Judgments of the Israel Supreme Court:

Fighting Terrorism within the Law

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Introduction

The terrible events of September 11, 2001 highlighted the dangers of terrorism with painful clarity. They sparked a declaration of war on terrorists and the conditions that allow them to flourish. Though the fight against terrorism is not new, it has turned into a proactive international effort without precedent.

There exists a consensus on the need to fight terror, but there is still much controversy regarding the best way to conduct this war. This is no surprise since the price of war is high. Fighting against terrorism in an effective manner entails finding the right balance between security and public interests, on one hand, and the need to safeguard human rights and basic freedoms, on the other. This is a very complex process.

Unfortunately, this dilemma is not new to the Israeli legal system. Since its birth, the State of Israel has been the target of significant threats to its existence which have been manifested in many ways, including terrorism. In this sense the Israeli experience in the legal-judicial field, as well as other fields, is relevant to all those interested in the war on terrorism.

The citizens of Israel have had to live for many years with the reality of suicide terrorism, where bombers blow themselves up in city centers, to an intensity and frequency unprecedented elsewhere around the world. The immediate challenge faced by Israel's security system is, on one hand, the urgent need to act in order to halt the attacks, this being part of the basic responsibility of every state to ensure the security of its citizens. On the other hand, the state must carry out these operations pursuant to the law and within the framework of the rule of law in a democratic state.

The goal of this booklet is to present examples of how the Israeli Supreme Court has dealt with this dilemma. The booklet presents judgments in which the Supreme Court was required to balance security needs and the public interest of fighting terrorism against human rights, humanitarian obligations

and other important values. The Court's approach to such cases sheds light on the dilemmas involved in finding this balance. Should the Court even descend to the level of such conflicts and address these types of questions? The fundamental answer of the Israeli legal system is "yes."

Supreme Court President Aharon Barak expressed this succinctly when he ruled that the war on terror should not be waged outside of the law, but rather within the framework of the law and using the means that the law affords the security forces. This is the analytical basis of the Israeli judicial experience of the war on terror, several expressions of which are found in this booklet. This basis is explained in an article (following this introduction) written by President Barak which deals with the Supreme Court and the problem of terrorism. Several judgments handed down by the Supreme Court which demonstrate the practical application of this concept follow. In all of these judgments the Supreme Court had to find a balance between the security needs in Israel, the West Bank and Gaza Strip, the human rights of those suspected of terrorist activities and the human rights and interests of the civilian population.

Each judgment presented in this booklet is preceded by an introduction explaining the context in which the judgment was handed down and its principle points.

Before moving on to the judgments we must first briefly explain the essential character of the judicial review exercised by the Israeli Supreme Court over the activities of the security forces fighting terrorism.

All the judgments brought in this booklet were handed down by the High Court of Justice. The High Court of Justice is one of the forms assumed by the Israeli Supreme Court. It 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 the 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. It is also the last instance. There is no appeal on its rulings since it is the Supreme Court, the highest in the land.

In general the panel is composed of three justices, but for petitions of particular importance a larger panel of 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 has the right 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 is at the basis of 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. But it also hears petitions brought by residents of the West Bank and Gaza Strip 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. Its 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.

The Supreme Court and the Problem of Terrorism*

by Aharon Barak
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A. Terrorism and Democracy

Terrorism plagues many countries. The United States realized its devastating power on September 11, 2001. Other countries, such as Israel, have suffered from terrorism for a long time. [FN1] While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts:

> We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties. [FN2]

Terrorism creates much tension between the essential components of democracy. One pillar of democracy—the rule of the people through its elected representatives—may encourage taking all steps effective in fighting terrorism, even if they are harmful to human rights. The other pillar of democracy—human rights—may encourage protecting the rights of every individual, including the terrorists, even at the cost of undermining the fight against terrorism. Struggling with this tension is primarily the task of the legislature and the executive, which are accountable to the people. But true

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democratic accountability cannot be satisfied by the judgment of the people alone. The legislature must also justify its decisions to judges, who are responsible for protecting the principles of democracy.

We, the judges in modern democracies, are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism. Of course, matters of daily life constantly test judges' ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual's human rights is a much more formidable duty in times of war and terrorism than in times of peace and security. If we fail in our role in times of war and terrorism, we will be unable to fulfill our role in times of peace and security. It is a myth to think that we can maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that a judicial ruling will be valid only during wartime and that things will change in peacetime. The line between war and peace is thin—what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term. Since its founding, Israel has faced a security threat. As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock.

Furthermore, a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive in times of war and terrorism. The reason is that the judiciary's mistakes will remain with the democracy when the threat of terrorism passes, and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws. This is not so with a mistake of the other branches, which can be erased through legislation or executive action and usually forgotten. In his dissent in Korematsu v. United States, [FN3] Justice Jackson expressed this distinction well:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty. . . . A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. [FN4]

Indeed, we judges must act coherently and consistently. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes. This is not the case with the other branches of state, whose actions during a time of war and terrorism may amount to an episode that does not affect decisions made during times of peace and security.

Moreover, democracy ensures us, as judges, independence and impartiality. Because of our unaccountability, it strengthens us against the fluctuations of public opinion. The real test of this independence and impartiality comes in situations of war and terrorism. The significance of our unaccountability becomes clear in these situations, when public opinion is more likely to be unanimous. Precisely in these times, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution. Lord Atkins's remarks on the subject of administrative detention during World War II aptly describe these duties of a judge. In a minority opinion in November 1941, he wrote:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges. . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. [FN5]

Admittedly, the struggle against terrorism turns our democracy into a "defensive democracy" or a "fighting democracy." Nonetheless, this defense and this fight must not deprive our regime of its democratic character. Defensive democracy: yes; uncontrolled democracy: no. The judges in the highest court of the modern democracy must act in this spirit. We have tried

to do so in Israel, and I will now discuss several fundamental views that have guided us in these efforts.

B. In Battle, the Laws Are Not Silent

There is a well-known saying that when the cannons speak, the Muses are silent. Cicero expressed a similar idea when he said that *"inter arma silent leges"* (in battle, the laws are silent). [FN6] These statements are regrettable; I hope they do not reflect our democracies today. [FN7] I know they do not reflect the way things should be. Every battle a country wages—against terrorism or any other enemy—is done according to rules and laws. There is always law—domestic or international—according to which the state must act. And the law needs Muses, never more urgently than when the cannons speak. We need laws most in times of war. As Harold Koh said, referring to the September 11, 2001 attacks:

> In the days since, I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.

During the Gulf War, Iraq fired missiles at Israel. Israel feared chemical and biological warfare as well, so the government distributed gas masks. A suit was brought against the military commander, arguing that he distributed gas masks unequally in the West Bank. We accepted the petitioner's argument. In my opinion, I wrote:

> When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values. [FN8]

This opinion sparked criticism; some argued that the Supreme Court had improperly interfered in Israel's struggle against Iraq. I believe that this criticism is unjustified. We did not intervene in military considerations, for which the expertise and responsibility lie with the executive. Rather, we intervened in considerations of equality, for which the expertise and responsibility rest with the judiciary. Indeed, the struggle against terrorism is not conducted outside the law, but within the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism, a democratic state acts within the framework of the law and according to the law. Justice Haim Cohen expressed this idea well more than twenty years ago, when he said:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never succumb to the state's enemies. [FN9]

Indeed, the war against terrorism is the war of a law-abiding nation and its law-abiding citizens against lawbreakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the Law against its enemies. My recent opinion in the case involving the alleged food shortage among the besieged Palestinians in the Church of the Nativity in Bethlehem addressed this role of the rule of law as a primary actor in matters of terrorism. We considered the petition and applied the relevant rules of international law. In doing so, I said:

> Israel is in a difficult war against rampant terrorism. It is acting on the basis of its right to self-defense. . . . This armed conflict is not undertaken in a normative vacuum. It is undertaken according to the rules of international law, which establish the principles and rules for armed conflicts. The saying that "when the cannons speak, the Muses are silent" is incorrect. . . . The reason underlying this approach is not merely pragmatic, the result of political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic State fighting for its survival and the battle of terrorists rising up against it. The State is fighting for the law and for the law's protection. The terrorists are fighting against and in defiance of the law. The armed conflict against terrorism is an armed conflict of the law against those who seek to destroy it. . . . But in addition, the State of Israel is a State whose values are Jewish and

> democratic. Here we have established a State that preserves law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular. Between these two there are harmony and accord, not conflict and estrangement. [FN10]

Therefore, as Justice Michael Cheshin has written: "[W]e will not falter in our efforts for the rule of law. We have sworn by our oath to dispense justice, to be the servant of the law, and we will be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law will make its voice heard." [FN11]

Discussing democracy's war on terrorism, Justice Kirby has rightly pointed out that it must be waged while "[k]eeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects."

C. The Balance Between National Security and Freedom of the Individual

Democratic nations should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On one hand, we must consider the values and principles relating to the security of the state and its citizens. Human rights are not a stage for national destruction; they cannot justify undermining national security in every case and in all circumstances. Similarly, a constitution is not a prescription for national suicide. [FN12] But on the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited license to harm the individual.

Democratic nations must find a balance between these conflicting values and principles. Neither side can rule alone. In a case that dealt with the legality of administrative detention, I said:

> There is no avoiding—in a democracy aspiring to freedom and security—a balance between freedom and dignity on the one hand, and security on the other. Human rights must not become a tool for denying security to the public and the State. A balance is required—a sensitive and difficult balance—between the freedom and dignity of the individual, and national security and public security. [FN13]

This synthesis between national security and individual freedom reflects the rich and fertile character of the principle of rule of law in particular, and of democracy in general. It is within the framework of this approach that the courts in Israel have made their decisions concerning the state's armed conflict against the terrorism that plagues it. Our Supreme Court—which in Israel serves as the court of first instance for complaints against the executive branch—opens its doors to anyone with a complaint about the activities of a public authority. Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue. We have not used the Act of State doctrine or non-justiciability under these circumstances. We consider these issues on their merits. Nor do we require injury in fact as a standing requirement; we recognize the standing of anyone to challenge the act. In the context of terrorism, the Israeli Supreme Court has ruled on petitions concerning the power of the state to arrest suspected terrorists and the conditions of their confinement. It has ruled on petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated. These hearings sometimes take place just hours after the alleged incident about which the suspected terrorist complains. When necessary, the Court issues a preliminary injunction preventing the state from continuing the interrogation until the Court can determine that it is being conducted legally. In one case, the state sought to deport 400 suspected terrorists to Lebanon. Human rights organizations petitioned us. I was the Justice on call at the time. Late that night, I issued an interim order enjoining the deportation. At the time, the deportees were in automobiles en route to Lebanon. The order immediately halted the deportation. Only after a hearing held in our Court throughout the night that included comprehensive argumentation, including testimony by the Army's Chief of Staff, did we invalidate the deportation order. [FN14] We ruled that the state breached its obligation to grant the deportees the right to a hearing before deporting them, and we ordered a *post factum* right to a hearing.

