It also includes defense of the State of Israel itself (compare §62(2) of *The Fourth Geneva Convention*, and HCJ 302/72 *Hilo v. The Government of Israel*, 27(2) P.D. 162, 178; *The Iyub Case*, at p. 117; HCJ 258/79 *Amira v. The Minister of Defense*, 34(1) P.D. 90; *The Beit Sourik Case*, at p. 833; *Kretzmer*, at p. 101). Does the military commander's authority to construct a separation fence also include his authority to construct a fence in order to protect the lives and safety of Israelis living in Israeli communities in the Judea and Samaria area? This question arises in light of the fact that Israelis living in the *area* are not "protected persons," as per the meaning of that term in §4 of *The Fourth Geneva Convention* (*see The Gaza Coast Regional Council Case* (yet unpublished, paragraph 4 of the opinion of the Court)). Is the military commander authorized to protect the lives and defend the safety of people who are not "protected" under *The Fourth Geneva Convention*? In our opinion, the answer is positive. The reason for this is twofold: first, the military commander's general authority is set out in regulation 43 of *The Hague Regulations*, which determines:

> 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.

The authority of the military commander is, therefore, "to ensure . . . public order and safety." This authority is not restricted only to situations of actual combat. It applies as long as the belligerent occupation continues (*see The Timraz Case*, at p. 336). This authority is not restricted only to the persons protected under international humanitarian law. It is a general authority, covering any person present in the territory held under belligerent occupation. Justice E. Mazza discussed this, stating:

> as far as the need to preserve the security of the *area* and the security of the public in the *area* is concerned, the military commander's authority applies to all persons present in the boundaries of the *area* at any given time. This determination is

> a necessary deduction as the military commander's known and clear duty is to preserve the security of the area, as is his responsibility for preservation of the public peace in his area (HCJ 2612/94 *Sha'ar v. The Commander of IDF Forces in the Judea and Samaria Area*, 48(3) P.D. 675, 679).

In another case I added:

> The Israeli settlement in the Gaza Strip is controlled by the law of belligerent occupation. Israeli law does not apply in this area . . . the lives of the settlers are arranged, mainly, by the security legislation of the military commander. The military commander's authority 'to ensure public order and safety' is directed towards every person present in the area under belligerent occupation. It is not restricted to 'protected persons' only . . . this authority of his covers all Israelis present in the *area* (HCJ 6339/05 *Matar v. The Commander of IDF Forces in the Gaza Strip* (yet unpublished); *see also the Hess case*, at p. 455).

Indeed, the military commander must ensure security. He must preserve the safety of every person present in the area of belligerent occupation, even if that person does not fall into the category of 'protected persons' (*see* HCJ 72/86 *Zlum v. The Military Commander of the Judea and Samaria Area*, 41(1) P.D. 528, 532, hereinafter – *The Zlum Case*; HCJ 2717/96 *Wafa v. The Minister of Defense*, 50(2) P.D. 848, 856; HCJ 4363/02 *Zindat v. The Commander of IDF Forces in the Gaza Strip* (unpublished); HCJ 6982/02 *Wahidi v. The Commander of IDF Forces in the Gaza Strip* (unpublished); HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) P.D. 608, 611).

19. Our conclusion is, therefore, that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*. It is not relevant to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at the Hague. For this reason, we shall express no position regarding that question. The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (regulation 43 of *The Hague Regulations*). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God's image. The life of a person who is in the area illegally is not up for the taking. Even if a

person is located in the area illegally, he is not outlawed. This Court took this approach in a number of judgments. In one case I noted:

> The military commander's duty is to protect the security of his soldiers, while considering the safety of the local population. This population also includes the settlements located in the area. Their legality is not under discussion before us, and will be determined in the peace treaties which the relevant parties will reach (HCJ 4364/02 *Zindat v. The Commander of the IDF Forces in the Gaza Strip* (unpublished), and *see also* HCJ 6982/02 *Wahidi v. The Commander of IDF Forces in the Gaza Strip* (unpublished)).

In another case I stated:

> It is contended before us that the objective of the order is to allow movement between two settlements, and that this objective is not a legal one, as the settlements are not legal. Not security considerations lie at the base of the order, rather political considerations. This argument holds no water. The status of the settlements will be determined in the peace treaty. Until that time, respondent has the duty to defend the population (Arab and Jewish) in the territory under his military control (HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) P.D. 608, 611; *see also The Zlum Case*, at p. 532).

In a similar vein wrote my colleague, Justice A. Procaccia:

> Alongside the *area's* commander's responsibility for safeguarding the safety of the military force under his command, he must ensure the well being, safety and welfare of the residents of the *area*. This duty applies to all residents, without distinction by identity – Jew, Arab, or foreigner. The question of the legality of various populations' settlement activity in the area is not the issue put forth for our decision in this case. From the very fact that they have settled in the area, the area commander's duty is derived to preserve their lives and their human rights. This sits well with the humanitarian aspect of the military force's responsibility in belligerent occupation (*The Hess Case*, at p. 460).

20. Indeed, the legality of the Israeli settlement activity in the *area* does not affect the military commander's duty – as the long arm of the State of Israel – to ensure the life, dignity and honor, and liberty of every person present in the *area* under belligerent occupation (*see* Y. Shany "Capacities and Inadequacies: a Look at the Two Separation Barrier Cases" 38 *Isr. L. Rev.* 230, 243 (2005)).

Even if the military commander acted in a manner that conflicted with the law of belligerent occupation at the time he agreed to the establishment of one settlement or another – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers. Ensuring of the safety of Israelis present in the area is cast upon the shoulders of the military commander (compare §3 of *The Fourth Geneva Convention*). Professor Kretzmer discussed this:

> [A] theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law. After all, the measures may be needed to protect civilians (rather than the settlements in which they live) against a serious violation of IHL (*Kretzmer*, at p. 93).

It is also to be noted that the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, signed in Washington D.C. between the State of Israel and the PLO on September 28, 1995, provided that the question of the Israeli settlements in the *area* will be discussed in the negotiations over the final status (*see* §17(a) and §31(5)). It was also provided in that agreement that "Israel shall . . . carry the responsibility . . . for overall security of Israelis and settlements, for the purpose of safeguarding their internal security and public order" (§12(1)). This arrangement applies to all the Israeli settlements in the *area*. This agreement was granted legal status in the *area* (*see* Decree Regarding Implementation of the Interim Agreement (Judea and Samaria)(No. 7), 5756-1995)(*see The Gaza Coast Regional Council Case*, paragraph 10 of the opinion of the Court, *as well as* Y. Zinger "The Israeli-Palestinian Interim Agreement Regarding Autonomy Arrangements in the West Bank and Gaza Strip – Some Legal Aspects," 27 *Mishpatim* 605 (1997) [Hebrew]).

21. The second reason which justifies our conclusion that the military commander is authorized to order the construction of a separation fence intended to protect the lives and ensure the security of the Israeli settlers in the area is this: the Israelis living in the area are Israeli citizens. The State of Israel has a duty to defend their lives, safety, and well being. Indeed, the constitutional rights which our Basic Laws and our common law grant to every person in Israel are also granted to Israelis who are located in territory under belligerent occupation which is under Israeli control. We discussed that point in *The Gaza Coast Regional Council Case:*

> In our opinion, the Basic Laws grant rights to every Israeli settler in the area to be evacuated. This jurisdiction is personal. It is derived from the State of Israel's control over the area to be evacuated. It is the eminating from the view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation (*Id.*, paragraph 80 of the opinion of the Court).

In sum, Israelis present in the *area* have the rights to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel enjoys (*see The Hess Case*, at p. 461). Converse to this right of theirs stands the state's duty to refrain from infringing upon these rights, and the duty to protect them. In one case, an Israeli wished to enter the *area*. The military commander refused the request, reasoning his refusal by the danger to the Israeli from being present in the place he wished to enter. The Israeli responded that he will "take the risk" upon himself. We rejected this approach, stating:

> Israel has the duty to protect its citizens. The State does not satisfy its duty merely because citizens are willing to 'take the risk upon themselves.' This 'taking of risk' does not add or detract from the issue, as the state remains obligated to the well being of its citizens, and must do everything possible to return them safely to the country (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385, 406. *See also* HCJ 9293/01 *Barakeh, M.K. v. The Minister of Defense*, 56(2) P.D. 509, 515; *The Gaza Coast Regional Council Case* (not published), paragraph 111 of the opinion of the Court).

Thus it applies in general circumstances. Thus it certainly applies when many of the Israelis living in the area do so with the encouragement and blessing of the government of Israel.

22. Of course, the scope of human rights of the Israeli living in the *area*, and the level of protection of these rights, are different from the scope of human rights of an Israeli living in Israel and the level of protection of these rights. At the foundation of this differentiation lies the fact that the *area* is not part of the State of Israel. Israeli law does not apply in the area. He who lives in the *area* lives under the regime of belligerent occupation. Such a regime is inherently temporary (*see* HCJ 351/80 *The Jerusalem District Electric Company v. The Minister of Energy and Infrastructure*, 35(2) P.D. 673, 690; *The Jami'at Ascan Case*, at p. 802; *The Beit Sourik Case*, paragraph 27; *The Gaza Coast Regional Council Case*, paragraph 8 of the opinion of the Court).

The rights granted to Israelis living in the area came to them from the military commander. They have no more than what he has – *Nemo dat quod non habet*. Therefore, in determining the substance of the rights of Israelis living in the *area*, one must take the character of the *area* and the powers of the military commander into account. This Court discussed this point in *The Gaza Coast Regional Council Case*, as it examined the infringment of human rights of the Israelis evacuated from the Gaza Strip:

> In determining the substance of the infringment and the rate of compensation, one must take into consideration the fact that the rights infringed upon are the rights of Israelis in territory under belligerent occupation. The temporariness of the belligerent occupation affects the substance of the right infringed upon, and thus also, automatically, the compensation for the infringment (*Id.,* paragraph 126 of the opinion of the Court).

While discussing the property right of Israelis evacuated from the Gaza Strip, the Court stated:

> This property right is limited in scope . . . most Israelis do not have ownership of the land on which they built their houses and businesses in the territory to be evacuated. They acquired their rights from the military commander, or from persons acting on his behalf. Neither the military commander nor those acting on his behalf are owners of the property, and they cannot transfer rights beyond the ones they hold. To the extent that the Israelis built their homes and assets on land which is not private ('state land'), that land is not owned by the military commander. His authority is defined in regulation 55 of *The Hague Regulations*. . . . The State of Israel acts . . . as the administrator of the state property and as usufructuary of it . . . (*Id.,* paragraph 127 of the opinion of the Court).

The scope of this right and the level of protection of it are not put forth for decision before us. The Israelis whose lives and security the separation fence is intended to protect are not petitioners before us. Their security, lives, rights of property, movement, and freedom of vocation, as well as the other rights recognized in Israeli law, are taken into consideration in the petition before us in the framework of the military commander's discretion regarding the need for a separation fence, and regarding its route (*see The Zlum Case*, at p. 532).

23. Israel's duty to defend its citizens and residents, even if they are in the *area*, is anchored in internal Israeli law. The legality of the implementation

of this duty is anchored in public international law, as discussed, in the provisions of regulation 43 of *The Hague Regulations*. In *The Beit Sourik Case*, this Court did not anchor the military commander's authority to erect the separation fence upon the law of self defense. The Advisory Opinion of the International Court of Justice at the Hague determined that the authority to erect the fence is not to be based upon the law of self defense. The reason for this is that §51 of the Charter of the United Nations recognizes the natural right of self defense, when one state militarily attacks another state. Since Israel is not claiming that the source of the attack upon her is a foreign state, there is no application of this provision regarding the erection of the wall (paragraph 138 of the Advisory Opinion of the International Court of Justice at the Hague). Nor does the right of a state to self defense against international terrorism authorize Israel to employ the law of self defense against terrorism coming from the *area*, as such terrorism is not international, rather originates in territory controlled by Israel by belligerent occupation. This approach of the International Court of Justice at the Hague is not indubitable (*see* R. Higgins *Problems and Process, International Law and How We Use It* 253 (1994); F. Frank "Terrorism and the Right of Self-Defense" 95 *A.J.I.L.* 839 (2001); J. J. Paust "Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond" 35 *Cornell Int'l L.J.* 533 (2002); A. C. Arend and R. J. Beck *International Law and the Use of Force - Beyond the UN Charter Paradigm* (2000)). It stirred criticism both from the dissenting judge, Judge Buergenthal (paragraph 6) and in the separate opinion of Judge Higgins (paragraphs 33 and 34). Conflicting opinions have been voiced in legal literature. There are those who support the ICJ's conclusion regarding self defense (*see* I. Scobbie "Words My Mother Never Taught Me – 'In Defense of the International Court'" 99 *A.J.I.L.* 76 (2005). There are those who criticize the ICJ's views on self-defense (*see* M. Pomerance "The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial" 99 *A.J.I.L.* 26 (2005); Murphy "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse, Dixit* from the ICJ" 99 *I.J.I.L.* 62 (2005); Wedgwood "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self Defence" 99 *A.J.I.L.* 52 (2005); Gross "Combating Terrorism: Self-Defense, Does it Include Security Barrier – Depends Who You Ask" 38 *Corn. Int. L.J.* 569 (2005)). We find this approach of the International Court of Justice hard to come to terms with. It is not called for by the language of §51 of the Charter of the United Nations (*see* the difference between the English and French versions, S. Rosenne 291 *General Course on Public International Law* 149 (2001)). It is doubtful whether it fits the needs of democracy in its struggle against terrorism. From

the point of view of a state's right to self defense, what difference does it make if a terrorist attack against it comes from another country or from territory external to it which is under belligerent occupation? And what shall be the status of international terrorism which penetrates into territory under belligerent occupation, while being launched from that territory by international terrorism's local agents? As mentioned, we have no need to thoroughly examine this issue, as we have found that regulation 43 of *The Hague Regulations* authorizes the military commander to take all necessary action to preserve security. The acts which self defense permits are surely included within such action. We shall, therefore, leave the examination of self defense for a future opportunity.

3. The Military Commander's Considerations in Erecting the Separation Fence and the Balancing Between Them

24. What are the considerations which the military commander must weigh in determining the route of the fence? The first consideration recognized by international law is the security and military consideration. Derived from it the military commander is permitted to weigh considerations of the security of the state, the security of the army, and the personal security of all present in the area. Indeed, converse to the human rights of the Israelis stands the military commander's duty and authority to defend them. The second consideration is, in the context of the petition before us, the good of the local Arab population. The human dignity of every member of the population, including the local population, must be defended by the military commander. Indeed, the basic rule is that every member of the local population is entitled to recognition:

> His human dignity, the sanctity of his life, and his status as a free person … one must not take his life or his dignity as a person, and one must defend his dignity as a person . . . the military commander's duty according to the basic rule is twofold: first, he must refrain from acts which hurt the local residents. That is his 'negative' duty; second, he must take the action necessary to ensure that the local residents will not be hurt. That is his 'positive' duty (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385, 394).

The human rights of the local residents include the whole gamut of human rights. My colleague, Justice A. Procaccia, discussed this point, noting:

> In the framework of his responsibility for the well being of the residents of the *area*, the commander must also work diligently to provide proper defense to the constitutional human rights of the local residents, subject to the limitations posed by the conditions and factual circumstances on the ground . . . included in these protected constitutional rights are freedom of movement, religion, and worship, and property rights. The commander of the area must use his authority to preserve the public safety and order in the area, while protecting human rights (*The Hess Case*, at p. 461).

25. Human rights, to which the protected residents in the area are entitled, are not absolute. As any human rights, they are relative. They can be restricted (*The Limitation of Human Rights in Comparative Constitutional Law* (de Mestral ed. 1986); Kiss "Permissible Limitations on Rights" *The International Bill of Rights* (L. Henkin ed. 1981) 290). Some of the limitations stem from the need to take rights of other people into account. Some of the limitations stem from the public interest (*see The Hess Case*, at p. 461; *The Bethlehem Municipality Case*, paragraphs 14 and 15). Thus, for example, the freedom of movement is not an absolute freedom. It can be restricted due to national security needs, public order, or the rights and freedoms of others (*see* § 12(3) of the International Covenant on Civil and Political Rights, 1966). The person responsible for the public interest in the *area* is the military commander.

26. What is the legal source from which the protected persons in the *area* derive their rights? It is unanimously agreed that international humanitarian law is the central source of these rights. This law is established, *inter alia*, by *The Hague Regulations*. Regulation 46 of *The Hague Regulations* provides as follows:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

This humanitarian law is also established in *The Fourth Geneva Convention*, which protects the rights of "protected persons." The central provision is established in §27:

> Art. 27. 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. . . . 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.

These provisions have been quoted at various times in the judgments of the Supreme Court (*see* HCJ 256/72 *The Jerusalem District Electric Company v. The Minister of Defense*, 27(1) P.D. 124; HCJ 302/72 *Abu Hilu v. The Government of Israel*, 27(2) P.D. 169; HCJ 574/82 *Al Nawari v. The Minister of Defense*, 39(3) P.D. 449; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 27(2) 349; HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(3) P.D. 385; *The Beit Sourik Case*).

27. Can the rights of the protected residents be anchored in the international conventions on human rights, the central of which is the International Covenant on Civil and Political Rights, 1966, to which Israel is party (*see* E. Benvenisti *The International Law of Occupation* (1993); Dennis "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation" 99 *A.J.I.L.* 119 (2005))? The International Court of Justice at the Hague determined, in its Advisory Opinion, that these conventions apply in an area under belligerent occupation. When this question arose in the past in the Supreme Court, it was left open, and the Court was willing, without deciding the matter, to rely upon the international conventions. In one case, President M. Shamgar relied upon these international sources, stating:

> I enter not, at this point, into the question whether the obligations arising from the various agreements and declarations to be referred to, are legally binding . . . for the concrete purposes before us now, I shall assume that one can view the content of these legal documents as relevant (HCJ 13/86 *Shahin v. The Commander of IDF Forces in the Judea and Samaria Area,* 41(1) P.D. 197, 210).

In another case, my colleague Justice D. Beinisch stated:

> We need not decide whether, and to what extent, the international conventions on human rights apply in the Judea and Samaria area . . . Suffice it to say that in the framework of the military commander's duty to exercise his discretion reasonably, he must also take into account the interests and rights of the local population, including the need to minimize the infringment of freedom of movement; and that,

the respondents do not contest (*The Bethlehem Municipality Case* (unpublished), paragraph 15).

We shall adopt a similar approach. Indeed, we need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the *area*. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights (on this question *see* T. Meron *Human Rights and Humanitarian Norms as Customary Law* (1989); *Human Rights and Humanitarian Law: The Quest for Universality* (D. Warner ed. 1997); J. Frowein "The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation" 28 *Isr. Y. H. R.* 1 (1998); D. Schindler "Human Rights and Humanitarian Law: Interrelationship of the Laws" 31 *Am. U. L. Rev.* 935 (1982)). However, we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.

28. Indeed, in exercising his authority pursuant to the law of belligerent occupation, the military commander must "ensure the public order and safety." In this framework, he must consider, on the one hand, considerations of state security, security of the army, and the personal security of all who are present in the *area*. On the other hand, he must consider the human rights of the local Arab population. Indeed, "the law of war usually creates a delicate balance between two magnetic poles. Military necessity on the one hand, and humanitarian considerations on the other" (Y. Dinstein "The Authority to Legislate in the Administered Territories" 2 *Iyunei Mishpat* 505, 509 (5732-5733) [Hebrew]). I discussed this point in one case, noting:

> *The Hague Regulations* revolve around two main axes: one – ensuring the legitimate security interests of the occupier in territory held under belligerent occupation; the other – ensuring the needs of the civilian population in the territory held under belligerent occupation (*The Jami'at Ascan Case*, at p. 794).

My colleague Justice A. Procaccia similarly noted that *The Hague Regulations* authorize the military commander to provide for two needs:

> The first need is military, and the other is a civilian-humanitarian need. The first concerns itself with providing for the safety of the military force holding the area, and the second with the responsibility for maintaining the well being of the residents. On the latter subject, the military commander is charged not only with

> preservation of the order and safety of the residents, but also with defense of their rights, and especially the constitutional human rights granted them. The concern for human rights stands at the center of the humanitarian considerations which the military commander must weigh (*The Hess Case*, at p. 455).

29. These considerations – security needs on the one hand and the needs of the local population on the other – conflict with each other. This is usually the case. Certainly is thus the case regarding the construction of the fence. What is the military commander to do in this situation? The answer is that he must create a balance between the conflicting considerations. Indeed, like in many other areas of law, the solution is not found in "all" or "nothing;" the solution is in locating the proper balance between the clashing considerations. The solution is not to assign absolute weight to one of the considerations; the solution is to assign relative weights to the various considerations, while balancing between them at the point of decision (*see* HCJ 953/83 *Levy v. The Commander of the Southern District of the Israeli Police*, 38(2) P.D. 393). "In performing his task of preserving order and safety, the commander of the area must ensure, therefore, the critical security interests on the one hand, and protect the interests of the civilian population in the area on the other . . . between these foci of responsibility, a proper balance is needed" (*The Hess Case,* at p. 456). Indeed, "The law of belligerent occupation recognizes the military commander's power to preserve the security of the area and to defend the safety of the state and its citizens. However, the exercise of this authority is conditional upon the proper balance between these duties and the rights, needs, and interests of the local population" (*The Beit Sourik Case*, at p. 833).

4. Proportionality

30. How shall this balancing be achieved? The answer is that this balancing raises no problem unique to belligerent occupation. It is a part of a general problem in law (*see* A. Barak *A Judge in A Democratic Society* 262 (2004)[Hebrew]). The solution to it is universal. It is found, *inter alia*, in general principles of law, including reasonableness and good faith. One of these basic principles which balances between a proper and fitting goal and the means for realizing it is the principle of proportionality (*see The Hess Case*, at p. 461; *The Bethlehem Municipality Case*, paragraph 15; *The Beit Sourik Case*, at p. 836; *The Gaza Coast Regional Council Case*, paragraph 102 of the opinion of the Court). This principle draws its strength from international law and from the fundamental principles of Israeli public law. The principle

of proportionality is based on three subtests which fill it with concrete content. The first subtest calls for a fit between goal and means. There must be a rational link between the means employed and the goal one is wishing to accomplish. The second subtest determines that of the gamut of means which can be employed to accomplish the goal, one must employ the least harmful mean. The third subtest demands that the damage caused to the individual by the means employed must be of appropriate proportion to the benefit stemming from it. Note that "at times there is more than one way to satisfy the proportionality demand. In such situations, a zone of proportionality (similar to the zone of reasonableness) should be recognized. Any means which the administrative body chooses from within the zone is proportional" (*The Beit Sourik Case*, at p. 840).

5. The Scope of Judicial Review

31. In a long line of judgments, the Supreme Court has determined the standards for the scope of judicial review of decisions and acts of the military commander in territory held under belligerent occupation. This judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law (§15(3) of Basic Law: The Judiciary). In determining the scope of judicial review, it was decided on the one hand that the Court does not substitute the discretion of the military commander with its own discretion. "[It is] obvious that the Court does not slip into the shoes of the deciding military official . . . in order to replace the commander's discretion with the discretion of the Court" (Shamgar P. in HCJ 1005/89 *Aga v. The Commander of IDF Forces in the Gaza Strip Area*, 44(1) P.D. 536, 539). The Court does not examine the wisdom of the decision, rather its legality (*see* HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385, 393). This is appropriate from the point of view of separation of powers. On the other hand it was determined that the Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander infringe upon human rights, they are justiceable. The door of the Court is open. The argument that the infringment upon human rights is due to security considerations does not rule out judicial review. "Security considerations" or "military necessity" are not magic words (*see* HCJ 7015/02 *Ajuri v. The Commander of IDF Forces in the West Bank*, 56(6) P.D. 352, 375; HCJ 619/

78 *"Al Taliyeh" Weekly v. The Minister of Defense*, 33(3) P.D. 505, 512; *The Jami'at Ascan Case*, at p. 809; HCJ 3114/02 *Barakeh, M.K. v. The Minister of Defense*, 56(3) P.D. 11, 16). This is an appropriate way from the point of view of protection of human rights.

32. It is between these two edges that the normative outline for the scope of judicial review is determined. This outline examines whether the actions and decisions of the military commander uphold the law in the *area*. When the action can be performed in a number of ways, the Court examines whether the act of the military commander is an act that a reasonable military commander would have adopted. When the decision of the military commander relies upon military knowledge, the Court grants special weight to the military expertise of the commander of the area, upon whom the responsibility for the security of the area is cast (*see* HCJ 390/79 *Duikat v. The Government of Israel*, 34(1) P.D. 1, 25; HCJ 258/79 *Amira v. The Minister of Defense*, 34(1) P.D. 90, 92; *The Beit Sourik Case*, at p. 844). When the decision of the military commander – based upon his military expertise – infringes upon human rights, the proportionality of the infringment will be determined according to the customary tests of proportionality. In one case I discussed this point, noting:

> We assume that the military action performed in Rafiah is necessary from a military standpoint. The question before us is whether the military action withstands the national and international standards which determine the legality of that action. The mere fact that the action is called for on the military level does not mean that it is lawful on the legal level. Indeed, we do not substitute the discretion of the military commander, regarding military considerations. That is his expertise. We examine their results on the humanitarian law level. That is our expertise (*The Physicians for Human Rights Case*, at p. 393).

These standards – by which this Court has acted for a very long time – apply also regarding the scope of judicial review of the separation fence route at Alfei Menashe. So we said in *The Beit Sourik Case*:

> The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise (*Id.*, at p. 846).

C. The Beit Sourik Case

33. In *The Beit Sourik Case*, the legality of the construction of the separation fence west of Jerusalem was discussed. The length of that separation fence was approximately 40 kilometers. It was part of phase C of the separation fence (upon which the government decided on October 1, 2003). Most of it was built east of the Green Line. It includes, in its "Israeli" part, a number of Israeli settlements which were built in the Judea and Samaria area, near the Green Line. The Supreme Court (President A. Barak, Vice-President E. Mazza and Justice M. Cheshin) first discussed whether the military commander is authorized to order the construction of the fence, in light of the petitioners' argument that a political consideration, and not a military one, lies at the foundation of its construction. The Court held that the military commander's authority is limited to military and security considerations. He is not authorized to consider political reasons. The Supreme Court examined the data presented and determined that "according to the factual basis before us, the reason for erecting the fence is a security reason" (*Id.*, at p. 830). On this issue, the Court relied upon government decisions which stressed its character as a security fence; upon affidavits of the commander of the *area*, in which the military considerations at the heart of the choice of route were detailed; upon the way the government officials went about changing (more than once) the route during the hearings, showing openness to suggestions which were raised, and agreeing (more than once) to move the fence route closer to the Green Line. Summarizing this issue, the Supreme Court stated:

> We have no reason to assume that the objective is political rather than security based. Indeed, the petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, the petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the *area*, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding (*Id.*, at p. 831).

34. The second question discussed by the Supreme Court regarded the legality of the orders issued in order to take possession of the land upon which the fence was built. The various seizure orders were examined on their merits. The Court found that there had been no defect in the process of

issuing the orders or in the process of allowing the submission of appeals. The Court determined that the military commander is authorized – according to the international law which applies in the *area* – to take possession of land, needed for military purposes, subject to his duty to pay compensation. The Court relied upon regulations 23(g) and 52 of *The Hague Regulations*, and upon §53 of *The Fourth Geneva Convention.* The Court held that "the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers" (*Id.*, at p. 832).

35. The third question discussed by the Court was the legality of the route chosen for the construction of the separation fence. The Court discussed the need to achieve a balance between the security and military needs and the rights of the protected residents. Regarding the security and military needs, the Court stated that it assigns special weight to the military opinion of the military commander, with whom the responsibility for security lies. Regarding the rights of the protected persons, the Court relied upon the humanitarian law set out in *The Hague Regulations* and *The Fourth Geneva Convention*. In the discussion on the appropriate balance, a considerable part of the judgment was devoted to the question of proportionality. A comparison was made between the intensity of harm to security (without the security fence) and the harm to the local residents (caused by the security fence). The Court held that the test for proportionality is an objective one. "This is a legal question; the expertise to deal with it belongs to the Court" (*Id.*, at p. 841). Considering this background, the Court examined the five segments of the fence (according to the five seizure orders). Each fence segment was examined separately, as the separation fence's "proportionality varies according to local conditions" (*Id.*, at p. 846). In addition, the compound harm caused to the lives of the local population by all the fence segments together was examined. Some of the fence segments were found to be proportionate. Others were found to be disproportionate. The basis of the determination of lack of proportionality was the third subtest of proportionality. The question posed by this subtest was whether "the severity of the injury to local inhabitants by the construction of the separation fence along the route determined by the military commander, stand[s] in reasonable (proper) proportion to the security benefit from the construction of the fence along that route" (*Id.*, at p. 850). According to that subtest, it was determined, regarding one of the fence segments, that the separation

fence "undermines the delicate balance between the duty of the military commander to preserve security and his duty to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injured the local inhabitants in a severe and acute way, while violating their rights under international humanitarian law" (*Id.*, at p. 850). One fence segment was held to be disproportionate, since "the farmers' way of life is infringed upon most severely. The regime of licensing and gates, as set out by the military commander, does not solve this problem" (*Id.,* at p. 854). A third fence segment was found to be disproportionate, as it created "a veritable chokehold, which will severely stifle daily life" (*Id.*, at p. 855). Regarding all of the fence segments found to be disproportionate, the Court stated that "[t]he injury caused by the separation fence is not restricted to the lands of the residents and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population" (*Id.*, at p. 861). The result was that those parts of the fence found to be disproportionate were annulled.

36. After the judgment in *The Beit Sourik Case* was handed down, the issue went back to the military commander. He reexamined the route which had been under discussion in that case. He made alterations to it, which, in his opinion, implement the content of the judgment. Eight petitions against the legality of the new route are pending. In seven of them, the Arab residents are petitioning against the new route (HCJ 5683/04 *The Beit Sira Village Council et al. v. The Government of Israel*; HCJ 426/05 *The Bidu Village Council v. The Government of Israel*; HCJ 2223/05 *Abd el Wahab Kandil et al. v. The Military Commander of the Judea and Samaria Area*; HCJ 3758/04 *Agraib v. The Government of Israel*; HCJ 8264/05 *Hadur et al. v. The Military Commander of the Judea and Samaria Area*; HCJ 8265/05 *Saker Ibrahim Abdalla v. The Military Commander of the Judea and Samaria Area*; HCJ 8266/05 *Jamal v. The Military Commander*). In one of the petitions, an Israeli settlement petitions against the new route (HCJ 1767/05 *The Har Adar Local Council v. The Ministry of Defense*). These petitions are yet pending, as we have been asked to examine – in an expanded panel – the Advisory Opinion of the International Court of Justice at the Hague, and its effect upon the normative outline as set out in *The Beit Sourik Case*. It is to these questions which we now address.

D. The Advisory Opinion of the International Court of Justice at the Hague

1. The Request for an Advisory Opinion and the Proceedings Before the International Court of Justice

37. The General Assembly of the United Nations decided (on December 8, 2003) to request an Advisory Opinion of the International Court of Justice at the Hague, regarding the legal consequences arising from the construction of the wall (as the separation fence is called in the decision of the General Assembly). The decision stated:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions? (Resolution ES-10/14).

When it received the request for an Advisory opinion, the International Court of Justice notified all states entitled to appear before the Court that they may relay information to it regarding all aspects of the question presented before it. In this framework, the Secretary-General of the UN submitted a dossier containing documents likely to throw light upon the question before the ICJ (on January 19, 2004). Written statements were filed to the ICJ by a number of states, including Israel. The ICJ heard oral arguments. Israel did not request to make oral arguments. Two questions stood before the ICJ. The first question was whether the ICJ has jurisdiction to give the requested opinion, and if the answer to that question is positive, are there reasons not to exercise that jurisdiction. The second question was the question posed to it by the General Assembly, on the merits. The Advisory Opinion was handed down on July 9, 2004.

38. The main factual basis upon which the ICJ based its opinion comes from the dossier filed with the ICJ by the Secretary-General of the UN. The dossier contains the resolution of the General Assembly requesting the ICJ's Advisory Opinion, as well as the background of the events that led to its adoption by the General Assembly. The dossier also contains data likely to throw light upon the question posed to the ICJ. A central source of the

information on the separation fence is the report of the Secretary-General of the UN (of November 24, 2003; hereinafter – "The Secretary-General's Report"), prepared prior to the UN General Assembly decision, and a written statement updating his report (of January 19, 2004; hereinafter – "the Secretary-General's written statement"). The Secretary-General's Report opens with a survey of government decisions regarding the "barrier" (as the Secretary-General calls it). It describes the route of the barrier.

According to this description, approximately 975 km^2 (which are 16.6%) of the West Bank, containing 237,000 Palestinians, will end up between the Green Line and the barrier (220,000 of whom in East Jerusalem). When the entire route of the barrier is completed, an additional 160,000 Palestinians will be in isolated enclaves, with the barrier almost completely encircling communities and tracts of land. The planned route contains 320,000 Israelis (178,000 in East Jerusalem). As the report continues, the Secretary-General describes the format of the barrier. He notes that out of 180 km of the barrier already constructed or being constructed, 8.5 km are concrete walls, which the Israeli army sees as "gunfire protection walls." They are generally found where Palestinian population centers spelling Israel, such as the towns of Qalqiliya and Tulkarm, and parts of Jerusalem. The report further describes the phases of construction of the barrier. Phase A runs 123 km (from the north end to Elkana). Much of Phase A construction deviates from the Green Line, and incorporates Israeli settlements. According to UN officials' estimations, approximately 56,000 Palestinians have been put into enclaves – encircled areas that open into the West Bank. Approximately 5,300 Palestinians are in "closed areas" between the barrier and the Green Line. These people require permits or identity cards. The enclaves include Qalqiliya (population 41,606) and, to its south, a cluster of three villages with about 7,300 residents. Phase B of the barrier is 45 km long, at the northern part of the Green Line to the Jordan Valley. It does not incorporate any settlements and does not create Palestinian enclaves. The Secretary-General 's report also describes the plan for the barrier in Jerusalem. Further on in the report, the route of the barrier from Elkana to the Ofer Camp military base is described. It includes two "depth barriers" that together create enclaves encompassing 29,000 acres and 72,000 Palestinians in 24 communities. The route deviates up to 22 km from the Green Line. It includes a number of large settlements, including about 52,000 settlers in the "Ariel salient." The government decision does not explain the nature of the barrier around this area. Last described is the southern part of the barrier, 115 km long, which cuts several kilometers into the West Bank, to encompass the

Gush Etzion settlement bloc and the settlement of Efrat. An enclave is created with around 17,000 Palestinians. The construction of the fence in this area has not yet begun.

39. The Secretary-General's report describes the way in which land is requisitioned to build the barrier, including the possibility of petitioning the High Court of Justice. It is noted that the orders expire on December 31, 2005, but that they are renewable. The report also describes the orders closing the area between the Green Line and the barrier ("Closed Areas"), pursuant to which there is no entrance into the closed area, and no one is allowed to be present in it. This order will affect 73 km^2 and 5,300 Palestinians, living in 15 communities. The order introduces a new system of residency status in the closed area. Only upon issuance of a permit or ID card by the IDF will residents of the closed area be able to remain in it. Israeli citizens and residents can remain in the closed area and move freely to the closed area, from it, and within it, with no need for a permit. At the date the report was written, most residents of the closed area had received permits for one month, three months, or six months. All those that have a permit enter and exit through gates which open for 15 minutes, three times a day. It is mentioned that if the Palestinian residents are denied regular access to their land, jobs and services, there is a concern that they will leave the area.

40. The final part of the Secretary-General's report examines the humanitarian and socio-economic impact of the barrier. According to the report, the barrier appears likely to deepen the fragmentation of the West Bank, which began with the closure system imposed after the outbreak of hostilities in September/October 2000. The barrier dramatically increased the damage to the communities resulting from the closure system. According to a report of the Palestinian Central Bureau of Statistics, the barrier has separated 30 localities from their health services, 22 localities from their schools, 8 localities from their primary water sources, and 3 localities from the electricity network. The report states that the Palestinians living in the enclaves are facing some of the harshest consequences of the barrier's construction and route. Thus, for example, the city of Qalqiliya is encircled by the barrier, with entrance and exit possible from only one gate. Thus the town is isolated from almost all its agricultural land. The villages surrounding it are separated from their markets and services. Thus, for example, at the UN hospital in Qalqiliya, a 40% drop in caseloads has been noted. The report further notes that completed barrier sections have had a serious impact on

agriculture. Tens of thousands of trees have been uprooted. Farmers, separated from their land, and often also from their water sources, must cross the barrier via the controlled gates. Recent harvests have perished due to the irregular opening and closing times of the gates. According to the Secretary-General's report, the barrier has severely restricted movement and access for thousands of urban Palestinians in Jerusalem. The wall at Abu Dis has already affected the access to jobs and essential social services, notably schools and hospitals. The northern part of the barrier in Jerusalem has damaged long standing commercial and social connections of tens of thousands of people. This phenomenon will be repeated along much of the route through Jerusalem. The report states that some Jerusalem identity card holders are outside the barrier, and some West Bank identity card holders are within the barrier. This raises concerns about the future status of residency for Palestinians in occupied East Jerusalem under current Israeli laws. The report states that if Israel persists in construction of the barrier, some of its economic and humanitarian impact can be limited if Israel allows regular movement through a series of 41 gates to Palestinians living east of the barrier who need to access their farms, jobs, or services in the closed area. Such access cannot compensate for incomes lost from the barrier's destruction of property, land, and businesses. This raises concerns over violations of the rights of the Palestinians to work, health, education, and an adequate standard of living. At the end of the report appears a short summary of the positions of the government of Israel and of the PLO.

41. The Secretary-General's report was prepared before the General Assembly resolution. After that resolution, the Secretary-General added a written statement updating his report (on January 29, 2004). In the Secretary-General's written statement, the Secretary-General repeated some of the data from his first report, and gave an update regarding the developments in the three months which had passed since it was filed. The statement reported that at the time of its writing, 190 km of the barrier had been completed, and two main crossing terminals had been built. The Secretary-General's written statement surveys the various segments of the barrier, according to the phase of construction to which they belong. Phase A, according to the updated data, 150 km long, includes a double barrier around the Baka Sharqiya enclave. The written statement notes, regarding this enclave, that according to the original route completed in July 2003, the barrier was erected east of the Green Line, such that the enclave included about 6,700 Palestinians. At the end of November 2003, Israel began to build a new barrier along the Green Line, west of the enclave. Part of the new barrier passes through the town

of Nazlat Issa, where a wall 800 m long has been built. The United Nations has been informed that the east side of the barrier will eventually be pulled down. The Secretary-General's written statement further states that south of Tulkarm, on the Green Line, a major crossing terminal is being built, modeled after the Karni crossing in the Gaza Strip. The written statement notes that Israel has removed the permanent checkpoint at the east entrance to Qalqiliya. In addition, in mid January 2004, construction started on underpasses connecting Qalqiliya to Habla, under the access road to Alfei Menashe. Regarding Phase B, the written statement mentions the completion of barrier segments running along the Green Line or adjacent to it, from the Gilboa Mountains to the Al Mutilla valley. In January 2004, construction began on an additional segment, in the direction of the Jordanian border. A third segment is planned to run south and away from the Green Line, toward the Taysir village. The written statement notes that Israeli officials informed the UN that this segment may not be completed. The written statement further updates regarding construction of the crossing terminal at Jalameh, north of Jenin, which is to serve as the primary point of entry between Israel and the northern West Bank. The written statement further describes Phase C of the barrier, including its three sub-phases (Phase C1 – from Elkana to the Ofer Camp military base; Phase C2 – the Ariel salient; and Phase C3 – "the depth barriers"). Construction has begun of 4 km of Phase C1, mostly near the Green Line, out of 40 planned kilometers. The remainder of the planned route deviates from the Green Line, reaching up to 7 km inside the West Bank. Phase C3 includes two planned "depth barriers," up to 9 km inside the West Bank – one east of the Ben Gurion airport and the other along the planned highway 45. It was noted that the exact components of the "depth barriers" had not yet been determined, but that if they are constructed, they will create two enclaves containing 72,000 Palestinians living in 24 communities. The UN was informed that this segment will to be the last to be built.

42. A considerable part of the Secretary-General's written statement is devoted to the barrier in East Jerusalem. The statement mentions that construction of the barrier in the southeast of the city had begun at the end of November 2003, along the municipal boundary determined by Israel. The barrier runs 6 km beyond the Green Line, from El Ezaria to Har Homa. In residential areas, like El Ezaria, the wall is built to a height of 9 m. This segment cuts El Ezaria off from Jerusalem, and splits the village of Abu Dis into two. At least 35,000 people will live east of the barrier along this segment, which has no gates. The entrance into Jerusalem by those with Jerusalem

identity cards will be allowed via a checkpoint beneath the eastern slope of the Mount of Olives. Another concrete wall has been constructed south of Abu Dis. The Secretary-General's written statement also spoke of a number of roads which are planned or being constructed adjacent to the barrier around Jerusalem, which will result, *inter alia*, in the separation of Palestinian traffic from Israeli traffic. The written statement concludes with a description of the obstacle planned in the north of Jerusalem, which will separate the Al-Ram village from Jerusalem. The UN was informed that changes in the route of highway 45 in this area are being considered. Finally, the written statement noted that the government of Israel was continuing to erect the barrier along the route approved by the cabinet (on October 1, 2003). Moreover, noted the written statement, additional components, such as crossing terminals, roads, underpasses, and gates were being constructed.

43. In addition to the two reports of the Secretary-General, the dossier included two reports by *special rapporteurs*, appointed by the Commission on Human Rights, which were filed prior to the General Assembly decision. One report (of September 8, 2003) discussed the question of human rights violations in the occupied Arab territories, including Palestine. Its author is Mr. John Dugard (hereinafter – "the Dugard report"). The second report (of October 31, 2003) discusses "the right to food." Its author is Jean Ziegler (hereinafter – "the Ziegler report"). We shall briefly discuss each of the two reports.

44. The Dugard report opens and closes with the finding that the fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security. The report describes the process of building the wall. It points out that Palestinians between the wall and the Green Line will effectively be cut off from their land and workplaces, schools, health clinics, and other social services. As a result, many Palestinians are leaving their homes and moving into the Palestinian territory beyond the wall. There is a real concern of the creation of a new generation of refugees or internally displaced persons. In the opinion of the *rapporteur*, the construction of the wall is nothing other than *de facto* annexation of territory. The construction of the wall should be seen in the context of the building of settlements and the annexation of East Jerusalem. Settlements in East Jerusalem and the West Bank are the principal beneficiaries of the wall, and approximately half of the 400,000 settler population will be incorporated on the Israeli side of the wall. This

data, along with the high cost of the wall, confirm the permanent nature of the wall. Therefore, beyond the fact that the wall violates Palestinians' freedom of movement, restricts their access to education and health facilities, and results in the unlawful taking of Palestinian property, the wall also violates two of the most fundamental principles of international law: the prohibition on the forcible acquisition of territory, and the right to self determination. The construction of the wall creates facts on the ground. Despite the refrain from use of the term, the wall is annexation for all intents and purposes. Thus the prohibition against forcible acquisition of territory – a prohibition mentioned in many international conventions, including the UN Charter – is violated. This prohibition applies irrespective of whether the territory is acquired as a result of an act of aggression or in self-defense. The building of the wall violates the Palestinians' right to self determination. The realization of the right to self determination requires territorial sovereignty. The construction of the wall substantially reduces the already small territory within which the Palestinians can exercise their right to self determination. Israel responded to the Dugard report (on April 2, 2004).

45. Ziegler calls the security fence an "apartheid fence." The building of the wall constitutes a violation of the obligation to respect the Palestinians' right to food, since it cuts the Palestinians off from their agricultural land, water wells, and other means of subsistence. The report mentions that the fence route deviates considerably from the Green Line, and is a *de facto* annexation of territory on Israel's part. The report presents data from the "B'tselem" organization, according to which 72,200 Palestinians in 36 communities will be cut off from their lands. 128,500 people in 19 communities will be put in enclaves and almost completely imprisoned by the winding route of the wall, including 40,000 residents of Qalqiliya. 11,700 people in 13 communities will be trapped in military closed areas between the wall and the Green Line, cut off from the Palestinian areas, but forbidden from entering Israel. As a result of the construction of the wall, Israel will effectively annex most of the west aquifer system which provides 51% of the West Bank water resources. As a result of their detachment from means of existence, many residents will be forced to leave their homes. According to the estimate, between 6,000 and 8,000 residents have already left the area of Qalqiliya. The report refers to the government's position that residents will be allowed to appeal the expropriation of lands. However, the writer notes that all appeals made to the military Appeals Committee at the time of writing have been rejected, although the area expropriated

was reduced in some of the cases. In any case, the report adds, the speed at which the wall is being built (work continues 24 hours a day) makes it difficult to allow for proper judicial process. The *rapporteur* concludes with a finding that if the wall continues to be built as planned, it will bite off almost half of the area remaining for the future Palestinian State. Thus, the possibility of establishing a viable Palestinian state will be eliminated, and the Palestinians right to food will be denied. Israel responded to the Zeigler report (on November 26, 2003).

2. The ICJ's Jurisdiction and Discretion

46. The International Court of Justice held, in the first part of its opinion, that it has jurisdiction to give the requested opinion, and that that jurisdiction is a discretionary power. The ICJ further held that it sees no compelling reason for it not to give the opinion. In this context, the opinion held that the ICJ has sufficient information and evidence to enable it to give the requested opinion. This information is derived from the dossier submitted to the ICJ by the UN Secretary-General, written statements submitted to the ICJ by a number of states, Israel's written statement which, although limited to the question of jurisdiction and judicial propriety, included observations on other matters, including Israel's security concerns. Additional documents issued by Israel on that issue, which are in the public domain, also stood before the ICJ. This part of the Advisory Opinion was given by a majority of ICJ judges, with Judge Buergenthal dissenting. According to the opinion of Judge Buergenthal, the ICJ should have exercised its discretion and declined to render the requested Advisory Opinion, since it did not have before it the requisite factual bases for its sweeping findings. Judge Higgins and Judge Kooijmans noted in separate opinions, that they agree with the ICJ's opinion regarding exercise of jurisdiction with considerable hesitation. Judge Higgins noted that she gave her vote in favor of the ICJ's finding that the building of the wall violates international law, since the wall undoubtedly has a significant negative impact upon portions of the population of the West Bank, without it being able to be excused on the grounds of military necessity. On this issue, Israel did not explain to the ICJ why its legitimate security needs can be met only by the route selected. Judge Owada noted that the ICJ is lacking material explaining Israel's side of the picture, especially regarding the question why and how the wall, as planned and implemented, is necessary and appropriate.

3. The Legality of the Fence in International Law

47. The second part of the opinion is devoted to answering the question posed to the ICJ by the General Assembly. The ICJ briefly described the historic background, beginning with the establishment of the British mandate at the end of the First World War and ending with the political agreements between Israel and the PLO in the 1990's. The ICJ concluded this analysis with its conclusion that the territories between the Green Line and the eastern boundary of mandatory Palestine were occupied by Israel in 1967, and are held by her pursuant to customary international law, as an occupying power. Following this introduction, the ICJ proceeded with an analysis of the factual basis before it. It referred, on this issue, to the Secretary-General's report and to his written statement. At the conclusion of the analysis, the ICJ noted that 975 km^2 (which are 16.6%) of the West Bank, containing 237,000 Palestinians, will lie between the Green Line and the wall. If the full wall should be completed, an additional 160,000 Palestinians would live in almost completely encircled communities, described as enclavcs. Nearly 320,000 Israeli settlers (178,000 of whom in East Jerusalem) would be living in the area between the Green Line and the wall. It was further stated that the area between the Green Line and the wall had been declared as a closed area. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. Most residents have received permits for a limited period. Israelis may remain in, or move freely to, from and within the Closed Area without a permit. Access into and exit from the closed area are possible through access gates, which are open for short and infrequent periods.

48. Following the description of the factual basis, the ICJ proceeded to determine the principles of international law relevant to the examination of the legality of the actions taken by Israel. The ICJ referred to §2(4) of the Charter of the United Nations, which prohibits use or threat of force. The ICJ also referred to the principle of self determination. The ICJ further determined that *The Hague Regulations* have become part of customary international law. *The Fourth Geneva Convention* applies as well. The ICJ further found that the international conventions on human rights also apply to the occupied Palestinian territory. In this context, the ICJ held that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child apply in the area.

49. Considering this background of the normative outline, the ICJ proceeded to examine the question whether the building of the wall is in breach of rules and principles of international law. The ICJ noted, in this context, the rule prohibiting acquisition of territory by force, the international recognition of the Palestinian people's right to self determination, and its position that the Israeli settlements in areas occupied in 1967 are illegal, as they are contrary to the terms of §49(6) of *The Fourth Geneva Convention*. Against this background, the ICJ noted the factual findings presented before it, according to which most Israelis and most of the Israeli settlements are expected, when the wall is completed, to be on its "Israeli" side. This fact, held the ICJ, raises concern of *de facto* annexation of the territory on the "Israeli" side of the wall, as well as concern of promoting forced transfer of Palestinians from the seamline area to the "Palestinian" side of the wall. All these severely infringe upon the Palestinians' right to self determination, a right which Israel must respect. Judge Higgins, in her separate opinion, criticized the ICJ's finding that the fence infringes upon the Palestinians' right to self determination. Judge Kooijmans noted, in his separate opinion, that the ICJ would have done well to have left the question of self determination to the political process.

50. At this point, the ICJ proceeded to examine a number of specific provisions of humanitarian law and of human rights law, which appear in international conventions. In this analysis, the ICJ relied upon the Commission on Human Rights' two *rapporteurs'* reports. On this issue, the ICJ held: first, that there is no justification for building the wall in regulation 23(g) of *The Hague Regulations*, as this regulation is included in the second part of the regulations, which does not apply; second, the building of the fence is contrary to the provisions of regulations 46 and 52 of *The Hague Regulations*, and of §53 of *The Fourth Geneva Convention*. Third, the fence restricts the Palestinians' freedom of movement. That restriction is aggravated by the fact that the gates where passage is permitted are few in number, and their opening hours are restricted and unpredictably applied. Thus, for example, the city of Qalqiliya, with a population of 40,000, is encircled by the wall, and the residents can enter it or exit from it through one military checkpoint, which is open from 7am until 7pm. Fourth, the building of the wall damages agricultural produce and many water wells, which are the principle means of subsistence for many Palestinians. Fifth, the wall makes difficult many Palestinians' access to health, education, water, and electricity services, while effectively annexing most of the western aquifer system in the area. The wall has caused many businesses to shut down. Last, as a result of the building of

the wall, many Palestinians will likely be forced to move from their present place of residence to another place of residence. These repercussions, together with the establishment of Israeli settlements in the area, tend toward a change of the *area*'s demographic composition.

51. In light of the ICJ's holdings regarding the breach of international law resulting from the building of the wall, the ICJ examined whether there are legal sources which derogate from the application of that law or qualify its application. The ICJ held that there are no such sources. It was held that *The Hague Regulations* and *The Fourth Geneva Convention* do not qualify the prohibition of transfer of civilian population into the occupied territory. Regarding the qualification in *The Geneva Convention* regarding military necessity, it was determined that this qualification may apply in periods in which there is no active combat, but the ICJ was not persuaded that such necessity exists in this case. Nor did the ICJ find that any of the recognized qualifications in international human rights conventions apply. Israel did not qualify her duties pursuant to these conventions in the relevant context, and the exemptions in them do not arise in these circumstances. Nor was the ICJ persuaded that Israel's actions in building the wall were taken for the purposes of promoting the general welfare (as required by §4 of The International Covenant on Economic, Social and Cultural Rights). Judge Kooijmans commented, in his separate opinion, that even if the wall was being built for the military purpose of defending the legitimate rights of the Israeli citizens, it would fail the test of proportionality.

52. The ICJ summed up this aspect of its opinion by saying:

> To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments (paragraph 137 of the opinion).

This conclusion was criticized by the dissenting judge, Judge Buergenthal. He noted that the ICJ's opinion failed to address any facts or evidence

specifically rebutting Israel's claim of military exigencies or requirements of national security. On this subject, the ICJ ignored Israel's position. The ICJ determined that it was "not convinced" that the route of the wall was chosen for security reasons, without showing why it was not so convinced. Therefore, according to Judge Buergenthal, the conclusions of the ICJ are not convincing. Judge Owada also noted in his separate opinion that the ICJ did not have before it the material explaining the Israeli side of the picture regarding the security necessity of the fence. Judge Owada wrote that, even if such material cannot prevent the conclusion that international humanitarian law has been breached, presentation of such material is important for fairness in the proceedings.

53. The ICJ proceeded to examine the argument that justification for the building of the wall is to be found in Israel's right to self defense, as provided in §51 of the Charter of the United Nations. It was determined that §51 recognizes the existence of an inherent right of self-defense in the case of armed attacks by other states. However, Israel does not claim that the attacks against it are imputable to a foreign state. Even the Security Council's resolutions (no. 1368 and 1373 of 2001), which recognized certain aspects of war against terrorism as included in §51 of the charter, do not justify the construction of the wall, since Israel is arguing that the attack against it originates in territory in which it exercises control, and not in territory beyond its control, as was the case in those resolutions. The ICJ found that §51 of the charter has no relevance in the case. This approach of the ICJ spurred the criticism of a number of judges. Dissenting Judge Buergenthal did not accept the ICJ's position that only when a state is attacked by another state, is it entitled to exercise its right to self defense. In his opinion, the terrorist attacks upon Israel from the territory under belligerent occupation grant Israel the right to self defense. Judge Higgins as well, in her separate opinion, distanced herself from the ICJ's position regarding self defense. In her opinion, there is nothing in the text of §51 of the Charter of the United Nations which stipulates that self-defense is available only when an armed attack is made by a state. Judge Higgins also failed to understand the ICJ's view that an occupying power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory – a territory which it has found not to have been annexed and is certainly 'other than' Israel. However, she did not vote against the ICJ's opinion on this issue, both since she was unconvinced that non-forcible measures (such as the

building of a wall) fall within self-defense under Article 51 of the Charter, and since the building of the fence, even if it can be seen as an act of self-defense, would need to be justified as necessary and proportional. Those justifications, according to Judge Higgins, have not been explained. Judge Kooijmans noted in his separate opinion, in this context, that a state has the right to defend itself against international terrorism. He opined that Israel does not have this right, since the terrorism against her originates in territory held by her.

54. Finally, the possibility of basing the construction of the wall upon customary international law regarding "state of necessity" was rejected. The ICJ stated that this doctrine allows such acts only if they are the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction. The construction of the wall on its present route does not meet this condition. The ICJ writes:

> The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law (paragraph 141).

In this context, Judge Higgins noted, in her separate opinion, that the ICJ should have said that defense of civilians is not only the duty of the occupying state, but is also the duty of those seeking to liberate themselves from occupation (paragraph 19).

55. At the conclusion of its opinion, the ICJ detailed the normative results stemming from it. The ICJ held that the construction of the wall is contrary to international law. The ICJ further held that Israel is under an obligation to terminate its breaches of international law, and to cease forthwith the works of construction of the wall. Israel must dismantle all that it built, and repeal or render ineffective forthwith all acts relating thereto. According to the Advisory Opinion, Israel is under an obligation to make reparation for all damage caused by the construction of the wall. It was further determined, on the international plane, that all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall. Judge Kooijmans voted against this final conclusion regarding the duty of the states.

E. The Advisory Opinion of the International Court of Justice at the Hague and *The Beit Sourik Case*

1. The Legal Status of the Advisory Opinion

56. The opinion of the ICJ – as its title testifies, and in contrast to a judgment by the same court – is an Advisory Opinion. It does not bind the party who requested it. As the ICJ itself noted in its opinion (paragraph 31), it does not bind the states. It is not *res judicata* (*see* S. Rosenne *The Perplexities of Modern International Law* 122 (2002)). However, the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law (S. Rosenne 3 *The Law and Practice of the International Court, 1920-1996* 1754 (3rd ed. 1997)). The ICJ's interpretation of international law should be given its full appropriate weight.

2. The Difference Between the Conclusions of the Advisory Opinion of the ICJ and of *The Beit Sourik Case*

57. The basic normative foundation upon which the ICJ and the Supreme Court in *The Beit Sourik Case* based their decisions was a common one (*see* Watson "The 'Wall' Decisions in Legal and Political Context" 99 *A.J.I.L.* 6 (2005); hereinafter – *Watson*). The ICJ held that Israel holds the West Bank (Judea and Samaria) pursuant to the law of belligerent occupation. That is also the legal view at the base of *The Beit Sourik Case*. The ICJ held that an occupier state is not permitted to annex the occupied territory. That was also the position of the Court in *The Beit Sourik Case*. The ICJ held that in an occupied territory, the occupier state must act according to *The Hague Regulations* and *The Fourth Geneva Convention.* That too was the assumption of the Court in *The Beit Sourik Case*, although the question of the force of *The Fourth Geneva Convention* was not decided, in light of the state's declaration that it shall act in accordance with the humanitarian part of that convention. The ICJ determined that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. This question did not arise in *The Beit Sourik Case*. For the purposes of our judgment in this case, we assume that these conventions indeed apply. The ICJ held that the legality of the "wall" (the "fence" in our nomenclature) shall be determined, *inter alia*, by regulations 46 and 52 of *The Hague Regulations* and §53 of *The Fourth Geneva Convention.* This was also the position of the Supreme Court in *The*

Beit Sourik Case. The ICJ held that as a result of the building of the "wall," a number of rights of the Palestinian residents were infringed. The Supreme Court in *The Beit Sourik Case* also held that a number of human rights of the Palestinian residents had been infringed by the building of the fence. Finally, the ICJ held that the harm to the Palestinian residents would not violate international law if the harm was caused as a result of military necessity, national security requirements, or public order. That was also the approach of the Court in *The Beit Sourik Case.*

58. Despite this common normative foundation, the two courts reached different conclusions. The ICJ held that the building of the wall, and the regime accompanying it, are contrary to international law (paragraph 142). In contrast, the Supreme Court in *The Beit Sourik Case* held that it is not to be sweepingly said that any route of the fence is a breach of international law. According to the approach of the Supreme Court, each segment of the route should be examined to clarify whether it infringes upon the rights of the Palestinian residents, and whether the infringement is proportional. It was according to this approach, that the fence segments discussed in *The Beit Sourik Case* were examined. Regarding some segments of the fence, it was held that their construction does not violate international law. Regarding other segments of the fence, it was held that their construction does violate international law. Due to the difference in background, two questions arise: The first, what is the basis of this difference, and how can it be explained? The second, how does the explanation of the difference between the conclusions of the two courts affect the approach of the Supreme Court of Israel regarding the question of the legality of the separation fence according to international law generally, and the question of the legality of the separation fence in the Alfei Menashe enclave, specifically? We shall discuss each of these two questions separately.

3. The Basis of the Difference Between the Conclusions of Each of the Two Courts

59. The basis of the main difference between the legal conclusions of the International Court of Justice at the Hague and the judgment in *The Beit Sourik Case* can be found in the ICJ's concluding passage. We discussed this passage (*see* paragraph 52, supra). In light of its importance, we shall quote it again:

> To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments (paragraph 137).

From this passage – as well as the rest of the opinion – it appears that, based on the data before the ICJ, it was not persuaded that the route of the wall – which severely infringes the rights of the Palestinian residents – is necessary for achieving the security objectives which Israel contended. In contrast, the Supreme Court in *The Beit Sourik Case* ruled that there is a military necessity to erect the fence. However, it ruled that some discussed segments of the fence route violate the Palestinian residents' rights disproportionately. What is the basis of this difference between the two judgments?

60. The answer to that question is that the main difference between the legal conclusions stems from the difference in the factual basis laid before the court. This difference was affected, in turn, by the way the proceedings were conducted and by the legal problem before the court. We shall discuss this difference.

4. The Difference in the Factual Basis

61. The main difference between the two judgments stems primarily from the difference in the factual basis upon which each court based its decision. Once again, the simple truth is proven: the facts lie at the foundation of the law, and the law arises from the facts (*ex facto jus oritur*). The ICJ drew the factual basis for its opinion from the Secretary-General's report, his written statement, the Dugard report, and the Zeigler report. The Supreme Court drew the facts from the data brought before it by the Palestinian petitioners on the one hand, and the State on the other. In addition, The Supreme Court received an expert opinion by military specialists who requested the opportunity to present their position as *amici curie*. Despite the fact that the data each court received regarded the same wall/fence, the difference between each set of

data is wide and deep. This difference ultimately led to the diverse legal conclusions. In what is this difference manifested?

62. The first difference, and the most important one, regarded the security and military necessity to erect the fence. This necessity was presented expansively before the court in *The Beit Sourik Case*. The State laid out before the Court the full data regarding terrorist activity which has plagued Israel since September 2000; regarding the character of this terrorism, which spared no means, including "human bombs" which explode in buses, in shopping centers, and in markets; regarding the thousands killed and injured; regarding the various military actions taken in order to defeat terrorism ("Defensive Wall" in March 2002; "Determined Path" in June 2002), which did not provide a sufficient solution to the problem; regarding the additional plans which were suggested, yet rejected due to legal reasons (*see, e.g., The Ajuri Case*) or were of no avail. Against this background came the decision to construct the fence. From the evidence presented before the Court, the conclusion arose that the decision to erect the fence was not the fruit of a political decision to annex occupied territory to Israel. The decision to erect the fence arose out of security and military considerations, and out of security and military necessity, as a necessary means to defend the state, its citizens, and its army against terrorist activity. Given this background, we wrote, in *The Beit Sourik Case:*

> We examined petitioners' arguments. We have come to the conclusion, based upon the facts before us, that the reason the fence is being erected is a security reason. As we have seen in the government decisions concerning the construction of the fence, the government has emphasized, numerous times, that 'the fence, like the additional obstacles, is a security measure. Its construction does not reflect a political border, or any other border' (decision of June 23, 2002). The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the 'Seamline Area,' is a security measure for the prevention of terrorist attacks and does not mark a political border or any other border (decision of October 1, 2003) (p. 830).

Later in our judgment, we dealt with the affidavit submitted to us by the military commander:

> In his affidavit he stated that 'the objective of the security fence is to allow effective confrontation of the array of threats stemming from Palestinian terrorism. Specifically, the fence is intended to prevent the unchecked passage of residents of the *area* into Israel and their infiltration into certain Israeli communities located

in the *area*. The choice of the topographic route was derived from the security consideration (affidavit of April 15, 2004, sections 22-23). The commander of the *area* detailed his considerations for the choice of the route. He noted the necessity that the fence pass through territory that topographically controls its surroundings; that it pass through a route as flat as possible, which will allow surveillance of it; and that a 'security zone' be established which will delay infiltration into Israel. These are security considerations *par excellence*. In an additional affidavit which was submitted to us, Major General Kaplinsky testified that 'it is not a permanent fence, but rather a fence erected temporarily, for security needs' (affidavit of April 19, 2004, section 4). We have no reason to give this testimony less than its full weight, and we have no basis for not believing in the sincerity of the military commander's testimony (p. 830).

We concluded our discussion on this question, stating:

> We devoted seven sessions to the hearing of the petition. We intently listened to the explanations of officers and workers who handled the details of the fence. During our hearing of the petition, the route of the fence was altered in a number of locations. Respondents showed openness to various suggestions which were made. Thus, for example, adjacent to the town of Har Adar, they agreed to move the fence passing north of the town to the security zone closer to the town, and distance it from the lands of the adjacent village of El Kabiba. We have no reason to assume that the objective is political rather than security-based. Indeed, petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, the petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the *area*, in determining the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding (p. 831).

63. The security and military necessity is mentioned in an insignificant manner in the sources upon which the ICJ based its opinion. Only one line is devoted to it in the Secretary-General's report, stating that the decision to erect the fence was made due to a new rise in Palestinian terrorism in the Spring of 2002. In his written statement, the security and military consideration is not mentioned at all. In addition, the Dugard report and the Zeigler report hold no data on this issue at all. In Israel's written statement to the ICJ regarding jurisdiction and discretion, data regarding the terrorism and its repercussions were presented, but these did not find their way to the opinion itself. This

minimal factual basis is manifest, of course, in the opinion itself. It contains no real mention of the security and military aspect. In one of the paragraphs, the opinion notes that Israel argues that the objective of the wall is to allow an effective struggle against terrorist attacks emanating from the West Bank (paragraph 116). The issue is hardly mentioned. In another paragraph, the ICJ discusses the force of §53 of *The Fourth Geneva Convention*, according to which it is prohibited for an occupier state to harm local property, "except where such destruction is rendered absolutely necessary by military operations." Regarding that, the ICJ stated:

> [O]n the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations (paragraph 135).

Further on, the ICJ discussed human rights according to the international conventions. It notes that the conventions allow restriction of human rights. In this context, the ICJ mentioned the freedom of movement (§12 of The International Covenant on Civil and Political Rights). It noted that pursuant to §12(3) of that convention, it is permissible to restrict the freedom of movement, if the restriction is necessary for the defense of national security or public order (*ordre public)*. The ICJ ruled out the applicability of these restrictions to the wall, since:

> On the basis of the information available to it, the Court finds that these conditions are not met in the present instance (paragraph 136).

The ICJ concluded its position, holding:

> [T]he Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives (paragraph 137).

Finally, the ICJ discussed the necessity defense. The ICJ analyzed the elements of this defense, noting:

> In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interest of Israel against the peril which it has invoked as justification for the construction (paragraph 140).

64. This minimal factual basis regarding Israel's security-military necessity to erect the fence did not go unnoticed by the judges of the ICJ. The dissenting judge, Judge Buergenthal, noted in his opinion:

> I am compelled to vote against the Court's finding on the merits because the Court did not have before it the requisite factual bases for its sweeping findings (paragraph 1).

Judge Buergenthal mentioned the possibility that, on the basis of all the facts, the conclusion would be that the building of the wall violates international law; however, in his opinion,

> [To] reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subject, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject (paragraph 3).

In his separate opinion, Judge Kooijmans stated:

> [T]he present Opinion could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique reference to terrorist acts which can be found at several places in the Opinion, are in my view not sufficient for this purpose (paragraph 13).

A similar attitude can be found in the separate opinion of Judge Owada. He notes that the ICJ had ample material before it regarding the humanitarian and socioeconomic effect of the building of the wall. In contrast,

> What seems to be wanting, however, is the material explaining the Israeli side of the picture, especially in the context of why and how the construction of the wall as it is actually planned and implemented is necessary and appropriate (paragraph 22).

Judge Owada quotes the statement in the Advisory Opinion that, on the basis of the material before it, the ICJ is not convinced that the fence route is

necessary for achieving the security objectives (pargraph 137 of the Advisory Opinion), and adds:

> It seems clear to me that here the Court is in effect admitting the fact that elaborate material on this point from the Israeli side is not available, rather than engaging in a rebuttal of the arguments of Israel on the basis of the material that might have been made available by Israel on this point (paragraph 23).