In all these decisions—and there have been hundreds of this kind—we have recognized the power of the state to protect its security and the security of its citizens on the one hand; on the other hand, we have emphasized that the rights of every individual must be preserved, including the rights of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not constant, but rather differs from case to case and from issue to issue. The damage to national security caused by a given terrorist act and the nation's response to that act affect the way the

freedom and dignity of the individual are protected. Thus, for example, when the response to terrorism was the destruction of the terrorists' homes, we discussed the need to act proportionately. We concluded that only when human life has been lost is it permissible to destroy the buildings where the terrorists lived, and even then the goal of the destruction may not be collective punishment (which is forbidden in an area under military occupation). [FN15] Such destruction may be used only for preventive purposes, and even then the owner of the building to be destroyed has a right to a prior hearing unless such a hearing would interfere with current military activity. [FN16] Obviously, there is no right to a hearing in the middle of a military operation. But when the time and place permit—and there is no danger of interference with security forces that are fighting terrorism— this right should be honored as much as possible. [FN17]

When it was necessary to use administrative detention against terrorists, we interpreted the relevant legislation to determine that the purpose of administrative detention laws is twofold: "On one hand, protecting national security; on the other hand, protecting the dignity and freedom of every person." [FN18] We added that "protection of national security is a social interest that every State strives to satisfy. Within this framework, democratic freedom-loving countries recognize the 'institution' of administrative detention." [FN19] We also concluded that "defending and protecting . . . freedom and dignity extend even to the freedom and dignity of someone whom the state wishes to confine in administrative detention." [FN20] .Against this background, we held:

> [I]t is possible to allow—in a democratic state that aspires to freedom and security—the administrative detention of a person who is regarded personally as a danger to national security. But this possibility should not be extended to the detention of a person who is not regarded personally as any danger to national security, and who is merely a "bargaining chip." [FN21]

The war against terrorism also requires the interrogation of terrorists, which must be conducted according to the ordinary rules of interrogation. Physical force must not be used in these interrogations; specifically, the persons being interrogated must not be tortured. [FN22]

Any balance that is struck between security and freedom will impose certain limitations on both. A proper balance will not be achieved when human rights are fully protected, as if there were no terrorism. Similarly, a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security. It follows that the balance between security and freedom does not reflect the lack of a clear position. On the contrary, the proper balance is the result of a clear position that recognizes both the need for security and the need for human rights. I discussed this in a difficult case addressing whether the state may forcibly relocate residents of an occupied territory who pose a threat to state security: "A delicate and sensitive balance is necessary. That is the price of democracy. It is expensive but worthwhile. It strengthens the state. It gives it a reason to its fight." [FN23]

When a court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from all sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue the converse. Frequently, those making these arguments only read the judicial conclusions without considering the judicial reasoning that seeks to reach a proper balance among the conflicting values and principles. None of this should intimidate the judge; he must rule according to his best understanding and conscience. [FN24]

D. The Scope of Judicial Intervention

Judicial review of the war against terrorism by its nature raises questions regarding the timing and scope of judicial intervention. There is no theoretical difference between applying judicial review before or after the war on terrorism. In practice, however, as Chief Justice Rehnquist has correctly noted, the timing of judicial intervention affects its content. As he stated, "courts are more prone to uphold wartime claims of civil liberties after the war is over." [FN25] In light of this recognition, Chief Justice Rehnquist goes on to ask whether it would be better to abstain from judicial adjudication during warfare. [FN26] The answer, from my point of view—and, I am sure, that of Chief Justice Rehnquist—is clear: I will adjudicate a question when it is presented to me. I will not defer it until the war on terror is over, because the fate of a human being may hang in the balance. The protection of human rights would be bankrupt if, during armed conflict, courts—consciously or

unconsciously—decided to review the executive branch's behavior only after the period of emergency has ended. Furthermore, the decision should not rest on issuing general declarations about the balance of human rights and the need for security. Rather, the judicial ruling must impart guidance and direction in the specific case before it. As Justice Brennan correctly noted: "abstract principles announcing the applicability of civil liberties during times of war and crisis are ineffectual when a war or other crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns." [FN27]

From a judicial review perspective, the situation in Israel is unique. Petitions from suspected terrorists reach the Supreme Court—which has exclusive jurisdiction over such matters—in real time. The judicial adjudication may take place not only during combat, but also often while the events being reviewed are still taking place. For example, the question whether the General Security Service may use extraordinary methods of interrogation (including what has been classified as torture) did not come before us in the context of a criminal case in which we had to rule, *ex post*, on the admissibility of a suspected terrorist's confession. [FN28] Rather, the question arose at the beginning of his interrogation. The suspect's lawyer came before us at the start of the interrogation and claimed, on the basis of past experience, that the General Security Service would torture his client. When we summoned the state's representative hours later, he confirmed the lawyer's allegation but nonetheless argued that the interrogation was legal. We had to make a decision in real time. How must we, as Supreme Court justices in a democracy, approach such an issue?

I believe that the court should not adopt a position on the efficient security measures for fighting against terrorism: "this court will not take any stance on the manner of conducting the combat." [FN29] For example, in a petition filed by citizens who were in the precincts of the Church of the Nativity when it was besieged by the Army—a petition that was filed while negotiations were being held between the Government of Israel and the Palestinian Authority regarding a solution to the problem—I wrote that "this court is not conducting the negotiations and is not taking part in them. The national responsibility in this affair lies with the executive and those acting on its behalf." [FN30] Indeed, the efficiency of security measures is within the power of the other branches of government. As long as these branches are acting within the framework of the "zone of reasonableness," there is no basis for judicial

intervention. Often the executive will argue that "security considerations" led to a government action and request that the court be satisfied with this argument. Such a request should not be granted. "Security considerations" are not magic words. The court must insist on learning the specific security considerations that prompted the government's actions. The court must also be persuaded that these considerations actually motivated the government's actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights. Indeed, in several of the many security measure cases that the Supreme Court has heard, senior army commanders and heads of the security services testified. Only if we were convinced, in the total balance, that the security consideration was the dominant one, and that the security measure was proportionate to the terrorist act, did we dismiss the challenge against the action. [FN31] We should be neither naïve nor cynical. We should analyze objectively the evidence before us. In a case dealing with review, under the Geneva Convention, of the state's decision to assign the residence of Arabs from the West Bank to the Gaza Strip, I noted that:

In exercising judicial review. . . we do not make ourselves into security experts. We do not replace the military commander's security considerations with our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military commander's discretion. . . because of the important security aspects in which the commander's decision is grounded. We do not, however, replace the commander's discretion with our own. We insist upon the legality of the military commander's exercise of discretion and that it fall into the range of reasonableness, determined by the relevant legal norms applicable to the issue. [FN32]

Is it proper for judges to review the legality of the war on terrorism? Many, on both extremes of the political spectrum, argue that the courts should not become involved in these matters. On one side, critics argue that judicial review undermines security; on the other side, critics argue that judicial review gives undeserved legitimacy to government actions against terrorism. Both arguments are unacceptable. Judicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the people in the long term. The rule of law is a central element in national security. As I wrote in the case of the pretrial pardon given to the heads of the General Security Service:

> There is no security without law. The rule of law is a component of national security. Security requires us to find proper tools for interrogation. Otherwise, the General Security Service will be unable to fulfill its mission. The strength of the Service lies in the public's confidence in it. Its strength lies in the court's confidence in it. If security considerations tip the scales, neither the public nor the court will have confidence in the Security Service and the lawfulness of its interrogations. Without this confidence, the branches of the state cannot function. This is true of public confidence in the courts, and it true of public confidence in the other branches of state. [FN33]

I concluded my opinion in that case with the following historical analogy:

> It is said that there was a dispute between King James I and Justice Coke. The question was whether the king could take matters in the province of the judiciary into his own hands and decide them himself. At first, Justice Coke tried to persuade the king that judging required expertise that the king did not have. The king was not convinced. Then Justice Coke rose and said: "Quod rex non debet sub homine, sed sub deo et lege." The king is not subject to man, but subject to God and the law. Let it be so. [FN34]

The security considerations entertained by the branches of the state are subject to "God and the law." In the final analysis, this subservience strengthens democracy. It makes the struggle against terrorism worthwhile. To the extent that the legitimacy of the court means that the acts of the state are lawful, the court fulfills an important role. Public confidence in the branches of the state is vital for democracy. Both when the state wins and when it loses, the rule of law and democracy benefit. The main effect of the judicial decision occurs not in the individual instance that comes before it, but by determining the general norms according to which governmental authorities act and establishing the deterrent effect that these norms will have. The test of the rule of law arises not merely in the few cases brought before the court, but also in the many potential cases that are not brought before it, since governmental authorities are aware of the court's rulings and act accordingly. The argument that judicial review necessarily validates the governmental action does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the war against terrorism, but only the legality of the acts taken in furtherance of the war. The court does not ask itself if it would have adopted the same security measures if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be prudent to adopt the security measures that were adopted. Thus, the court does not express agreement or disagreement with the means adopted, but rather fulfills its role of reviewing the constitutionality and legality of the executive acts.

Naturally, one must not go from one extreme to the other. One must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law. This is the court's contribution to democracy's struggle to survive. In my opinion, it is an important contribution, one that aptly reflects the judicial role in a democracy. Realizing this rule during a fight against terrorism is difficult. We cannot and would not want to escape from this difficulty, as I noted in one case:

> The decision has been laid before us, and we must stand by it. We are obligated to preserve the legality of the regime even in difficult decisions. Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden, what is legal and what is illegal. And when law exists, courts also exist to adjudicate what is permitted and what is forbidden, what is legal and what is illegal. Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligations as judges. [FN35]

[FN1]. For a comparison of the American experience and the Israeli experience, see William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Time of Security Crises, 18 Isr. Yearbook Hum. Rts. 11 (1988).

[FN2]. H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845.

[FN3]. 323 U.S. 214 (1944).

[FN4]. Id. at 245-46 (Jackson, J., dissenting).

[FN5]. Liversidge v. Anderson, 3 All E.R. 338, 361 (1941) (Atkins, L.J., minority opinion).

[FN6]. Cicero, Pro Milone 16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).

[FN7]. But cf. William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 224 (1998) (arguing that Cicero's approach reflects reality).

[FN8]. H.C. 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470-71.

[FN9]. H.C. 320/80, Kwasama v. Minister of Def., 5(3) P.D. 113, 132.

[FN10]. H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 34-35.

[FN10]. H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 34-35.

[FN11]. H.C. 1730/96, Sabiah v. IDF Commander in Judea & Samaria, 50(1) P.D. 353, 369.

[FN12]. See C.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225, 310; cf. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackon, J., dissenting).

[FN13]. Cr.A. 7048/97, Anonymous v. Minister of Def., 54(1) P.D. 721, 741.

[FN14]. See H.C. 5973/92, Ass'n for Civil Rights in Isr. v. Minister of Def., 47(1) P.D. 267.

[FN15]. See H.C. 5510/92, Turkeman v. Minister of Def., 48(1) P.D. 217. Harsh criticism has been leveled at this opinion and others like it. See David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories 160-61 (2002)

[FN16]. See H.C. 6696/02, Adal Sado Amar v. IDF Commander in the W. Bank, http://www.court.gov.il.

[FN17]. See id.

[FN18]. Anonymous, 54(1) P.D. at 740.

[FN19]. Id.

[FN20]. Id.

[FN21]. Id. at 741.

[FN22]. H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 835.

[FN23]. H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, http:// www.court.gov.il.

[FN24]. See H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 585 (Barak, J., dissenting).

[FN25]. Rehnquist, supra note 519, at 222.

[FN26]. Id.

[FN27]. Brennan, supra note 513, at 19.

[FN28]. See H.C. 4054/95, Pub. Comm'n Against Torture in Isr. v. Gov't of Israel,

43(4) P.D. 817.

[FN29]. H.C. 3114/02, Barakeh v. Minister of Def., 56(3) P.D. 11, 16.

[FN30]. H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 36.

[FN31]. In Secretary of State for the Home Department v. Rehman, No. UKHL47, 2001 WL 1135176 (H.L. Oct. 11, 2001) (U.K.), Lord Hoffman noted that "the judicial arm of government [needs] to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." I hope the meaning of these comments is limited to the general principle that a court determines not the means of fighting terrorism but rather the lawfulness of the means employed.

[FN32]. H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, http:// www.court.gov.il.