65. We need not determine, nor have we a sufficient factual basis to determine, who is to blame for this severe oversight. Is it the dossier of documents submitted to the ICJ? Is it the oversight of the State of Israel itself, or was it the ICJ's unwillingness to use the data submitted to it by Israel and other data in the public domain? Or maybe it is the method of examination, which focused on the fence as a totality, without examining its various segments (see paragraph 70, infra)? Whatever the reason may be, the reality is that the ICJ based its opinion on a factual basis regarding infringment of Palestinian residents' rights, without the factual basis regarding the security and military justification for this infringment. In contrast, in *The Beit Sourik Case*, an expansive factual basis was laid before the court, both regarding the infringment upon the local residents' human rights and regarding the security and military needs. This comprehensive factual basis made it possible for the Court to decide that certain parts of the separation fence violate the rules of international law, and that other parts of the fence did not violate those rules. Thus, we have the first explanation for the difference between the conclusions of the ICJ and the conclusions of this Court in *The Beit Sourik Case*.

66. The other difference between the two judgments relating to the factual basis regards the scope of the infringment on the local residents' rights. This infringment stood at the foundation of both judgments. However, the factual basis was different. In *The Beit Sourik Case*, the petitioners brought various data regarding the scope of the infringment of their rights due to the construction of the fence on their lands. The State brought its own data. The Court examined the different positions. It examined each part of the route before it, separately. On the basis of the totality of the evidence before it, the scope of the infringment on the local residents' rights was established. This infringment was by no means a light one. Thus wrote the Court:

> Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the

> entire route of the section of the separation fence which is the subject of all of the orders. The length of the section of the separation fence to which the orders before us apply is approximately forty kilometers. It infringes upon the lives of 35,000 local residents. Four thousand dunams of their lands are taken up by the fence route itself, and thousands of olive trees growing along the route itself are uprooted. The fence cuts off the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees, and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with a farmer's ability to work his land. There will surely be places where the security fence must cut the local residents off from their lands. In these places, passage which will reduce the injury to the farmers to the greatest extent possible should be ensured (p. 860).

Later in the judgment the Court held:

> The damage caused by the separation fence is not restricted to the lands of the residents and to their access to these lands. The damage is of a wider scope; it strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the ties between the local residents and the urban centers (Bir Nabbala and Ramallah). These ties are difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence (p. 861).

Given this background – and on balance with the security and military needs – it was decided which fence sections illegally violate the rights of the local population according to international law, and which fence sections are legal.

67. The ICJ based its factual findings regarding infringment upon the local residents' rights, upon the Secretary-General's report and his supplemental documents, and upon the Dugard report and the Zeigler report (see paragraph 133 of the opinion). In their arguments before us, State's counsel noted that

the information relayed to the ICJ in these reports is far from precise. We shall discuss some of these arguments of the State:

(a) The ICJ quotes data relayed by a special committee, according to which 100,000 dunams of agricultural land were seized for construction of the first phase of the obstacle. The State contends that this figure is most exaggerated. According to its figures, the area seized for the construction of phase A of the fence is 8,300 dunams, 7,000 of which are private land.

(b) The reports upon which the ICJ relied describe a cutoff between the residents of the seamline area and the other parts of the West Bank. According to figures presented to us, that is not precise, as a regime of permits allows entry and exit from the seamline area.

(c) The opinion quotes the Zeigler report, according to which Israel is annexing most of the western aquifer system, which supplies 51% of the water consumption of the territories, by erecting the obstacle. The State claims that this is completely baseless. It was mentioned before us that in the framework of the interim agreement between Israel and the PLO, detailed arrangements regarding the water issue were stipulated. The construction of the fence does not affect the implementation of the water agreement.

(d) A number of paragraphs in the opinion discussed the city of Qalqiliya. The ICJ quotes the Dugard report, according to which the city is sealed off from all sides. Residents are allowed to exit and enter through one military gate which is open from 7am to 7pm. This conclusion contradicts the Secretary-General's written statement, according to which there is no checkpoint at the entrance to the city. The State adds that two open access roads now lead to the city of Qalqiliya. Part of the obstacle east of the city was dismantled. Parts of the Dugard report and the Zeigler report, according to which 6,000 to 8,000 residents left the city of Qalqiliya and 600 stores were closed in that city, were mentioned in the opinion. The State contends that since April 2004, approximately 90% of the stores which closed have been reopened. Regarding residents' leaving, in the State's opinion, it is very difficult to reach a clear cut conclusion on this issue. The ICJ's opinion held, on the basis of the Secretary-General's report, that as a result of the building of the wall, a 40% drop in caseload at the UN hospital in Qalqiliya had been recorded. From a graph submitted to us by the State it appears that the number of hospitalization days in 2004 is higher than that of 2002. The conclusion is that it cannot be said that the separation fence brought to a decrease in the number of hospitalized patients. The graph also shows that in 2003 there was a considerable rise in the

number of beds in hospitals. In addition, a new private hospital was opened in Qalqiliya in 2003, and the Palestinian Authority also opened a hospital in 2002. In the opinion of the State, it is reasonable to assume that the opening of the new hospitals affected the caseload of the UN hospital in Qalqiliya.

68. The difference between the factual bases upon which the courts relied is of decisive significance. According to international law, the legality of the wall/fence route depends upon an appropriate balance between the security needs on the one hand, and the infringment upon the rights of the local residents on the other. We have a scale before us: on one side rests the infringment upon the rights of the local residents, and on the other side rest the security and military considerations. A delicate and sensitive balance between the two sides of the scale is required, taking into account the need to ensure the proportionality of the security measures' infringment upon the local residents' rights, and the margin of appreciation given the state, brings about the appropriate solution. In *The Beit Sourik Case*, data was laid before the Court on both sides of the scale. In certain parts of the route discussed before the court, the considerations regarding the infringment upon human rights prevailed. At other parts of the route, the security and military needs prevailed. Not so was the opinion of the ICJ. As a result of the factual basis presented to the ICJ, full weight was placed on the rights-infringement side; no weight was given to the security and military needs, and therefore the questions of the proportionality of the impingement or of the margin of appreciation were not discussed at all. This resulted in the ICJ's conclusion that Israel is violating international law. The different factual bases led to different legal conclusions. This stands out especially in the case of those parts of the ICJ's opinion dealing with Qalqiliya. On one side of the scale, the ICJ placed the severe infringment on the rights of Palestinians in Qalqiliya. Even if we remove the imprecision of these figures, the remainder is sufficient to indicate a severe infringment of their rights. On the other side of the scale, the ICJ did not place – due to the factual basis laid before it – any data regarding the security and military considerations. It was not mentioned that Qalqiliya lies two kilometers from the Israeli city of Kfar Saba; that, primarily in the years 2002-2003, Qalqiliya served as a passage point to Israel for suicide bomber terrorists, who enter for the purpose of committing terrorist attacks inside of Israel; that the Trans-Israel highway (highway 6), whose users must be protected, passes right by the city; that the majority of the fence route on the western side of the city runs on the Green Line, and part of it even within Israel; that since the fence around Qalqiliya was built – including the wall on the western side which borders

upon highway 6 – terrorist infiltrations in that area have ceased.

69. The difference in the factual bases was affected by the difference between the proceedings which took place in the ICJ and the proceedings in *The Beit Sourik Case* (*see Weston*, at p. 24). In the proceedings before the ICJ, the injured parties did not participate. Israel was not party to the proceedings. There was no adversarial process, whose purpose is to establish the factual basis through a choice between contradictory factual figures. The ICJ accepted the figures in the Secretary-General's report, and in the reports of the *special rapporteurs*, as objective factual figures. The burden was not cast upon the parties to the proceedings, nor was it examined. In contrast, the parties to the proceedings in *The Beit Sourik Case* stood before the Court. An adversarial process took place. The burden of establishing the factual basis before the court was cast upon the parties. The parties' factual figures were examined and the parties confronted each other as to factual basis which would determine the decision was established. The proceedings themselves lacked strict formalities, and allowed the parties to make suggestions for alternative routes, which were examined by the other party, and the fence route was altered during the hearings themselves. All these aspects had an effect on the legal conclusions reached by the ICJ and the Supreme Court of Israel in *The Beit Sourik Case* (*see* Y. Shany "Capacities and Inadequacies: A Look at the Two Separation Barrier Cases" 38 *Isr. L. Rev.* 230 (2005)).

70. We would especially like to point out an important difference in the scope of examination. Before the ICJ, the entire route of the fence was up for examination. The factual basis which was laid before the ICJ (the Secretary-General's report and written statement, the reports of the *special rapporteurs*) did not analyze the different segments of the fence in a detailed fashion, except for a few examples, such as the fence around Qalqiliya. The material submitted to the ICJ contains no specific mention of the injury to local population at each segment of the route. We have already seen that this material contains no discussion of the security and military considerations behind the selection of the route, or of the process of rejecting various alternatives to it. These circumstances cast an unbearable task upon the ICJ. Thus, for example, expansive parts of the fence (approximately 153 km of the 763 km of the entire fence, which are approximately 20%) are adjacent to the Green Line (that is, less than 500 m away). An additional 135 km – which are 17.7% of the route – are within a distance of between 500 m and 2000 m from the Green Line. Between these parts of the route and the Green Line (the "seamline area")

there are no Palestinian communities, nor is there agricultural land. Nor are there Israeli communities in this area. The only reason for establishing the route beyond the Green Line is a professional reason related to topography, the ability to control the immediate surroundings, and other similar military reasons. Upon which rules of international law can it be said that such a route violates international law? Other parts of the fence are close to the Green Line. They separate Palestinian farmers and their lands. However, a very small precentage of these are cultivated. Gates were built into the fence, which allow passage, when necessary, to the cultivated lands. Can it be determined that this arrangement contradicts international law *prima facie*, without examining, in a detailed fashion, the injury to the farmers on the one hand, and the military necessity on the other? Should the monetary compensation offered in each case, and the option of allocation of alternate land (as ruled in *The Beit Sourik Case* (*Id.*, at p. 860)) not be considered? There are, of course, other segments of the fence, whose location lands a severe blow upon the local residents. Each of these requires an exact examination of the essence of the injury, of the various suggestions for reducing it, and of the security and military considerations. None of these were done by the ICJ, and they could not have been done with the factual basis before the ICJ.

71. Of course, *prima facie,* the ICJ could have determined, that on the basis of the examination of the totality of the fence, it had reached the conclusion that the motivation behind its construction is political and not security-based, and that the intention of the government of Israel in erecting the fence was its desire to annex parts of the West Bank which lay on the "Israeli" side of the fence. The ICJ did not, however, do so; nor was a factual basis placed before it, which would have enabled it to do so. The ICJ came extremely close to this approach, stating:

> Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature ... it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation (paragraph. 121).

However, this statement – which expressed grave concerns – is not a positive finding that the fence is political, and that its objective is annexation.

72. The method of the Supreme Court of Israel was different. *The Beit Sourik Case* dealt with five segments of the separation fence, approximately forty kilometers long. Other segments of the fence have been discussed by the Supreme Court in other petitions, which were examined by various panels of Supreme Court justices. Since the construction of the separation fence, about 90 petitions have been submitted to the Supreme Court. The hearing of 44 petitions has been completed. In most of them the parties succeeded, after negotiations, and usually after amendments were made to the route as requested by the Palestinian petitioners, to reach a compromise, so that no legal decision on the merits was needed. Approximately 43 petitions are still pending before the Court. In most cases the arguments have been submitted, and they await our decision regarding the effect of the Advisory Opinion of the ICJ upon the ruling of the Supreme Court of Israel. They examine the legality of the route of the fence. These petitions can be divided into three main types: the first type of petition is a petition by farmers on infringment upon their rights caused by the fact that the separation fence separates them from their lands. *The Beit Sourik Case* itself belongs to this type. The second type is a petition regarding the large blocs of settlements, which in some instances create enclaves of communities which are cut off from their urban infrastructure, or impede Arab farmers' access to their lands. The petition before us belongs to this type. The third type includes petitions regarding the fence route around Jerusalem.

5. The Effect of the Advisory Opinion of the International Court of Justice at the Hague upon the Rulings in *The Beit Sourik Case*

73. Our point of departure was that the basic normative foundation upon which the ICJ and the Supreme Court based their judgments is a common one. Despite that, the two courts reached different conclusions. The ICJ held, in its opinion, that the route of the wall contradicts international law, as a majority of it passes through the West Bank. The Supreme Court in *The Beit Sourik Case* ruled in its judgment that a sweeping answer to the question of the legality of the fence according to international law should not be given, and that each segment of the fence route should be examined separately. Against this background, it was decided in *The Beit Sourik Case*, that part of the route discussed in that petition sits well with international law and that part of it

violates international law. We asked ourselves: what is the explanation for this difference? We answered that question by showing that the difference stems from the factual basis that was laid before the ICJ, which was different from the factual basis which was laid before the Court in *The Beit Sourik Case*. We also noted that the difference in the model of proceedings also contributed to the different results. Against this background, we must answer the following question: what is the effect of the Advisory Opinion of the ICJ on the future approach of the Supreme Court on the question of the legality of the separation fence according to international law, as determined in *The Beit Sourik Case*?

74. Our answer is as follows: the Supreme Court of Israel shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion. However, the ICJ's conclusion, based upon a factual basis different than the one before us, is not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law. The Israeli Court shall continue to examine each of the segments of the fence, as they are brought to its decision and according to its customary model of proceedings; the court shall ask itself, regarding each and every segment, whether it represents a proportional balance between the security and military need and the rights of the local population. If its answer regarding a particular segment of the fence is positive, it shall hold that that segment is legal. If its answer is negative, it shall hold that that segment is not legal. In doing so, the Court shall not ignore the entire picture; its decision will always regard each segment as a part of a whole. Against the background of this normative approach – which is the approach set out in *The Beit Sourik Case* – we shall now turn to examining the legality of the separation fence in the Alfei Menashe enclave.

F. The Separation Fence at the Alfei Menashe Enclave

1. The Enclave

75. The Alfei Menashe enclave is an 11,000 dunam area (see the appendix to this judgment). It includes Alfei Menashe (estimated population: 5,650) and five Palestinian villages (Arab a-Ramadin (estimated population: 180); Arab Abu Farde (estimated population: 80); Wadi a-Rasha (estimated population: 180); Ma'arat a-Dara (estimated population: 250) and Hirbet Ras a-Tira (estimated population: 400); total population of the five villages

is approximately 1,200). The enclave is located on the "Israeli" side of the separation fence. It is part of the seamline area. The enclave and Israel are territorially contiguous, meeting at highway 55. Exit from the enclave into the *area*, by car and foot, is through one crossing ("crossing 109") to Qalqiliya. This crossing is open at all hours of the day. The separation fence also includes three gates (the Ras a-Tira gate; the South Qalqiliya gate; and the Habla gate). At first, we shall discuss petitioners' arguments and the state's response in detail. Then, we shall examine the arguments and the answers to them according to the standards determined in *The Beit Sourik Case*.

2. Petitioners' Arguments

76. Petitioners expand upon the severe damage to the fabric of life of the residents of the five Palestinian villages within the enclave. These are small villages which are unable to provide necessary services such as employment, medical care, education, and community services by themselves. Thus, for example, the schools attended by enclave residents are located in Palestinian communities outside the enclave, with the exception of the elementary school of Ras a-Tira and a-Daba. The fence cuts the residents of the villages off from the Palestinian communities which provide them necessary services. The fence traps the residents of the villages inside of an enclave cut off from the Palestinian population in the West Bank. The residents of the villages are unable to enter a Palestinian community outside the enclave without passing through the gates in the fence or a checkpoint (crossing 109). Residents who wish to travel from the villages of the enclave to the adjacent towns of Habla and Ras Atiyeh are forced to pass long and wearying roads, which require travel by car, just to get to a place which in the past was reachable by foot. Petitioners note that the availability of cars for enclave residents, especially for women, is minimal.

77. According to petitioners, the enclave has caused mortal injury to all areas of life – freedom of movement; employment and commerce; health; education; family, community, and social ties; religious services; and more. Almost all of the Palestinian residents of the enclave have lost their sources of income since the construction of the fence. The fence cuts the residents of the villages off from pastures, hothouses, and agricultural lands. The regime of permits has turned the enclave into a place that non residents do not enter. The residents of the enclave are thus denied the possibility of holding social events in their villages. As for the future, the fence has destined the five villages to economic, social, and cultural destruction.

78. Soon after the petition was filed, petitioners submitted an expert opinion on the subject of planning, prepared by the nonprofit society known as "Bimkom – Planners for Planning Rights," which works to strengthen the ties between civil and human rights and the Israeli planning system. The expert opinion was prepared by four architects and urban planners. They reached the conclusion that the current route of the fence critically injures the Palestinian population living in the Alfei Menashe enclave. Prior to the construction of the fence, the Palestinian villages in the enclave relied upon the array of villages and cities in the Qalqiliya district and in the West Bank. The fence route chopped the area into three enclaves (the Qalqiliya enclave, the Habla and Hirbet Ras Atiyeh enclave and the Alfei Menashe enclave which includes the five Palestinian villages), and caused immediate damage to the system of spatial interrelations which existed prior to construction of the fence. The fence was constructed without any spatial planning logic. The fence cuts off main roads and access roads, crosses through built areas, chops up contiguous cultivated agricultural lands, and separates villages from their agricultural lands. As a result of the construction of the fence, two villages have even been cut off from the wells which provide them and their agricultural lands with water. The fence and the associated permit system make access to regional civil services very difficult, and damage the economic potential and existing social structure.

79. According to the expert opinion, the fence has a substantial effect on the Palestinian villages' continued function in all life-spheres. As far as economy and employment are concerned, hundreds of dunams of the villages and thousands of dunams of the cultivated agricultural lands, mostly olive groves, were expropriated for the construction of the fence. The fence cut off farmers' access to markets in Habla and Qalqiliya. It also decreased access to all sources of employment in the West Bank. From an employment perspective, there is a substantial rise in unemployment, and a trend of finding undesirable jobs that require limited skills in Alfei Menashe. In the field of education, the fence makes students' access to schools in Habla and Ras Atiyeh very difficult, and within a year a substantial rise in dropout level was noted in the education system. In the field of health, only partial and irregular health services are now provided in the villages. The fence cut the villages off from health and medical services, and access of emergency vehicles from the Habla area has been cut off. In terms of family and social ties as well, the fence's damage has been severe. The permit regime cuts enclave residents off from their relatives and friends, from ceremonies and family events, and

threatens to disenfranchise them of their status and connections in Palestinian society. As time goes on, this is likely to lead to abandonment of the villages and the cessation of the present communities' existence.

80. The petitioners' legal argument is that the construction of the fence surrounding the Alfei Menashe enclave, built completely in the *area*, violates the principles of public international law and is illegal. The petitioners' position is based upon two main pillars: *ultra vires* and lack of proportionality. First it is contended that respondents have no authority to erect the fence around the enclave, both due to the lack of security necessity and due to the creation of *de facto* annexation of the enclave territory to the State of Israel. The arguments on this issue rely, *inter alia*, upon the Advisory Opinion of the ICJ. Petitioners further argue that the enclave was not created for military or national security reasons, and not even for the security needs of Alfei Menashe residents. The construction of the fence around the enclave was intended to put Alfei Menashe west of the fence, and make it territorially contiguous to the State of Israel. It is an act whose entire purpose is to move the effective border of the state, and it is not legal according to the laws of belligerent occupation. According to petitioners, the decision to erect the fence on the present route was made under pressure from the residents of Alfei Menashe and of the residents of the Matan community, who requested that a road alternative to highway 55 not be built near it. According to the original plan, highway 55 was to be left east of the fence, and thus security officials decided to pave a new road to connect Alfei Menashe with Israel via the Matan community. However, in light of Matan residents' opposition to the new road, the fence route was altered so that highway 55 would be included in the enclave. Petitioners contend that the fence does not serve a military need. Military necessity does not include defense of settlement residents. Petitioners argue that leaving the Palestinian villages west of the fence does not fit the military need, as presented by army officials. The fence creates a long term change, whose meaning is practical annexation of the lands in the enclave to an area in absolute control of the State of Israel. Cutting the ties between the residents living in the enclave and those living beyond it creates a new geopolitical entity.

81. The petitioners' second argument is that the enclave – according to the route upon which it was created – is disproportionate. The enclave creates a wide scale infringment upon the basic rights of protected civilians. It seriously infringes upon property rights, freedom of movement, and rights to make a

living, to education, to health, to food, to dignity and honor, and to equality. International law, like Israeli law, includes the condition that infringment of rights be proportionate. The petitioners add that international human rights law also applies to the petition, and that the prohibitions upon violation of the petitioners' basic rights flow from it as well. The petitioners contend that the fence's route around the enclave causes damage which is disproportionate, both due to the fact that it is unnecessary for achieving its declared objective, and due to the lack of any serious interest which would justify it. It is contended that the fence's route around the enclave does not satisfy any of the three subtests of proportionality. The first subtest (fit between the injury and the objective) is not satisfied, since there is no rational connection between construction of the fence and an Israeli security goal. The second subtest (the least harmful means) is not satisfied, as it is possible to realize the legitimate objective of defending the residents of Israel by pushing the fence back to the Green Line. Petitioners claim that a fence along the Green Line would serve the security objectives better, since it would be much shorter, straight and not winding, and would leave a considerable Palestinian population east of the fence. The third subtest (proportionality in the strict sense) is not satisfied, since the infringment upon the petitioners' rights is not proportional to the danger which it is intended to confront. The injury to the residents of the villages is all-encompassing; moving the fence to the Green Line, on the other hand, will not bring about any decrease in security.

82. The petitioners' third argument is directed against the legal regime put into force in the enclave, which requires non Israeli residents to hold permits. Petitioners contend that the legal regime in the seamline area is a discriminatory regime based upon nationality, and is therefore to be annulled. The enclave regime creates legal classes according to ethnicity, and only disguises itself under security claims. The very existence of the permit regime is shameful and presents an illegal legal situation of formalized discrimination on the basis of ethnic and national background.

83. The remedy requested by petitioners is that the separation fence be dismantled and moved to the Green Line. To the extent that Alfei Menashe needs a separation fence, such a fence can be built around that community, on the basis of the existing fence around it. In any case – so argue the petitioners – there is no justification for including the enclave of villages inside of it.

3. The State's Response

84. In its first response to the petition (of September 9, 2004), the respondents announced that as a result of the judgment in *The Beit Sourik Case*, staff work is being done in order to examine the patterns of life in the seamline area. They announced that there is a most reasonable possibility that there will be alterations to the arrangements in the seamline area. Improvements in the arrangements will decrease the injury to the residents and affect the balance between the rights of the residents and the security needs. The respondents requested that the proceedings in the petition be postponed, in order to allow them to formulate their position. In these circumstances, it was contended that the petition, as a petition demanding the dismantling of the fence, is *prima facie* an early petition, and that it is appropriate to wait for the formulation of final decisions. However, the respondents emphasized that the decisive need for the existence of a fence in this area leads to the conclusion that, in any case, no order to dismantle the fence in the Alfei Menashe area should be issued.

85. In a supplementary statement by the respondents (of December 5, 2004), they raised a number of preliminary arguments for rejecting the petition. The first argument claimed that the petition was served in delay. According to the respondents, the petitioners' request to dismantle the fence a year and a half after its construction was completed, when its dismantling would cause severe damage to the respondents, suffers from severe delay. The petitioners had many opportunities to voice their claims against the route. They were served with the land seizure orders at the end of 2002 and at the beginning of 2003, and they had the opportunity to submit appeals. Regarding the objective element of the law on laches (undue delay), dismantling the fence will cause most severe security damage, as well as severe economic damage. On the other hand, the injury to petitioners is not as severe, as it can be moderated and minimized to a large extent by various improvements which are being made, and are yet to be made, by the respondents. The second preliminary argument raised by the respondents regards the petition's character as a "public petition," at a time when there are specific potential petitioners who refrained from petitioning. The petitioners are residents of two of the five villages in the enclave. From the petition itself it appears that the residents of the other three villages refused to join the petitioners. The specific petitioners, as well as the Association for Civil Rights in Israel (petitioner no. 7) are not authorized to speak in the name of all of the enclave's residents. Third, it is argued that the petition should be preliminarily rejected due to a lack of a prior plea directly to the respondents.

Although the Association for Civil Rights in Israel wrote to the Prime Minister and the Minister of Defense prior to the petition, requesting that they order the alteration of the fence route at the segment under discussion, these pleas were most compact, and most of the arguments in the petition were not mentioned in them at all.

86. On the merits, the respondents argue that there is no justification for altering the Alfei Menashe route. The fence indeed changed the reality of life for the residents of the villages left on the Israeli side of the fence. This stems from the decisive security need to defend the citizens of Israel against terrorist attacks. The injury to the residents of the villages is proportionate, considering the decisive security need to leave the fence where it is. Respondents noted that just prior to construction of the fence, the military commander's civil administration collected data regarding the enclave residents and their way of life, and that on the basis of the collected data, they issued permits to the residents of the enclave which enable them to live in the enclave and move to the *area* from it, and back. Today, there are approximately 1,200 permits in force, held by the residents of the enclave. The respondents informed us that the permits are soon to be replaced with permanent identity cards for seamline area residents, which will be valid as long as the declaration is in force. Approximately 1,065 entrance permits have also been issued, for workers of international organizations, infrastructure workers, traders, educators, medical services, and similar purposes. The Commander of IDF Forces in the *area* recently decided that the various permits will be replaced by a uniform permit, valid for a two year period (the current permits are valid for a period up to three months). The permits allow entry into the enclave through four gates.

87. In their response, the respondents discussed a list of infrastructure and logistic improvements intended to relieve the situation of the residents of the villages to the extent possible. First, crossing 109, located at the north end of the enclave near the eastern entrance to Qalqiliya, is open constantly, all day long. Permanently on site is a representative of the coordination and liaison administration, whose role is to handle problems which may arise. Second, the eastern entrance to Qalqiliya (DCO Qalqiliya) is open to free movement, and at present, no checkpoint operates there (except in the case of a security alert). Thus, those wishing to enter or exit Qalqiliya are spared the prolonged wait at the city entrance. Exit from the enclave through passage 109 and through the entrance into Qalqiliya are thus free. Third, close to the time the petition was submitted, an underpass connecting Habla to Qalqiliya was

opened under highway 55. Fourth, The Commander of IDF Forces decided to keep the agricultural fence at Ras a-Tira, which connects the enclave to Habla and Ras Atiyeh, open longer, so that the gate will be open to travel by foot and car during most hours of the day. For that purpose, a specialized military force will be allocated, which will also ensure more precise opening hours of the two additional agricultural gates. Fifth, the respondents are running transportation, funded by the civil authority, of all pupils living in the enclave who go to school beyond it. Sixth, a permanent staff of doctors, equipped with entrance permits, visits the enclave villages through crossing 109, according to a regular schedule. In the case that urgent medical care is needed, it is possible to travel to Qalqiliya and other areas through crossing 109, which is open at all hours of the day. Seventh, the coordination and liaison administration, in coordination with an international organization by the name of ANERA, commenced a project to connect the villages of Ras a-Tira and Hirbet a-Daba to the water system. The rest of the villages also enjoy regular supply of water. Eighth, approval has been given, in principle, for a plan to improve the access road from the villages to crossing 109 and for a plan to improve the road which goes along highway 55, in order to make it passable and safe for wagons.

88. The respondents further noted in their response that most of the enclave residents' agricultural lands are inside the enclave itself, and that the fence does not have any effect on residents' access to them. Farmers whose lands are located in the Habla and Ras Atiyeh area are able to reach their lands through the agricultural fences. Moreover, a large part of enclave residents make their living in the community of Alfei Menashe. The possibility of working in Alfei Menashe has not only not been decreased by the construction of the fence; it has been improved.

89. In the respondents' supplementary response (of June 19, 2005), the respondents presented their general position regarding the construction of the security fence on lands in the *area*, including such construction for the purpose of protecting the Israeli communities in the *area*. The respondents also presented their position regarding the effect of the Advisory Opinion of the International Court of Justice at the Hague (of July 9, 2004) upon the petition before us. Regarding the state's position on the implications of the Advisory Opinion on the issue of the fence, the respondents referred to their position in HCJ 4815/04 and HCJ 4938/04 (discussing the separation fence at the village of Shukba and the village of Budrus). We discussed this position in

the part of our present judgment which was devoted to the Advisory Opinion of the International Court of Justice at the Hague.

90. The state's position is that the construction of the fence is a security act *par excellence*. It is intended to provide a temporary solution to the terrorism offensive, both in Israel and in the *area*. It is intended to provide a solution to existing and future threats of terrorism, until it will be possible to reach a stable and reliable political arrangement. The respondents clarify that the contacts underway between Israel and the new Palestinian Authority leadership do not remove the need for construction and completion of the obstacle. According to the respondents, the present route of the obstacle is temporary. The seizure orders, issued for the purpose of obstacle construction within the *area*, are restricted to a definite period of a few years. The obstacle is not a permanent one. It is intended to protect the residents of Israeli communities in the *area* as well. The obstacle itself provides defense not only to the community itself, but also to the road access to and from it to its surroundings. However, the selected route is not the ideal route from a security standpoint. That is the case, due to the duty to protect the conflicting interests of the Palestinian residents, who are harmed by the construction of the obstacle due to seizure of lands, harm to agriculture, restrictions of movement, and injury to daily life. The respondents recognize this harm, and are working to minimize it both at the time of construction of the obstacle and by protecting the residents' fabric of life after its construction.

91. The respondents claim that the military commander is authorized to defend the Israeli communities in the *area* both pursuant to international law and pursuant to Israeli administrative and constitutional law. Israel's right – which is also her duty – to defend her citizens, is the fundamental legal source which grants it the right and the duty to defend its citizens living in the *area*. The respondents are of the opinion that the construction of the obstacle satisfies the restrictions in the law of belligerent occupation. The military commander is required, pursuant to rules of international law, to protect all present in the area held under belligerent occupation, and that includes Israeli citizens living in the *area* or traveling on the roads in the *area*. The duty of the military commander to protect those present in the occupied territory is not limited to those defined as "protected" in *The Fourth Geneva Convention*. This duty is not conditional upon the legal status of the Israeli communities in the *area* in terms of international law,

which will be decided in the permanent status agreement between Israel and the Palestinian Authority. The respondents note that the political agreements between Israelis and Palestinians also leave the authority to protect the Israeli citizens in the *area* in the hands of the State of Israel, until the issue is arranged in the permanent status agreement. The internal security legislation in the *area* also reflects Israel's responsibility for the security of the Israelis in the *area*. On this point, the respondents refer to §6 of the Interim Agreement Implementation Proclamation (Judea and Samaria)(No. 7). An additional source of the duty to protect the Israelis in the *area* is the Israeli administrative law and the Basic Laws of the State of Israel. The state claims that the military commander is obligated to protect the basic rights of Israeli citizens (both those pursuant to the Basic Laws and those stemming from "common law"). Exercise of the authority must be proportionate. The military commander is therefore authorized to protect Israeli citizens in the *area*, and even to infringe upon other rights for that purpose, as long as the infringment is a proportional one which stems exclusively from the security purpose.

4. The Petitioners' Response to the Respondents' Response

92. The petitioners informed us, in their response, that the planned alterations to the enclave do not provide a real solution to the hardships which enclave residents confront. Most of the changes are cosmetic, and a few of them are of low significance. The most significant change is the decision to lengthen the opening ours of the Ras a-Tira gate, but at the time the response was submitted, it had not yet been implemented. Petitioners ask us to reject all of the preliminary arguments raised by the respondents. They argue that there is no justification for rejecting the petition as a "public petition." Among the petitioners are private people, and the damage described in the petition is caused to them personally, in addition to the similar damage caused to their neighbors. Regarding the lack of prior direct plea, the petitioners state that petitioner no. 7's letters (of March 10, 2004 and July 19, 2004) contained the main arguments against the route, and these pleas are to be seen as worthy ones. The petitioners also ask that we reject the argument regarding undue delay. There was no subjective delay, as the petitioners' awareness of the damage came about only after daily life in the enclave had entered a regular pattern. Regarding objective delay, the only damage in this case is economic damage, and it is lesser in severity and weight than the violations of basic rights and of the rule of law.

5. The Alfei Menashe Local Council's Response

93. The Alfei Menashe Local Council was joined as a respondent to the petition, at its own request. It argues that the fence does not harm the Palestinian residents, and certainly not in the way described by the petitioners. Regarding the security aspect, the fence should be left in its present place, where it is able to provide security for the residents of Alfei Menashe and only minimally harms the Palestinian residents. The Local Council wished to present a different picture regarding the reality of life of the Palestinian residents in the enclave, especially that of the residents of the a-Ramadin tribe. It was claimed that Alfei Menashe is an honorable source of employment for many of the residents of the villages. Employment problems, to the extent that they exist, are not the result of the fence or its location. It was further claimed that the issue of movement from the village of Habla and the city of Qalqiliya, and that of medical services, are not problems faced by the members of the a-Ramadin tribe.

6. The Outline of the Discussion on the Legality of the Alfei Menashe Enclave

94. We shall commence our discussion on the legality of the Alfei Menashe enclave with an examination of the state's preliminary arguments. Then, we shall proceed to examine the question whether the construction of the separation fence around the enclave was *intra vires*. This discussion will examine the reasons behind the construction of the fence generally, and the route determined for it at Alfei Menashe, specifically. After examining the question of authority, we shall proceed to examine the scope of the damage to the local residents. Given this background examination, we shall examine whether this damage is proportional. We shall conclude our discussion with an examination of the appropriate remedies as a result of the legal analysis.

7. The Preliminary Arguments

95. In its response, the state raised three preliminary arguments. The first is a claim of undue delay in petitioning the Supreme Court. The state argues that construction of the separation fence in the Alfei Menashe enclave was concluded approximately a year and a half prior to the filing of the petition. The petitioners could have attacked the land seizure orders which were served to them at the end of 2002 and at the beginning of 2003. At the same

time, surveys along the planned route were held with the participation of the residents, and they were given the opportunity to appeal the route. Even after that – previous to or during fence construction work – it was possible to petition this Court. In the petitioners' response to the state's response, the petitioners state that their awareness of the damage came about only after daily life resumed its course in the enclave. In any case, due to the severe affront to the rule of law, the undue delay claim should not be accepted. In our opinion, the petitioners are right. We accept their claim that they could not assess the scope of the infringment upon their rights before life in the Alfei Menashe enclave entered a regular pattern. Only once the permit regime had been formulated; only once the opening and closing hours of the gates had been set; only once the cutoff from health, education, and commerce institutions in Qalqiliya and in Habla began to take their toll – only then was it possible to know what the scope of the damage was. In fact, even at the time the petition was filed, the pattern of life in the enclave had not yet resumed its course. The respondents themselves announced that there is a most probable possibility that there will be alterations to the arrangements in the seamline area, and in that context they even claimed that "the petition is early." In this state of affairs, the fact that petitioners waited for the formulation of the regular pattern of life in the seamline area does not provide a basis for a claim of undue delay.

96. The respondents' second preliminary argument regards the petitioners' standing, as it arises from the petition itself. Petitioners no. 1-3 are residents of Ras a-Tira, and petitioners no. 4-6 are residents of Wadi a-Rasha. Petitioner no. 7 is the Association for Civil Rights in Israel. The state argues that the petition shows that the three other villages (Hirbet a-Daba, Arab a-Ramadin, and Arab Abu Farda) refused, for undisclosed reasons, to join as petitioners in the petition. Under these circumstances, it is doubtful that the petitioners represent all of the residents of the two villages. They certainly do not represent the other three villages. The petition regarding the latter villages is a public petition. The state contends that such a petition should not be allowed, as individual potential petitioners exist, yet refrain, for undisclosed reasons, from petitioning the Court. We have no need to examine this argument, seeing as the petitioners' counsel noted before us in oral argument that he possesses a letter (of March 30, 2005) written by the five council heads of the enclave villages. In this letter, they authorize counsel to act on their behalves in the petition before us. Thus this issue was solved. We can therefore leave open the question whether it was impossible to suffice ourselves with the petitioners before us, for further hearing of the petition.

97. The third preliminary argument is that the petitioners did not make a direct plea to the respondents before their petition to the Court. This argument is rejected. As it appears from the material before us, petitioner no. 7 (The Association for Civil Rights in Israel) wrote (on March 10, 2004 and July 19, 2004) to the Prime Minister and the Minister of Defense. In these pleas, the petitioner raised the main points of its opposition to the fence route at the Alfei Menashe enclave, emphasizing the severe injury to the residents of the villages (in the first letter) and the disproportionate level of injury (in the second letter, written after *The Beit Sourik Case*). This is sufficient to satisfy the direct plea requirement.

8. The Authority to Erect the Separation Fence in General, and at the Alfei Menashe Enclave, Specifically

98. The military commander is authorized to order the construction of the separation fence in the Judea and Samaria area, if the reason behind it is a security and a military one. He is not authorized to order the construction of the fence, if the reason behind it is a political one (*see The Beit Sourik Case*, at p. 828). In *The Beit Sourik Case* we examined – using the legal tools at our disposal – the motivation behind the government decision. We reached the conclusion, on the basis of the data before us, that the motivation behind construction of the fence is not political. That is our conclusion in the petition before us as well. Here as well, we have been persuaded that the decision to erect the fence was made in light of the reality of severe terrorism which has plagued Israel since September 2000. Justice D. Beinisch discussed this in a case dealing with the northeast segment of the fence, in the area surrounding the territory discussed in this petition:

> The decision to erect the separation fence was made on April 14, 2002 by the Council of Ministers on National Security, in order 'to improve and reinforce the operational assessments and capabilities in the framework of confronting terrorism, and in order to frustrate, obstruct, and prevent infiltration of terrorism from Judea and Samaria into Israel.' This decision was approved after a government debate on June 23, 2002, in which the decision was made to erect a 116 kilometer long obstacle, particularly in sensitive areas through which terrorists – sowing destruction and blood – often passed in order to commit terrorist attacks. The final route of the obstacle was selected by security and military officials, in cooperation with relevant professionals, and was approved by the Committee of Ministers on National Security on August 14, 2002.

> The seamline area is intended to block passage of suicide bombers and other terrorists into the State of Israel. According to the view of the security and military officials responsible for this subject, the creation of a seamline area is a central component of the fight against terrorism originating in the Judea and Samaria area. To the extent that the obstacle will not create a hermetic seal against terrorist infiltration, the purpose of the obstacle is to delay the infiltration into Israel for a period of time which might allow security forces to reach the point of infiltration, and thus create a geographic security area which will allow the combat forces to pursue the terrorists before they enter the state.
>
> There is no doubt that the creation of a seamline area injures the Palestinian residents in that area. Agricultural land is being and will be seized for construction of the obstacle, which is liable to harm residents' ability to utilize their lands; their access to the land is also liable to be infringed. Such harm is a necessity of the hour, and it is a result of the combat situation in the *area* which has continued for more than two years – a situation which has cost many human lives (HCJ 8172/02 *Abtasam Muhammad Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished)).

99. We asked state's counsel why the separation fence cannot be built on the Green Line. We understood from the state's response, that security and military considerations prevented that possibility. Their response was based upon three considerations: first, the Green Line "passes under a mountain ridge located east of the line. The line is crossed by many east-west riverbeds. In many of its segments, there is thick vegetation. This topography does not allow attainment of the obstacle's goals by a route which passes only within Israel. Erecting the obstacle exactly on the border line of the Judea and Samaria area does not allow for defense of the soldiers patrolling it, who in many cases would be in disadvantaged topographic positions. Nor does such a route allow surveillance of the Judea and Samaria area, and would leave IDF forces in a situation of operational disadvantage, in comparison with terrorists waiting on the other side of the obstacle" (paragraph 64 of the state's response of February 23, 2005); second, "at many segments, Israeli communities and other important locations inside of Israeli territory are in close proximity to the boundary of the Judea and Samaria area. For example, the communities of Kochav Yair, Tzur Yigal, Matan, Maccabim, Mevasseret Tzion, the neighborhood of Ramot in Jerusalem, *et cetera.* Laying the route inside of Israel would require constructing the obstacle on the fences of these communities and locations with no alert zone to allow security forces to arrive

prior to infiltration. Such an alert zone is necessary to target terrorists liable to cross the obstacle, before they commit their attack. Such a route would have allowed sabotage of locations by way of gunfire from beyond the obstacle (*Id.,* id.); third, the separation fence is intended to protect Israelis living in Judea and Samaria as well. The fence is also intended to protect other important locations, such as roads and high voltage lines.

100. On the basis of all the material at our disposal, we have reached the conclusion that the reason behind the decision to erect the fence is a security consideration, of preventing terrorist infiltration into the State of Israel and into the Israeli communities in the *area*. The separation fence is a central security component in Israel's fight against Palestinian terrorism. The fence is inherently temporary. The seizure orders issued in order to erect the fence are limited to a definite period of a few years. So it also appears from the government decisions, whose reliability we have no basis for doubting, including the decision of February 20, 2005, which brought about a change in the separation fence route as a result of the judgment in *The Beit Sourik Case*. This change was especially apparent in phases C and D of the separation fence, which had not yet been constructed, or were in various stages of construction. So it also appeared from the affidavits submitted to us and from the rest of the material at our disposal. Thus, for example, according to the figures of the General Security Service, in the (approximately) 34 months between the outbreak of the armed conflict and until the completion of the first part of the separation fence, the terrorist infrastructure committed 73 mass murder attacks in the Samaria area, in which 293 Israelis were killed, and 1,950 injured. Since the completion of the separation fence – that is, the year between August 2003 and August 2004 – the terrorist infrastructure succeeded in committing five mass murder attacks, in which 28 Israelis were killed and 81 injured. Comparison between the year prior to commencement of work on the separation fence (September 2001 – July 2002) and the year after construction of the fence (August 2003 – 2004) indicates an 84% drop in the number of killed and a 92% drop in the number of wounded. The respondents brought to our attention an example of the security efficacy of the separation fence. The Islamic Jihad organization wished to detonate a suicide bomber from the Jenin area at a school in Yokneam or Afula. The suicide bomber and his guide left Jenin in the early morning, and intended to reach Wadi Ara, and from there, Afula or Yokneam. In the pre-separation fence era the terrorists' job was easy. The seamline area was wide open, and one could easily reach Wadi Ara. This route is now sealed. Therefore, the terrorist had to travel to Wadi Ara through a much longer route, through an area where

the separation fence had not yet been constructed, a detour which lengthened the route from 27 km to 105 km. The long detour allowed the security forces to gather intelligence, arrange the forces and locate the two terrorists *en route*. After they were caught, the explosive belt was located, and the attack was avoided. This is only one of various examples brought to our attention. They all indicate the security importance of the fence and the security benefit which results from its construction.

101. Such is the case regarding the separation fence generally. Such is also the case regarding the separation fence route around the Alfei Menashe enclave. The decision regarding that segment of the fence was made by the government on June 23, 2002. It is a part of phase A of the separation fence. It appears, from the interrogation of various terrorists from Samaria – so we were informed by the respondents' affidavit (paragraph 14) – that the separation fence in this area indeed provides a significant obstacle which affects the ability of the terrorist infrastructure in Samaria to penetrate terrorists into Israel. It also appears from the interrogations that, due to the existence of the obstacle, terrorist organizations are forced to seek alternative ways of slipping terrorists into Israel, through areas in which the obstacle has not yet been built, such as the Judea area. We examined the separation fence at the Alfei Menashe area. We received detailed explanations regarding the route of the fence. We have reached the conclusion that the considerations behind the determined route are security considerations. It is not a political consideration which lies behind the fence route at the Alfei Menashe enclave, rather the need to protect the well being and security of the Israelis (those in Israel and those living in Alfei Menashe, as well as those wishing to travel from Alfei Menashe to Israel and those wishing to travel from Israel to Alfei Menashe). Our conclusion, therefore, is that the decision to erect the separation fence at the Alfei Menashe enclave was made within the authority granted to the military commander. We shall now proceed to examine the question whether the authority granted to the military commander to erect the security fence has been exercised proportionately. We shall deal first with the fabric of life in the Alfei Menashe enclave. Then we shall examine whether the injury to the local residents' lives is proportionate.

9. The Scope of the Injury to the Local Residents

102. The respondents accept that "the security fence erected in the Alfei Menashe area altered the reality of life for the residents of the villages west

of the fence" (paragraph 44 of the supplementary statement of December 5, 2004). There is disagreement between the petitioners and the respondents relates to the scope of this injury. We shall discuss a number of central components of the fabric of life, including education, health, employment, movement, and social ties.

103. The petitioners claim that most of the children in the enclave villages attend the elementary, middle, and high schools located in Habla and Ras a-Atiyeh, that is to say, on the other side of the separation fence. Prior to construction of the fence, the children were driven to school by their parents. Some of the children (from the villages adjacent to Habla) even walked to school by foot. Now, in order to reach school, they must pass through the gates in the fence. The respondents informed us, regarding this issue, that the civil administration funds regular transportation of all the pupils from the enclave villages to school and back. Of course, parents cannot reach their children during school hours, and the children cannot return to their villages on their own.

104. There are no hospitals or clinics in the enclave villages. Medical services were previously provided in Qalqiliya and Habla. There is a government hospital in Shchem (Nablus). The petitioners argued before us that prior to construction of the fence, doctors from Qalqiliya or Habla would visit the villages, and village residents would travel to them to Qalqiliya or Habla, within a few minutes. After the construction of the separation fence, one must prearrange a visit with a doctor, who must pass through one of the fences, during fence opening hours. There is no solution in the case of an urgent medical situation. Entrance by ambulances from Qalqiliya or Habla requires coordination which takes many hours. In their response, respondents state that permits have been issued to a permanent staff of doctors, who visit the enclave villages according to a regular schedule. Ambulances enter on a basis of need, by coordination with a coordination officer who is available 24 hours a day.

105. The petitioners claim that the construction of the separation fence had a severe effect upon the employment status of the residents of the enclave villages. About ten percent of the lands of the village of Ras a-Tira are on the other side of the fence. Eight dunams of hothouses belonging to residents of the village of Wadi a-Rasha are located on the other side of the separation fence. The residents of the village of Arab a-Ramadin make their

living primarily from growing sheep. The fence separates the village and its pasture grounds. The residents of the village of a-Daba make their living from agriculture (production of olive oil, as well as vegetable and other seasonal crop growing). The fence separates the village from its agricultural lands. The residents of the village of Abu-Farda made their living from cattle and goat commerce. After construction of the fence, the village was cut off from the pasture grounds and the customers, who are unable to reach it. The residents of the village had no choice but to sell the cattle. Some residents of the villages worked as Palestinian Authority officials in Qalqiliya. Due to the separation fence, they have difficulty reaching their place of work. Many of the workers who worked in agriculture lost their jobs, due to their inability to reach their jobs at the times necessary for agriculture. They have found jobs as workers in Alfei Menashe. In their response, the respondents mention that the residents of the villages are able to get to the cities and villages of the West Bank through the crossing and gates in the separation fence. Farmers can pass through the agricultural gates at Habla and Ras a-Tira. The respondents add that most of the agricultural lands of the enclave's residents are located within the enclave itself. A significant part of the families living in the villages of the enclave make their living from work in the Alfei Menashe community.

106. Petitioners claim that the separation fence severely damages the ties between the enclave villages and Qalqiliya and Habla. Prior to the construction of the fence, it was possible to reach Qalqiliya within a few minutes. After construction of the fence, and resulting from the need to pass through the gates, the journey takes many hours. Moreover, a permit to pass through the gates by car is granted only to a car owner who is a resident of the enclave. Relatives and friends are not allowed to receive a permit. Most residents of the villages have no car of their own, and as a result – and due to fact that one can not be assisted by the car of a relative or friend – most residents of the villages are bound to their villages. This also causes damage – regarding the village of Arab a-Ramadin – to religious services. There is no mosque in that village. The residents of the village used to pray in the mosque in Habla, which was walking distance from the village. The fence now separates the village from the mosque. Considering the fact that there are only five cars in the village, residents of the village have no practical possibility of attending prayer on Fridays and holidays. In addition, the fence separates the residents of the villages from their relatives and friends. It is difficult to invite guests to various ceremonies (like weddings and funerals), as entry requires a permit, which is not given at all, or given only a long time after the request date.

107. The petitioners argue that the separation fence has brought financial and social destruction to the Arab residents of the Alfei Menashe enclave. It has created a cutoff between the residents and their agricultural lands and all the services necessary for normal life. The petitioners contend that "due to the construction of the fence, the lives of hundreds of people have turned into miserable lives, sentenced to an economic, social, and cultural withering" (paragraph 4 of the petition). The petitioners claim that the residents' freedom of movement, and rights to family life, health, education, equality, subsistence, human dignity and respect have been infringed. These infringments are not proportionate, and legally, they are destined to be annulled.

108. The respondents recognize that the separation fence infringes upon the rights of the Arab residents of the Alfei Menashe enclave. However, the respondents' position is that the general regime in practice in the seamline area, and the new arrangements regarding crossings and gates, have generally turned the injury to the Palestinians, and specifically to the residents of the villages in the enclave, into proportionate ones. On this subject, we were informed that in July 2004 the declaration was amended, so that permanent residents of the seamline areas were issued a "permanent resident card." The holder of such a card needs not hold a permit in order to enter into the seamline area or to stay in it. In order to preserve the fabric of life in the seamline area, checkpoints, allowing passage from one part of the separation fence to the other, have been established. The checkpoints are manned every day of the year, all day long. In addition, the agricultural fences have been opened, allowing farmers to pass from their place of residence to their fields. The gates are open three times a day, for regular, published periods of time. When these times are insufficient, they can be extended. The gates are open for a longer time during periods of intensive agricultural cultivation, like during the olive picking season.

109. In the separation fence at the Alfei Menashe enclave there is one crossing and three gates. The crossing ("crossing 109") is open at all hours of the night and day, every day of the year. Enclave residents can pass through it, after a security check, by foot or by car, to Qalqiliya and all other parts of Judea and Samaria, whether for employment purposes or for any other reason. From Qalqiliya, it is possible to continue on to Judea and Samaria with no additional checkpoint. It should also be mentioned that a new underpass connecting Qalqiliya to Habla has been opened. It passes under highway 55, which leads to Alfei Menashe. Movement through this underpass is unrestricted. In addition to the underpass, there are three gates in the enclave:

the Ras a-Tira gate, the Habla gate, and the South Qalqiliya gate. The Ras a-Tira gate connects the enclave to Habla and to Ras a-Atiyeh. It was decided that it would be open from one hour after sunrise until one hour before sunset. Both other gates are open three times a day for one hour. The farmers can reach their lands through these gates.

10. The Proportionality of the Injury to the Local Residents

110. Is the injury to the residents of the enclave villages proportionate? According to the caselaw of this Court – and in the footsteps of comparative law – proportionality is tested according to three subtests. The first subtest holds that the injury is proportionate only if there is a rational connection between the desired objective and the means being used to achieve that objective. The second subtest determines that the injury is proportionate only if there is no other less injurious means which can achieve the desired objective. The third subtest holds that the injury is proportionate only if the infringment upon human rights is of appropriate proportion to the benefit reaped from it. We applied this standard in *The Beit Sourik Case*. We must now examine if it is satisfied in the case before us?

111. Petitioners contend that the first subtest (rational connection) is not satisfied in the Alfei Menashe enclave. That is since the current route "annexes, *de facto*, the residents of the five villages that found themselves in the enclave, into Israel; and instead of creating 'separation' (which is, to our understanding, the essence of the fence's security doctrine), it creates a reality in which hundreds of Palestinians find themselves west of the fence, without any checkpoint or gate between them and the cities of Israel. Therefore, it is difficult to see how the infringment upon the rights of the residents of the villages promotes the security of the State of Israel, of the IDF, or even of Alfei Menashe, none of which are separated from the residents of the villages; *au contraire*" (paragraphs 140-141 of the petition). We cannot accept this argument. The separation fence creates a separation between terrorists and Israelis (in Israel and in the area), and from that standpoint, the required rational connection exists between the objective and the means for its attainment.

112. Is the second subtest (the least injurious means) satisfied? Is it possible to ensure the security of Israelis through a different fence route, whose infringment upon the rights of the local residents would be a lesser

one? The petitioners answer this question in the affirmative. According to their argument, it is possible to protect the Israelis through a fence constructed on the Green Line. We cannot accept this argument. In their arguments before us, the respondents correctly noted that construction of the separation fence on the Green Line would leave Alfei Menashe on the eastern side of the fence. It would be left vulnerable to terrorist attacks from Qalqiliya, Habla, and the remaining cities and villages of Samaria. Movement from it to Israel and back would be vulnerable to acts of terrorism. Indeed, any route of the fence must take into account the need to provide security for the 5,650 Israeli residents of Alfei Menashe.

113. Given this background the question arises whether the security objective behind the security fence could not be attained by changing the fence's route such that the new route would encircle Alfei Menashe, but would leave the five villages of the enclave outside of the fence. Such a route would create a natural link between the villages of the enclave and Qalqiliya and Habla. It would create a link to the array of civil services which were provided to the residents prior to the construction of the fence. Most of the injuries to the residents of the villages would be avoided. Indeed, the lives of the residents under to the present route are difficult. The enclave creates a chokehold around the villages. It seriously damages the entire fabric of life. The alteration to the route, which will remove the villages from the enclave, will reduce the injury to the local residents to a large extent. If it is not possible to remove all five villages from the enclave, is it possible for most of them to be removed from it? Indeed, based upon the factual basis as presented to us, the existing route of the fence seems strange. We shall begin with the southwest part of the enclave. We are by no means persuaded that there is a decisive security and military reason for setting the fence route where it presently is. Why is it not possible to change the route in a way that the three villages in this part (Wadi a-Rasha, Ma'arat a-Daba, and Hirbet Ras a-Tira), or most of them, remain outside of the fenced enclave? There is a planning scheme, which has been filed, for the development of Alfei Menashe in the direction of the southwestern part of the enclave. But as Mr. Tirza, who presented the enclave map to us, stated before us, that is not a consideration which should be taken into account. We shall now turn to the northern and northwestern part of the enclave. Why should the villages of Arab a-Ramadin and Arab Abu-Farde not remain outside of the fence? A main consideration in this issue might be the need to defend highway 55, which connects Alfei Menashe to Israel. On this issue, Mr. Tirza noted that the location of highway 55 raises security problems. Israelis have

been shot on it from the direction of Qalqiliya. We learned from the material before us, that according to the original plan, the segment of highway 55 which connects Alfei Menashe to Israel was to be cancelled. Instead, a new road was supposed to be paved, which would connect Alfei Menashe to Israel, southwest of the enclave, adjacent to the Matan community inside the Green Line. The petitioners argued – an argument which is supported by the evidentury material they submitted to us – that this plan was not approved due to the opposition of the Matan community, who thought that it would harm its quality of life. Mr. Tirza noted before us that the road connecting Alfei Menashe to Israel (highway 55) should be viewed as a temporary road. In this state of affairs, we were by no means convinced that it is necessary, for security and military reasons, to preserve the northwest route of the enclave. If this route will indeed be altered, it will have an additional implication, in that it will be possible to cancel the two gates separating Qalqiliya and Habla, and reconnect them into a large urban bloc, as it was in the past, and not make due only with the new underpass which connects them.

114. Thus, we have by no means been convinced that the second subtest of proportionality has been satisfied by the fence route creating the Alfei Menashe enclave. It seems to us that the required effort has not been made, and the details of an alternative route have not been examined, in order to ensure security with a lesser injury to the residents of the villages. The respondents must reconsider the existing route. They must examine the possibility of removing the villages of the enclave – some or all of them – from the "Israeli" side of the fence. Of course, this alteration cannot be done in one day, as it requires the dismantling of the existing fence (in the northern part, the northwestern part and the southwestern part) and the building of a new fence, while canceling highway 55 which connects Alfei Menashe to Israel and building a new road southwest of Alfei Menashe. The respondents must examine, therefore, the preparation of timetables and various sub-phases, which can ensure the changes to the route within a reasonable period.

115. Has the third condition of the proportionality test (narrow proportionality) been satisfied? In order to answer this question, we must determine whether the existing route of the separation fence at the Alfei Menashe enclave has an alternative route which provides Israelis (in Israel and Alfei Menashe) the required level of security. If such an alternative route exists, we must examine the intensity of injury to the fabric of life of the village residents. Thus, for example, if it is possible, according to the

security considerations, to reduce the route of the fence so that the enclave will contain only Alfei Menashe, then there is no doubt that the additional security provided by the existing route (compared to the alternate route) does not measure up to the additional injury which the existing route (compared to the alternate route) causes to the local residents (for "relative" implementation of narrow proportionality: *see The Beit Sourik Case*, at p. 840).

116. And what will be the case if examination of the alternative route leads to the conclusion that the only route which provides the minimum required security is the existing route? Without it, there is no security for the Israelis. With it, there a severe injury to the fabric of life of the residents of the villages. What will the case be in such a situation ("absolute" implementation of narrow proportionality: *see The Beit Sourik Case*, at p. 840)? That is the most difficult of the questions. We were not confronted with it in *The Beit Sourik Case*, since we found that there was an alternative which provides security to Israelis. How shall we solve this difficulty in the case before us? It seems to us that the time has not yet come to confront this difficulty, and the time may never come. We hope that the examination of the second of the proportionality subtests will allow the alteration of the fence's route, in the spirit of our comments, so that a new route can be found, whose injury to the lives of the local residents will be to a lesser extent than that caused by the current route. We can therefore leave the examination of the satisfaction of the third subtest open, while focusing the examination at this time upon the second condition, that is, examination of the possibility of reducing the area of the enclave.

Therefore, we turn the *order nisi* into an *order absolute* in the following way: respondents no. 1-4 must, within a reasonable period, reconsider the various alternatives for the separation fence route at Alfei Menashe, while examining security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent. In this context, the alternative by which the enclave will contain only Alfei Menashe and a connecting road to Israel, while moving the existing road connecting Alfei Menashe to Israel to another location in the south of the enclave, should be examined.

Justice D. Beinisch

I concur in the judgment of my colleague President A. Barak.

Justice A. Procaccia

I concur in the judgment of my colleague, President A. Barak.

Justice E. Levy

I concur in the result of the judgment of my colleague, the President.

Justice A. Grunis

I agree that the petition is to be allowed, as proposed by my colleague, President A. Barak.

Justice M. Naor

I concur in the judgment of my colleague, President A. Barak.

Justice S. Jubran

I concur in the judgment of my colleague, President A. Barak.

Justice E. Chayut

I concur in the judgment of my colleague, President A. Barak.

Vice-President M. Cheshin

1. I read the comprehensive opinion of my colleague President Barak, impressive in scope and depth, and I agree with his legal decision, and with the way he traveled the paths of the facts and the law until he reached the conclusions he did. Usually I would not add anything to my colleague's words – as we all know that often, he who adds, actually detracts – however, I found the decision of the International Court of Justice at the Hague to be so objectionable, that I said to myself that I should take pen to paper and add a few words of my own.

2. International law has undergone many welcome revolutionary changes in recent decades. I remember that 50 years ago – when I was a young student at the Faculty of Law of the Hebrew University of Jerusalem – the subject of Public International Law (as opposed to Private International Law) was a negligible and peripheral subject (even though it was taught as a required course). Public International Law was not seen by us – we the students – as worthy of the title "law," and the institutions of the international community, including the International Court of Justice, received the same treatment. The years passed, and public international law got stronger and began to stand on its own two feet as a legal system worthy of the title "law." That is the

case, at least, as far as certain areas or certain states on the face of the globe are concerned. It is fortunate that public international law has developed in that way, although the road is long before it will turn into a legal system of full standing; as a legal system whose norms can be enforced against those who violate them. In the same context, we should know and remember that the International Court of Justice at the Hague, even when asked to write an Advisory Opinion, is still a court. Indeed, when the ICJ sits in judgment as the giver of an advisory opinion, the proceedings before it are not regular adversary proceedings, and its decision does not have immediate operative force – as opposed to the decision of a regular court. However, the way in which the ICJ writes its opinion is the way of a court; the proceedings of the ICJ are, in principle, like the proceedings of a court; and the judges sitting in judgment don the robes of a judge in the way familiar to us from regular courts. Take these procedural distinguishing marks away from the ICJ, and you have taken away its spirit as a court. For we have no lack of political forums.

3. I read the majority opinion of the International Court of Justice at the Hague, and, unfortunately, I could not discover those distinguishing marks which turn a document into a legal opinion or a judgment of a court. Generally, and without going into piecemeal detail, there are two main parts to the judgment of a court, and likewise, to an opinion of the ICJ: one part lays a basis of facts which were properly proven before the tribunal, and upon this basis is built the other part – the legal part. Thus is also the case with the opinion of the ICJ before us, one part of which is the factual part, and the other part – which builds itself on the first part – is the legal part. Regarding the legal part of the opinion of the ICJ, I shall not add to what my colleague the President wrote. We have seen that there are no essential disagreements between us and the ICJ on the subject of law, and that is fortunate. However, if that is the case regarding the legal part, regarding the factual part – the part which is the basis upon which the judgment is built – I should like to disagree with the ICJ.

4. As we saw in my colleague's survey, the factual basis upon which the ICJ built its opinion is a ramshackled one. Some will say that the judgment has no worthy factual basis whatsoever. The ICJ reached findings of fact on the basis of general statements of opinion; its findings are general and unexplained; and it seems that it is not right to base a judgment, whether regarding an issue of little or great importance and value, upon findings such as those upon which the ICJ based its judgment. The generality and lack of explanation which

characterize the factual aspect of the opinion are not among the distinguishing marks worthy of appearing in a legal opinion or a judgment. Moreover, generality and lack of explanation infuse the opinion with an emotional element which is heaped on to such an extent that it is unworthy of a legal opinion. I might add that in this way, the opinion was colored by a political hue which, to the extent possible, legal decision does best to distance itself from. And if all that is not enough, there is the ICJ's almost complete ignoring of the horrible terrorism and security problems which have plagued Israel – a silence that the reader cannot help but notice – a foreign and strange silence. I can only agree with Judge Buergenthal, and partly with Judge Higgins, Judge Kooijmans, and Judge Owada, that the factual basis upon which the judgment was built is inadequate to the point that it is inappropriate to pass judgment upon it, even by way of opinion. As Judge Buergenthal wrote (paragraph 1 of his opinion):

> . . . I am compelled to vote against the Court's findings on the merits because the court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case . . .

See also, further in his opinion (see paragraph 64 of the President's judgment). I am sorry, but the decision of the ICJ cannot light my path. Its light is too dim for me to guide myself by it to law, truth, and justice in the way a judge does, as I learned from those who preceded me and from my father's home.

Decided according to the judgment of President A. Barak.

Given today, September 15, 2005.

Safe Access to Rachel's Tomb

HCJ 1890/03 **Bethlehem Municipality et Al**

v.

1. **The State of Israel – Ministry of Defense**
2. **Major General Moshe Kaplinsky – Commander of IDF Forces in the Judea and Samaria Area**

Rachel's Tomb – the burial place of the Biblical Matriarch Rachel, the wife of Jacob – is located south of Jerusalem in the city of Bethlehem, within the West Bank. During the second intifada, Jewish worshippers at Rachel's Tomb were vulnerable to terrorist attacks in the form of sniper fire and explosive charges. In 2005, a land sequestration order was issued in order to construct a road that would provide Jewish worshippers safe access to Rachel's Tomb. Petitioners from Bethlehem challenged the constitutionality of the sequestration order.

In the 1990's, the interim agreements (known as the Oslo Accords) between Israel, the PLO and the Palestinian Authority, in which Bethlehem was transferred to the Palestinian Authority, established two important regulations with respect to Rachel's Tomb. First, the agreements provided Jews with the right to maintain their freedom of worship at Rachel's Tomb. Second, the agreements provided Israel with the right to maintain security control over both the tomb itself and the access roads to it.

In the case at hand, the main issue was whether – in sequestrating land to build this secured road to Rachel's Tomb – Israel properly balanced between the Jews' freedom of worship and the Palestinian petitioners' freedom of movement. The petitioners argued that the land sequestration order failed to provide sufficient weight to the Palestinians' freedom of movement. Israeli authorities argued that – despite limited impingements on the Palestinians' freedom of movement – it took proportional and reasonable action to maintain the Jews' freedom of

worship, because Bethlehem had turned into a hotbed of terror during the second intifada.

The Court found that the sequestration order was both necessary to protect the Jews' freedom of worship at Rachel's Tomb and impinged on the right to freedom of movement of some of the Palestinians of Bethlehem. The Court found that the competing values – freedom of worship, on the one hand, and freedom of movement, on the other hand – were "two basic rights of equal weight" and that, therefore, the balance between them must be "a horizontal one." As such, the Court found that the military commander had a duty to employ his discretion in issuing the sequestration order proportionally and reasonably by considering the interests and rights of the local population.

The Court held that the means – a bypass road with protective walls – used by the military commander were within the zone of proportionality and were reasonable because they did not severely or significantly impinge upon the freedom of movement of the petitioners. The Court reasoned that both the geographical scope and the intensity of the impingement on the petitioners' freedom of movement was small. As the Court stated:

> [W]e are convinced that the injury remaining in this case – a certain lengthening of a small number of petitioners' route to the eastern part of Bethlehem – is not a severe and substantial infringement upon freedom of movement which strays beyond the zone of proportional and reasonable means which respondents, as those responsible for security and daily routine in the area, are permitted to employ.

Further, the Court noted that although there were a number of proportionate and reasonable ways by which the military commander could accomplish the goal of protecting worshipers at Rachel's Tomb, the choice of which of these means to employ was within the discretion of the military commander.

HCJ 1890/03 **Bethlehem Municipality et Al**

v.

1. The State of Israel – Ministry of Defense
2. Major General Moshe Kaplinsky – Commander of IDF Forces in the Judea and Samaria Area

The Supreme Court Sitting as the High Court of Justice
[February 3, 2005]
Before Justices D. Beinisch, E. Rivlin & E. Hayut

Petition for an *Order Nisi* and *Interlocutory Order*
For Petitioner: Arieh Toussiah-Cohen
For Respondents: Avi Licht

JUDGMENT

Justice D. Beinisch

We have before us a petition, amended for the second time, in which petitioners argue the illegality of Land Sequestration Order no. Tav/14/03 (Second Boundary Alteration) (Judea and Samaria), 5763-2003, issued on August 17, 2004, by the Commander of the IDF Forces in the Judea and Samaria Areas [hereinafter – second respondent, or respondent]. The order is for the sequestration of a strip of land in the Bethlehem area, in order to pave a detour road for Jewish worshippers wishing to travel from Jerusalem to Rachel's Tomb [hereinafter – the tomb] and in order to construct a defense wall for said road. The intention, as discussed below, is that these walls be integrated in the "separation obstacle" planned in the Jerusalem area.