[FN33]. H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 622 (citation omitted).

[FN34]. Id. at 623.

[FN35]. H.C. 2161/96, Rabbi Said Sharif v. Military Commander, 50 (4) P.D. 485, 491.

The GSS's Methods of Interrogation

HCJ 5100/94 **Public Committee Against Torture in Israel**

v.

The State of Israel

The General Security Service (GSS) is responsible for safeguarding the security of the State of Israel. One of its tasks is to eliminate terrorist activities from the state's territories. It regularly interrogates terrorist suspects in an effort to obtain information from them and thwart planned terrorist attacks.

In the petitions brought before the High Court of Justice in this case it was claimed that the methods employed by GSS interrogators constitute torture and are illegal. The state claimed in response that physical techniques of interrogation are used only in extreme cases, where a "moderate degree of physical pressure" is applied. These measures are reserved in particular for times when an immanent terrorist attack is feared. In such cases there is an urgent need to get information from those being interrogated. Such situations are termed "ticking bombs."

An expanded panel of nine Supreme Court justices heard the petitions and accepted their claims by a majority opinion. The Court was required to balance between the important security interest of obtaining information from terror suspects and the need to protect the rights of the suspects. The majority opinion was written by Court President Barak.

The judgment did not directly address the question of whether the interrogation methods were reasonable or not. Instead, the Court examined whether the GSS was authorized to use those methods. The Court did so in light of the fundamental legal principle of administrative legality, according to which the activities of an administrative authority must be authorized by statute or by virtue of statute. The Court did not find such authorization. It was ruled that GSS investigators do indeed possess the authority to interrogate those suspected of terrorist activity, but the sources of this general power do

not provide for the methods of interrogation described in the case. The power to adopt these extreme methods of interrogation requires express authorization in statute.

This ruling emphasizes the centrality of human rights. For this reason, the Court noted that if the Knesset wishes to grant such powers of interrogation to the security forces, it must do so explicitly in statute. Such legislation would need to be formulated in keeping with the Basic Law: Human Dignity and Liberty. In a landmark ruling, the Court maintained that as a democracy, Israel must wage its war against terrorism with self-restraint due to the need to safeguard human rights. This self-restraint is the source of a democracy's strength.

In his minority opinion, Justice Y. Kedmi agreed with the judgment, but determined that its implementation should be postponed in order to allow the security services to prepare.

Following the handing down of this judgment, the Knesset enacted the General Security Services Law, 2002, which regulated the operations of this security agency for the first time. In late 2004, a number of specific regulations were approved by the Knesset in keeping with the 2002 GSS law.

HCJ 5100/94 **Public Committee Against Torture in Israel**

v.

1. The State of Israel
2. The General Security Service

HCJ 4054/95 **The Association for Civil Rights in Israel**

v.

1. The Prime Minister of Israel
2. The Minister of Justice
3. The Minister of Police
4. The Minister of the Environment
5. The Head of the General Security Service

HCJ 6536/95 **Hat'm Abu Zayda**

v.

The General Security Service

HCJ 5188/96 **1. Wa'al Al Kaaqua**
2. Ibrahim Abd'allah Ganimat
3. Center for the Defense of the Individual

v.

1. The General Security Service
2. The Prison Commander—Jerusalem

HCJ 7563/97

1. Abd Al Rahman Ismail Ganimat
2. Public Committee Against Torture in Israel

v.

1. The Minister of Defense
2. The General Security Service

HCJ 7628/97

1. Fouad Awad Quran
2. Public Committee against Torture in Israel

v.

1. The Minister of Defense
2. The General Security Service

HCJ 1043/99

Issa Ali Batat

v.

The General Security Service

The Supreme Court Sitting as the High Court of Justice
[May 5, 1998, January 13, 1999, May 26, 1999] Before
President A. Barak, Deputy President S. Levin, and Justices T. Or, E. Mazza, M. Cheshin, Y. Kedmi, I. Zamir, T. Strasberg-Cohen, D. Dorner.

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

Facts: In its investigations, the General Security Service makes use of methods that include subjecting suspects to moderate physical pressure. The means are employed under the authority of directives. These directives allow for the use of moderate physical pressure if such pressure is immediately necessary to save human life. Petitioners challenge the legality of these methods.

Held: The Court held that the GSS did not have the authority to employ certain methods challenged by the petitioners. The Court also held that the "necessity defense," found in the Israeli Penal Law, could serve to *ex ante* allow GSS investigators to employ such interrogation practices. The Court's decision did not negate the possibility that the "necessity defense" would be available *post factum* to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges were brought against them.

Petition denied.

Counsel for the petitioner in HCJ 5100/94—Avigdor Feldman; Ronit Robinson
Counsel for the petitioner in HCJ 4054/95—Dan Yakir
Counsel for the petitioners in HCJ 6536/95 HCJ 5188/96 and HCJ 1043/99—Andre Rosenthal
Counsel for petitioner Number Three in HCJ 5188/96—Eliyahu Abram
Counsel for petitioners in HCJ 7563/97 and HCJ 7628/97—Leah Tzemel; Allegra Pachko
Counsel for respondents—Shai Nitzan; Yehuda Scheffer

JUDGMENT

President A. Barak

The General Security Service [hereinafter the "GSS"] investigates individuals suspected of committing crimes against Israel's security. Authorization for these interrogations is granted by directives that regulate interrogation methods. These directives authorize investigators to apply physical means against those undergoing interrogation, including shaking the suspect and placing him in the "Shabach" position. These methods are permitted since they are seen as immediately necessary to save human lives. Are these interrogation practices legal? These are the issues before us.

Background

1. Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal. Terrorist acts and the general disruption of order are their means of choice. In employing such

methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas—in areas of public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy. (For an in depth description of this phenomenon see the Report of the Commission of Inquiry Regarding the Interrogation Practices of the GSS with Respect to Hostile Terrorist Activities headed by Justice (ret.) M. Landau, 1987) [hereinafter the Report of the Commission of Inquiry]. *See* 1 The Landau Book 269, 276 (1995).

The facts before this Court reveal that 121 people died in terrorist attacks between January 1, 1996 and May 14, 1998. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to highjack buses, murders, and the placing of explosives—were prevented due to daily measures taken by authorities responsible for fighting terrorist activities. The GSS is the main body responsible for fighting terrorism.

In order to fulfill this function, the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations includes the gathering of information regarding terrorists in order to prevent them from carrying out terrorist attacks. In the context of these interrogations, GSS investigators also make use of physical means.

The Petitions

2. These petitions are concerned with the interrogation methods of the GSS. They outline several of these methods in detail. Two of the petitions are of a public nature. One of these (HCJ 5100/94) is brought by the Public Committee against Torture in Israel. It submits that GSS investigators are not authorized to investigate those suspected of hostile terrorist activities. Moreover, they claim that the GSS is not entitled to employ those methods approved by the Report of the Commission of Inquiry, such as "the application of non-violent psychological pressure" and of "a moderate degree of physical pressure." The second petition (4054/95) is brought by the Association for Civil Rights in Israel. It argues that the GSS should be ordered to cease shaking suspects during interrogations.

The five remaining petitions involve individual petitioners. They each petitioned the Court to hold that the methods used against them by the GSS are illegal.

3. The petitioners in HCJ 5188/96 (Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat) were arrested at the beginning of June 1996. They were interrogated by GSS investigators. They appealed to this Court on July 21, 1996 through the Center for the Defense of the Individual, founded by Dr. Lota Saltzberger. They petitioned the Court for an *order nisi* prohibiting the use of physical force against them during their interrogation. The Court granted the order. The two petitioners were released from custody prior to the hearing. As per their request, we have elected to continue hearing their case, in light of the importance of the issues they raise.

4. The petitioner in HCJ 6536/96 (Hat'm Abu Zayda), was arrested on September 21, 1995 and interrogated by GSS investigators. He turned to this Court on October 22, 1995 via the Center for the Defense of the Individual, founded by Dr. Lota Saltzberger. He complained of the interrogation methods allegedly used against him, including sleep deprivation, shaking, beatings, and use of the "Shabach" position. We immediately ordered the petition be heard. The Court was then informed that petitioner's interrogation had ended. Petitioner was subsequently convicted of activities in the military branch of the Hamas terrorist organization. He was sentenced to 74 months in prison. The court held that petitioner both recruited for Hamas and also helped construct its terrorist infrastructure. The purpose of this infrastructure was to carry out the kidnapping of Israeli soldiers as well as to execute other terrorist attacks against Israeli security forces. During oral arguments, it was asserted that the information provided by petitioner during his interrogation led to the thwarting of a plan to carry out serious terrorist attacks, including the kidnapping of soldiers.

5. The petitioner in HCJ 7563/97 (Abd al Rahman Ismail Ganimat) was arrested on November 13, 1997 and interrogated by the GSS. He appealed to this Court on December 24, 1997 via the Public Committee against Torture in Israel. He claimed to have been tortured by his investigators, through use of the "Shabach" position," excessively tight handcuffs and sleep deprivation. His interrogation revealed that he was involved in numerous terrorist activities, which resulted in the deaths of many Israeli citizens. He was instrumental in the kidnapping and murder of Sharon Edry, an IDF soldier.

Additionally, he was involved in the bombing of Apropo Café in Tel Aviv, in which three women were murdered and thirty people were injured. He was charged with all these crimes and convicted at trial. He was sentenced to five consecutive life sentences plus an additional twenty years in prison.

Subsequent to the dismantling and interrogation of the terrorist cell to which the petitioner belonged, a powerful explosive device, identical to the one detonated at Apropo Café in Tel Aviv, was found in Tzurif, the petitioner's village. Uncovering this explosive device thwarted an attack like the one at Apropo Café. According to GSS investigators, the petitioner possessed additional crucial information which he revealed only as a result of the interrogation. Revealing this information immediately was essential to safeguarding national and regional security and preventing danger to human life.

6. The petitioner in HCJ 7628/97 (Fouad Awad Quran) was arrested on December 10, 1997 and interrogated. He turned to this Court on December 25, 1997 via the Public Committee against Torture in Israel. The petitioner claimed that he was being deprived of sleep and was being seated in the "Shabach" position. The Court issued an *order nisi* and held oral arguments immediately. During the hearing, the state informed the Court that "at this stage of the interrogation, the GSS is not employing the alleged methods." For this reason, no interim order was granted.

7. The petitioner in HCJ1043/99 (Issa Ali Batat) was arrested on February 2, 1999, and interrogated by GSS investigators. The petition, brought via the Public Committee against Torture in Israel, argues that physical force was used against the petitioner during the course of the interrogation. The Court issued an *order nisi*. During oral arguments, it came to the Court's attention that the petitioner's interrogation had ended and that he was being detained pending trial. The indictment alleges his involvement in hostile activities, the purpose of which was to harm the security and public safety of the "area" (Judea, Samaria and the Gaza Strip).

Physical Means

8. The GSS did not describe the physical means employed by GSS investigators. The State Attorney was prepared to present this information *in camera*. Petitioners opposed this proposal. As such, the information before the Court was provided by the petitioners and was not examined in each individual petition. This having been said, the state did not deny the use of these interrogation methods, and even offered justifications for these methods. This provided the Court with a picture of the interrogation practices of the GSS.

The decision to utilize physical means in a particular instance is based on internal regulations, which require obtaining permission from the higher ranks of the GSS. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the committee set forth directives regarding the rank required of an officer who was to authorize such interrogation practices. These directives were not examined by this Court. Different interrogation methods are employed in each situation, depending what is necessary in that situation and the likelihood of obtaining authorization. The GSS does not resort to every interrogation method at its disposal in each case.