Factual and Procedural History

1. On February 9, 2003, respondent issued Land Sequestration Order no. Tav/14/03 (Judea and Samaria), 5763-2003 [hereinafter – the original order]. Respondent intended, by way of this order, to construct walls to ensure the safe arrival, via existing access routes, of worshippers from Jerusalem to Rachel's Tomb, located in the outskirts of Bethlehem, approximately 500 meters south

of Jerusalem's municipal border. According to the original plan, the wall was to divide the Hebron Road, which is Bethlehem's main thoroughfare as well as the main route to the tomb, in such a way that half of the road would be used exclusively for traffic to the tomb and the other half, beyond the wall, would serve the local residents. An additional wall was planned for the other side of the road, and yet another along the Al Aida refugee camp, which is adjacent to the tomb and topographically controls the access road to it (for the route per the original order see the aerial photo enclosed as appendix A). This order sequestered large areas in the Bethlehem and Beit Jalla area, and the walls planned in it were liable to box in an entire neighborhood.

As a result of this order, the Bethlehem (first petitioner) and Beit Jalla (second petitioner) municipalities, the Jerusalem District Electric Company (third petitioner), the Muslim Waqf (twenty third petitioner) and local residents (fourth to twenty-second petitioners), who claimed they were apt to be harmed by the order if carried out [hereinafter, jointly – petitioners], petitioned this Court. In the original petition, directed against that order, petitioners argued that the order should be invalidated, because they were not given the right to a hearing before it was published, and because the order strays beyond the zone of reasonableness and proportionality. Their main argument was that in the selection of that original solution, respondent did not give appropriate weight to the harm which would be caused to the local population, or to the other alternatives, which would impede less upon the lives of the local population. In their petition, petitioners even suggested a number of alternatives to the solution originally chosen. *Inter alia,* petitioners proposed the digging of a tunnel to the tomb, or the creation of an alternate route for the worshippers, by building a double wall which would pass between the edges of the olive groves on the western side of most of the petitioners' homes.

2. In response to the original petition, respondents' counsel announced that second respondent had decided to grant petitioners the opportunity to appeal the order, and an agreement was reached with petitioners' counsel, by which the petition, including its arguments and appendices, would be the appeal which would be brought before respondent for decision. As a result of this agreement, petitioners' appeal was indeed brought before respondent, who decided to allow the appeal and change the original order. Instead of the solution planned in the original order, which was based, as previously mentioned, on the defense of the existing access routes to the tomb, respondent now chose a solution of constructing an alternate road, to

be used exclusively as an access road to Rachel's Tomb, and defending it with walls. In order to make this change, respondent issued Land Sequestration Order no. Tav/14/03 (Boundary Alteration) (Judea and Samaria), 5763-2003 [hereinafter – the second order], on August 5, 2003. According to the second order's planned route, the new road was to begin at checkpoint no. 300 at the entrance to Bethlehem (from the direction of Jerusalem) in the north, and make a westerly bypass around the homes adjacent to the Hebron Road, in which most of petitioners live. Toward its end, the planned road was to branch off into two roads connecting to Rachel's Tomb: one facing east and connecting to the Hebron Road, then continuing south and reaching Rachel's tomb on the basis of the existing access road; the other continuing south, and then east, to Rachel's tomb. Both of these access routes to the tomb were to create a ring-shaped road, for entering and exiting the tomb area. According to the plan, a wall intended to prevent gunfire from the direction of Bethlehem and a similar wall north of the Al Aida refugee camp and the zone adjacent to the refugee camp were to be constructed (for the route of the second order, see the aerial photograph enclosed as appendix A).

On August 14, 2003, petitioners were informed that their appeal had been granted and of the respondent's intention to alter the route. Thereafter, on August 19, 2003 a survey, in which petitioners and their counsel participated, was made of the sequestration area in order to present the route chosen in the second order. On August 28, 2003, petitioners appealed this route. As a result of this appeal, a meeting was held between respondent's and petitioners' representatives; the meeting, however, was not fruitful. Thus, respondent considered petitioners' appeal on its merits, and rejected it. After the rejection of the appeal, petitioners submitted the first amended petition, directed against said second order.

3. Petitioners' main argument in the first amended petition was that respondent's decision to issue the second order also suffered from extreme unreasonableness. They argued that this decision did not reflect an appropriate balance between the rights of the worshippers on the one hand, and the local population's right to their property and right of movement within Bethlehem, which were severely impinged upon by that order, on the other. Petitioners further claimed that the objective of the order could be realized through alternative means, which would compromise petitioners' rights to a lesser extent than the alternative chosen in the second order. Petitioners did not refute that the second order substantially reduced the number of residents whose freedom

of movement would be impinged upon due to the security arrangements for the access roads to the tomb, in comparison with the original order. The route of the new road planned in the second order – which makes a westerly bypass of the homes adjacent to the Hebron Road, where most of the petitioners live – brought about, according to respondents' approximation, a 70% reduction in the number of residents whose homes would be surrounded by the wall, in comparison with the original order. However, argued petitioners, the fact that the solution adopted in the second order is more proportional (or shall we say less disproportional) than the solution chosen in the original order, does not make this solution proportional and reasonable.

It appears to be uncontested that the main damage which the second order was liable to cause to the residents (especially to their freedom of movement) resulted from the final segment of the route planned in the second order, by which the planned road was to branch off into two rouds near its end and to connect to Rachel's tomb from two directions, as described above. This final segment was to create a walled in zone, boxing in from all sides – even according to respondents – at least five homes housing six families, a number of stores and offices, including the offices of the Muslim Waqf [hereinafter – the zone]. Indeed, it seems that even respondents' counsel was aware that this zone was liable to cause most of the infringement upon the freedom of movement, as he noted in p. 16 of his response to the first amended petition that "the main claimed infringement is upon residents who will now live within an area surrounded by a wall, with no free access to Bethlehem." This part of the route, and the severe damage it was liable to impose upon the residents who were to be closed in by it, was indeed the segment which most bothered us in the route of the second order.

4. On October 29, 2003, we held a hearing in the framework of the first amended petition, at the end of which the parties agreed to discuss finding concrete solutions for the petitioners injured by the second order, without conceding their principled arguments. We thus decided, on the basis of said agreement, that petitioners would submit to respondents' counsel a list of concrete arguments worthy, in their eyes, of investigation, and that a meeting would then be held between the parties, for detailed discussion. We further decided that the parties would inform us of the results of the negotiations and that we would then decide regarding further treatment of the petition accordingly.

According to respondents' additional response of December 5, 2003, only two of petitioners (The Jerusalem District Electric Company and the Muslim

Waqf) chose to bring detailed arguments before respondents. In the additional response it was also mentioned that following these two petitioners' claims, a meeting was indeed held between the parties, but that at the end of the day they did not succeed in reaching agreement. In their response to respondents' additional response, petitioners confirmed that they had not succeeded in reaching agreement with respondents on the questions and claims brought by them in the petition, and therefore requested that this Court decide the petition on its merits.

5. Negotiations between the parties having failed, we held an additional hearing for the first amended petition on June 2, 2004. The hearing focused mainly on the damage which the second order was liable to cause to the residents of said zone, who were to live enclosed within the walls, and on ways to prevent or limit the damage to these residents. After this hearing an *Order Nisi* was granted.

As a result of the *Order Nisi* and in light of this Court's comments during the hearing, respondents requested additional time in order to reevaluate the planned route. In the meantime, on June 30, 2004, this Court gave its judgment in H.C.J. 2056/04 *Beit Sourik Village Council v. The Government of Israel* regarding the route of the "separation obstacle" in the area northwest of Jerusalem. According to respondents' response of November 1, 2004 to the second amended petition, as a result of said judgment respondents commenced comprehensive staff work on a reevaluation of the entire "separation obstacle," and staff work on a reevaluation of the route in the area of Rachel's Tomb was integrated into said comprehensive staff work.

6. After that staff work, respondents decided to once again alter the planned route in the area of Rachel's Tomb. Therefore, respondent issued Land Sequestration Order no. Tav/14/03 (Second Boundary Alteration) (Judea and Samaria), 5763-2003 [hereinafter – the new order]. The new order was based on the route proposed in the second order, in that it included the construction of an alternative road to be used exclusively as an access road to Rachel's tomb, which would start at checkpoint no. 300 in the north and make a westerly bypass of the homes adjacent to the Hebron Road, in which most of petitioners live. Adjacent to the road, a wall intended to prevent gunfire on cars from the direction of Bethlehem, and a similar wall north of the Al Aida refugee camp and the zone adjacent to it, would be built. The alteration in the new order, compared to the second order, is at the end of the road, in the area

in which it attaches to the tomb. Instead of two access roads to the tomb, the new order left only the road facing east, connecting to the Hebron Road and continuing on to the tomb. By canceling the ring-shaped road in the second order which connected between the bypass road and the tomb, and by making due with only one access road to the tomb, the result in the second order, by which some of the residents would find themselves in a zone surrounded by walls with no free access to Bethlehem, was avoided. Therefore, due to this last alteration in the route, none of petitioners' buildings will be inside of a zone surrounded by walls, and all the petitioners will have free direct access to the city of Bethlehem, with no need to cross a checkpoint (for the route of the new order see the aerial photo enclosed as appendix B) .

A copy of the new order was served to petitioners along with written explanation for their counsel, yet none of petitioners appealed the order. However, on September 27, 2004, petitioners announced to the Court that the alteration to the order is not satisfactory, and that they do not intend to withdraw the petition. Accordingly, on October 26, 2004, petitioners submitted a second amended petition, against the new order. That petition is the one before us today.

The Arguments of the Parties

7. In their second amended petition, petitioners argue against the validity of the new order – Land Sequestration Order no. Tav/14/03 (Second Boundary Alteration) (Judea and Samaria), 5763-2003. In this petition, petitioners claim that the issuing of this new order and its replacement of the previous orders cannot solve the problems which they pointed out in the original petition and in the first amended petition. Petitioners' main argument is that respondent's decision to issue the new order suffers from extreme unreasonableness. They claim that this decision does not reflect an appropriate balance between the rights of the worshippers and the rights of the local population, especially their right to the freedom of movement. Petitioners do not contest that the new order does not box residents in between walls, or that the new order indeed reduces the harm to residents, in comparison with the previous orders; however, they claim, this order still causes unreasonable damage and discomfort to residents due to the restriction of their freedom of movement and the havoc it wreaks in their daily lives. Petitioners once again argue that the objective of the order could have been attained through alternative means, whose injury

to petitioners would be less than that of the means chosen in the new order. Thus, for example, they claim it would be possible to ensure the worshippers' security with the existing security arrangements, or by digging a tunnel to the tomb. They also claim the respondent took irrelevant considerations into account in issuing the order, and that the objective of the order is not the ensuring of the worshippers' security against terrorist attacks, but, rather, the "annexation" of Rachel's Tomb to Jerusalem. Petitioners also argue that the order should be invalidated since they were not able to exercise a substantive right to a hearing before the decision to issue the new order was made.

Respondents claim that the solution chosen in the new order reflects a proper balance between the contradicting interests, and that the decision is reasonable and proportional. Respondents' counsel claims that the new order adopts a route intended to take into account the Court's comments during the hearing of the first amended petition on June 2, 2004 and the test formulated by this Court in *Beit Sourik*. The point of departure for the renewed consideration was, according to respondents' argument, the desire to choose a more proportional solution which would minimize harm to the local population to the extent possible, without compromising the need to defend the access routes to the tomb. Therefore, they argue, a route suboptimal in terms of security was chosen, in order to avoid leaving local residents beyond the obstacle. Respondents' counsel claims that the route which was finally chosen solves petitioners' problems and takes into account all the particular complaints they made in their original and amended petitions. Respondent also argues that the selected solution is based, with certain changes, upon one of the proposals of petitioners themselves in their amended petition: paving a detour route for the worshippers. Respondent claims that the construction of the wall and the paving of the bypass road are meant to serve a security need *par excellence* – defending the lives of the Israelis visiting Rachel's Tomb. In his response, respondents' counsel emphasizes the need to ensure worshippers' access to Rachel's Tomb, outlining the terrorist attacks directed at the tomb since terrorism and combat activities began in September 2000, including sniper fire, explosive charges, throwing of Molotov cocktails and rioting. In light of these events, he argues, the military commander had no choice but to take steps to secure the tomb site and the worshippers on their way to, at, and from the tomb. Therefore, respondents' counsel persists, in his response, in the claim that security reasons exclusively lay at the base of the decision, and that there is no basis for petitioners' claims that irrelevant considerations and the intent to annex the tomb area to Jerusalem motivate the

decision to pave the road and erect the walls for its protection. Respondents' counsel also emphasizes that the means are temporary ones, and that there is no intention to determine through them the permanent status of the tomb and the access roads to it.

Thus, the point of departure for our discussion is that petitioners do not contest the worshippers' right of access to Rachel's Tomb, however they argue that this access must be ensured without impinging upon their freedom of movement in Bethlehem and their property rights. As for respondents, they recognize their duty to minimize the compromise of the freedom of movement and the property rights of petitioners resulting from steps taken to ensure the worshippers' freedom of access. The main dispute is, therefore, whether respondent appropriately balanced between the rights of the worshippers and the rights of the local population.

It must also be mentioned that the route sequestered pursuant to the new order (as well as the route of the planned bypass road and walls according to this order), was planned so that it would be integrated into the planned route of the "separation obstacle" in the Jerusalem area. However, as petitioners explicitly note in their petition, this petition does not deal with the "separation obstacle," rather only with the question of the legality of the specific sequestration order considered in it:

> It should be noted that this petition is not directed against the 'separation fence' being erected at this time in the land of Israel (the petitioners in this petition do not wish to comment on the fence itself at this point in time), it rather deals solely with the issue of safe passage to Rachel's tomb, precisely as respondents themselves define the order, whose objective is the erection of a wall to protect the worshippers visiting Rachel's Tomb.

(paragraph 25 of the second amended petition; emphasis original).

Indeed, both sides agreed that the declared purpose of the sequestration order in this case is not the prevention of infiltration of terrorists into Jerusalem, rather the creation of a safe access road for worshippers wishing to travel from Jerusalem to Rachel's Tomb. The legal questions arising in this case are different than those which the "separation obstacle" generally raises, and not all of the relevant considerations are the same (*compare Beit Sourik*). Therefore, our judgment will be limited strictly to the question put before

us by petitioners: the question of the legality of the new order, which is the subject of the second amended petition.

Discussion

8. In the petition before us, petitioners do not contest respondent's **authority** to issue the land sequestration order under discussion. And indeed, the military commander's general authority to sequester land on the basis of the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter – the Hague Regulations] and IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [hereinafter – the Fourth Geneva Convention], subject to conditions pursuant to international and Israeli law, has been recognized by this court in a series of judgments (see, *e.g.*: *Beit Sourik*, at paragraph 32; H.C.J. 940/04 *Abu Tir v. The Military Commander in the Judea and Samaria Area* (yet unpublished), at paragraph 10 (hereinafter – *Abu Tir*); H.C.J. 10356/02 *Hess v. Commander of IDF Forces in the West Bank* (yet unpublished), at paragraphs 8-9 [hereinafter – *Hess*]; H.C.J. 401/88 *Abu Riyan v. Commander of IDF Forces in Judea and Samaria*, 42(2) P.D. 767, 770; H.C.J. 24/91 *Timraz v. Commander of IDF Forces in the Gaza Strip Area*, 45(2) P.D. 325, 333-335; H.C.J. 2717/96 *Wafa v. Minister of Defense*, 50(2) P.D. 848, 856). Petitioners in this petition argue against respondent's **discretion** in issuing the order, and claim a cause of action due to unreasonableness and disproportionality. Indeed, even when acting within his authority, the military commander must use his authority according (*inter alia*) to the principles of reasonableness and proportionality, and his discretion is subject to the review of this Court (*see*, *e.g.*: *Beit Sourik,* at paragraph 24; *Hess*, at paragraph 10; H.C.J. 7015/02 *Ajuri v. Commander of IDF Forces in the West Bank*, 56(6) P.D. 352, 375-377 [hereinafter – *Ajuri*]). Our discussion will be focused, therefore, upon judicial review of the military commander's considerations according to the guidelines set out by this Court in its caselaw.

The Argument Regarding Irrelevant Considerations

9. As mentioned, one of petitioners' arguments is that an irrelevant consideration lies at the foundation of respondent's decision to issue the order. They claim that the order was based not on the consideration of protecting the

worshippers from terrorist attacks, but, rather, on the consideration of the "annexation" of Rachel's Tomb to Jerusalem. Indeed, it is a rule that the administrative agency must act in every particular case exclusively on the basis of relevant considerations, and for a purpose for which the authority was granted. However, in this case we were not convinced that petitioners provided a factual basis sufficient to determine that respondent weighed irrelevant considerations in issuing the order. In his response, respondents' counsel emphasizes that security reasons – the security and lives of visitors who come to pray at Rachel's Tomb – are the only basis for the order, and that there is no intention to determine, via the order, the permanent status of Rachel's Tomb and of the access roads to it. To reinforce his argument, respondents' counsel details the current threats to worshippers on the existing access road to the Tomb, and explains why, in respondent's opinion, the means chosen to reduce the current danger to worshippers are needed. In his response to the second amended petition, respondents' counsel argues that since the "Western Wall Tunnel" riots, and especially since the events of September 2000, there has been an ongoing Palestinian attempt to strike at Jewish sites which remain in the territories, including Rachel's Tomb, at Jewish worshippers visiting these sites, and at IDF forces securing them. Respondents' counsel further details the terrorism directed toward Rachel's Tomb since October 2000, including sniper fire, explosive charges, throwing of Molotov cocktails, and rioting. Respondents' counsel details the security measures taken thus far, including the reinforcement and fortification of Rachel's Tomb. Respondents' argument is that after the reinforcement of the tomb, the point of security vulnerability is the access road to the tomb, which is topographically controlled along almost its entire length by hostile territory. Respondents' counsel further claims that Bethlehem has recently turned into a hotbed of terror, thus increasing the danger of terrorist attacks directed against traffic to the tomb. Moreover, in his additional statement of November 8, 2004, he adds details which have just recently been released for publication that note that in the weeks prior, the General Security Service [hereinafter – GSS] and the IDF uncovered a number of terrorist cells in Bethlehem, which included Palestinian police serving in Bethlehem. He further noted that, in the framework of this investigation, the existence of a terrorist cell which committed terrorist acts in Bethlehem and the area of Rachel's tomb, had further planned to carry out an attack against the bulletproof bus which leads worshippers to the tomb. According to the discovered plan, the terrorist cell was to carry out a car bomb attack against the bus and then to attack the rescue forces

which would come to aid the wounded. Accordingly, respondents claim that there is a real need for steps to ensure the security and lives of the worshippers on their way to Rachel's Tomb, and that this was the purpose of the order. Attached to the additional statement was a summary prepared by the GSS, describing the intelligence which had been received as a result of the discovery of the said terrorist cells. Respondents' counsel's argument in his response to the amended petition and the second amended petition rested upon the affidavits of second respondent, GOC Central Command Moshe Kaplinsky, and of Colonel (res.) Dan Teresa, who coordinate the planning of the "separation obstacle" route. Indeed, the detailed factual picture provided by respondents shows that in the present situation, there is a real security risk to the lives of the worshippers visiting Rachel's Tomb in Bethlehem. Petitioners, on the other hand, did not provide a factual basis capable of contradicting the arguments regarding the security considerations on which second respondent's decision is based. Therefore, as the administrative presumption of legality enjoyed by respondent was not contradicted, this argument must be rejected.

The Right to a Hearing

10. An additional argument raised by petitioners is that they were not given an opportunity substantively to exercise the right to a hearing prior to the decision to issue the new order. It is not contested that petitioners have the right to voice their arguments regarding the route of the order (see, *e.g.*: *Hess*, at paragraph 6; H.C.J. 358/88 *The Association for Civil Rights in Israel v. GOC Central Command*, 43(2) P.D. 529, 540); however, the respondents argue that this right was respected by respondents and exercised by petitioners *de facto*. Respondents' counsel claims that petitioners' appeals regarding the original order and the second order were weighed with great consideration, and that in formulating the new order, respondents were attentive to petitioners' arguments and claims, and open to altering their original position. Indeed, proof of that is to be found in the fact that as a result of petitioners' petitions and appeals, respondent changed his original position and made a substantial alteration to the route, adopting an alternative based, with certain changes, on one of the alternatives proposed by petitioners themselves. Moreover, it is not contested that respondents diligently notified petitioners of the granting of their appeal on the original order and of the

intention to alter the route, and even invited petitioners and their counsel to a survey, in order to present the proposed altered sequestration area. Nor is it disputed that petitioners were given an opportunity to appeal the second order and that they indeed did so. As a result of this appeal, an additional meeting was held between petitioners' and respondents' representatives, in order to find solutions acceptable to both parties. This attempt having failed, respondent considered the appeal and rejected it, in a detailed and reasoned opinion. Furthermore, it is not contested that petitioners were also given an opportunity to appeal the new order, which was also served to them along with explanation for their counsel, but none of petitioners submitted such an appeal. Indeed, the history of the order under consideration in this petition, and the alterations resulting from petitioners' claims regarding harm to them, show that respondents granted a full opportunity to those who might suffer from the route of the proposed road and fence to raise their arguments prior to the determination of the final route. Under these circumstances, we found no basis to the claim that petitioners' right to a hearing had been violated in this case, even though thought was given to that right only after the submission of the original petition.

Having rejected petitioners' argument regarding irrelevant considerations and the right to a hearing, we shall now examine petitioners' central claim in this case: the claim that respondent's decision does not grant sufficient weight to the compromise of petitioners' basic rights, and therefore suffers from unreasonableness and disproportionality.

The Reasonableness of Respondent's Decision

11. As stated in respondent's affidavit, the Land Sequestration Order was issued in order to increase the security of worshippers on their way to Rachel's tomb. The purpose behind the order, then, is to permit the freedom of worship of worshippers at Rachel's Tomb. However, the means chosen to realize this purpose inherently compromise petitioners' property rights and freedom of movement. The question before us, then, is whether the new order properly balances between the worshippers' freedom of worship, and the property rights and freedom of movement of petitioners. We shall discuss, first, the freedom of worship of the worshippers at Rachel's Tomb, and then the appropriate balance between it and petitioners' rights.

Freedom of Worship

12. Freedom of religion and worship is recognized in our legal system as a fundamental human right. By the early 20th century, this freedom had already been noted in article 83 of the Palestine Order in Council, 1922, and in the Declaration of Independence. Freedom of religion and worship was recognized by this Court long ago (*see, e.g.*: H.C.J. 292/83 *Temple Mount Faithful v. Commander of the Jerusalem Region Police*, 38(2) P.D. 449, 454 [hereinafter – H.C.J. 292/83 *Temple Mount Faithful*]; H.C.J. 650/88 *The Israel Movement for Progressive Judaism v. Minister of Religious Affairs*, 42(3) P.D. 377, 381; H.C.J. 257/89 *Hoffman v. Western Wall Administrator*, 48(2) P.D. 265, 340-341 [hereinafter – H.C.J. 257/89 *Hoffman*]; H.C.J. 1514/01 *Gur Arieh v. The Second Authority for Television and Radio*, 55(4) P.D. 267, 277 [hereinafter – *Gur Arieh*]). Freedom of worship has been recognized as an expression of freedom of religion, and as an offshoot of freedom of expression (H.C.J. 7128/96 *The Movement of Temple Mount Faithful v. Government of Israel*, 51(2) P.D. 509, 523-524 [hereinafter – H.C.J. 7128/96 *The Movement of Temple Mount Faithful*]; *Hess,* at paragraph 19). Some have even seen it as an aspect of human dignity (H.C.J. 3261/93 *Menning v. Minister of Justice*, 47(3) P.D. 282, 286 (Barak, J.); C.A. 6024/97 *Shavit v. Rishon le Zion Burial Society*, 53(3) P.D. 600, 649 (Barak, P.)). The believing person's yearning to worship in the place holy to him or her has been recognized as falling within the boundaries of freedom of religion and freedom of worship (*Hess,* at paragraph 16). To this, one may add the recognition of freedom of access of members of different religions to the places holy to them as a right worthy of protection, pursuant in Israeli law to the Protection of Holy Places Law, 5727 – 1967 (§1 and § 2(b)).

This Court recently discussed the status of freedom of worship in our legal system in *Hess*:

> Freedom of religion is a basic constitutional right of the individual, of higher status than even some other constitutional human rights. Freedom of worship is an expression of freedom of religion, and is a branch of freedom of expression . . . . the constitutional protection given to freedom of worship is thus fundamentally similar to the protection given to freedom of expression, and the constitutional balancing equation fitting for one is also applicable to the other . . . . this is a constitutional right of great force, and the weight of the right is great, in the range of balances with contradicting social values.

[(*Id.,* at paragraph 19, Procaccia J.)].

> Freedom of religion and worship . . . is held to be a constitutional right of supreme status, to be realized to the extent reality on the ground will allow, while defending the worshippers' safety and lives.

[(*Id.,* at paragraph 15)].

In that case, an issue very close to the one under consideration now was discussed: the legality of a sequestration and demolition order issued by the Commander of IDF Forces in the Judea and Samaria Areas, in order to enhance the security of pedestrians on the "worshipper's path" in Hebron (a path used by the Jewish residents of Kiryat Arba who wish to exercise their right to pray at the Machpela Cave). Regarding the right of the worshippers in that case, the Court said:

> The worshippers wishing to travel to the Machpela Cave by foot on Sabbath and holy days wish to exercise their constitutional right to freedom of worship in a holy place. **This right is of special importance and weight in the hierarchy of constitutional rights.**

[(*Id.,* Procaccia, J.; emphasis added)].

13. It is uncontested that Rachel's Tomb is a holy place to Jews and that the site is understood, in the eyes of Jews, to have been a holy place and site of worship for generations upon generations. Indeed, there is much evidence of the site's holiness to Jews and of pilgrimage to it, even since ancient days. In Dr. S. Berkowitz's book *The Wars for Holy Places – the Struggle for Jerusalem and the Holy Places in Israel, Judea, Samaria and the Gaza Strip* (The Jerusalem Institute for Israel Studies, 2000), to which we were referred by the state's response, Dr. Berkowitz notes that the site known today as "Rachel's Tomb," in the outskirts of Bethlehem, has been identified as the tomb of Rachel the matriarch for more than a millennium. He adds that Rachel, a holy figure in Judaism, symbolizes motherhood, mercy, redemption, and the return to the land of Israel in the bible and in Jewish tradition. Moreover, her tomb is said to be considered the third holiest site to Jews after the Temple Mount and the Machpela Cave (*id.,* at p. 301). In the book, Dr. Berkowitz points out that despite its additional holiness to Islam, writers and pilgrims from the middle ages forward, Jews and Muslims alike, refer to Rachel's tomb as a holy place for Jews. He also notes that the Jews' rights to possess the site and pray at it were officially recognized in

a firman (decree) of the Sultan of Turkey in the mid 19th century, as a result of a fundamental remodeling of the site in 1841, funded and instructed by Moses Montifiore (*id.,* at pp. 301, 17-19). During the period of the British mandate, the *status quo ante* at the site was preserved, and the Jews were allowed to visit the tomb and worship there (*id.,* at pp. 26-29). Although the site was well preserved under the control of the Kingdom of Jordan after the War of Independence, the Jews were unable to exercise she right of access to the tomb *de facto* (*id.,* at p. 302). However, after the Six Day War, control of the tomb returned to Israel, and new status was given to the centrality of the tomb as a site of religious worship. The site was renovated and became a site of prayer as well as a tourist attraction. When the boundaries of Jerusalem were expanded after the Six Day War, Rachel's Tomb was not annexed to Jerusalem, and its status within the Bethlehem municipal borders was preserved. Nevertheless, the right of access to it was once again exercised, and the tomb became a magnet for worshippers and tourists (*id.,* at p. 302).

Respondents' counsel adds that even according to the interim agreements between Israel, the P.L.O. and the Palestinian Authority, in which, *inter alia*, contol of Bethlehem was transferred to the Palestinian Authority, the right of Jews to exercise freedom of worship at the places holy to them was preserved, and that according to these agreements, the security control over the tomb and the access roads to it remained in Israel's hands (*see also*, *Berkowitz*, at pp. 215-220, 287, 302-303). As for petitioners, they do not contest the right of the worshippers to freedom of worship at Rachel's Tomb, and do not even contest that they have a right to exercise this right with relative security. The point of departure for our discussion, then – and we express no opinion regarding the political status of Rachel's Tomb or the right to possess it – is that the Jewish worshippers have a basic right of freedom of worship at Rachel's Tomb.

14. Freedom of worship is not an absolute right. It is a relative right, which will in certain cases retreat when confronted by public interests or other basic rights. As this Court quite fittingly stated:

> Freedom of conscience, belief, religion, and worship, to the extent that it is exercised *de facto*, is not an absolute right . . . my right to worship does not allow me to trespass my fellow citizen's border or to commit nuisance against him. Freedom of conscience, belief, religion, and worship is a relative freedom. One must balance between it and other rights and interests which are also worthy of protection, like

> private and public property and freedom of movement. One interest which must be considered is public order and security.

[H.C.J. 292/83 *Temple Mount Faithful*, at p. 455 (Barak, J.)].

Indeed, in certain situations, the military commander is authorized to restrict or even prevent exercise of freedom of worship at a certain site in order to protect public order and security, and in order to protect the safety and lives of the worshippers themselves (*Hess,* at paragraph 19; *see also* H.C.J. 2725/93 *Salomon v. Jerusalem District Commander, Israel Police*, 59(5) P.D. 366 [hereinafter – H.C.J. 2725/93 *Salomon*]; H.C.J. 4044/93 *Salomon v. Jerusalem District Commander, Israel Police*, 49(5) P.D. 617 [hereinafter – H.C.J. 4044/93 *Salomon*]. However, before he restricts the freedom of worship, the military commander must examine whether he is able to take reasonable steps which will allow the exercise of freedom of worship while ensuring the safety of the worshippers. As this Court stated:

> Freedom of conscience, belief, religion, and worship is limited, to the extent necessary in order to preserve public security and order. Of course, before any act which could infringe upon and limit this freedom is taken due to a threat to public security, the police should take all reasonable steps at their disposal to prevent the threat to public security without compromising the right to conscience, belief, religion and worship. Therefore, if the concern regards violence by a hostile crowd against the worshippers, the police must act against this violence, not against the worshippers. If however reasonable action by the police cannot, due to its limitations, remove the threat to public security, there is no choice but to limit the freedom of conscience and religion, as necessary in order to preserve public security.

[H.C.J. 292/83 *Temple Mount Faithful*, at p. 455 (Barak, J.); *see also Hess,* at paragraph 19.]

In the case before us, the right of worship has not been denied to the worshippers by the authorities, but, rather, has been infringed upon as a result of the danger to them from terrorist attacks targeting them. Therefore, respondent decided to find means which would reduce the danger to the security of the worshippers, while preserving their right to worship. Respondent's decision was to grant substantial weight to the basic right of freedom of worship, while determining a reasonable balance between it and

the public interest of preservation of public security. However, in this case, opposite the worshippers' right to freedom of worship, stands not only the interest of public peace, but also petitioners' property rights and right to the freedom of movement, which are likely to be compromised as a result of acts taken to preserve the security of worshippers, and which have already been compromised by the means chosen by respondent (*see and compare Hess*, at paragraph 18). We emphasize: respondents do not contest that petitioners have these basic rights or that respondent must consider them in his decision, and petitioners, on their part, do not contest the worshippers' basic right to freedom of worship at Rachel's tomb. Thus, the dispute between the parties is whether the new order determines an appropriate balance between the worshippers' freedom of worship and petitioners' freedom of movement, and between the worshippers' freedom of worship and petitioners' property rights.

Freedom of Worship v. Freedom of Movement

15. As stated above, petitioners' central argument is that the worshippers' exercise of freedom of worship according to the order severely infringes upon petitioners' freedom of movement in Bethlehem, and that therefore the order should be invalidated. Freedom of movement is among the individual's most basic rights and it is recognized in our legal system both as a basic right standing on its own two feet (*see, e.g.*: H.C.J. 672/87 *Atamallah v. GOC Northern Command*, 42(4) P.D. 708, 709, 712 [hereinafter – *Atamallah*]; H.C.J. 153/83 *Levi v. Southern District Commander, Israel Police*, 38(2) P.D. 393, 401-402 [hereinafter – *Levi*]), and as a right derived from the right to liberty (H.C.J. 5016/96 *Horev v. Minister of Transportation*, 51(4) P.D. 1, 59 (Barak, P.), 147 (M. Cheshin, J.) [hereinafter – *Horev*]). In addition, there are those who view this freedom even as a derivation of human dignity (*Horev*, at p. 59 (Barak, P.); *Shavit*, at p. 651 (Barak, P.); H.C.J. 2481/93 *Dayan v. Jerusalem District Commander*, 48(2) P.D. 456, 472 (Barak, V.P.) [hereinafter – *Dayan*]; *compare Horev*, at p. 181 (Tal, J.)).

This Court discussed the status of the freedom of movement in our system of law in *Horev*, in which, *inter alia*, the relationship between freedom of movement, on the one hand, and injury to religious sentiments and way of life on the other, was discussed. In that case, President Barak stated that freedom of movement is "among the more basic rights" (*id.,* at p. 49), that it "stands in the front row of human rights" (*id.,* at p. 51), and that it is "a

freedom located at the highest level of the hierarchy of rights in Israel" (*id.*, at p. 53). The President added in *Horev* that "usually, the freedom of movement within the borders of the state is placed on a constitutional level similar to that of freedom of expression" (*id.*, at p. 49). It is noteworthy that similar words about the status of freedom of movement were written even by the Justices who did not concur with President Barak's majority opinion in *Horev* (*see id., e.g.,* at p. 147 (M. Cheshin, J.) and at p. 181 (Tal, J.)). On the status of freedom of movement in Israeli law after *Horev* see Y. Zilbershatz "Freedom of Movement Within a State" 4 *Mishpat U'Mimshal* 793, 806-809 (1998) [hereinafter – Zilbershatz].

Freedom of movement is also recognized as a basic right in international law. Intrastate freedom of movement is protected in a long line of international conventions and declarations on human rights (*e.g.*, International Covenant on Civil and Political Rights, 1966 §12, Universal Declaration of Human Rights, 1948 §13, Fourth Protocol (1963) of the European Convention on Human Rights, 1950 §2) and it seems that it is also part of customary international law (*see Zilbershatz*, at pp. 800-801).

However, like freedom of worship and almost all other liberties, the freedom of movement is not absolute; it is relative, and must be balanced against other interests and rights. It is so in our constitutional law (*see, e.g., Horev,* at pp. 39, 181); as it is also in international human rights law – for example, in article 12 of the International Covenant on Civil and Political Rights:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . .
>
> . . .
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

See also id., §4, regarding the possibility of restricting the rights listed in the covenant at a time of national emergency. We emphasize, that due to the stances of the parties in their arguments before us, we need not decide

whether, or to what extent, the principles of Israeli constitutional law and the international conventions on human rights apply in the Judea and Samaria areas (*compare*: H.C.J. 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57(2) P.D. 349, 364; H.C.J. 13/86 *Shahin v. The Commander of IDF Forces in the Judea and Samaria Area*, 41(1) P.D. 197, 210-213). Suffice it to say that within the framework of the military commander's duty to employ his discretion reasonably, he must consider among his considerations the interests and rights of the local population, including the need to minimize the burden of its freedom of movement; and that, respondents do not contest. How, then, shall the military commander balance between the basic right of freedom of movement and the basic right of freedom of worship?

16. The appropriate equation for balancing between these two rights is determined by the relative weight of each of these rights, as "the balancing equations vary according to the identity of the competing values" (*Dayan*, at p. 475):

> the proper standard regarding all types of cases is **not** constant and consistent . . . rather, a fitting test should be adopted, in consideration of the **essence** and importance of the competing principles, our view regarding their **relative priority** and the level of **protection** we wish to grant to each principle or interest.

[H.C.J. 448/85 *Dahar v. Minister of Interior*, 40(2) P.D. 701, 708 (Ben Porat, V.P.) [hereinafter – *Dahar*].

In the case before us, we face a clash between two basic rights of equal weight. As stated above (paragraphs 12 & 15), both freedom of worship and freedom of movement have been recognized in our caselaw as belonging to the highest level of the hierarchy of rights (regarding freedom of worship, *see Hess*, at paragraphs 15 & 19; regarding freedom of movement see *Horev*, at pp. 49-53). Moreover, both freedom of worship and freedom of movement have been recognized by the caselaw of this Court as having weight equal to that of freedom of expression (*see Hess,* at paragraph 19 and *Gur Arieh*, at p. 285 regarding freedom of worship; *see Horev,* at p. 49, *Dahar*, at pp. 706, 708 and *Levi*, at pp. 401-402 regarding freedom of movement). In addition, an identical balancing equation is employed for both of them, in balancing them against the same public interests (regarding freedom of worship, *see, e.g.,* H.C.J. 292/83 *Temple Mount Faithful*, at p. 456; H.C.J. 2725/93 *Salomon*, at

p. 369; H.C.J. 4044/93 *Salomon*, at p. 620; H.C.J. 7128/96 *The Movement of Temple Mount Faithful*, at pp. 523-524; regarding freedom of movement, *see, e.g.*, *Horev*, at p. 54 (Barak, P.): "in light of the proximity between intrastate freedom of movement and freedom of expression and worship, it seems to me that the same probability demand [applicable to compromise of the freedom of expression and worship – D.B.] should apply to the compromise of intrastate freedom of movement").

The conclusion that we are dealing with a clash between two rights of equal weight means that the balance needed in this case is a horizontal one, which will allow both rights to coexist. This Court's statement, regarding the balance between the right to assemble and march and the right of privacy in one's home, is fitting:

> We deal here with two human rights of equal status, the balance between which should be expressed by reciprocal concession, by which each right must concede to the other, so that both rights may coexist . . . the balance needed between the rights is a horizontal balance.

[*Dayan,* at p. 480.]

Indeed, "in the organized life of society there is no 'all or nothing.' There is 'give and take,' and balance between the different interests" (H.C.J. 148/79 *Saar v. The Minister of the Interior and the Police*, 34(2) P.D. 169, 178 (Barak, J.)). Therefore, freedom of worship is not to be exercised at the expense of the complete negation of freedom of movement, rather, reciprocal limitation of the scope of protection granted to each of these liberties is needed, so that the "breathing room" of each of the competing values can be preserved (*Dayan*, at p. 481). The balance which allows the essential exercise of freedom of worship, without essential compromise of freedom of movement, must thus be found (*Levi*, at p. 402). In the framework of this balance, one must aspire to preserve the "nucleus" of each of these liberties, and to compromise each of them only at its "shell." In addition, the level and essence of the damage must be considered (*Shavit*, at p. 651).

Against the background of the above, we shall examine the essence of the infringement of petitioners' freedom of movement, as well as its severity in this case, in order to decide whether the new order indeed brings about the essential realization of freedom of worship without essentially compromising

freedom of movement, as proper in the horizontal balancing between these two liberties of equal weight.

17. How, then, shall we examine the severity of the infringement upon the freedom of movement of petitioners, when their place of residence or work is located in the area adjacent to Rachel's Tomb? A number of subtests, or tools of measurement, for the examination of the severity of the infringement upon the freedom of movement of an individual, can be gleaned from the caselaw of this Court, predominantly: the geographical scope of the limitation of movement, the intensity of the limitation of movement, the duration of the limitation, and the interests whose exercise require the freedom of movement.

In regard to the subtest concerning the **geographical scope of the restriction of movement**, Justice Türkel stated:

> Needless to say, the most severe infringement of the freedom of movement and the right to liberty is the imprisonment of a person in jail, pursuant to an arrest or imprisonment order, and the restriction of his or her movements between the walls of the prison. Lesser is the restriction of movement to a particular place of residence, such as an alternative to detention subject to the indicted's remaining at a certain address ('house arrest'). Even lesser is the restriction of movement to the boundaries of a certain city, and lesser than that is the restriction of movement by forbidding entry into the boundaries of a certain city. Lesser still is the compromise of freedom of movement by forbidding exit from the country. . . . Lesser still is restriction by forbidding entry into a certain country, such as forbidding entry into an enemy country.

[H.J.C. 4706/02 *Salah v. Minister of Interior*, 56(5) P.D. 695, 704 [hereinafter – *Salah*].]

Justice Goldberg wrote similarly in *Atamallah*:

> Restriction orders can be varied and diverse, and the severity of their injury is not the same for each person. A restriction order imposing 'house arrest' on the restricted party is not . . . like a restriction order restricting his or her movements to a large area, in whose boundaries he or she is at liberty to move freely around. A restriction to a particular area, to a person who resides and works in it, is not the same as a person 'exiled' to that area. Similarly, an injury in forbidding a

person to leave the country is different than a restriction of movement within the country.

[*Atamallah,* at p. 710. *See, also, Dahar*, at p. 714-715 (Bach, J.); *Horev*, at p. 147 (M. Cheshin, J, dissenting).]

An additional subtest, as mentioned, is **the intensity of the restriction of movement**. Obviously, the injury caused by complete negation of freedom of movement is more severe than that resulting from a partial restriction of freedom of movement; and as the level of restriction lessens, so does the intensity of injury. Thus, for example, it was determined, regarding the severity of injury to freedom of movement due to closing of roads, that the closing of a road which is an exclusive access road is unlike the closing of a road when adjacent alternative roads remain open; the closing of a main transportation thoroughfare is unlike the closing of an internal neighborhood road; the closing of a road leading to absolute denial of access is not the same as a closing leading only to the lengthening of the road users' route and hassle; and as the lengthening of the route and the hassle due to the closing of the road lessen, so lessens the severity of the injury to freedom of movement (*Horev*, at p. 67 (Barak, P.); at pp. 98-102 (Or, J.); at pp. 145-156 (M. Cheshin, J.); at p. 162 (Levine, J.); H.C.J. 174/62 *Religious Coercion Prevention League v. Jerusalem Municipal Council*, 16(4) P.D. 2665, 2668 [hereinafter – *Religious Coercion Prevention League*]; H.C.J. 531/77 *Baruch v. Tel Aviv Transportation Inspector – Central Sign Authority*, 32(2) P.D. 160, 165, 167 [hereinafter – *Baruch*]). Indeed, total prevention of movement is not the same as delay of movement or burdening of it, and as the level of burden decreases, so decreases the intensity of the injury to freedom of movement. Likewise, it was determined in the assessment of the severity of the injury involved in the separation fence, that considerations such as the number and locations of exit gates and passage points planned in the fence, the distance between them and the places of residence and work of the local residents, and the comfort and speed of passage through those gates and passage points, must be taken into account (*see*: *Abu Tir,* at paragraph 12; *compare Beit Sourik*, at paragraphs 60, 74, 76, *and especially* 82; *see also* K. Michael & A. Ramon *A Fence Around Jerusalem – The Construction of the Security Fence ("Separation Fence") Around Jerusalem* (Jerusalem Institute for Israel Studies, 2004) pp. 79-82).

According to the subtest regarding **duration of the restriction**, the longer the duration of the limitation on freedom of movement, the greater the severity

of the injury (*Salah*, at p. 705). A curfew negating a person's right to exit his home for a few hours is not the same as house arrest negating a person's right to leave his home for a number of weeks or even months; similarly, a restriction of the right to leave the country for a few days is not the same as a restriction of this right for a number of months or even years (*Salah*, at p. 705); just as the partial closing of a thoroughfare during times of prayer is not the same as its closing for the entire Sabbath (*Horev*, at p. 66).

According to the subtest regarding **the person's interest in exercising the freedom of movement,** the purpose of the movement or journey is examined, in order to assess the severity of injury to the freedom of movement. Indeed, one's travel for the purpose of urgent medical care is not the same as one's travel for the purpose of sightseeing (*Salah,* at p. 705). Professor Zilbershatz proposes a similar test in her article on freedom of travel:

> The more important the purpose of the movement, the greater the constitutional protection that is to be given to the right to freedom of travel. Accordingly, it may well happen that travel for a certain purpose which is not of highest priority, such as for passage only, will be recognized as a protected basic right; but that, to a lesser extent than movement for a most high purpose, such as saving a life.

[*Zilbershatz*, at p. 815.]

A similar approach was expressed in *Horev*, where all the Justices agreed that limitation of movement on Bar Ilan street must be imposed in a way which would leave the street open to security and emergency vehicles (*see, e.g.,* at p. 67 (Barak, P.) and p. 183 (Tal, J.). Indeed, examination of the severity of a limitation of movement must include recognition of the fact that the right of movement is not only a right which exists for its own sake, but is also a right needed in order to realize other rights and interests. Therefore, for example, it was determined in *Horev*, that the injury to the secular public which uses Bar Ilan street for passage from one part of Jerusalem to another, is lesser than the injury to the secular population residing in the vicinity, since, *inter alia*, "the latter population has additional special needs. The difficulties with which it will have to deal are different. The blow to freedom of movement, and to other interests whose realization depends upon the freedom of movement of this population, is different" (*id.,* at p. 104 (Or, J.); *see also* at pp. 67-68 (Barak, P.); at pp. 163, 167 (Levin, V.P.); *and* at pp. 170-171 (Mazza, J.). Thus, for example, it was determined also in *Beit Sourik* that where the

"separation obstacle" route separates farmers from the lands which provide their livelihood, it impinges upon their freedom of movement severely (*id.,* at paragraphs 60, 68-71, 80-82). Accordingly, the examination of the severity of the injury stemming from the limitation of freedom of movement must also take into consideration the purpose of the movement, and the intensity of the interests whose realization depends upon that movement.

Against the backdrop of these principles, we shall examine the injury to the freedom of movement in this case.

Application of the General Principles in the Specific Case

18. By issuing the land sequestration order, respondent intended, as mentioned, to enhance the security of worshippers on their way to Rachel's Tomb, in order to allow the realization of the worshippers' freedom of worship. Respondent chose to realize this purpose (about whose status as a worthy purpose there is no contest) by creating a bypass road, which would be used exclusively as an access route to Rachel's Tomb, and would be defended by walls. The solution of paving a bypass road for the worshippers is an appropriate solution, as it makes possible the securing of the worshippers' access to Rachel's Tomb in order to exercise their freedom of worship at the site, without compromising the freedom of movement of the local population on the existing roads of Bethlehem, as might have occurred as a result of the original order. Respondents' counsel even argues that when the new arrangement, which will ensure the safe access of the worshippers to the tomb, is employed, it will be possible to lift the current restrictions on the freedom of movement of most of the residents of the area between checkpoint 300, located south of Jerusalem, and Rachel's Tomb. Moreover, the new order's blow to the residents' freedom of movement is far smaller (both in terms of the number of affected residents and in terms of the severity of the injury), than that according to the first and second orders, and this is not contested by petitioners. What then is the remaining burden to the residents' freedom of movement?

Study of parties' arguments, and of maps and aerial photographs attached to them, reveals that even after the new order's alteration of the route, there are a number of residents whose freedom of movement is still compromised to a certain extent by the securing of the worshippers' access to the tomb. As

a result of the second order's alteration of the route (which was preserved also in the new order), the movement of most of the petitioners living along the Hebron Road is not disturbed by the sequestration order, since, as mentioned, the road paved will bypass their homes from the west, in an undeveloped area. Thus, the number of residents whose freedom of movement will be compromised has been reduced, since the original order, by approximately 70% (by respondents' estimation). The remaining harm is to tens of residents who reside in proximity to Rachel's Tomb, in the area where the bypass road will connect in an easterly direction to the Hebron Road and then continue south to the tomb. Due to the new order's alteration, these residents living adjacent to the tomb will no longer be surrounded by walls, and their movement to the other parts of Bethlehem will be free, with no need to pass a checkpoint. Nevertheless, there will be a restriction of the movement of residents living adjacent to the tomb, as they will not be able to cross the Hebron Road, and will be forced to bypass the sequestration order area from the south.

Thus, the second order brought about a substantial reduction in the number of residents whose freedom of movement will be compromised, whereas the new order brings about a substantial reduction in the severity of the injury to the freedom of movement of the remaining harmed residents. Indeed, in assessing the level of harm to the local residents by the selected route, not only the number of injured residents, but also the severity of the blow to their rights, must be taken into consideration. The following passage, written recently about the separation fence in the Tsur Baher village, is fitting in this case as well:

> In assessing the proportionality of the proper route, both the number of people whose rights are liable to be impinged upon, and the strength of the compromised rights, must be considered. These factors must be weighed according to their relative weight, in order to formulate a route which, in the big picture, will cause the smallest damage to the local residents. Examining the **number** of right holders harmed under each alternative is not enough. Without an assessment of the **strength** of the rights liable to be compromised, the proportionality of the chosen alternative cannot be assessed . . . The assessment of the strength of the compromised rights should be performed together with consideration of the number of residents affected, whilst weighing appropriately between them.

[Abu Tir, at paragraph 12; emphasis in original.]

Reduction in the severity of the new order's blow to freedom of movement, compared to that of the second order, is manifest especially in two of the subtests mentioned above: the geographic scope of the restriction of movement, and the intensity of the restriction of movement.

As for the geographical scope of the limit on movement, according to the second order (now cancelled), the residents of the planned ring-shaped road area adjacent to Rachel's Tomb, were to be left within a zone surrounded by walls, exit from which – even to Bethlehem itself – would necessitate crossing a checkpoint. That is: according to the second order, the issue was not one of restricting the residents' ability to enter Jerusalem or even their restriction to the area of Bethlehem, rather one of restriction to a most limited area. According to the new order, however, the ring-shaped road has been cancelled and none of the petitioners will be left in a zone surrounded by walls. The restriction to the movement of the residents is now limited, in terms of its geographical scope, to a restriction of their travel into Jerusalem, and even this restriction does not stem directly from the order under consideration in this petition. Clearly, therefore, from the standpoint of this subtest, the injury to the freedom of movement has been immeasurably lessened.

Regarding the subtest dealing with the intensity of the restriction of movement, here too there is a notable reduction. According to the solution proposed in the framework of the second order, residents of said zone wishing to leave it would have to travel to checkpoint no. 300 (a distance of 250 meters) and pass a checkpoint in order to enter Bethlehem. However, according to the solution adopted at the end of the day in the new order, movement of all petitioners within Bethlehem will be free and direct, with no need to pass checkpoints. Movement of residents of said zone to the west will now be completely open, whereas their movement east, to the other side of the Hebron Road, will necessitate bypassing Rachel's Tomb and the walls protecting access to it from the south. True, this bypass lengthens the journey of residents of the zone on their way to the eastern part of Bethlehem, by a few hundred meters; and this will cause some extent of burden and discomfort; but this burden obviously is much lighter than the burden that would have been caused by the need to cross a checkpoint every time zone residents wished to enter the zone from, or exit it to, Bethlehem. This is a level of burden which a person is liable to be subject to in the context of regular, daily life, when entrance to a road is blocked due to traffic considerations, or considerations of public order.

From the standpoint of the subtest regarding interests whose realization depends on freedom of movement of zone residents, a noticeable reduction in the sequestration order's injury to petitioners can be observed. The solution proposed in the second order was liable to interfere most severely with the routine daily lives of residents living in that zone. The result of the second order would have been, that even the most basic daily activities - like going to work and to school, the purchase of necessary food staples, medical care, *et cetera* - would require leaving the zone and passing through a military checkpoint, making the residents' day to day lives very difficult. The zone residents' daily lives were likely to be obstructed also by the fact that the entrance of guests, visitors and service providers (including the workers for the first and third petitioners) into the zone would have been restricted. Now that the restriction of movement from the zone and into it has been significantly reduced, there will also be significant easing, regarding restrictions on the interests whose realization requires freedom of movement, in the daily lives of petitioners living in the zone.

Regarding the duration of the limitation, the new order involves no change from the previous orders. Although respondents emphasize that the steps in the order are temporary steps and argue that when the security situation improves and the threat to the lives of the worshippers visiting the tomb decreases, it will be possible to deconstruct the walls and end the limitation on petitioners' freedom of movement, the length of this period is unknown, and depends on the totality of circumstances in the area, which are likely to remain as they are for a very long time.

The conclusion is, therefore, that even the new order involves a certain infringement upon freedom of movement, but it seems that this is a much lesser infringement than that according to the first and second orders. We accept, of course, petitioners' principled argument that the very fact that respondents considered more injurious steps cannot, in and of itself, turn the means chosen in the end into reasonable or proportional ones. However, even on the merits of the issue, we are convinced that the injury remaining in this case – a certain lengthening of a small number of petitioners' route to the eastern part of Bethlehem – is not a severe and substantial infringement upon the freedom of movement which strays beyond the zone of proportional and reasonable means which respondents, as those responsible for security and daily routine in the area, are permitted to employ (*see Horev*, at p. 67 (Barak, P.); *Religious Coercion Prevention League*, at p. 2668; *Baruch*, at p. 165).

19. Petitioners further argue that the objective of the order – creation of safe access for worshippers wishing to realize their freedom of worship at Rachel's Tomb – could have been realized through other means whose injury to petitioners would be a lesser one. Thus, for example, they claim that it would be possible to ensure the worshippers' security through existing security arrangements (driving worshippers in a bulletproof bus with military escort to the tomb) or by digging a tunnel to the tomb.

Respondents completely reject petitioners' arguments. They argue that the means proposed by petitioners are not fit for the objective of the order, and even raise doubt whether the injury to petitioners resulting from these means would indeed be a lesser one. Respondents' argument is that in the present situation, in which only the area of the tomb itself is fortified, the vulnerable spot in terms of security is the access road to the tomb, which is topographically controlled by hostile territory, almost along its entire length. They further claim that movement to and from the tomb is a priority target for terrorist attacks, and that the existing method, involving vulnerable transport using a bulletproof bus and military escort, does not provide a worthy security response to the danger to the lives of the worshippers and the soldiers escorting them. (These arguments are reinforced today, *inter alia*, by the intelligence now known to the General Security Service due to the discovery of a number of terrorist cells in Bethlehem, as mentioned in respondents' additional declaration of November 8, 2004. Primarily, the existence of a terrorist cell led by a Palestinian policeman, which carried out terrorist attacks in Bethlehem and in the area of Rachel's Tomb, and even planned to carry out an attack against a bulletproof bus of worshippers using a car bomb.) Respondents even go so far as to argue that leaving the current situation as it is, involves a more severe burden on local residents, as the current situation requires many restrictions on movement, whereas the solution proposed in the new order will permit lifting them.

Regarding petitioners' proposal to dig a tunnel to the tomb, respondents claim that it is totally unclear, from the engineering standpoint, whether such a solution can be implemented, and in any case, the digging of a tunnel under a hostile area is not a good solution. They claim that such a solution involves the danger of the infiltration of a terrorist into the tunnel or the setting of an explosive charge in the tunnel, which are liable to turn the tunnel into a deathtrap for those inside it. Therefore, they argue, such a solution would require maintaining a military presence above the tunnel and its openings. As

such, it would not lead to an alteration in the military deployment in the area, and only increase the danger to those coming to the tomb. Respondents further argue that a tunnel would actually have the characteristics of a permanent solution, whereas respondents wish only to find a solution for a given and temporary security situation.

Thus, the parties disagree regarding the suitable security means for realizing the objective of the order and regarding the efficacy of the means proposed by petitioners. In general, in such a dispute regarding military-professional questions, in which a court of law has no supported knowledge of its own, a court will give great weight to the professional opinion of a military official, who has the professional expertise and with whom the responsibility for security lies (*see Beit Sourik*, at paragraph 47 and sources referred to *id.)*. In this case, petitioners did not lift the burden of convincing us that their position regarding the efficacy of means they proposed is to be preferred over that of the military commander.

Moreover, having reached the conclusion that the means chosen by respondents are not a severe and significant impingement upon freedom of movement, and that these means do not stray beyond the zone of proportional and reasonable means which respondents may employ, we need not decide whether the means proposed by petitioners are efficient or fitting. Indeed, it is not uncommon for there to be a number of ways to realize an objective, all of which are proportional and reasonable. It is for the military commander to choose between such ways, and as long as he does not stray beyond the "zone of proportionality" or the "zone of reasonability," the Court shall not interfere with his discretion (*Beit Sourik,* at paragraph 42). Indeed,

> It is but obvious that this Court does not 'enter the shoes' of the deciding military official . . . in order to substitute the commander's discretion with the discretion of the court, it considers the question whether, in light of the totality of existing data, the chosen means is found within the zone of means which can be seen, in the circumstances of the case, as reasonable . . .

[H.C.J. 1005/89 *Aga v. Commander of IDF Troops in the Gaza Strip Area*, 44(1) P.D. 536, 539; *see also Ajuri*, at p. 375-376; *Beit Sourik,* at paragraph 46.]

In sum, after having examined the essence of the injury to the freedom of movement and its severity in the case before us, we have reached the conclusion

that the solution chosen by respondents in the new order indeed ensures the substantive realization of freedom of worship without substantively infringing upon freedom of movement. Respondent's decision, in the framework of the new order, succeeds in preserving the "breathing room" of both of these two even-weighted liberties, and therefore, the balance is a reasonable one, in which there is no justification to intervene.

Freedom of Worship v. Property Rights

20. Property rights are also counted among basic human rights. This type of right has been recognized as a basic right worthy of protection in the caselaw of this Court (*see, e.g.*: H.C.J. 390/79 *Duikat v. Government of Israel*, 34(1) P.D. 1, 14-15; F.H.C.J. 4466/94 *Nusseibah v Minister of Finance*, 49(4) P.D. 68, 83-85) and has also received explicit constitutional anchoring in §3 of Basic Law: Human Dignity and Liberty. This right is also recognized in international law, and regarding territories held in belligerent occupation it is anchored, *inter alia*, in the Hague Regulations and in the Fourth Geneva Convention. However, a property right is not an absolute right, and it will at times have to retreat when faced with public interests and other basic rights (*see, e.g., Hess*, at paragraph 17; *Ajuri*, at p. 365).

The balance between freedom of worship and private property was recently discussed in *Hess*. In that case, this Court reached the conclusion that "there is no need to state a decisive position regarding the conceptual hierarchy between the right of worship and property rights, in order to decide the question of "how to balance between them in the case of a confrontation between them." That was because, in the circumstances of that case, the Court reached the conclusion that "even if we assume, for the sake of discussion, that these are constitutional rights of equal weight and equal importance, even then, in the horizontal balance between them," the balance performed by respondent there passed the test of constitutionality (*id.,* at paragraph 20). These words are applicable also in the case before us, and we too shall walk the same path, as we have been convinced that the infringement upon personal property in this case is marginal. Respondents' counsel argues, in his response to the second amended petition, that that the new order's infringement upon private lands is "completely marginal," and even petitioners placed their main focus on freedom of movement and did not indicate a concrete infringement upon any of the petitioners' property rights. Respondents' counsel claims that

an effort was made, in planning the route, to use the existing boundaries of land parcels as a basis, that only a few of the petitioners suffered damage to their property as a result of the sequestration, and that even then, the sequestration was of little bits of parcels only. Respondents' counsel further notes that rent and damages will be paid for such sequestration. Therefore, we have been convinced that the balance between freedom of worship and property rights in this case does not stray beyond the zone of reasonableness, even under the assumption that both rights are of even weight, for which the proper balancing is a horizontal balancing. We have also noted respondents' counsel's declaration that respondents will be willing to examine any request for pinpoint alterations in the route, in order to reduce the damage to landowners.

Conclusion

21. The Jewish worshippers have the basic right to freedom of worship at Rachel's Tomb, and respondent is responsible for securing the realization of this right, while protecting the security and lives of the worshippers. In examining the means for realization of this purpose, respondent must take into consideration the basic rights of petitioners, including property rights and freedom of movement, and balance properly between them. In this case, the solution adopted by respondent, after he reexamined his original plans and followed the instructions of the caselaw of this Court, indeed ensures the realization of the worshippers' freedom of worship without causing a substantial impingement upon petitioners' freedom of movement and property rights. We therefore have not found that the arrangement made at the end of the proceedings is characterized by unreasonableness which would justify our intervention.

Therefore, the petition is denied.

JUSTICE E. RIVLIN
I Concur.

JUSTICE E. CHAYUT
I Concur.

Decided, therefore, as stated in the Judgment of Justice Dorit Beinisch.

Given today, February 3, 2005.

The "Early Warning" Procedure

HCJ 3799/02 **Adalah**

v.

GOC Central Command, IDF

International law under the Hague Regulations and the Fourth Geneva Convention contains restrictions on the involvement of civilians in conflict. The Israeli Supreme Court decided that the consensual use of a local resident in an occupied territory to improve the safety of soldiers and civilians violates international law.

The IDF's 'early-warning' procedure was a method used to apprehend wanted terrorists who, according to military intelligence, were hiding in a house among civilians and seeking to resist arrest. To avoid a needless battle that could injure or kill innocent neighbors or family members, the IDF's written policy sought "assistance of a local resident" to inform the suspect that the army is planning his arrest and to inform those around him that it could be dangerous for them to remain in the house.

The policy operated by the IDF required the consent of the local resident and prohibited the IDF from using threats, coercion, or any type of contact beyond verbal contact. In accordance with international law, the IDF explicitly forbade its soldiers from using civilians as "human shields." On this basis, the government argued that the policy was within the occupying force's discretion and duty, under the Hague Convention, to promote the security of both its military and the local civilian population.

The petitioners, aided by a brief from Prof. Eyal Benvenisti from the Tel Aviv University Faculty of Law, submitted that, even with its limitations, the procedure is unlawful under the law of armed conflict because it is ripe for abuse and involves civilians in combat.

Writing for a unanimous court, Supreme Court President Barak identified the schism in the normative legal framework. An occupying force has a duty to ensure the security of the civilian population and of its own soldiers; but the military also has a duty to safeguard the life of the local resident sent to make the early warning. Under the latter duty, the military may not force a local resident to make an early warning, nor may it place him in harm's way. But under the former duty, can the military use a civilian to make a consensual early warning where there is no harm expected?

The Court decided that it could not. President Barak identified a "common thread" in the law prohibiting the use of civilians for the war effort of the occupying army. This principle stands at the base of the prohibition on the use of human shields. Second, the President invoked the central principle from international humanitarian law requiring separation and distinction between civilian populations and military activity. Even with consent, a civilian may not be brought into a zone of combat by the military – a civilian is "not permitted to waive his right" to be uninvolved in conflict under humanitarian law.

Third, the Supreme Court President noted, in a situation of such inequality between civilian and soldier, consent is unlikely to be real in many cases. It would be "difficult to judge when his consent is given freely and when it is the result of overt or subtle pressure," the Court decided.

Finally, President Barak indicated, it is not always possible to predict the level of risk to which the civilian might be put.

Supreme Court Justice Cheshin wrote a concurring opinion expressing the difficulty with which he reached his conclusion. He believed that a father or a neighbor would want to get his family out of the house so that the terror suspect could be confronted individually.

Nonetheless, the practicality of the situation demanded that Israel abandon the procedure in his view. "Under pressure, in tense circumstances, in conditions of mortal danger" there will be "deviations from the directive [to get consent], misunderstandings, or incorrect readings of the conditions of the field" that can lead to abuse. He cited a concern with "bureaucratic routine" which could "deteriorate" the necessary "sensitivity" for such a policy.

Supreme Court Justice Beinish, concurring, also recognized that the procedure is "intended to ensure that the residents of the house in which the terrorist is hiding will not be injured during the arrest."

Justice Benish found that there was danger inherent in the use of a civilian for the procedure and, thus, the government's insistence that the procedure was safe could not be credited. She reiterated President Barak's concern that "there is no permissible way to obtain such consent," noting that some actual applications of the procedure involved coercion.

HCJ 3799/02

1. **Adalah – The Legal Center for Arab Minority Rights in Israel**
2. **The Association for Civil Rights in Israel**
3. **Kanon – The Palestinian Organization for the Protection of Human and Environmental Rights**
4. **Physicians for Human Rights**
5. **B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories**
6. **The Public Committee Against Torture in Israel**
7. **Center for the Defense of the Individual**

v.

1. **GOC Central Command, IDF**
2. **Chief of the General Staff, IDF**
3. **The Minister of Defense**
4. **The Prime Minister of Israel**

The Supreme Court Sitting as the High Court of Justice
[June 23, 2005]

Before President A. Barak, Vice-President M. Cheshin & Justice D. Beinisch

Petition for an *Order Nisi* and an *Interlocutory Order*
For Petitioners: Marwan Dalal
For Respondents: Shai Nitzan

JUDGMENT

President A. Barak

According to the "Early Warning" procedure, Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him if the suspect resists arrest. Is this procedure legal? That is the question before us.

A. The Petition and the Course of its Hearing

Petitioners, seven human rights organizations, submitted this petition after the commencement of combat activities in the territories, in the framework of operation "Defensive Wall." They contend that the IDF is using the civilian population in a way that violates fundamental norms of international and constitutional law. They have based their arguments on reports in the Israeli press and upon reports of international human rights organizations (*e.g.* Human Rights Watch, B'tselem, and Amnesty International). These reports contain descriptions of many cases in which the IDF made use of local residents for military needs. Described, *inter alia*, are cases in which the IDF forced Palestinian residents to walk through and scan buildings suspected to be booby-trapped, and in which it ordered them to enter certain areas before the combat forces, in order to find wanted persons there; also described are cases in which the army used residents as a "human shield" which accompanied the combat forces, to serve as a shield against attack on those forces. Thus, residents were stationed on porches of houses where soldiers were present, in order to prevent gunfire upon the houses. Further described were cases in which local residents were asked about the presence of wanted persons and weapons, under threat of bodily injury or death, should the questions go unanswered. According to the reports, relatives were taken in certain cases as hostages, in order to ensure the arrest of wanted persons.

2. It was against this background that petitioners submitted this petition (on May 5, 2002). They contended that respondents were violating Israeli constitutional law and the fundamental norms of public international law, when the civilian population was used during operations in the Judea and Samaria areas. They asked that this Court issue an interlocutory injunction, ordering respondents to refrain from using people as a "human shield" or as hostages during their military operations. Respondents responded that:

> In light of various complaints which have reached respondents, including, *inter alia*, the information detailed in the petition, and taking no position on the question whether the content of the complaints is true or not, and to eliminate any doubt, the IDF has decided to immediately issue an unequivocal order to the forces operating in the field, that all forces operating in the field are strictly forbidden to use civilians, *qua* civilians, as a 'live shield' against live fire or attacks by the Palestinian side, or as 'hostages.' It is further clarified in the order that this rule applies in houses, in streets, and in any area or place where IDF forces are operating.

It is to be noted, that some of the complaints detailed in the petition do not relate to use of people as 'human shields,' rather to the assistance which the IDF receives from Palestinian residents, for the purpose of entry into houses of other Palestinian residents during operational activity. In light of the complaints detailed in the petition, the IDF decided to clarify that such acts are also forbidden, in those cases in which the commander in the field believes that the civilian is liable to be exposed to danger of bodily harm.

3. Respondents later announced (on May 20, 2002) that the Chief of the General Staff had instructed the IDF to prepare orders relating to the subject. As a result, the instructions providing that it is strictly forbidden to use Palestinian civilians as a live shield (to position civilians alongside army forces in order to protect the soldiers from injury) were issued. The instructions further provided that it is strictly forbidden to hold Palestinian civilians as "hostages" (to seize and hold civilians as a means to pressure others). Last, the instructions provided that it is strictly forbidden to use civilians in situations where they might be exposed to danger to life or limb. However, respondents did not rule out the possibility of being assisted by the local population. They emphasized that such assistance is solicited in situations where it will allow avoidance of a military act liable to cause greater harm to local residents, to soldiers, and to property. At the first hearing in the petition (on May 21, 2002), before Justices T. Strasberg-Cohen, D. Beinisch, and E. Rivlin, it was decided that respondents shall submit a supplementary response, in which they shall update the Court regarding preparation of an order to formalize and clarify the issue of soliciting Palestinian residents' assistance.