Shaking

9. A number of petitioners (HCJ 5100/94; HCJ 4054/95; HCJ 6536/95) claimed that they were subject to shaking. Among the investigation methods outlined in the GSS interrogation regulations, shaking is considered the harshest. The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion submitted in HCJ 5584/95 and HCJ 5100/95, the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

The state entered several opposing expert opinions into evidence. It admits the use of this method by the GSS. It contends, however, that shaking does not present an inherent danger to the life of the suspect, that the risk to life as a result of shaking is rare, that there is no evidence that shaking causes fatal damage, and that medical literature has not, to date, reported a case in which a person died as a direct result of having been shaken. In any event, they argue, doctors are present at all interrogation areas, and the possibility of medical injury is always investigated.

All agree that, in one particular case, (HCJ 4054/95) the suspect expired after being shaken. According to the state, that case was a rare exception. Death was caused by an extremely rare complication which resulted in pulmonary edema. In addition, the state argues that the shaking method is only resorted to in very specific cases, and only as a last resort. The directives define the appropriate circumstances for its use, and the rank responsible for authorizing its use. The investigators were instructed that, in every case where they consider the use of shaking, they must examine the severity of the danger that the interrogation is intending to prevent, consider the urgency of uncovering the information presumably possessed by the suspect in question, and seek an alternative means of preventing the danger. Finally, the directives state that, in cases where this method is to be used, the investigator must first provide an evaluation of the suspect's health and ensure that no harm comes to him. According to the respondent, shaking is indispensable to fighting and winning the war on terrorism. It is not possible to prohibit its use without seriously harming the ability of the GSS effectively to thwart deadly terrorist attacks. Its use in the past has lead to the prevention of murderous attacks.

Waiting in the "Shabach" Position

10. This interrogation method arose in several petitions (HCJ 6536/95, HCJ 5188/96, HCJ 7628/97). As per the petitioners' submissions, a suspect investigated under the "Shabach" position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.

Petitioners claim that prolonged sitting in this position causes serious muscle pain in the arms, in the neck and headaches. The state did not deny the use of this method. It submits that both crucial security considerations and the safety of the investigators require the tying of the suspect's hands as he is being interrogated. The head covering is intended to prevent contact with other suspects. Loud music is played for the same reason.

The "Frog Crouch"

11. This interrogation method appeared in one of the petitions (HCJ 5188/96). According to the petition, the suspect was interrogated in a "frog crouch" position. This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals. The state did not deny the use of this method, and the Court issued an *order nisi* in the petition. Prior to hearing the petition, however, this interrogation practice ceased.

Excessively Tight Handcuffs

12. In a number of petitions (HCJ 5188/96; HCJ 7563/97), several petitioners complained of excessively tight hand or leg cuffs. They contended that this practice results in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations. The petitioners contend that particularly small cuffs were used. The state, for its part, denies the use of unusually small cuffs, arguing that those used were of standard issue and were properly applied. Even so, the state is prepared to admit that prolonged hand or foot cuffing is likely to cause injuries to the suspect's hands or feet. The state contends, however, that injuries of this nature are inherent to any lengthy interrogation.

Sleep Deprivation

13. In a number of petitions (HCJ 6536/96; HCJ 7563/97; HCJ 7628/97) petitioners complained of being deprived of sleep as a result of being tied in the "Shabach" position, while subject to the playing of loud music, or of being subjected to intense non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion. While the state agrees that suspects are at times deprived of regular sleep hours, it argues that this does not constitute an interrogation method aimed at causing exhaustion, but rather results from the long amount of time necessary for conducting the interrogation.

Petitioners' Arguments

14. Before us are a number of petitions. Different petitioners raise different arguments. All the petitions raise two essential arguments. First, they submit that the GSS is never authorized to conduct interrogations. Second, they argue

that the physical means employed by GSS investigators not only infringe upon the human dignity of the suspect undergoing interrogation, but also constitute criminal offences. These methods, argue the petitioners, are in violation of international law as they constitute “torture.” As such, GSS investigators are not authorized to conduct these interrogations. Furthermore, the “necessity defense” is not relevant to the circumstances in question. In any event, the doctrine of "necessity" at most constitutes an exceptional *post factum* defense, exclusively confined to criminal proceedings against investigators. It cannot, however, provide GSS investigators with the authorization to conduct interrogations. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the legislature which conforms to the constitutional requirements of the Basic Law: Human Dignity and Liberty. There is no purpose in engaging in a bureaucratic set up of the regulations and authority, as suggested by the Report of the Commission of Inquiry, since doing so would merely regulate the torture of human beings.

We asked petitioners whether the “ticking bomb” rationale was sufficiently persuasive to justify the use of physical means. This rationale would apply in a situation where a bomb is known to have been placed in a public area and will cause human tragedy if its location is not revealed. This question elicited different responses from the petitioners. There are those convinced that physical means are not to be used under any circumstances; the prohibition on such methods, to their mind, is absolute, whatever the consequences may be. On the other hand, there are others who argue that, even if it is acceptable to employ physical means in the exceptional circumstances of the “ticking bomb,” these methods are used even in absence of “ticking bomb” conditions. The very fact that the use of such means is illegal in most cases warrants banning their use altogether, even if doing so would include those rare cases in which physical coercion may have been justified. Whatever their individual views, all petitioners unanimously highlight the distinction between the *post factum* possibility of escaping criminal liability and the advance granting of permission to use physical means for interrogation purposes.

The State’s Arguments

15. According to the state, GSS investigators are authorized to interrogate those suspected of committing crimes against the security of Israel. This authority comes from the government’s general and residual powers, as per

article 40 of the Basic Law: the Government. Similarly, the authority to investigate is bestowed upon every individual investigator under article 2(1) of the Criminal Procedure Statute [Testimony]. With respect to the physical means employed by the GSS, the state argues that these methods do not violate international law. Indeed, it is submitted that these methods cannot be described as “torture,” as “cruel and inhuman treatment¨” or as “degrading treatment,” which are all strictly prohibited under international law. The state further contends that the practices of the GSS do not cause pain and suffering.

Moreover, the state argues that these means are legal under domestic Israeli law. This is due to the “necessity defense” of article 34(11) of the Penal Law-1977. In the specific cases where the “necessity defense” would apply, GSS investigators are entitled to use “moderate physical pressure” as a last resort in order to prevent real injury to human life and well-being. Such “moderate physical pressure” may include shaking. Resort to such means is legal, and does not constitute a criminal offence. In any case, if a specific method is not deemed to be a criminal offence, there is no reason not to employ it, even for interrogation purposes. According to the state, there is no reason to prohibit a particular act if, in specific circumstances, it does not constitute a crime. This is particularly true with respect to GSS investigators who, according to the state, are responsible for the protection of lives and public safety. In support of their position, the state notes that the use of physical means by GSS investigators is most unusual and is only employed as a last resort in very extreme cases. Moreover, even in such cases, these methods are subject to strict scrutiny and supervision, as per the conditions and restrictions in the Report of the Commission of Inquiry. This having been said, when such exceptional conditions are present, these interrogation methods are fundamental to saving human lives and safeguarding Israel’s security.

The Report of the Commission of Inquiry

16. The authority of the GSS to employ particular interrogation methods was examined by the Commission of Inquiry. The Commission, appointed by the government under the Commission of Inquiry Statute-1968, considered the legal status of the GSS. Following a prolonged deliberation, the Commission concluded that the GSS is authorized to investigate those suspected of hostile terrorist acts, even in the absence of an express statute, in light of the powers granted to it by other legislation as well as by the

government's residual powers, outlined in the Basic Law: the Government. See The Basic Law: The Government, § 40. In addition, the power to investigate suspects, granted to investigators by the Minister of Justice, as per article 2(1) of the Statute of Criminal Procedure [Testimony], also endows the GSS with the authority to investigate. Another part of the Report of the Commission of Inquiry deals with "defenses available to the investigator." With regard to this matter, the Commission concluded that, in cases where the saving of human lives requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure." As such, an investigator who, in the face of such danger, applies a degree of physical pressure which does not constitute abuse or torture of the suspect but is proportionate to the danger to human life, can, in the face of criminal liability, avail himself of the "necessity defense." The Commission was convinced that its conclusions were not in conflict with international law, but, rather, were consistent with both the rule of law and the need effectively to protect the security of Israel and its citizens.

The commission approved the use of a "moderate degree of physical pressure." Such "moderate physical pressure" could be applied under stringent conditions. Directives to this effect were set out in the second, secret part of the report, and subject to the supervision of bodies both internal and external to the GSS. The commission's recommendations were approved by the government.

The Petitions

17. A number of petitions dealing with the application of physical force by the GSS for interrogation purposes have made their way to this Court over the years. *See, e.g.*, HCJ 7964/95 *Billbissi v. The GSS* (unreported decision); HCJ 8049/96 *Hamdan v. The GSS* (unreported decision); HCJ 3123/94 *Atun v. The Head of the GSS* (unreported decision); HCJ 3029/95 *Arquan v. The GSS* (unreported decision); HCJ 5578/95 *Hajazi v. The GSS* (unreported decision). Immediate oral arguments were ordered in each of these cases. In most of the cases, the state declared that the GSS did not employ physical means. As a result, petitioners requested to withdraw their petitions. The Court accepted these motions and informed petitioners of their right to set forth a complaint if physical means were used against them. *See* HCJ 3029/95. In only a minority of complaints did the state not issue such a notice. In other instances, an interim order was issued. At times, we noted that we "did not receive any

information regarding the interrogation methods which the respondent [generally the GSS] seeks to employ and we did not take any position with respect to these methods." *See* HCJ 8049/96 *Hamdan v. The GSS* (unreported decision). In HCJ 336/96; HCJ 7954/95 *Billbissi v. The GSS* (unreported decision), the Court noted that, "[T]he annulment of the interim order does not in any way constitute permission to employ methods that do not conform to the law and binding directives."

As such, the Court has not decided whether the GSS is permitted to employ physical means for interrogation under the defense of "necessity." Until now, it was not possible for the Court to hear the sort of arguments that would provide a complete normative picture, in all its complexity. At this time, in contrast, a number of petitions have properly laid out complete arguments. For this we thank them.

Some of the petitions are rather general or theoretical, while others are quite specific. Even so, we have decided to deal with all of them, since we seek to clarify the state of the law in this most complicated question. To this end, we shall begin by addressing the first issue—are GSS investigators authorized to conduct interrogations? We shall then proceed to examine whether a general power to investigate could potentially sanction the use of physical means—including mental suffering—the likes of which the GSS employs. Finally, we shall examine circumstances where such methods are immediately necessary to rescue human lives and shall decide whether such circumstances justify granting GSS investigators the authority to employ physical interrogation methods.

The Authority to Interrogate

18. The term "interrogation" takes on various meanings in different contexts. For the purposes of these petitions, we refer to the asking of questions which seek to elicit a truthful answer, subject to the privilege against self-incrimination. *See* the Criminal Procedure Statute (Testimony), § 2. Generally, the investigation of a suspect is conducted at the suspect's place of detention. Any interrogation inevitably infringes upon the suspect's freedom—including his human dignity and privacy—even if physical means are not used. In a country adhering to the rule of law, therefore, interrogations are not permitted in the absence of clear statutory authorization, whether such authorization is through primary or secondary legislation. This essential

principle is expressed in the Criminal Procedure Statute (Powers of Enforcement, Detention)-1996, §1(a):

Detentions and arrests shall be conducted only by law or by virtue of express statutory authorization.