4. Petitioners submitted a statement (on August 18, 2002), attempting to illustrate the illegality of using civilians, through the case of the death of Palestinian civilian Abu Muhsan from the village of Tubas. Abu Muhsan was killed (on August 14, 2002) while participating in "the neighbor procedure," as IDF forces tried to arrest a dangerous wanted person. Petitioners contended that he was asked to assist soldiers during the arrest of a wanted person in a most dangerous situation, and that his death illustrates the illegality of use of civilians who are asked to assist the security forces. Against this background, petitioners claimed that one cannot rely at all upon security agencies' discretion in employing the procedures they enacted. In light of petitioners' statement, this Court issued (Strasberg-Cohen J. on August 18, 2002) a temporary interlocutory injunction, ordering respondents to refrain from using Palestinian civilians as a "human shield" or as "hostages," "including their use

for any military acts such as 'the neighbor procedure,' absolutely, irrespective of the discretion of any military personnel." This temporary interlocutory injunction was extended a number of times, with respondents' agreement.

B. The "Early Warning" Procedure

5. In respondents' supplementary statement (of December 5, 2002), they stated that IDF soldiers will continue to be absolutely forbidden from using civilians as a "live shield" against gunfire or attacks by the Palestinian side, or as "hostages." Regarding assistance by Palestinian residents in order to prevent loss of life, it was decided that an order would be issued, clarifying in which exact situations it is forbidden, in which permitted, and under what restrictions. Respondents stated that at the end of a debate in which various IDF officials participated, instructions and orders were issued (on November 26, 2002), along with an operational directive by the name of "Early Warning." This directive lays out the procedures for soliciting the assistance of local residents, in order to arrest wanted persons. The directive opens with the following general description:

General

> 'Early Warning' is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident's assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves (allowing their arrest without bloodshed). Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow the innocent to leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life.

When operations are preplanned, the procedure must be approved, in the framework in which the operations are approved. In cases of activity which was not preplanned, the approval of the brigade commander, his deputy, or of the brigade operations directorate officer is needed. When the procedure is used, an effort is to be made to find a person such as a relative or neighbor, who is acquainted with the wanted person or with the residents of the house, or has influence over them. The procedure is not to solicit the assistance of women, children, the elderly, or the disabled (clause 1 of the procedure).

6. The "Early Warning" directive also included the details of the procedure for approaching a resident in order to receive his consent to provide assistance. Due to its importance, we shall quote it in its entirety:

> 2. **Approaching the Local Palestinian Resident in order to Receive Assistance**
>
> **Contact with the local resident is to be made by the commander of the force directly, or via a translator. Contact is to be made in a language understood by the local resident, while strictly preserving human dignity. When contact is made with the resident, it is to be clarified to him that he is being asked to assist soldiers in order to prevent injury to innocent persons or their property.**
>
> **Emphases:**
>
> A. The civilian population has no obligation to assist the IDF in warning civilians of attack.
>
> B. Contact and persuasion, shall be exclusively verbal.
>
> C. It is strictly forbidden to use force or violence toward a local resident or others, in order to secure said assistance.
>
> D. It is strictly forbidden to threaten a resident or other people, that physical violence, arrest or other means will be used against them.
>
> E. It is strictly forbidden to hold people 'hostage' in order to secure the assistance of a local resident.
>
> F. If a local resident refuses – **under no circumstances is provision of assistance to be forced**" [emphases in original].

7. The operational directive included instructions regarding the use of the procedure, when the local resident has agreed to assist army forces. Here also the instructions will be fully quoted, in light of their importance:

> **3. Assistance of a Local Resident**
>
> **Solicitation of a local resident's assistance is intended to allow innocent persons to leave the building and/or allow the wanted persons to turn themselves in**

before there is a need to use force, which is liable to endanger human life. For that purpose, one may ask a local resident to approach the house, to give notice to those in the house that the army is present and to warn them that if they do not leave the house, the army is liable to use force in order to arrest the wanted persons.

Emphases:

A. It is strictly forbidden to use the local resident in military missions (*e.g.* locating explosive charges and intelligence gathering).

B. It is strictly forbidden to solicit the assistance of a local resident, when the commander of the force believes that the latter will be in danger – even with his consent.

C. It is strictly forbidden to use a local resident as a 'live shield' against attack. Thus, during the advance of the force, accompanied by the local resident, the latter is not to be positioned at the head of the force.

D. It is strictly forbidden to equip the local resident with military equipment (uniform, weapon, battle vest, *etc.*).

E. 'Early Warning' is not to be employed when there is another effective way to achieve the objective, whose results are less severe.

F. It is to be preferred that the local resident not be asked to enter the building, but rather be asked to relay the warning from the outside (through a knock on the door and a conversation with the persons in the building from the outside). He shall be asked to enter the building only in those cases in which there is no other way to relay the warning, and only if the commander of the force believes that the local resident will not be exposed to danger as a result of his entry into the building" [emphases in the original].

In addition, the operational directive provides that the assistance of a local resident will be terminated as soon as the persons in the house have exited it (clause 4(1) of the directive). It further provides that the assistance of a local resident shall be used only at a specific time and place, and that one may not "adjoin a local resident to a military force" (clause 4, emphasis B). It also determines the duty to terminate the assistance prior to attacking the building

or undertaking other forceful acts (clause 4, emphasis C). It was decided that military units can make use of the procedure only after having received detailed guidance about the directive.

8. As a result of the issuing of the "Early Warning" procedure, the Court held an additional hearing on the petition (on January 21, 2003), before Strasberg-Cohen J., Englard J., and Procaccia J. That hearing was not a hearing of the original petition. That petition is no longer relevant. During the hearing, petitioners' claimed that the new procedure was illegal. The parties were asked to supplement their arguments, while relating to the new procedure from the standpoint of international law, and to the question of the legitimacy of the differentiation between use of people as "live shields" or as "hostages" on the one hand, and the acts described as permitted in the procedures on the other. It was decided that the temporary injunction would continue to be in force until judgment in the petition was handed down; and that the wording of the original injunction would be replaced by wording by which "respondents shall refrain from using people as human shields and/or as hostages during their military activity in the West Bank." The use of the new procedure, in and of itself, was not prohibited in the interlocutory injunction.

9. Petitioners later asked (on April 27, 2003) to submit additional testimony regarding respondents' use of civilians as human shields and/or as hostages. Attached to the motion was the testimony of a number of Palestinian residents, who, according to their claims, were forced to serve as "human shields" for IDF forces during the operations of the forces in the West Bank in the months of January-March 2003. Against the background of this testimony, petitioners claimed that respondents continue to use Palestinian civilians as a "human shield" and/or as hostages, in violation of international law and the temporary interlocutory order. Petitioners also submitted (on May 22, 2003) the testimony of a volunteer in the Machsom Watch organization who claimed she witnessed IDF soldiers using a Palestinian bus driver at one of the checkpoints in the West Bank. Per petitioners' request, an urgent hearing in the petition was held (on July 8, 2003), before Barak P., Or V.P., and Mazza J.

10. On August 16, 2004, petitioners submitted a motion pursuant to the Contempt of Court Ordinance. The motion included the testimony of eight

more people regarding the use of Palestinian civilians as "human shields" and/or as hostages during the months January-July 2004. *Inter alia*, it was contended in the motion that during respondents' military activity, they forced Palestinian civilians to stand in front of them during live fire exchanges with the side with which the civilian identifies; to enter houses and buildings before the military force; to search for objects suspected to be dangerous; and to check the bodies of combatants belonging to the civilians' side.

11. The fourth hearing in the petition was held (on September 5, 2004) before Barak P., Mazza V.P., and Cheshin J. (who replaced Or V.P., who had retired). During the hearing, the new procedure and the way it is implemented by IDF forces was discussed. In oral argument, respondents presented the accumulative experience from the previous two years, in employing the procedure in hundreds of cases. That experience, it was claimed, shows that the procedure is not forced upon the residents, and that its use has not led to bodily or mental injury to the participants in it. Respondents clarified that they do not take the claims regarding violation of the procedure lightly, and that those are being examined and investigated. At the end of the hearing, it was decided that the continued hearing of the petition would be adjourned, in order to allow respondents to submit a report on their treatment of the cases presented in petitioners' documents, regarding charges of violation of the "Early Warning" procedure. Such report was submitted in a third supplementary statement by respondents (on February 28, 2005). Respondents discussed the rationale upon which the procedure is based, the way it is implemented today by the IDF, and the way that the specific cases presented by petitioners, whereby the IDF forces were claimed to have violated the procedure, had been dealt with. Respondents stated that in all the cases brought up in the framework of the petition which raised suspicion of violation of the procedure, the military police (*metzach*) had begun an investigation, or an investigating officer had been appointed.

12. Prior to the hearing of the petition, petitioners submitted (on June 23, 2005) a motion to submit additional testimony, in which they wished to update the Court regarding the respondents' continued use of civilians protected under the Fourth Geneva Convention of 1949 as "human shields" and/or as hostages. Attached to the motion was testimony of Palestinian civilians regarding three events which occurred in the months March and May 2005. The final hearing in the petition took place (on June 23, 2005) before Barak P, Cheshin V.P. and Beinisch J. (who replaced Mazza V.P., who had retired). During the hearing, respondents stated that petitioners' claims regarding these three new cases were

being examined. In one case, military police investigation had commenced; in another case, a committee of investigation had not found a violation of the procedure; and in a third case, respondents were waiting for the decision of the Military Advocate General. Respondents emphasized that the fact that a number of cases of violation of the procedure had been discovered over a period of years does not mean that the procedure itself is to be rejected. During the hearing we heard, *inter alia*, a survey by the operations officer of the central command, regarding the operational importance of the "Early Warning" procedure, in preventing injury to Palestinian civilians.

C. The Arguments of the Parties

13. Petitioners claim that the procedure known as "Early Warning" is illegal, as it is at odds with the principles of international humanitarian law regarding the military activity of an occupying force in occupied territory. It is, in fact, the use of a protected civilian as a "human shield." The procedure puts the protected civilian in real and tangible danger. It puts him at the forefront of military activity, the objective of which is arresting a person whom respondents themselves define as most dangerous. Petitioners are of the opinion that the dimension of consent in the procedure, or lack of refusal on the part of the protected civilian, cannot absolve it of its illegality. The protected civilian's consent is not true consent, and in any case is irrelevant. The protected civilian cannot waive the rights granted him by international law, including the right not to be involved in the military activity of an occupying force. It was further contended that the procedure creates a certain and tangible injury to the dignity of the protected civilian, since he is used against the side with which he naturally identifies. It is likely even to cause him critical mental injury. In this context, petitioners refer to the judgment of the International Court of Justice regarding the crimes committed in the former Yugoslavia, according to which use of prisoners for digging a trench for the military force is a cruel and inhuman use, and violates the prisoners' right to dignity. Petitioners contend that various articles of the Fourth Geneva Convention of 1949 prohibit the "Early Warning" procedure, including articles 3, 8, 27, 28, 47 & 51 of that convention. The use of the procedure is also prohibited, claim petitioners, by article 51(7) of the first protocol of the Geneva Convention of 1977. Last, the decisions of the International Court of Justice regarding the crimes committed in the former Yugoslavia also require that the procedure be determined illegal.

14. Petitioners argue that one can learn from the procedure instructions themselves that the procedure endangers the civilian population, whereas respondents have a duty to refrain from causing harm to it. The directive relates to situations which deteriorate into exchanges of gunfire, and to situations in which the individual is positioned in front of a military force (while knocking on the building door) in a manner which endangers him. Petitioners point out that the procedure grants substantial discretion to military personnel, regarding the possibility of soliciting the local population's assistance. The military discretion, claim petitioners, is regularly employed in violation of the interlocutory injunction. Respondents continue to abuse the local population and make use of Palestinian civilians, including as "human shields," in order to achieve the objectives of military activity. From this it can be learned that the military discretion on this issue cannot be relied upon. The procedure broadcasts an inhuman message to soldiers, according to which instrumental use can be made of Palestinian civilians in order to succeed in the military activity, whose objective is the making of an arrest.

15. Petitioners submitted the expert opinion of Professor E. Benvenisti, according to which the "Early Warning" procedure does not fulfill the requirements of international humanitarian law. Professor Benvenisti is of the opinion that the procedure is likely to endanger the lives of the Palestinian residents. The danger is liable to stem from a response by those entrenching themselves in the building, or from a response by soldiers to the response of the former. One must examine whether that danger is justified by legitimate reasons, and whether it is proportional. In this context, Professor Benvenisti notes:

> The procedure describes a legitimate motivation for use of 'early warning' measures, since protection of those who are not combatants is, as mentioned, the duty of the army in combat. What has yet to be examined is whether or not that means is proportional, that is to say, whether the same objective cannot be achieved without the use of the Palestinian residents. It seems that on this point the procedure raises difficulty, since the use of a simple audio amplification system would, *prima facie*, be an efficient enough means . . .
>
> It is unclear whether the danger involved in using residents to relay warnings is equivalent to the saving of the lives of those who are believed to be in the building into which the army wishes to enter, and whom the army wishes to warn. The

uncertainty regarding the expected level of danger makes the exposure to the danger disproportionate [(clause 9 of the expert opinion)].

Professor Benvenisti determines that the supposition that the procedure is intended to prevent injury to the military forces remains an open question. He further explains that the requirement of receiving the local resident's consent to provide assistance does not change anything, in light of the large power imbalance between IDF soldiers and the residents, which turns the consent into consent which is coerced, or understood to be coerced. In addition, the procedure does not include clear instructions to soldiers on how to decide between the alternative of using residents and other means of relaying warning. Against this background, petitioners claim that the procedure is not legal, and is not proportional.

16. Respondents argue that the arguments regarding the illegality and disproportionateness of the "Early Warning" procedure are to be rejected. According to respondents, these arguments are unfounded and do not fit reality and international law. Respondents point out the reality, in which the IDF combats terrorists hiding among the civilian population. Respondents recognize the restrictions upon them in the framework of such combat. IDF soldiers are categorically forbidden to use civilians, *qua* civilians, as a "live shield" or as "hostages," for the purpose of protection against gunfire or attacks by the Palestinian side. The army forces must perform a balancing between the need to arrest wanted persons and the need to protect the civilian population. In the framework of this balancing, the IDF prefers to arrest terrorists instead of killing them, as permitted by the laws of war, while granting an effective early warning. Against this background, the "Early Warning" procedure was formulated. The procedure is intended primarily to prevent injury to innocent local residents. In a great many cases there is no effective alternative to relaying a warning via a local resident. According to respondents, past experience shows that soliciting the assistance of local residents in order to grant an effective early warning allows the making of arrests while substantially reducing the need to resort to means of force, which damage property and create danger to innocent civilians. This also reduces the possibility of gunfire exchanges, from which innocents are liable to be injured. Its use is likely also to prevent injury to the wanted person himself and to IDF soldiers, objectives which are also legitimate, in and of themselves. The attainment of these advantages, in a way that does not involve danger to the residents, is worthy, legal, and proportional.

17. Respondents contend that the use of the "Early Warning" procedure in appropriate cases sits well with the fundamental principles of international law. Those principles require that during the planning of a military activity, every attempt be made to reduce the collateral damage caused as a result of the military activity to those who are not combatants, to the extent possible, under the circumstances. In addition, pursuant to the rules of international law, an armed force which is about to undertake an activity liable to injure civilians must, to the extent possible, grant prior notice regarding the planned activity, in order to reduce the danger of injury to civilians. International law does not prohibit receiving the assistance of a consenting local civilian, in order to warn other residents of an impending attack, if he is not exposed to danger as a result. *Au contraire*: it is desirable, argue respondents, to grant an early warning before the attack, which is liable to injure the civilian population or damage civilian buildings which have been abused by wanted Palestinians. Moreover, international law even permits forcing the relaying of a warning if necessary military considerations so require; however, the procedure does not go so far, as it requires the consent of the resident. Respondents' position is, therefore, that in planning arrests, the military commander is permitted – and even required – to examine whether, under the circumstances, it is possible to reduce collateral damage to innocent persons and property, by soliciting the assistance of a local civilian, in circumstances which do not endanger him.

18. Respondents further note that the approval for issuance of the "Early Warning" procedure was given by the Attorney General, after he was persuaded that such assistance by local consenting residents can save many lives, primarily those of the local residents. If the wanted person does not turn himself in, military personnel must indeed use force, which can harm the wanted person, those living in the house, property, and IDF soldiers. All these, claim respondents, can be prevented when the procedure is used in the fitting circumstances. The Attorney General was persuaded that the granting of warning by local residents will have a better effect than warning granted by the army forces. Respondents contend that in the formulation of the procedure, the lessons from the case in which Abu Muhsan was killed were studied. That case was an exception, and one cannot conclude from it that the directive is generally dangerous. They further contend that the directive is proportional, and that in certain cases alternate means such as an audio amplification system cannot be used, as it can endanger the soldiers.

19. Regarding cases in which the procedure was violated, respondents emphasize that the IDF views as severe any suspicion of violation of the procedure, and thoroughly examines the cases in which such suspicion arises. Regarding all the cases mentioned in the petition in which suspicion of violation of the procedure arose, a military police investigation was initiated or an examining officer was appointed. It was further stated that additional investigations of the military police were commenced regarding a number of complaints which were brought before the Military Advocate General personnel, outside the framework of the petition. Some of the investigations are still pending. In one case an IDF officer was indicted regarding an event in April 2004. The officer was convicted, given a prison sentence to be served by way of military labor, lowered in rank, and expelled from his position. On the other hand respondents noted that in hundreds of other cases in which the procedure was used, no complaints whatsoever were made regarding its use. Isolated cases cannot lead to a conclusion that the procedure is illegal or unreasonable. All they show is that the procedure was violated in isolated cases.

The Normative Framework

20. An army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security (*see* HCJ 102/82 *Tsemel v. The Minister of Defense*, 37 (3) PD 365, 369; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57 (2) PD 349, 365). In this framework – and to the extent that it does not frustrate the military intent to arrest the wanted person, the army is permitted – and at times even required – to give the wanted person an early warning. Thus it is possible to ensure the making of the arrest without injury to the civilian population (*see* regulation 26 of Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – *The Hague Regulations*); article 57(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter – *The First Protocol*); *see also* Fleck *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 171, 223 (hereinafter – *Fleck*); rule 20 of 1 *Customary International Humanitarian Law: Rules* (2005) 62 (hereinafter – *International Humanitarian Law*)).

21. Just as it is clear that an army is authorized to arrest a wanted person who endangers security, so is it clear that the army is not permitted to use local residents as a "human shield" (*see* article 28 of IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*); article 51(7) of *The First Protocol*; *see also Fleck*, at p. 218)). Pictet correctly noted that the use of people as a "human shield" is a "cruel and barbaric" act (*see* J. Pictet *Commentary IV Geneva Convention* (1958) 208; rule 97 of *International Humanitarian Law*).

22. Is the army permitted to make a local resident relay an "early warning" to a wanted person in a place besieged by the army, against his will? All agree that such a thing is prohibited (*compare* regulation 23(4) of *The Hague Regulations*; article 51 of *The Fourth Geneva Convention*; *Pictet*, at p. 292; *Fleck*, at p. 252). Indeed, the "Early Warning" procedure explicitly states that the assistance of a local Palestinian resident can be solicited in order to relay an early warning only when that resident has consented to provide such assistance. It is also agreed by all that early warning is not to be relayed by a local resident, if doing so will endanger him.

23. However, what is the law regarding the solicitation of a local resident's assistance, for the purpose of relaying an "early warning" according to the procedure for doing so, when that resident gives his consent, and damage will not be done to him by relaying the warning? Let it be said immediately: no explicit provision applying to that issue, which would contain a solution to our problem, is to be found (*see* R. Otto "Neighbors as Human Shields? The Israel Defense Forces 'Early Warning Procedure' and International Humanitarian Law" 86 *Int'l Rev. Red Cross* 771, 776 (2004)). The solution to our question requires a balancing between conflicting considerations. On the one hand, is the value of human life. Use of the "Early Warning" procedure is intended to prevent the need to arrest a wanted person through use of force. In this regard, the procedure is intended to prevent damage to the local residents who are in the same place as the wanted person. Indeed, safeguarding of the lives of the civilian population is a central value in the humanitarian law applicable to belligerent occupation (*see* article 27 of *The Fourth Geneva Convention*; HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) PD 385, 39X; *Fleck*, at p. 212).

The legality of the "Early Warning" procedure might draw its validity from the general duty of the occupying army to ensure the dignity and security of the civilian population. It also sits well with the occupying army's power to protect the lives and security of its soldiers. On the other hand stands the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning. That is certainly the case when he does not consent to take upon himself the task he has been given, and when its performance is likely to cause him damage. But that is also the case when he gives his consent, and when performance of the role will cause him no damage. That is so not only since he is not permitted to waive his rights pursuant to the humanitarian law (*see* article 8 of *The Fourth Geneva Convention*; *Pictet*, at pp. 72, 74), but also since, *de facto*, it is difficult to judge when his consent is given freely, and when it is the result of overt or subtle pressure.

24. In balancing between these conflicting considerations, which shall prevail? In my opinion, the considerations in favor of forbidding the army from using a local resident prevail. At the foundation of my view lie a number of principled reasons. First, a basic principle, which passes as a common thread running through all of the law of belligerent occupation, is the prohibition of use of protected residents as a part of the war effort of the occupying army. The civilian population is not to be used for the military needs of the occupying army (*see Fleck*, at p. 218). They are not to be "volunteered" for cooperation with the army (*see* regulation 23(b) of *The Hague Regulations* and article 51 of *The Fourth Geneva Convention*; *see also Pictet*, at p. 292). From this general principle is derived the specific prohibition of use of local residents as a "human shield." Also derived from this principle is the prohibition of use of coercion (physical or moral) of protected persons in order to obtain intelligence (article 31 of *The Fourth Geneva Convention*; *Pictet*, at p. 219). It seems to me that prohibiting use of local residents for relaying warnings from the army to those whom the army wishes to arrest should also be derived from this general principle. Second, an additional principle of the humanitarian law is that all is to be done to separate the civilian population from military activity (*see Fleck*, at p. 169). The central application of this rule is the duty to distance innocent local residents from the zone of hostilities (*see* rule 24 of *International Humanitarian Law*). This rule calls for an approach, according to which a local resident is not to be brought, even with his consent, into

a zone in which combat activity is taking place. Third, in light of the inequality between the occupying force and the local resident, it is not to be expected that the local resident will reject the request that he relay a warning to the person whom the army wishes to arrest. A procedure is not to be based upon consent, when in many cases the consent will not be real (*see Fleck*, at p. 252). The situation in which such consent would be requested should be avoided. Last, one cannot know in advance whether the relaying of a warning involves danger to the local resident who relays it. The ability to properly estimate the existence of danger is difficult in combat conditions, and a procedure should not be based on the need to assume a lack of danger, when such an assumption is at times unfounded. On this issue, one must consider not only the physical danger of damage from gunfire originating in the wanted person's location, or from various booby-traps, but also the wider danger which a local resident who "collaborates" with the occupying army can expect.

25. These considerations lead me to the conclusion that the "Early Warning" procedure is at odds with international law. It comes too close to the normative "nucleus" of the forbidden, and is found in the relatively grey area (the penumbra) of the improper.

The result is that we turn the *order nisi* into an *order absolute*, in the following way: we declare that the "Early Warning" procedure contradicts international law.

Vice-President M. Cheshin

The subject is a difficult one. Most difficult. So difficult is it, that a judge might ask himself why he chose the calling of the judiciary, and not of another profession, to be busy with. Woe is me, for I answer to my creator; woe is me, with my conflicting inclinations (*see* Babylonian Talmud, Brachot, 61, 1). No matter which solution I choose, the time will come that I will regret my choice. Indeed, there is no clear legal rule to show us the way, and I shall decide according to my own way of legal reasoning. The present issue is quite similar to the "ticking bomb" issue (HCJ 5100/94 *The Public Committee Against Torture in Israel v. The Government of Israel*, 53 (4) PD 817), where interests and values of the first degree stood opposite each other, and deciding which interests and values would prevail, and which interests would retreat, was hard – unbearably hard.

2. Professor Eyal Benvenisti wrote, in the conclusion of his expert opinion which lies before us:

> The 'early warning' procedure is at odds with the rules of international humanitarian law dealing with the protection of civilians and others removed from participation in combat, from unnecessary dangers of war. These are cogent rules which obligate the agencies of the State of Israel and cannot be stipulated out.
>
> The question whether the danger is unnecessary or not is to be examined according to the standards of the worthy objective, and of the proportionality of the means to realize it. The 'Early Warning' procedure is intended to advance a worthy objective. However, the means to realize it – use of Palestinian residents to relay warnings – is not proportional, as it is not clear whether it is effective, why other alternatives which do not involve use of local civilians (like a loudspeaker or other means of amplification) are not feasible or preferable, or whether the danger to the resident relaying the warning is substantially less than the danger to the civilians being held together with those entrenching themselves inside the building; and there are no clear instructions to soldiers how to choose between the alternative of use of residents and other means of warning.

Professor Benvenisti raises various difficult questions, but to all of these difficult questions – the state has responded with answers. The summary of the answers is: and what shall be the law when all the difficult questions have been answered to our satisfaction? That is to say, when, under the circumstances, soliciting a local resident's aid is the most effective means, or the only means, remaining before violently storming the house, and when the use of a loudspeaker and of other means of amplification were unproductive? Regarding the question whether the danger to the warning resident is substantially less than the danger to which the residents in the building are exposed, the state replies that, according to the procedure, it is forbidden to be aided by a resident if the commander of the force believes that he is liable to be exposed to danger due to his consent to the army's request, and thus, even though the resident has granted his consent, and regarding the lack of clear instructions how to decide between alternatives, it seems that the procedure is sufficiently detailed, but can, in any case, be improved and perfected.

3. The basic assumption is that the army is about to storm the building by force, and that the army, in its manner and in the manner of any army, may, and even almost certainly will, injure those in the house, including even

the family members living in the house. Can we decisively say that being aided, in good faith, by a neighbor, is disproportionate in **all** cases? In **any** circumstances whatsoever?

Here he is, that dangerous terrorist whose hands have become covered with blood, and whose plans are only evil. The terrorist is hiding out in the house, and the order is to apprehend him "alive or dead." That order is uncontroversial, and the question in merely what shall be done, and what shall not be done, to carry out the order. Suddenly the father of the family living in the house appears on the scene. The father had previously gone to the store to buy food for his family, and he now returns to his house, which is surrounded by army personnel. And in the house are his wife and his eight children. The startled and fearful father hears whatever he hears from the army personnel, and he immediately agrees to the army's offer – it might even be his own request – that he call his family to leave the house, all according to the written procedure. Yet here we forbid the army from allowing the father to so protect his family. Indeed, it is not so in every case. However, such a case – or a similar case – can occur.

4. Moreover, our assumption is that we have reached the last resort: that the army has made use of all other means at its disposal – excepting violent storming of the house – and that the terrorist has not surrendered. We thus stand before the following choice: being aided by the father, who will warn his family, or storming the house, involving mortal danger to the residents of the house and to the soldiers. Non-recognition of the procedure in such circumstances is by no means simple.

5. And if despite all these things that I have written, I shall concur in the opinion of the President – it is because I have considered the formula adopted in *The Public Committee Against Torture in Israel* case (*see* **id.**, starting at p. 840). The formula is one of *ex ante* and *ex post*, and for our purposes is applicable to an even greater degree. And it is even possible that life will teach us otherwise, and that our conclusion will come to be changed.

6. To conclude: subject to what I have written above, I concur in the opinion of President Barak.

7. Meanwhile, I have read the opinion of my colleague Justice Beinisch, and I would wholeheartedly sign my name by each and every one of her

comments. There are two reasons which strengthen our conclusion. **The first reason** can be called "the written rule versus reality." However clear and clean the written rule may be, we must not forget that it is carried out, *de facto*, in the field, outside, under pressure, in tense circumstances, in conditions of mortal danger – to residents and soldiers. With any slight deviation from the directive, misunderstanding, or incorrect reading of the conditions in the field, we have strayed off the proper road onto the forbidden shoulders – we have slid from the permitted over to the forbidden. The temptation is great, and the justification will be easily found. Indeed, as the intensity of the danger rises, so rises the intensity of the temptation – in field conditions – to deviate from the procedure.

The second reason is found in routine, which awaits us around the bend. Routine, according to its very nature, deteriorates the sensitivity and caution needed to perform the procedure, and the concern that the special and rare will become regular and routine – even bureaucratic – is great. This is the same difficulty we came upon in *The Public Committee Against Torture in Israel* case, and in the "ticking bomb" issue. Yet it is the *ex ante* and *ex post* formula, limited as it may be, which is likely to assist us, even if only partially.

Justice D. Beinisch

I concur in the judgment of President Barak, and will add a bit of my own only to emphasize the main unacceptable aspects, in my opinion, of the "Early Warning" procedure presently discussed.

1. The issue placed before us in this petition is one of the most difficult issues to come before us in the reality in which we have found ourselves in recent years. The difficulty is found in the fact the petition deals with the way to safeguard human life during military activity, in an area held under belligerent occupation, and is interwoven with the discretion of the military commander in fulfilling his duties. It should be recalled that the primary assumption of our discussion is that we are dealing with the safeguarding of human life at the time of legitimate military activity whose objective is the arrest of a wanted person who endangers the security of the region and the security of the civilians and the soldiers. An additional assumption is that the military commander of the area held under belligerent occupation, and the commanders acting on his behalf and in his name, are the ones charged with the safety and security of all the residents in the area, including the security

of the very protected resident who is asked to assist IDF forces according to the procedure, and belongs to the civilian population. In the background of the case before us is found, therefore, the assumption that the task and the weighty responsibility of safeguarding the lives and bodily integrity of the local population, and of IDF soldiers operating in the occupied territory in order to ensure security in it, is cast upon the military commander. Another uncontested primary assumption is that the military commander and those who obey him must honor the rules of international law and the constitutional principles of our legal system. Our judicial review of the legality of procedures meant to safeguard human life are anchored in these primary assumptions.

2. At first this petition was submitted arguing that during its military activity in the area, the IDF employs a practice prohibited by the fundamental norms of international and constitutional law, by making use of the civilian population as a "live shield" for the forces in combat. In their response to the original petition, respondents already clarified unequivocally that they recognize that the forces operating in the field are categorically forbidden from using Palestinian residents as a "live shield" or as "hostages," and that involving local residents in any activity exposing them to danger to life or limb is prohibited. As a result of that unequivocal declaration, respondents claimed that they wish to enact clear and legitimate instructions, which would ensure that the military forces operating in the field will act legally, regarding the prevention of mortal danger to civilians during operational activity. In the existing circumstances, respondents were permitted to present us with the new detailed procedure which they wish to enact in the army in order to prevent use of a forbidden practice, and to lay out rules to ensure that IDF soldiers will not act illegally. By the end of the proceedings, however, the original petition had undergone a metamorphosis, and came to be directed against the "Early Warning" procedure, which the army was using as part of a declared agenda of avoiding the forbidden practice of using local residents as a "live shield" or as "hostages."

3. According to respondents' argument, the purpose of the procedure is to formalize and detail the possibility of soliciting the assistance of local residents in order to minimize the danger of injury to innocent civilians, and even to the wanted persons themselves, during operational activity; the procedure is also intended to ensure that the residents of the house in which the wanted terrorist is hiding out will not be injured during the operational-military arrest, all exclusively in the framework of the permissible, and

according to the principles of public international law, which charge the army holding the territory with the duty to protect the local residents and to prevent mortal danger to them.

4. The question which we must decide is whether the enacted procedure is in fact legal; in other words, whether the procedure can ensure the achievement of the worthy purpose of safeguarding the lives of the residents, through fitting and worthy means. As explained in the judgment of my colleague the President, in which the Vice-President, Justice M. Cheshin, concurred, the answer to that question is negative. The said procedure cannot stand, due to the fact that it permits the use of a disproportionate means, and therefore cannot prevent the unacceptable practice which respondents themselves wish to prevent. The main reason for that, in my opinion, is that *de facto*, the procedure does not stop the forbidden practice of using local residents in order to aid army forces, and is even liable to endanger the lives of those residents who are asked to provide such assistance. The gap between the prohibition, which the respondents recognize, and the permission, which can be enacted according to the discretion of the military commander, is narrow and close, and is no different, in essence, from the sweeping prohibition determined in the norms of international law. Moreover, even if the procedure were legal, the danger of sliding into the practice forbidden by a categorical prohibition is inherent in the means permitted by the procedure.

5. Respondents emphasized before us that the procedure revolves around two central axes. The first is that the mission of assisting in "early warning" is not to be cast upon a resident, unless he has given his consent; the other is that the mission of "early warning" is not to be cast upon a local resident if it is likely to expose him to danger to life or limb. It seems to me that both these axes are inapplicable, and therefore cannot serve as anchor for the entire procedure.

Regarding the element of the local resident's consent to assist the forces in combat, which is a necessary condition for receiving such assistance, it can be determined that there is no permissible way to obtain such consent. Beyond the prohibition, anchored in principles of international law, of involving the protected population in the war effort of the army holding the territory, it is difficult to see how, in the circumstances present in the area, the required consent can be obtained. The validity of consent is conditional upon it being given of free will. When a local resident is asked by a military commander,

accompanied by armed army forces, to assist in an act performed against the population to which he belongs, even if the request is made for a desirable objective, the resident has no real option of refusing the request, and therefore his consent – is not consent.

Regarding the danger to the resident asked to assist army forces, there is no way to ensure that his life is not being endangered by involving him in the activity – activity with which he has no connection, and into which he is thrown against his best interest. Naturally, in the operational activity, the military commander has wide discretion to make decisions in the field, and he must do so under pressure. The burden is on him, to estimate the level of danger to which the local resident is exposed, and at the same time to estimate the danger to those in the house against which the activity is directed. And of course, the weighty burden of minimizing the danger to the lives of his soldiers rests on his shoulders. In these circumstances, the danger to the life of the resident is a real danger which does not stand in proper proportion to the purpose of the procedure – minimizing loss of the lives of the innocent residents – while severely violating the free will of the resident asked to assist army forces, and no less, violating his dignity as a human being.

6. Thus, the necessary conclusion is that the violation of the principles protected in international law is reflected, as discussed, in the instructions of the procedure, which, on its face, is not proportional. In addition to that, it is impossible to escape the impression that the reality described by petitioners, which was not categorically denied by respondents, shows that the procedure, with all the qualifications in it – even if it was legal, and I am not of the opinion that it is – is not capable of being implemented, *de facto*. As it turns out, there are deviations from the procedure in the field; nor does the use made of local residents for "early warning" remain within the restrictions set out in the procedure. Although respondents' counsel did not confirm before us the severe events which were described by petitioners, he did confirm that investigations are underway regarding suspected severe cases which were raised by petitioners, and also confirmed that additional complaints, which were not raised at all in the petition, are being investigated. The daily reality in the field is difficult. The conditions set out in the procedure, aside from being faulty in and of themselves, allow a slide down the slippery slope, which causes stark violations of the rules of international law, and of the constitutional principles of our legal system. The army must do everything in its power to prevent the possibility that a detailed and official procedure will

create gaps which will lead to a deterioration of the operations in the field to unequivocal situations of illegality. The procedure contains such a gap, and thus must be annulled.

Therefore, I concur in the judgment of President Barak, and in his reasoning.

Decided according to the judgment of President A. Barak.

Given today, 3 Tishrei 5766 (October 6, 2005).

Prisoner Release

HCJ 1671/05 **Almagor – Organization of Terrorism Victims**

v.

1. The Government of Israel
2. The Minister of Defense
3. The Chief of the General Staff, IDF
4. The Attorney General

On February 8, 2005, Israeli Prime Minister Ariel Sharon and newly-elected President of the Palestinian National Authority Mahmoud Abbas met at a summit in Sharm el-Sheikh, Egypt. At the summit, Prime Minster Sharon and President Abbas announced a truce seeking to bolster Palestinian support for the new Palestinian leader and the diplomatic process toward a resolution of the Israeli-Palestinian Conflict.

As part of the truce, Israel agreed to release from custody 900 Palestinians – with an initial release of 500. Immediately after, a publicly-active society of victims of Palestinian terrorism sought an order from the High Court of Justice of Israel, enjoining the Government of Israel from releasing the Palestinian prisoners. The terror victims main contention was that the Government of Israel's decision to release the Palestinian prisoners was unreasonable because it failed to take into account Israel's "bitter experience from past cases . . . in which released prisoners returned to the path of terrorism." The Government of Israel responded that the prisoner release was within its discretion. It made a political decision whose purpose was both the reduction of terrorism and Israel's long-term national security.

On February 20, 2005, a three-justice panel comprised of President Barak, Justice Procaccia, and Justice Rubinstein heard the case. On the same day, the Court released its opinion, voting 3 – 0 in favor of the Government's opinion. In a judgment written by President Barak, the Court held that both the Government of Israel's decision to release Palestinian prisoners as part of a

diplomatic process and the criteria by which the Government of Israel chose the particular Palestinian prisoners to release were reasonable. Being reasonable, the decision was therefore within the discretion of the administrative agency that made it and the Court had no basis from which to intervene.

In applying the reasonableness standard, the Court acknowledged the pain suffered by the victims of terrorism and the openness of the public debate surrounding the issue of whether releasing such prisoners was wise public policy. Nevertheless, the Court found that the Government of Israel's decision to fight terrorism through a diplomatic prisoner release was a reasonable political "regional policy." Further, the Government of Israel acted reasonably in its selection of the particular release candidates because the selection criteria made provision for both the degree of danger posed and the degree of offense committed by each individual release candidate.

Justice Procaccia and Justice Rubinstein concurred, with the latter writing separately. In his concurrence, Justice Rubinstein focused on why the Government of Israel acted reasonably in releasing the Palestinian prisoners. Ultimately Justice Rubinstein agreed that he "cannot say . . . that the present decision was made with extreme unreasonableness, due to the chance the government is trying to give the new Palestinian leadership, in the hope that it will grow stronger, fight terrorism unlike its predecessor, and that this time will be different than all previous times."

On February 21, 2005 – the day after the High Court of Justice decision – Israel released the 500 Palestinian prisoners to the West Bank and the Gaza Strip. Ultimately, on May 26, 2005, Israel released the remaining 400 Palestinian prisoners, thus fulfilling its obligation given at the Sharm el-Sheik Summit to release a total of 900 prisoners.

HCJ 1671/05 **Almagor – Organization of Terrorism Victims**

v.

1. The Government of Israel
2. The Minister of Defense
3. The Chief of the General Staff, IDF
4. The Attorney General

The Supreme Court Sitting as the High Court of Justice
[February 20, 2005]
Before President A. Barak, Justice A. Procaccia & Justice E. Rubinstein

Petition for an *Order Nisi* and an *Interlocutory Injunction*
For Petitioner: Naftali Wartzberger
For Respondents: Danny Chorin

JUDGMENT

President A. Barak

1. The Ministerial Committee on Release of Palestinian Prisoners decided (on February 13, 2005) to recommend the release of 380 Palestinian prisoners and 120 Palestinian detainees to the President of Israel and to the commanders of the military areas of Judea, Samaria, and Gaza. The decision was approved in government decision no. 3241. The list of prisoners and detainees according to the government decision was published on February 16, 2005. Petitioner, a publicly-active registered society of victims of Palestinian terrorism, contends that respondent no. 1 (hereinafter: respondent) has not fulfilled the criteria for prisoner release determined in previous decisions, by which prisoners who have not served two thirds of their sentences, or refuse to sign a pledge to abandon terrorism, are not to be released (*see* decisions 468 and 606 of July 6, 2003 and July 27, 2003, respectively). According to petitioner's argument, 180 out of 380 of the prisoners have not served two thirds of their sentences. It is further argued that the candidates for release are not being required to express remorse or pledge to abandon terrorism. Petitioner claims that the reason for the deviation from prisoner release criteria is respondent's desire to "fill the quota" of 500 prisoners for release. Petitioner contends that said reason is not reasonable, and is not comparable to the violation of fundamental principles

such as the rule of law and the safety of Israeli citizens. Ultimately, petitioner claims that respondent's decision is not reasonable, as it does not take into account the past record of released Palestinian prisoners who returned to the path of terrorism.

2. Respondents, on the other hand, claim that they are authorized to deviate from the criteria which they determined in the past, in light of political negotiations with the Palestinian Authority, and as part of a comprehensive process whose purpose is the reduction of terrorism. Respondents claim that all the prisoners who are candidates for release will be required to sign a pledge to refrain from all terrorist activity. Respondents further note that a prisoner who refuses to sign the pledge shall not be released.

3. After reading the material before us and hearing the parties' arguments, I have come to the conclusion that the petition is to be rejected. Petitioner's claims are directed against respondent's deviation from criteria it determined for release of prisoners, and against the slight weight given to the poor record from prior cases of Palestinian prisoner release. Regarding the contention that the candidates for release have not signed pledges to refrain from terrorist activity after their release, respondents' counsel announced before us that prisoners shall not be released without giving said pledge. That being the case, the claim regarding the pledge is to be rejected.

4. An additional argument which petitioner raised before us is that respondent recommended the release of prisoners who have not served two thirds of their sentences, contrary to a previous decision. Petitioner claims that the reason behind that deviation – the need to fill the list of prisoners for release – is not reasonable. That argument is to be rejected. It has already been held that respondent has the authority to formulate guiding criteria for prisoner release recommendations (*see* HCJ 1539/05 *Mishlat – Legal Institute for Study of Terrorism and Aid to its Victims v. The Prime Minister of Israel* (yet unpublished)). That being the case, it goes without saying that respondent is authorized to determine guiding criteria which are different from those determined in the past, or to deviate from existing criteria (*compare* Y. Dotan *Administrative Guidelines* (5756) 135 [Hebrew]). Indeed, the reasonableness of the deviation – as opposed to the authority to deviate – is what we are examining. On this issue, respondents noted that in formulating the list of release candidates, the entirety of the circumstances was weighed, the major of which is the level of danger posed by the release of candidates. Thus,

recommendations for release were not made for prisoners who pose a danger, even if they have served more than two thirds of their sentences. Likewise, those responsible for murder of Israelis were not included in the list of those recommended for release. It was further determined that those released in the past who returned to prison will not be recommended for a second release. This comprehensive examination was performed by the committee, which included representatives from the armed forces, the Ministry of Justice, and the prison service. Against this background, we have not been convinced that the formulation of the prisoner and detainee release candidate list was faulty to an extent that would justify our intervention. For this reason, we do not see fit to intervene in respondent's decision to exercise its discretion as an administrative agency, and to decide upon deviation from criteria it formulated in the past regarding prisoner release (*see and compare* §15 of The Interpretation Law, 5741 – 1981).

5. Petitioner's final argument is that the decision to release prisoners is unreasonable in the light of the bitter experience from past cases, in which released prisoners returned to the path of terrorism. On this issue, respondents note that at the foundation of the decision to recommend prisoner and detainee release stands the need to prevent terrorism. According to their reasoning, prisoner and detainee release does not stand alone, and should not be treated as an isolated phenomenon. It is part of a comprehensive diplomacy move, in the framework of which the Palestinian Authority has pledged to fight terrorism. This diplomacy move, it is argued, might bring about both the prevention of terrorist acts and the improvement of Israel's security situation. This regional policy consideration is a matter for respondent's decision. It does not deviate from the wide zone of reasonableness granted to the government (*see* HCJ 9290/99 *M.M.T. – The Terrorism Victims' Headquarters v. The Government of Israel*, 54 (1) PD 8). Thus, we do not find it appropriate to intervene in it.

6. We listened, with understanding and pain, to the words of one of the members of petitioner. Mr. Bachrach's son was murdered by a Palestinian terrorist a few years ago. We understand his pain, and the pain of others who are severely hurt by the release of prisoners. However, the Government of Israel has made a political decision. In the framework of that decision, it was seen fit to recommend prisoner and detainee release. The issues were examined on their merits. We are aware that many believe that the prisoner and detainee release is justified. Many others believe that it is totally unjustified. We have before us a question whose decision is the prerogative of the government (in

terms of the authority to recommend to those authorized to grant pardons). The Government's discretion, regarding making such recommendations to those authorized, is most wide. One cannot say that a reasonable government cannot decide to make such a recommendation. As there is no unreasonableness in the government decision, there is no basis for our intervention.

Therefore, the petition is rejected.

Justice A. Procaccia

I concur.

Justice E. Rubinstein

1. The release of prisoners who were involved in terrorism – that is, in the continuing effort to indiscriminately kill Israelis and Jews in the Arab-Israeli conflict – is an issue which this Court has dealt with for years, and petitioners on the subject, usually include bereaved family members whose loved ones were massacred by the terrorists. The Palestinian side of the conflict presents the demand for release of prisoners as a way to reinforce the Palestinian public's confidence in its leadership, explaining that that public sees those prisoners as fighters for their national cause. Many eyes in the world have been opened – especially since the terrorist attacks on September 11, 2001 in the United States – to the realization that terrorism is terrorism; but the conflict in our region is complex, and at every stage of relations with the Palestinians, demands for prisoner release are made, and the Government of Israel meets them, hoping that they will thus contribute to reinforcing the Palestinian Authority and the efforts for peace. Thus the government has done in the past, and thus it does this time as well, praying that what did not succeed in the past will succeed now, with the change in the Palestinian leadership.

2. (a) This petition based itself upon two contentions. The first contention regarded release candidates' signature of an antiterrorism pledge and a pledge not to be involved in terrorism, but that became irrelevant when State's counsel announced that such a pledge is a condition for release.

(b) The other remaining question is, ultimately, and as my colleague the President wrote, whether the government's decision to recommend to the President of Israel and to the commanders of the ocuppied areas that they pardon even those who haven’t served two thirds of their sentences,

is unreasonable. The demand that two thirds of the sentence be served was included in the release conditions according to a past government decision, and this time as well it was declared that that criterion is still in force, and that release of those who have not served two thirds of their sentence is merely an approved deviation from that criterion.

(c) It should be mentioned from the start, that the question before us is not the question of authority, as authority exists within the framework of the government's residual authority (HCJ 1539/05 *Mishlat – Legal Institute for Study of Terrorism and Aid to its Victims v. The Prime Minister of Israel* (yet unpublished decision of last week)(Barak P.).

(d) The facts this time were, as described, that government officials gave instructions to find 500 prisoners without "blood on their hands" – that is, those who did not participate in the planning or execution of terrorist attacks in which people were wounded – and are not among those who returned to terrorism after a previous release. When such a number was not found, even when administrative detainees were added, the criterion regarding the service of two thirds of the sentence was eased. The list was approved in a committee headed by the Director General of the Ministry of Justice, and State's counsel tells us that there are now 181 individuals out of 380 convicted prisoners on the list who do not meet that criterion (and 120 administrative detainees).

3. One should have no qualms with petitioners: this is a sensitive subject that has bothered other peoples as well, and it is especially sensitive in our country, so schooled in terrorism and so full of victims whose blood screams from under our feet. The choked up voice of bereaved father Dr. Bachrach when mentioning his late soldier son Ohad, a casualty of terrorism, proves the sensitivity of the subject like a hundred witnesses. Moreover, in my opinion, every good person should be sensitive to the subject, whether his family has been hurt by terror, heaven forbid, or not. However, we are dealing with the question of whether there is a legal cause of action for this Court's intervention. There are issues – and this is one of them – about which this Court has struggled for years, yet returns again and again to the same result, as it does not put itself in the place of the authorized body who bears the responsibility, barring irrelevant considerations or extreme unreasonableness in the considerations of said body; *see* HCJ 9290/99 *M.M.T. – The Terrorism Victims' Headquarters v. The Government of Israel*, 54 (1) PD 8 (Cheshin J.), and the references therein. Regarding this difficult dilemma, *see also* HCJ

914/04 *The International Organization for Victims of Arab Terror v. The Prime Minister et al*. (yet unpublished) (Levi J.).

4. (a) Petitioner's counsel argues that a red line – even a black line, in his words – has been crossed in the present decision, due to the deviation in the criteria, even if it has been declared that there has been no change in those criteria. Indeed, even without agreeing to those definitions, one begins to wonder when told that the number of deviations is near half the number of released convicts – 181 of about 380. The future will tell if indeed there has been no change in the criteria, or whether that is only wishful thinking, said in order to conciliate. This Court has already noted (in aforementioned HCJ *M.M.T.*, at p. 14) that "review of the ministerial committee's decisions reveals that the standards for prisoner release have been eased from one decision to the next. The ministerial committee realized that the standards which it first determined do not allow the government to meet the obligations which it took upon itself . . . however, we had difficulty understanding how it is that by easing the standards, it overstepped its authority . . .". In this case, even if there could have been a different decision regarding part of the list, as long as the deciding body acted within its authority, which includes alteration of the standards – and we are not even familiar with the entirety of the considerations in the relations with the Palestinian Authority – there is no cause, from the legal point of view, for interference in its decision. Even if it would have been appropriate to explain why the decision was to deviate from the criteria while leaving them in force, the decision did not, in and of itself, overstep the bounds of authority.

(b) Nor am I of the opinion that the reasoning that prisoner release is intended to decrease terrorism and to prevent injury to innocent people, and that it "might bring about the prevention of future acts of terrorism and prevent further loss of human life," in the words of the State's counsel, is itself a worthy explanation under the circumstances, even if prisoner release involves reinforcing the Palestinian Authority and its ability to act against terrorist organizations, which is to be encouraged and hoped for. The correct reasoning, in my opinion, is that as part of an effort to strengthen the Palestinian Authority, one of whose demands is prisoner release in order to strengthen itself among the Palestinian public, the Government of Israel takes a risk by releasing prisoners, even if it is not sure that they will refrain from returning to terrorism, out of the hope that it can thus encourage the Palestinian Authority to fight terrorism. Political processes involve, *inter alia*,

taking risks. That, it seems to me, is the more precise reasoning. Indeed, I am of the opinion that an important, if not exclusive, test of the reasonableness of the government's recommendation to pardoning authorities – and surely the government's recommendation is granted great weight, one may assume, even by the President of Israel, and decisive weight among the commanders of the areas under the control of the government – is the cumulative record regarding released prisoners' return to the path of terrorism. Respondents announce – as they did in their response to the aforementioned petition HCJ 1539/05 *Mishlat – Legal Institute for Study of Terrorism and Aid to its Victims v. The Prime Minister of Israel* – that the committee, which is headed by the Director General of the Ministry of Justice and includes representatives of the relevant security agencies, examined, *inter alia*, the expected dangerousness of the release candidates. Looking toward the future, and on the basis of the lessons of the past, I am of the opinion that the committee should have statistical data before it, regarding released prisoners' return to terrorism; there is inherent difficulty in decisions made on the basis of determining a "round number" for release, which at times require – as occurred in the case before us – the easement of the criteria. Behind considerations of state stand officials who make the decisions, and it is understood that they are subject to compelling circumstances, but the basis of the decisions should be the complete data and the lessons of the past. However, I cannot say, on the basis of the arguments and evidence before us, that the present decision was made with extreme unreasonableness, due to the chance the government is trying to give to the new Palestinian leadership, in the hope that it will grow stronger, fight terrorism unlike its predecessor, and that this time will be different than all previous times.

Therefore, I concur in the opinion of the President.

Decided according to the judgment of President A. Barak.

Given today, 11 Adar 5765 (February 20, 2005).

Administrative Detention

HCJ 11026/05 **A**

v.

1. The Commander of IDF Forces in the Judea and Samaria Areas
2. Military Court of Appeals Judge, Lieutenant Colonel Shlomi Kochav

Countries around the world are grappling with the issue of how to preemptively prevent terrorist attacks while ensuring that accused terrorists are not unfairly detained. In so doing, judicial review of executive action is vital. In this case, the Israeli Supreme Court reviewed the detention of a Hamas terrorist.

In an effort to preempt terrorist attacks, Israel uses administrative detentions in the territories. In 1979, the Israeli government modernized its administrative detention law, providing improved procedures for judicial review of detention orders. Currently, the Administrative Detentions Order (Temporary Provision) (Judea and Samaria) (no. 1226), 5748 – 1988 grants the Israeli military commander in the West Bank the authority to administratively detain those who pose a future threat to the public's security.

The Administrative Detentions Order contains several protections for administrative detainees. First, administrative detainees have the right to be represented by legal counsel. Second, the military commander must bring administrative detainees in front of a military judge for approval of the detention shortly after ordering the administrative detention itself. Third, administrative detainees have the right to appeal their detentions to the Military Court of Appeals. Fourth, administrative detainees are entitled to obtain review from the Israeli High Court of Justice.

In October of 2001, Israeli security forces arrested a man who lived in the area of Jenin in the West Bank. The man – an active member of the

Palestinian Islamic organization, Hamas – was on his way to committing a suicide bombing. In January of 2002, the military commander in the West Bank issued an administrative detention order against the man based on his threat to the public's security.

Between January of 2002 and the date of the detainee's petition to the Israeli High Court of Justice in late 2005, the military commander issued several orders extending the detainee's administrative detention. The most recent administrative detention order was submitted for approval to a military judge who shortened the period of detention. The military prosecutor appealed. The Military Court of Appeals in the West Bank allowed the appeal to proceed. That court found a reasonable basis for the continued administrative detention of the detainee because evidence showed that the detainee still intended to commit violent attacks in the future. As such, the court reinstated the administrative detention order in full.

The detainee petitioned the Israeli High Court of Justice for his release. On December 5, 2005, a three-judge panel comprised of President Barak, Justice Procaccia, and Justice Naor heard the detainee's claim. The detainee argued that Israel cannot administratively detain him for such a long period of time based on evidence that showed he was a threat so long ago. The military commander responded that the evidence showed that the detainee was still dangerous.

On December 22, 2005, the Israeli Supreme Court ruled for the military commander, upholding the administrative detention unanimously. In an opinion written by President Barak, the Court held that the military commander acted legally in issuing the administrative detention orders. In determining the legality of the four-year administrative detention, the Court ruled that the military commander's order was legal because the detainee presented an untenable concrete future danger from the beginning of his detention until the most recent administrative detention order. As President Barak wrote:

> The danger he poses is clear. His release from administrative detention in these times of bloody struggle between the terrorist organizations and the State of Israel would be like the release of a 'ticking bomb' waiting to explode. In this situation, in which the danger is so great, respondents' decision is reasonable even though petitioner has been in administrative detention for four years.

In so ruling, the Court emphasized two points. First, the Court emphasized the importance of subjecting administrative detentions to review by both the military judicial institutions and the High Court of Justice (the Supreme Court). The court indicated that the infringement upon human rights caused by administrative detention leads to the increased importance of reviewing the detention process. The Court then carefully distinguished its role as a court exercising judicial review – providing the military tribunals with significant deference – from that of a court (such as the lower military tribunals) exercising appellate review – providing a more penetrating form of review.

Second – and related to the first point – the Court emphasized that cases reviewing the propriety of administrative detentions require the Court to review the military commander's balance of, on the one hand, the administrative detainee's right to personal liberty and, on the other hand, the public's security. In so doing, the Court acknowledged that the military commander has discretion to balance these competing values, but outlined the legal framework in which the military commander must exercise that discretion: The harm to the personal liberty of the detainee must be proportionate to the threat to the public's security. Chief among the factors in determining the degree of harm to the personal liberty of the detainee is the length of time of the detention. "The longer the administrative detention is, the heavier becomes the burden upon the military commander to show the danger from the administrative detainee." Chief among the factors in determining the degree of the threat to the public's security is the future threat of concrete harm. The Court emphasized the fundamental nature of administrative detentions as forward-looking and preventative as opposed to the fundamental nature of imprisonment for convictions of a crime as backward-looking and punitive. Given this forward-looking and preventative nature, the level of danger presented by the detainee is paramount in deciding whether the Court will uphold an administrative detention order.

HCJ 11026/05 **A**

v.

1. The Commander of IDF Forces in the Judea and Samaria Areas
2. Military Court of Appeals Judge, Lieutenant Colonel Shlomi Kochav

The Supreme Court Sitting as the High Court of Justice
[December 5, 2005]
Before President A. Barak, Justice A. Procaccia & Justice M. Naor

Petition for an *Order Nisi*
For Petitioner: Tamar Peleg Shrik
For Respondents: Neta Oren

JUDGMENT

President A. Barak

In 2001, petitioner was on his way to commit a suicide bombing. Petitioner's intentions were not, however, carried out. On the basis of classified information, an administrative detention order was issued against petitioner. Since then (January 8, 2002), for the past four years or so, petitioner has been in administrative detention, which has been extended from time to time. It is the latest extension of the detention against which the petition before us is directed.

Background and Proceedings

1. Petitioner, born in 1981, is a resident of Akabeh in the Jenin district. In October 2001, petitioner was arrested by Israeli security forces. In January 2002 an administrative detention order was issued against him [pursuant to The Administrative Detentions Order (Temporary Provision) (Judea and Samaria) (no. 1226), 5748 – 1988 (hereinafter – *The Administrative Detentions Order*).] "since he is an active member of Hamas, who endangers the security of the region." Since then, petitioner has been in administrative detention, and the orders are extended from time to time, with the emphasis

that his detention is "because he is a terrorist who intends to commit severe attacks." The latest administrative detention order (of September 19, 2005) – issued by respondent no. 1 – extended petitioner's detention from September 26, 2005 to December 25, 2005.

2. The administrative detention order was brought for approval before a military judge, pursuant to the provisions of *The Administrative Detentions Order*, at the military court at K'tziot (Military Judge Major Menachem Lieberman). The military judge extensively discussed petitioner's contention, that the process of judicial review of his detention had been faulty since a judge did not begin to hear his case within eight days as per the provisions of the order. The judge also viewed classified material, which raised real and tangible suspicion of petitioner's intent to commit a suicide bombing. The judge decided to shorten the period of detention, setting it at two months. He did so in light of the age of the classified material, the petitioner's period of detention, and the procedural error which had occurred in his case. The judge added that the detention cannot be extended again unless new and substantial material is presented.

3. The military prosecutor appealed that decision before the Military Court of Appeals in Judea and Samaria (respondent no. 2). The Military Court of Appeals granted the appeal, and reinstated the administrative detention order in full. The court ruled that even if there had been some deviation from the required procedure, "that is only one consideration among the spectrum of considerations." The petitioner had not suffered any substantial injustice, since cause for his administrative detention indeed existed. Thus the Military Court of Appeals described the picture arising from the classified material:

> Indeed, the most severe intelligence was gathered in 2001, and it indicates [petitioner's] intention to commit a suicide bombing, the seriousness of his intention (which he did not keep to himself), and his connections to the infrastructure of Hamas' military activity. In addition, there is intelligence relating to 2002 . . . which also supports the evidence of [petitioner's] murderous intentions, and his link to the military infrastructure. Additional intelligence was collected later, but it is not so substantial.

Thus, the court related to the quality and age of the intelligence regarding petitioner. The court ruled – on the basis of that material – that even after four years, petitioner poses a serious danger. The court ruled that there is a

reasonable basis for the assumption that petitioner has not changed. For those reasons, and in light of the present security situation in the territories, the appeal of respondent no. 1 was granted, and the administrative detention order was confirmed, fully.

4. In the petition before us, petitioner complains that he has been in administrative detention for four years on the basis of intelligence information which was gathered four years ago. The new material regarding him – so he believes – does not renew, rather only reinforces, the previous material. According to his reasoning, even if the previous material regarding him is reliable, and the suspicions regarding him correct, he is not to be held in administrative detention for such a long period. Administrative detention is meant to prevent future danger. The test of a detainee's future danger level should be a strict test, a test of real and tangible danger which approaches certainty. All the more so, when petitioner has been in administrative detention for so long. Respondents oppose both petitioner's release and the shortening of the period of administrative detention. According to their reasoning, petitioner – and thus it appears from the classified material regarding him – is "a terrorist intending to commit severe attacks." The detention order was issued legally, after it had been found that petitioner presents real and tangible danger to the security of the area and the public. These days, in which the security situation is not a tranquil one, the extension of the detention is necessary despite the long period of time in which he has been in administrative detention.

The Normative Outline

5. The authority to order administrative detention is granted, in *The Administrative Detentions Order*, to respondent no. 1. *The Administrative Detentions Order* determines the conditions under which respondent no. 1 can order administrative detention. Those conditions are security reasons (*see:* HCJ 5784/03 *Salame v. The Commander of IDF Forces in Judea and Samaria*, 57 (6) PD 721, 725; hereinafter: *Salame*). Respondent no. 1 cannot exercise his authority unless there is "a reasonable basis to assume that reasons of security of the area or security of the public require that a person be held in detention" and there are "decisive security reasons" for that detention (§1(a), §3 of *The Administrative Detentions Order*; *see also: Salame, id.*). Indeed, imprisonment in administrative detention impinges severely upon the liberty of a person. "Liberty is denied, not by the court, but rather by the

administrative body; not by a judicial process, but rather by an administrative decision; usually, not on the basis of open facts which one can confront, but rather on the basis of classified information" (HCJ 2320/98 *El Amleh v. The Commander of IDF Forces in Judea and Samaria*, 52 (3) PD 346, 349 (Zamir, J)). In considering the issuance of an administrative detention order, the military commander must balance the administrative detainee's right to personal liberty against the security considerations. The art of balancing between the severe impingement upon personal liberties on the one hand and public security on the other is not easy. This art is the responsibility of the military commander. The discretion on the subject is his.

6. The exercise of the military commander's discretion must be proportional. In this context, the length of time that a person has been in administrative detention is important. The Court discussed that in the past, in the context of The Emergency Powers Law (Arrests), 5739 – 1979:

> Administrative detention cannot continue *ad infinitum*. As the period of detention grows longer, weightier considerations are needed in order to justify an additional extension of the detention. As time passes, the means of administrative detention becomes so severe that it ceases to be proportional. Indeed, even where authority is granted to impinge upon liberty by a detention order, the exercise of that authority must be proportional. The 'breaking point' at which administrative detention is no longer proportional must not be crossed.

[(CrimFH 7048/97 *A et al. v. The Minister of Defense*, 54 (1) PD 721, 744).]

The same is applicable to administrative detention pursuant to *The Administrative Detentions Order* (*compare: Salame*, at p. 726). "As the administrative detention period grows longer, so grows heavier the weight of the detainee's right to personal liberty in its balancing against the public interest, and with it grows heavier the burden on the authorized agency to prove the necessity of the person's continued custody in detention" (HCJ 11006/04 *Kadri v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished), paragraph 6; *see also:* HCJ 4960/05 *Ja'afra v. The Commander of IDF Forces in the West Bank* (unpublished)).

7. The question of the proportionality of the use of the means of administrative detention is to be examined according to the purpose which lies at the foundation of *The Administrative Detentions Order*. The *Order*

grants the military commander the authority to order administrative detention when there are public security reasons for it. Administrative detention is forward-looking, toward future danger. At its foundation, it is not a punitive measure, rather a preventative measure (*compare:* Administrative Detention Appeal 8607/04 *Fachima v. The State of Israel* (unpublished), paragraph 8). Considering this purpose of administrative detention, it is but clear that orders extending the period of administrative detention are to be examined according to the length of the detention period and the level of danger presented by the detainee. The continuation of the detention is a function of the danger. This danger is examined according to the circumstances. It depends upon the level of danger presented by the administrative detainee according to the evidence. It depends upon the extent to which the evidence itself is reliable and updated. The longer the administrative detention is, the heavier becomes the burden upon the military commander to show the danger from the administrative detainee.

8. The discretion granted to the military commander is subject to judicial review. Due to administrative detention's impingement upon human rights, there is great importance to judicial review of this process, both by military courts and by this Court. "The judicial review is substantive . . . the military court and the military court of appeals can examine the question of the reliability of the evidence, not only whether a reasonable agency would have made the decision on the basis of said material, . . . this judicial review is an internal part of the process by which the administrative detention order or extension becomes legal" (*Salame*, pp. 726-727; *see also*: HCJ 4400/98 *Barham v. Legal Judge Colonel Shefi*, 52 (5) PD 337). Military courts must examine the material regarding a person's administrative detention. The judicial review must take place as close as possible to the beginning of the administrative detention (*compare:* HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57 (2) PD 349, 372-368; *compare the recent* HCJ 7607/05 *Abdallah v. The Commander of IDF Forces in the West Bank* (unpublished, paragraph 9)). Thus, *The Administrative Detentions Order* determines a period of time by which an administrative detainee must be brought before a judge for the commencement of the hearing of his case (§4(a) of *The Administrative Detentions Order*; *see also Marab*, at pp. 382-384). In addition to the military judicial instances, respondents' discretion is subject to the review of the High Court of Justice (*compare:* HCJ 1052/05 *Federman v. GOC Central Command Moshe Kaplinsky* (unpublished), paragraph 6)). "Although this Court does not sit as a court of appeals over the

military court and the military court of appeals, by exercising judicial review, this Court takes into account the severe infringement of the human rights of the administrative detainees, and grants it great weight when examining both the evidential basis which motivated the security forces to use the means of administrative detainment and the discretion of the military courts themselves (*Salame*, at p. 726).

From the General to the Specific

9. The question placed before us is whether the four year custody of petitioner in administrative detention is legal. In our opinion, the answer is affirmative. From the intelligence material regarding petitioner – which we viewed with petitioner's consent and whose reliability is of the highest order – it appears that petitioner intended to commit a suicide bombing at the time of his arrest. More updated intelligence information – from different periods during petitioner's detention – shows that this intention of petitioner has not changed. This reliable material also reinforces the previous material regarding the intention which petitioner formed in the past. This intention, although formed in the past, is forward-looking, as are the administrative detention and the danger which it is intended to prevent. In the circumstances before us, the entirety of the classified material, both that gathered before his detention and that which was gathered during his detention, indicates a most concrete danger from petitioner. The danger he poses is clear. His release from administrative detention in these times of bloody struggle between the terrorist organizations and the State of Israel would be like the release of a "ticking bomb" waiting to explode. In this situation, in which the danger is so great, respondents' decision is reasonable even though petitioner has been in administrative detention for four years. On the basis of the material before us, we cannot assume that the long custody in administrative detention has lessened petitioner's dangerousness. The material which was placed before us forms a sufficient evidentiary basis for the continued custody of petitioner in administrative detention, for the present time. Indeed, the circumstances before us, in which petitioner's dangerousness is so great, might change in the future. The danger posed by petitioner might decrease if there is a change in his intentions and plans, or if there is a change in the present security situation, in which the terrorist organizations frequently use suicide bombers against civilians of the State. However, at the present time, and in the framework of the petition before us, we find that the military commander has lifted his burden and shown that his

decision is reasonable, and that there is no cause for our intervention in the conclusions of the military instances.

Petition denied.

Justice A. Procaccia
I concur.

Justice M. Naor
I concur.

Decided according to the judgment of President A. Barak.

Given today, 21 Kislev 5766 (December 22, 2005).