Hence, the statute and regulations must adhere to the requirements of the Basic Law: Human Dignity and Liberty. The same principle applies to interrogations. Thus, an administrative body seeking to interrogate an individual—an interrogation being defined as an exercise seeking to elicit truthful answers, as opposed to the mere asking of questions as in the context of an ordinary conversation—must point to an explicit statutory provision. This is required by the rule of law, both formally and substantively. Moreover, this is required by the principle of administrative legality. "If an authority cannot point to a statute from which it derives its authority to engage in a certain act, that act is *ultra vires* and illegal." *See* I. Zamir, The Administrative Authority (1996) at 50. *See* also 1 B. Bracha, Administrative Law 25 (1987).

19. Is there a statute that authorizes GSS investigators to carry out interrogations? There is no specific provision that deals with the investigatory authority of GSS agents. "The status of the Service, its function and powers, are not outlined in any statute addressing this matter." *See* the Report of the Commission of Inquiry, at 302. This having been said, the GSS constitutes an integral part of the executive branch. The fact that the GSS forms part of the executive branch is not, in itself, sufficient to invest it with the authority to interrogate. It is true that, under the Basic Law: The Government, § 40, the government does possess residual or prerogative powers:

> The Government is authorized to perform, in the name of the state, all actions which are not in the jurisdiction of another authority. In performing such actions, the Government is subject to all applicable laws.

We cannot, however, interpret this provision as granting the authority to investigate. As noted, the power to investigate infringes upon a person's individual liberty. The residual powers of the government authorize it to act whenever there is an "administrative vacuum." *See* HCJ 2918/93 *The City of Kiryat Gatt v. The State of Israel*. There is no so-called "administrative vacuum" in this case, as the field is entirely occupied by the principle of individual freedom. Infringing on this principle requires specific directives, as

President Shamgar insisted in HCJ 5128/94 *Federman v. The Minister of Police*:

> There are means which do not fall within the scope of government powers. Employing them, absent statutory authorization, runs contrary to our most basic normative understanding. Thus, basic rights forms part of our positive law, whether they have been spelled out in a Basic Law or whether this has yet to be done. Thus, for example, the government is not endowed with the capacity to shut down a newspaper on the basis of an administrative decision, absent explicit statutory authorization, irrespective of whether a Basic Law expressly protects freedom of expression. An act of this sort would undoubtedly run contrary to our basic understanding regarding human liberty and the democratic nature of our regime, which provides that liberty may only be infringed upon by virtue of explicit statutory authorization.... Freedom of expression, a basic right, forms an integral part of our positive law. It binds the executive and does not allow it to stray from the prohibition respecting guaranteed human liberty, absent statutory authorization.

In a similar vein, Professor Zamir has noted:

> In areas where the government may act under section 40 of the Basic Law: The Government, its actions must conform to the law. Clearly, this precludes the government from acting contrary to statutes. Moreover, it prevents the government from infringing basic rights. This, of course, is true regarding the rights explicitly protected by the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. This is also the case for human rights not specifically enumerated in those Basic Laws. For instance, section 40 cannot authorize the government to limit the freedom of expression…. Section 40 only grants general executive powers that cannot serve to directly infringe human rights, unless there is explicit or implicit statutory authorization for doing so. This same conclusion can also be drawn from the fact that a grant of administrative authority cannot be interpreted as granting the power to infringe human rights, unless such powers are explicitly granted by statute.

See 1. I. Zamir, The Administrative Authority 337 (1996).

The same is true in this case. There are to be no infringements on an individual's liberty against interrogation absent statutory provisions which successfully pass constitutional muster. The government's general administrative powers do not fulfill these requirements. Indeed, when the

legislature sought to endow the GSS with the power to infringe individual liberties, it anchored these powers in specific legislation. Thus, for instance, statutes provide that the head of a security service, under special circumstances, is authorized to allow the secret monitoring of telephone conversations. See the Secret Interception of Communication Statute-1979, § 5; *Compare* the Protection of Privacy Statute-1981, § 19(3)(4). Is there a special statutory instruction endowing GSS investigators with interrogating powers?

20. A specific statutory provision authorizing GSS investigators to conduct interrogations does not exist. While it is true that directives, some with ministerial approval, were promulgated in the wake of the Report of the Commission of Inquiry, these do not satisfy the requirement that a grant of authority flow directly from statute or from explicit statutory authorization. These directives merely constitute internal regulations. Addressing such directives, in HCJ 2581/91 *Salhat v. The State of Israel* , Justice Levin opined:

> Clearly, these directives are not to be understood as being tantamount to a "statute," as defined in article 8 of the Basic Law: Human Dignity. They are to be struck down if they are found not to conform to it.

From where, then, do the GSS investigators derive their interrogation powers? The answer is found in article 2(1) of the Criminal Procedure Statute [Testimony] which provides:

> A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined.

It is by virtue of the above provision that the Minister of Justice authorized GSS investigators to conduct interrogations regarding the commission of hostile terrorist activities. It has been brought to the Court's attention that, in the authorizing decree, the Minister of Justice took care to list the names of those GSS investigators who were authorized to conduct secret interrogations with respect to crimes committed under the Penal Law-1977, the Prevention of Terrorism Statute-1948, the (Emergency) Defense Regulations-1945, the Prevention of Infiltration Statute (Crimes and Judging)-1954, and crimes which are to be investigated as per the Emergency Defense Regulations (Judea, Samaria and the Gaza Strip — Judging in Crimes and Judicial Assistance-1967). It appears to us—and we have heard no arguments to the contrary—that the question of the authority of the GSS to conduct interrogations can be resolved. By virtue of this authorization, GSS investigators are, in the eyes of the law, like police officers. We shall not now, however, express our opinion as to whether this arrangement, as opposed to the explicit statutory regulation of GSS officers, is an ideal arrangement.

The Means Employed for Interrogation Purposes

21. As we have seen, GSS investigators are endowed with the authority to conduct interrogations. What is the scope of these powers and do they include the use of physical means in the course of the interrogation? Can use be made of the physical means presently employed by GSS investigators—such as shaking, the "Shabach" position, and sleep deprivation—by virtue of the investigating powers given the GSS investigators? Let us note that the state did not argue before us that all the means employed by GSS investigators are permissible by virtue of the "law of interrogation." Thus, for instance, the state did not make the argument that shaking is permitted simply because it is an "ordinary" method of investigation in Israel. Even so, it was argued that some of the physical means employed by the GSS investigators are permitted by the "law of interrogation" itself. For instance, this is the case with respect to some of the physical means applied in the context of waiting in the "Shabach" position—the placing of the head covering to prevent communication between the suspects, the playing of loud music to prevent the passing of information between suspects, the tying of the suspect's hands to a chair for the investigators' protection, and the deprivation of sleep, as necessary from the needs of the interrogation. Does the "law of interrogation" sanction the use of these physical means?

22. An interrogation, by its very nature, places the suspect in a difficult position. "The criminal's interrogation," wrote Justice Vitkon over twenty years ago, "is not a negotiation process between two open and honest merchants, conducting their affairs in mutual trust." Cr. A 216/74 *Cohen v The State of Israel*, at 352. An interrogation is a "competition of minds," in which the investigator attempts to penetrate the suspect's mind and elicit the

information that the investigator seeks to obtain. Quite accurately, it was noted that:

> Any interrogation, be it the fairest and most reasonable of all, inevitably places the suspect in embarrassing situations, burdens him, penetrates the deepest crevices of his soul, while creating serious emotional pressure.

See Y. Kedmi, On Evidence 25 (1991).

Indeed, the authority to conduct interrogations, like any administrative power, is designed for a specific purpose, and must be exercised in conformity with the basic principles of the democratic regime. In setting out the rules of interrogation, two values clash. On the one hand, lies the desire to uncover the truth, in accord with the public interest in exposing crime and preventing it. On the other hand is the need to protect the dignity and liberty of the individual being interrogated. This having been said, these values are not absolute. A democratic, freedom-loving society does not accept that investigators may use any means for the purpose of uncovering the truth. "The interrogation practices of the police in a given regime," noted Justice Landau, "are indicative of a regime's very character" Cr. A. 264/65 *Artzi v. The Government's Legal Advisor.* At times, the price of truth is so high that a democratic society is not prepared to pay. *See* A. Barak, *On Law, Judging and Truth*, 27 Mishpatim 11, 13 (1997). To the same extent, however, a democratic society, desirous of liberty, seeks to fight crime and, to that end, is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect—provided that it is done for a proper purpose and that the harm does not exceed that which is necessary. Concerning the collision of values, with respect to the use of evidence obtained in a violent police interrogation, Justice H. Cohen opined in Cr. A. 183/78 *Abu Midjim v. The State of Israel*, at 546:

> On the one hand, it is our duty to ensure that human dignity be protected; that it not be harmed at the hands of those who abuse it, and that we do all that we can to restrain police investigators from prohibited and criminal means. On the other hand, it is also our duty to fight the growing crime rate which destroys the good in our country, and to prevent the disruption of public peace by violent criminals.

Our concern, therefore, lies in the clash of values and the balancing of conflicting values. The balancing process results in the rules for a "reasonable

interrogation." *See* Bein, *The Police Investigation—Is There Room for Codification of the 'Laws of the Hunt'*, 12 Iyunei Mishpat 129 (1987). These rules are based, on the one hand, on preserving the "human image" of the suspect, *see* Cr. A. 115/82 *Mouadi v. The State of Israel*, at 222-24, and on preserving the "purity of arms" used during the interrogation. Cr. A. 183/78, *supra*. On the other hand, these rules take into consideration the need to fight crime in general, and terrorist attacks in particular. These rules reflect "a degree of reasonableness, straight thinking, and fairness." *See* Kedmi¨ *supra*, at 25. The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric.

23. It is not necessary for us to engage in an in-depth inquiry into the "law of interrogation" for the purposes of the petitions before us. These laws vary, depending on the context. For instance, the law of interrogation is different in the context of an investigator's potential criminal liability, and in the context of admitting evidence obtained by questionable means. Here we deal with the "law of interrogation" as a power of an administrative authority. *See* Bein *supra*. The "law of interrogation," by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting.

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation. F.H. 3081/91 *Kozli v. The State of Israel*, at 446. Human dignity also includes the dignity of the suspect being interrogated. *Compare* HCJ 355/59 *Catlan v. Prison Security Services*, at 298 and C.A.4463/94 Golan *v. Prison Security Services.* This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." *See* M. Evans & R. Morgan, Preventing Torture 61 (1998); N.S. Rodley, The Treatment of Prisoners under International Law 63 (1987). These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable. *See, e.g.*, the Penal Law: § 277. Cr. A. 64/86 *Ashash v. The State of Israel* (unreported decision).

Second, a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Of course, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various sophisticated techniques. Such techniques—accepted in the most progressive of societies—can be effective in achieving their goals. In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise, may be deemed disproportionate.

From the General to the Particular

24. We shall now turn from the general to the particular. Clearly, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which can not form part of a legal investigation. It surpasses that which is necessary. Even the state did not argue that shaking is an "ordinary" investigatory method which every investigator, whether in the GSS or the police, is permitted to employ. The argument before us was that the justification for shaking is found in the "necessity defense." That argument shall be dealt with below. In any event, there is no doubt that shaking is not to be resorted to in cases outside the bounds of "necessity" or as part of an "ordinary" investigation.

25. It was argued before the Court that one of the employed investigation methods consists of compelling the suspect to crouch on the tips of his toes for periods of five minutes. The state did not deny this practice. This is a prohibited investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes upon an individual's human dignity.

26. The "Shabach" method is composed of several components: the cuffing of the suspect, seating him on a low chair, covering his head with a sack, and playing loud music in the area. Does the general power to investigate authorize any of the above acts? Our point of departure is that there are actions which are inherent to the investigatory power. *Compare* C.A. 4463/94, *supra*. Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is included in the general

power to investigate. *Compare* HCJ 8124/96 *Mubarak v. The GSS* (unreported decision). Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him. The state's position is that the suspects are indeed cuffed with the intention of ensuring the investigators' safety or to prevent the suspect from fleeing from legal custody. Even petitioners agree that it is permissible to cuff a suspect in such circumstances and that cuffing constitutes an integral part of an interrogation. The cuffing associated with the "Shabach" position, however, is unlike routine cuffing. The suspect is cuffed with his hands tied behind his back. One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it. Similarly, there is no justification for handcuffing the suspect's hands with especially small handcuffs, if this is in fact the practice. The use of these methods is prohibited. As has been noted, "cuffing that causes pain is prohibited." *Mubarak supra*. Moreover, there are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering.

27. The same applies to seating the suspect in question in the "Shabach" position. We accept that seating a man is inherent to the investigation. This is not the case, however, when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is seated in this position for long hours. This sort of seating is not authorized by the general power to interrogate. Even if we suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective—for instance, to establish the "rules of the game" in the contest of wills between the parties, or to emphasize the investigator's superiority over the suspect— there is no inherent investigative need to seat the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering. Clearly, the general power to conduct interrogations does not authorize seating a suspect on a tilted chair, in a manner that applies pressure and causes pain to his back, all the more so when his hands are tied behind the chair, in the manner described. All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They infringe upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.

28. We accept that there are interrogation-related concerns regarding preventing contact between the suspect under interrogation and other suspects, and perhaps even between the suspect and the interrogator. These concerns require means to prevent the said contact. The need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or the security of the suspects and witnesses. It can also be part of the "mind game" which pits the information possessed by the suspect against that found in the hands of his investigators. For this purpose, the power to interrogate—in principle and according to the circumstances of each particular case—may include the need to prevent eye contact with a given person or place. In the case at bar, this was the explanation provided by the state for covering the suspect's head with a sack, while he is seated in the "Shabach" position. From what was stated in the declarations before us, the suspect's head is covered with a sack throughout his "wait" in the "Shabach" position. It was argued that the head covering causes the suspect to suffocate. The sack is large, reaching the shoulders of the suspect. All these methods are not inherent to an interrogation. They are not necessary to prevent eye contact between the suspect being interrogated and other suspects. Indeed, even if such contact is prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not related to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. Doing so will eliminate any need to cover the suspect's eyes. In the alternative, the suspect's eyes may be covered in a manner that does not cause him physical suffering. For it appears that, at present, the suspect's head covering—which covers his entire head, rather than eyes alone—for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under investigation, is not part of a fair interrogation. It harms the suspect and his dignity. It degrades him. It causes him to lose his sense of time and place. It suffocates him. All these things are not included in the general authority to investigate. In the cases before us, the State declared that it will make an effort to find a "ventilated" sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.

29. Cutting off the suspect from his surroundings can also include preventing him from listening to what is going on around him. We are

prepared to assume that the authority to investigate an individual may include preventing him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. At the same time, however, we must examine whether the means employed to accomplish this fall within the scope of a fair and reasonable interrogation. In the case at bar, the detainee is placed in the "Shabach" position while very loud music is played. Do these methods fall within the scope or the general authority to conduct interrogations? Here too, the answer is in the negative. Being exposed to very loud music for a long period of time causes the suspect suffering. Furthermore, the entire time, the suspect is tied in an uncomfortable position with his head covered. This is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. In the circumstances of the cases before us, the playing of loud music is prohibited.

30. To the above, we must add that the "Shabach" position employs all the above methods simultaneously. This combination gives rise to pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method is not authorized by the powers of interrogation. It is an unacceptable method. "The duty to safeguard the detainee's dignity includes his right not to be degraded and not to be submitted to sub-human conditions in the course of his detention, of the sort likely to harm his health and potentially his dignity." Cr. A. 7223/95 *The State of Israel v. Rotenstein.*

A similar—though not identical—combination of interrogation methods was discussed in the case of *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 3 (1976). In that case, the Court examined five interrogation methods used by England to investigate detainees suspected of terrorist activities in Northern Ireland. The methods included protracted standing against a wall on the tip of one's toes, covering of the suspect's head throughout the detention (except during the actual interrogation), exposing the suspect to very loud noise for a prolonged period of time, and deprivation of sleep, food and drink. The Court held that these methods did not constitute "torture." However, since they subjected the suspect to "inhuman and degrading" treatment, they were nonetheless prohibited.

31. The interrogation of a person is likely to be lengthy, due to the suspect's failure to cooperate, the complexity of the information sought, or in light of the need to obtain information urgently and immediately. *See, e.g., Mubarak*

supra; HCJ 5318/95 *Hajazi v. GSS* (unreported decision). Indeed, a person undergoing interrogation cannot sleep like one who is not being interrogated. The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation. This is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator. *Compare* HCJ 3429/94 *Shbana v. GSS* (unreported decision). Justice Shamgar noted as such in Cr. A. 485/76 *Ben Loulou v. The State of Israel* (unreported decision):

> The interrogation of crimes and, in particular, murder or other serious crimes, cannot be accomplished within an ordinary work day...The investigation of crime is essentially a game of mental resistance...For this reason, the interrogation is often carried out at frequent intervals. This, as noted, causes the investigation to drag on ...and requires diligent insistence on its momentum and consecutiveness.

The above described situation is different from one in which sleep deprivation shifts from being a "side effect" of the interrogation to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or "breaking" him, it is not part of the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner beyond what is necessary.

32. All these limitations on an interrogation, which flow from the requirement that an interrogation be fair and reasonable, are the law with respect to a regular police interrogation. The power to interrogate granted to the GSS investigator is the same power the law bestows upon the ordinary police investigator. The restrictions upon the police investigations are equally applicable to GSS investigations. There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator. From this we conclude that a GSS investigator, whose duty it is to conduct the interrogation according to the law, is subject to the same restrictions applicable to police interrogators.

Physical Means and the "Necessity" Defense

33. We have arrived at the conclusion that GSS personnel who have received permission to conduct interrogations as per the Criminal Procedure

Statute [Testimony] are authorized to do so. This authority— like that of the police investigator—does not include most of the physical means of interrogation in the petition before us. Can the authority to employ these methods be anchored in a legal source beyond the authority to conduct an interrogation? This question was answered by the state in the affirmative. As noted, our law does not contain an explicit authorization permitting the GSS to employ physical means. An authorization of this nature can, however, in the state's opinion, be obtained in specific cases by virtue of the criminal law defense of "necessity," as provided in section 34(1) of the Penal Law. The statute provides:

> A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.

The state's position is that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means—such as shaking—in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb. The state maintains that an act committed under conditions of "necessity" does not constitute a crime. Instead, the state sees such acts as worth committing in order to prevent serious harm to human life or limb. These are actions that society has an interest in encouraging, which should be seen as proper under the circumstances. In this, society is choosing the lesser evil. Not only is it legitimately permitted to engage in fighting terrorism, it is our moral duty to employ the means necessary for this purpose. This duty is particularly incumbent on the state authorities— and, for our purposes, on the GSS investigators—who carry the burden of safeguarding the public peace. As this is the case, there is no obstacle preventing the investigators' superiors from instructing and guiding them as to when the conditions of the "necessity" defense are fulfilled. This, the state contends, implies the legality of the use of physical means in GSS interrogations.

In the course of their argument, the state presented the "ticking bomb" argument. A given suspect is arrested by the GSS. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the

information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information? The state answers in the affirmative. The use of physical means should not constitute a criminal offence, and their use should be sanctioned, according to the state, by the "necessity" defense.

34. We are prepared to assume, although this matter is open to debate, that the "necessity defense" is available to all, including an investigator, during an interrogation, acting in the capacity of the state. *See* A. Dershowitz, *Is it Necessary to Apply 'Physical Pressure' to Terrorists— And to Lie About It?*, 23 Israel L. Rev. 193 (1989); K. Bernsmann, *Private Self-Defense and Necessity in German Penal Law and in the Penal Law Proposal— Some Remarks*, 30 Israel L. Rev. 171, 208-10 (1998). Likewise, we are prepared to accept—although this matter is equally contentious—that the "necessity defense" can arise in instances of "ticking bombs," and that the phrase "immediate need" in the statute refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or even in a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing it. *See* M. Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law or the Law to the Needs of the Security Service?*, 23 Israel L. Rev. 216, 244-47 (1989). In other words, there exists a concrete level of imminent danger of the explosion's occurrence. See M. Kremnitzer & R. Segev, *The Petition of Force in the Course of GSS Interrogations- A Lesser Evil?*, 4 Mishpat U'Memshal 667, 707 (1989); *See* also S.Z. Feller, *Not Actual "Necessity" but Possible "Justification"; Not "Moderate Pressure", but Either "Unlimited" or "None at All"*, 23 Israel L. Rev. 201, 207 (1989).

Consequently we are prepared to presume, as was held by the Report of the Commission of Inquiry, that if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the "necessity defense" is likely to be open to him in the appropriate circumstances. *See* Cr. A. 532/91 *Anonymous v. The State of Israel* (unreported decision). A long list of arguments, from the fields of ethics and political science, may be raised in support of and against the use of the "necessity defense." *See* Kremnitzer & Segev, *supra*, at 696; M.S. Moor, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989); L. Shelf, *The Lesser Evil and the Lesser Good—On the Landau Commission's Report, Terrorism and Torture*, 1 Plilim 185 (1989); W.L. & P.E. Twining, *Bentham on Torture*, 24 Northern Ireland Legal Quarterly 305 (1973); D. Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 Mishpat U' Mimshal 161, 175 (1997); A. Zuckerman, *Coersion and the Judicial Ascertainment of Truth*, 23 Israel L. Rev. 357 (1989). This matter, however, has already been decided under Israeli law. Israeli penal law recognizes the "necessity defense."

35. Indeed, we are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the "necessity defense" if criminally indicted. This, however, is not the issue before this Court. We are not dealing with the criminal liability of a GSS investigator who employed physical interrogation methods under circumstances of "necessity." Nor are we addressing the issue of the admissibility or probative value of evidence obtained as a result of a GSS investigator's application of physical means against a suspect. We are dealing with a different question. The question before us is whether it is possible, *ex ante*, to establish permanent directives setting out the physical interrogation means that may be used under conditions of "necessity." Moreover, we must decide whether the "necessity defense" can constitute a basis for the authority of a GSS investigator to investigate, in the performance of his duty. According to the state, it is possible to imply from the "necessity defense"—available *post factum* to an investigator indicted of a criminal offence—the *ex ante* legal authorization to allow the investigator to use physical interrogation methods. Is this position correct?

36. In the Court's opinion, the authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the "necessity defense." The "necessity defense" does not constitute a source of authority, which would allow GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the "necessity defense." The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an unpredictable event. *See* Feller, *supra* at 209. Thus, the very nature of the defense does not allow it to serve as the source of authorization. Authorization of administrative authority is based on establishing general, forward looking criteria, as noted by Professor Enker:

> Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values...The defense of necessity does not define a code of primary normative behavior. Necessity is certainly not a basis for establishing a broad detailed code of behavior such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like.

See A. Enker, *The Use of Physical Force in Interrogations and the Necessity Defense¨ in* Israel and International Human Rights Law: The Issue of Torture 61, 62 (1995). In a similar vein, Kremnitzer and Segev note:

> The basic rationale underlying the necessity defense is the impossibility of establishing accurate rules of behavior in advance, appropriate in concrete emergency situations, whose circumstances are varied and unexpected. From this it follows that the necessity defense is not well suited for the regulation of a general situation, the circumstances of which are known and may repeat themselves. In such cases, there is no reason for not setting out the rules of behavior in advance, in order that their content be determined in a thought out and well-planned manner, which would allow them to apply in a uniform manner to all.

The “necessity defense” has the effect of allowing one who acts under the circumstances of “necessity” to escape criminal liability. The “necessity defense” does not possess any additional normative value. It can not authorize the use of physical means to allow investigators to execute their duties in circumstances of necessity. The very fact that a particular act does not constitute a criminal act—due to the “necessity defense”—does not in itself authorize the act and the concomitant infringement of human rights. The rule of law, both as a formal and as a substantive principle, requires that an infringement of human rights be prescribed by statute. The lifting of criminal responsibility does not imply authorization to infringe upon a human right. It shall be noted that the Commission of Inquiry did not conclude that the “necessity defense” is the source of authority for employing physical means by GSS investigators during the course of their interrogations. All that the Commission of Inquiry determined was that, if an investigator finds himself in a situation of “necessity,” forcing him to choose the “lesser evil”—harming the suspect for the purpose of saving human lives—the “necessity defense” shall be available to him. Indeed, the Commission of Inquiry noted that, “the

law itself must ensure a proper framework governing the actions of the security service with respect to the interrogation of hostile terrorist activities and the related problems particular to it.” *Id*. at 328.

37. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of “necessity” cannot serve as a basis of authority. *See* Kremnitzer, *supra* at 236. If the state wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release would not flow from the “necessity defense,” but rather from the “justification” defense. This defense is provided for in section 34(13) of the Penal Law, which states:

> A person shall not bear criminal liability for an act committed in one of the following cases:
> (1) He was obliged or authorized by law to commit it.

This "justification" defense to criminal liability is rooted in an area outside the criminal law. This “external” law serves as a defense to criminal liability. This defense does not rest upon “necessity,” which is “internal” to the Penal Law itself. Thus, for instance, where the question of when an officer is authorized to apply deadly force in the course of detention arises, the answer is found in the laws of detention, which are external to the Penal Law. If a man is killed as a result of this application of force, the “justification” defense will likely come into play. *See* Cr. A. 486/88, *Ankonina v. The Chief Army Prosecutor.* The “necessity” defense cannot constitute the basis for rules regarding an interrogation. It cannot constitute a source of authority on which the individual investigator can rely on for the purpose of applying physical means in an investigation. The power to enact rules and to act according to them requires legislative authorization. In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation. Naturally, such considerations did not come before the legislature when the “necessity” defense was enacted. *See* Kremnitzer, *supra*, at 239-40. The “necessity” defense is not the appropriate place for laying out these considerations. See Enker, *supra*, at 72.

Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect's dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch. This is required by the principle of the separation of powers and the rule of law, under our understanding of democracy. *See* HCJ 3267/97 *Rubinstein v. Minister of Defense.*

38. We conclude, therefore, that, according to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself. Similarly, the individual GSS investigator—like any police officer—does not possess the authority to employ physical means that infringe upon a suspect's liberty during the interrogation, unless these means are inherent to the very essence of an interrogation and are both fair and reasonable.

An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the "necessity defense." Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the "necessity defense" does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from "necessity." A statutory provision is necessary to authorize the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary "law of investigation," and in order to provide the individual GSS investigator with the authority to employ these methods. The "necessity defense" cannot serve as a basis for such authority.

A Final Word

39. This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh reality.

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 hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

This having been said, there are those who argue that Israel's security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The debate must occur there. It is there that the required legislation may be passed, provided, of course, that the law "befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required." *See* article 8 of the Basic Law: Human Dignity and Liberty.

40. Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to deal properly with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience. We recall the words of Deputy President Landau, in HCJ 390/79 *Dawikat v. The State of Israel*, at 4:

> We possess proper sources upon which to construct our judgments and have no need—and, indeed, are forbidden—to allow our personal views as citizens to influence our decisions. Still, I fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am forced to rule in

accordance with the law, in complete awareness that the public at large will not be interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the stature of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges?

The Commission of Inquiry pointed to the “difficult dilemma between the imperative to safeguard the very existence of the State of Israel and the lives of its citizens, and between the need to preserve its character—a country subject to the rule of law and basic moral values.” Report of the Commission, at 326. The commission rejected an approach that would consign our fight against terrorism to the twilight shadows of the law. The commission also rejected the “ways of the hypocrites, who remind us of their adherence to the rule of law, even as they remain willfully blind to reality.” *Id*. at 327. Instead, the Commission chose to follow “the way of truth and the rule of law.” *Id*. at 328. In so doing, the Commission of Inquiry outlined the dilemma faced by Israel in a manner open to examination to all of Israeli society.

Consequently, it is decided that the *order nisi* be made absolute. The GSS does not have the authority to “shake” a man, hold him in the “Shabach” position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a “frog crouch” position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the “necessity defense,” found in the Penal Law, cannot serve as a basis of authority for interrogation practices, or for directives to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the “necessity defense” will be available to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.

Deputy President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice M. Cheshin

I agree.

Justice I. Zamir

I agree.

Justice T. Strasberg-Cohen

I agree.

Justice D. Dorner

I agree.

Justice Y. Kedmi

I accept the conclusion reached by my colleague, the President, that the use of exceptional interrogation methods, according to the directives of the Ministerial Committee, "has not been authorized, and is illegal." I am also of the opinion that the time has come for this issue to be regulated by explicit, clear and unambiguous legislation.

Even so, it is difficult for me to accept that, due to the absence of explicit legislation, the state should be helpless in those rare emergencies defined as "ticking bombs," and that the state would not be authorized to order the use of exceptional interrogation methods in such circumstances. As far as I am concerned, authority does exist under such circumstances, a result of the basic obligation of the state—like all countries of the world—to defend its existence, its well-being, and to safeguard the lives of its citizens. It is clear that, in those circumstances, the state—as well as its agents—will have the natural right of "self-defense," in the broad meaning of the term, against terrorist organizations that seek to take its life and the lives of its citizens.

Against this background, and in order to prevent a situation where the state stands helpless while the "bomb ticks" before our eyes, I suggest that this

judgment be suspended for one year. During that year, the GSS will be allowed to employ exceptional interrogative methods in those rare cases of "ticking bombs," on the condition that explicit authorization is granted by the Attorney-General.

Such a suspension would not limit our present ruling that the use of exceptional interrogation methods—those that rely on directives of the Ministerial Committee—are illegal. The suspension of the judgment would not constitute authorization to continue acting according to those directives, and the authorization of the Attorney-General would not legalize the performance of an illegal action. This suspension would only affect the employment of exceptional interrogation methods under the emergency circumstances of a "ticking bomb."

During such a suspension period, the Knesset would be given an opportunity to consider the issue of exceptional interrogation methods in security investigations, both in general and in times of emergency. The GSS would be given the opportunity to cope with emergency situations until the Knesset considers the issue. Meanwhile, the GSS would also have an opportunity to adapt, after a long period during which the directives of the Ministerial Committee have governed.

I therefore join the judgment of the President, subject to my proposal to suspend the judgment for a period of one year.

Decided according to the opinion of the President.

September 6, 1999

House Demolitions

HCJ 2006/97 **Janimat**

v.

IDF Military Commander

The issue of interrogation methods addressed above related to the war on terror being conducted within Israel proper. It dealt with internal Israeli law and the limitations imposed on the security forces when operating within Israeli territory. The rest of the judgments presented in this booklet address the activities of the Israel Defense Forces in the West Bank and Gaza Strip.

House demolitions are one of the measures employed by the security forces in the fight against terrorists and those involved in terrorist activities. This is an administrative measure. The security forces may decide to demolish a house due to one of the resident's involvement in terrorist activities or attacks.

This measure is controversial for both legal and social reasons. The power to implement it has its source in legislation from the period of the British Mandate, which was integrated into Israeli law (see Regulation 119 of the Defense Regulations [State of Emergency], 1945). The security forces make use of this regulation primarily, but not exclusively, in the West Bank and Gaza Strip.

The reason for the controversy is that this administrative measure primarily harms the family of the terrorist who live in the house which is demolished. It is claimed that house demolitions are a punitive measure and that they punish innocent people for their relative's crimes. The legal position, which was upheld by the majority of the justices of the Israeli Supreme Court, is that this is not a punitive step, but a preventative measure. The aim of house demolitions is not to penalize for past activities but rather to deter terrorists from acting in the future. It is important to emphasize that the deterrence of

terrorists is no trivial matter. It is extremely difficult to deter terrorists in an effective manner, especially those that are prepared to commit suicide in order to carry out an attack. The security forces have consistently maintained that house demolitions do, indeed, discourage terrorists in the long run.

The High Court of Justice, which exercises judicial review over the operations of the armed forces, has addressed the issue of house demolitions on occasion. Over the years it has imposed various legal limitations on the implementation of this measure. For example, house demolitions are allowed only in light of especially serious terrorist activities, such as involvement in suicide bombings aimed at civilians. In many cases the right to be heard must be allowed before the measure is carried out. Additionally, the demolitions are subject to legal principles, such as the principle of proportionality. For example, the measure may only be used if it is possible to limit it to the terrorist's home, without demolishing adjacent dwellings. Otherwise, demolition must be avoided and house sealing or other measures must be employed instead.

The judgment presented here deals with a house demolition order which followed the terrorist bombing of Apropo Café in Tel Aviv, which killed three civilians and wounded dozens. It clearly illustrates the complexity of the issue, expressed in the dissention between the majority opinion and the minority opinion of the Supreme Court panel.

HCJ 2006/97

1. Misun Mahmoud Abu Rara Janimat
2. Suad Mahmoud Yussef al-Baradeia

v.

OC Central Command Maj.-Gen. Uzi Dayan

The Supreme Court sitting as the High Court of Justice Before President A. Barak and Justices E. Goldberg, M. Cheshin.

Request for an *order nisi* and interim order
Counsel for Petitioners – Allegra Pachko
Counsel for Respondents –Yehuda Scheffer

JUDGMENT

President A. Barak

An explosion shook Tel Aviv's Apropo Café on March 21, 1997. A terrorist carrying explosives entered the café and blew himself up. Three of those sitting in the café met their deaths. Dozens of other people were wounded – some lightly, some seriously. Property damage was caused.

According to information gathered by the General Security Service (GSS), the bomber was Musa Abd el-Kader Janimat. He was the husband of petitioner 1 and the brother-in-law of petitioner 2.

On March 22, 1997, the military commander issued a confiscation and partial demolition order for the house where the bomber lived, in the village of Tsurif near Hebron. The confiscation order related to the apartment where he lived with his wife (petitioner 1) and their four children. This apartment is situated on the second floor. In the adjacent apartment lives the bomber's brother, the husband of petitioner 2. Obviously the confiscation and demolition order apply only to the bomber's apartment. The rest of the building would be left alone. Petitioners were delivered the confiscation and demolition order on March 22, 1997. They refused to accept it. This is the background of the petition at hand.

The Petitioners claim that the confiscation and demolition order is illegal. Their first claim is that the body of the bomber has not been identified to the required degree of certainty as Musa Abd el-Kader Janimat. This claim is baseless. Janimat's father identified the body as his son. The body somehow remained intact despite the explosion and the face was identifiable.

Furthermore, fingerprints of the bomber taken from his corpse match the fingerprints taken in the past from Musa Abd el-Kader Janimat. An Israeli identity card belonging to Janimat was found at the scene. The relatives of the bomber erected a "mourners' tent" where people came to comfort them. All these facts put together are sufficient, according to the requirements of administrative procedure, to conclude that the bomber responsible for the deaths of three women was indeed Musa Abd el-Kader Janimat, the husband of petitioner 1 and the brother-in-law of petitioner 2.

An additional claim brought before us is that the bomber's life was centered on the apartment where he lived in Rishon Lezion and not on the village of Tsurif. However this claim has also not been substantiated. The bomber's life centered on his village. There his family lived, there he would return at the end of his workweek, and from there he would set out again to Israel, where he resided illegally.

It was also claimed before us that the demolition of the bomber's home will cause damage to the rest of the building. Regarding this claim we have received the statement of the head of the construction unit of the IDF's Central Command. In his opinion, there is no reason why the home of the bomber could not be taken down in a controlled demolition.

The demolition will be carried out in a manner so as not damage the first floor of the building or the apartments adjacent to the bomber's home on the second floor, such as petitioner 2's home. Respondent declared before us that the demolition would be implemented in stages and with care in order to prevent damage to the rest of the building. If damage is caused, it will be repaired.

The petition raises additional claims regarding the authority of the military commander to make use of Regulation 119 of the Defense Regulations (State of Emergency), 1945. These claims have all been raised in the past and in a long list of judgments they have been rejected by this Court. Regulation 119

of the Defense Regulations – which dates from the Mandatory era and remains in force today – grants the authority and discretion to the military commander to adopt measures regarding a building which is home to someone who has seriously violated the provisions of the regulations. We have found nothing in the claims of petitioners that would justify a deviation from the many precedents on this issue.

We are aware that the demolition will leave petitioner 1 and her children without the roof over their heads, but this is not the aim of the demolition. It is not a punitive measure. It aims, rather, to deter. Its outcome does pose difficulties for the family, but respondent believes that this measure is essential in order to prevent further attacks on innocent people. He maintains that family pressure does discourage terrorists.

There is no absolute assurance that this measure will be effective. But considering the very few measures left to the state to defend itself against these "human bombs," we should not despise this one.

For these reasons I would reject the petition.

Justice M. Cheshin

The suicide murderer was a resident of the village of Tsurif near Hebron. If the military commander had decided to demolish all the houses in the village of Tsurif, then he would be acting, apparently, within the framework of his power pursuant to Regulation 119 of the Defense Regulations (State of Emergency), 1945. If the military commander had decided to demolish all the houses on the street where the suicide murderer lived, then he would be acting, apparently, within the bounds of his power under Regulation 119 of the Defense Regulations. Had the military commander sought to destroy the home of the suicide murderer and all the adjacent houses on all sides, then he would be acting, seemingly, within the framework of his powers pursuant to Regulation 119 of the Defense Regulations. Had the military commander decided to demolish both floors of the building where the suicide murderer lived, then he would be acting, apparently, within his powers under Regulation 119 of the Defense Regulations. Had the military commander sought to destroy the second floor of the building where the suicide murderer lived, then he would be operating, apparently, within his powers pursuant to Regulation 119 of the Defense Regulations.

However the military commander seeks to demolish the suicide murderer's apartment alone. The military commander therefore restricted the demolition order to the private domain of the suicide murderer. Pursuant to the wording of Regulation 119 of the Defense Regulations, the commander apparently acted within his powers. What, therefore, can petitioners claim against him?

On many occasions I have pointed out the difficulties inherent in exercising the powers granted by Regulation 119 of the Defense Regulations. *See* HCJ 5359/91 *Khizran v. IDF Commander of Judea and Samaria District*, IsrSC 46(2) 150, 151; HCJ 2722/92 *Elamrin v. IDF Commander of the Gaza Strip*, IsrSC 46(3) 693, 701; HCJ 6026/94 *Nazal v. IDF Commander of Judea and Samaria District*, IsrSC 48(5) 338, 351; HCJ 1730/96 *Sabiah v. IDF Commander of Judea and Samaria District*, IsrSC 50(1) 353, 365. In all these judgments I rooted myself in a basic legal principle, and from it I will not be swayed. This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets:

"The soul that sins, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him." (Ezekiel 18:20)

One should punish only cautiously, and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses:

"The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." (II Kings 14:6)

Petitioner 1 is the wife of the suicide murderer, and she is the mother of four small children. The woman and her children reside in that same apartment where the murderer lived, but nobody claims that they were accomplices in his plot to murder innocent souls. Likewise nobody claims that they knew about the intended attack. If we demolish the bomber's apartment we will simultaneously destroy the home of this woman and her children. We will thereby punish this woman and her children even though they have done no wrong. We do not do such things here.

Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we have read Regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of the free and democratic Jewish state. These values guided us on the path of justice during our people's glory days of old and our own times are no different:

"They shall say no more, The fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." (Jeremiah 31:28-29)

In the judgments cited *supra* I said similar things. However what I say now I have never said before. I deliberated long and hard until I reached this conclusion. This is the Torah that I learned from my teachers, and this is the doctrine of law that I have in my hands. I can rule no other way.

If my opinion will be heard, then we will allow the petition and issue an *order nisi* as petitioners request.

Justice E. Goldberg

I share the opinion of my colleague the President.

A study that can show conclusively just how many terrorist attacks have been prevented and how many lives have been saved as a result of house sealings and demolitions has never been conducted and never could be conducted. However, as far as I am concerned it is sufficient that the effectiveness of this deterrent measure has not been disproved in order to stop me from interfering with the discretion of the military commander.

Therefore it was decided by majority opinion to deny the petition.

March 30, 1997

Warfare and Humanitarian Matters

HCJ 2936/02 **Physicians for Human Rights**

v.

The Commander of I.D.F. Forces in the West Bank

HCJ 3114/02 **Barakeh**

v.

The Minister of Defense

HCJ 3451/02 **Almandi**

v.

The Minister of Defense

While September 11, 2001 was the turning point in the worldwide war on terror, the events of September 2000 represent a turning point for relations between Israel, the Palestinians and the Palestinian Authority. At that time violent riots erupted which became known as the "second intifada." This intifada is much more violent than its predecessor (which started in the late 1980s) and involves significantly more use of terror attacks with firearms and bombs, especially suicide bombers. These methods have taken a heavy toll on Israeli civilians and soldiers. Regretfully, Palestinians civilians were unintentionally killed in Israeli operations directed against terrorist targets.

The three judgments brought next were handed down in the context of Israel Defense Forces (IDF) operations in the West Bank. The army intensified its activities in the territories due to an escalation in terrorist attacks on Israel. Against this background, petitions were brought which claimed that the IDF operations were illegal. Petitioners claimed that the IDF damaged Red Cross vehicles, prevented the proper burial of those killed in the Jenin refugee camp, and laid siege to the Church of the Nativity in Bethlehem in an illegal manner that harmed innocent passersby.

How does the law relate to the IDF in such areas? On what basis is it possible to investigate its activities? The answer is not simple. It is clear that the IDF is subject to international public law, but are its provisions ultimately relevant for a judicial decision? The official position of the Government of Israel is that the Geneva Conventions and their protocols do not have direct bearing on the conflict between the sides. Nevertheless, Israel is prepared to acknowledge its obligation to adhere to the humanitarian provisions of the Fourth Geneva Convention.

The High Court of Justice applied these provisions when addressing these cases, as is clear from the judgments presented here. It is also possible to infer the readiness of the Court to exercise judicial review of military operations in "real time," while the operations continue. This situation demanded from both the sides, and from the Court itself, the ability to formulate suitably the normative and factual basis required for a decision in a relatively short time.

HCJ 2936/02 **Physicians for Human Rights**

v.

The Commander of IDF Forces in the West Bank

HJC 2941/02 **Badia Ra'ik Suabuta**

v.

The Commander of IDF Forces in the West Bank

The Supreme Court sitting as the High Court of Justice [April 8, 2002]
Before Justices D. Dorner, A. Proccacia, E. Levy.

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

Facts: This petition was submitted during IDF operations against the terrorist infrastructure in the areas of the Palestinian Authority ("Operation Defensive Shield"). Petitioners claim that the IDF violated international law by firing upon medical teams, preventing the evacuation of the wounded and the sick to hospitals, preventing the removal of bodies for the purposes of burial, and preventing the supply of medical equipment to hospitals. Respondents reply that, during the course of warfare, it became clear that incidents had occurred during which explosives had been transported in ambulances and wanted terrorists had found shelter in hospitals. However, respondents asserted, the IDF sees itself as bound to its obligations under humanitarian law, not only because this is their duty under international law, but also due to moral and even utilitarian considerations. Combat forces had been instructed to operate according to humanitarian law, and the IDF has dedicated personnel and resources to ensure that humanitarian aid was reaching combat areas.

Held: The Supreme Court held that combat forces must fulfill the rules of humanitarian law pertaining to the care of the wounded, the sick and the removal and burial of bodies. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the state. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.

For the petitioners in HCJ 2936/02—Andara Rosenthal For the petitioners in HCJ 2941/02—Jamal Dkoar, Hanan Hatib, Hasan Jubran For the respondent—Anar Helman

JUDGMENT

Justice D. Dorner

The petitions before us were filed yesterday and today, during the height of IDF combat activities in the areas of the Palestinian Authority, in the context of "Operation Defensive Shield." The petitions concern a number of specific events regarding shootings by IDF forces at Red Cross and Red Crescent medical teams working out of ambulances and in hospitals. The petitions are also directed against the prevention of the evacuation of the wounded and ill to hospitals to receive medical care.

They are also directed against the prevention of the evacuation of bodies, so that they may be buried by the families. Petitioners also argue against the lack of provision of medical supplies to besieged hospitals. According to petitioners, these incidents are in violation of international law.

In response, the state explained that, in light of the brief period at its disposal to prepare a response, and especially in light of the fact that combat continues even as the petitions are being heard, it was not possible to investigate petitioner's claims regarding these specific events. Substantively, the state agrees that the situation regarding the care of the ill, the wounded, and the bodies of the dead, is not free of complications. The state claims, however, that this situation is the result of the fighting itself, in the context of which it became clear that, in a number of cases, explosives were transported via ambulances and wanted terrorists found shelter in hospitals. Nonetheless, the state emphasized that the IDF sees itself as bound by the rules of

humanitarian law, not only because these rules are binding under international law, but also because they are required by morality itself, and even due to utilitarian reasons. The state declared that the combat forces have been instructed to act according to these rules, and that the IDF has allocated forces and resources for the purpose of liaison and humanitarian aid in zones of combat.

Though we are unable to express a position regarding the specific events mentioned in the petition, which are, on the face of things, severe, we see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the state. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.

The IDF shall once again instruct the combat forces, down to the level of the lone soldier in the field, of this commitment by our forces based on law and morality—and, according to the state, even on utilitarian considerations—through concrete instructions which will prevent, to the extent possible, and even in severe situations, incidents which are inconsistent with the rules of humanitarian law.

The petitions requested an order requiring explanations from the state. The explanation having been given, wherein it was clarified that IDF soldiers have been instructed to act according to humanitarian law, and that they are indeed so acting, the petition is rejected.

April 8, 2002

HCJ 3114/02 **MK Mohammed Barake**

v.

1. The Minister of Defense, Benjamin Ben-Eliezer
2. The Chief of Staff, Shaul Mofaz
3. The Commander of the IDF Forces in the Jenin Area

HCJ 3115/02 **MK Ahmed Tibi**

v.

1. The Prime Minister, Ariel Sharon
2. The Minister of Defense, Benjamin Ben-Eliezer
3. The Chief of Staff, Shaul Mofaz
4. The Commander of the Central Command, Yitzchak Eitan

HCJ 3116/02 **1. Adalah—The Legal Center for Arab Minority Rights in Israel**
2. LAW—The Palestinian Organization For the Defense of Human Rights

v.

The Commander of IDF Forces in the West Bank

The Supreme Court Sitting as the High Court of Justice
[April 14, 2002] Before President A. Barak, Justices T. Or, D. Beinisch.

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

Facts: This petition was submitted during IDF operations against the terrorist infrastructure in the areas of the Palestinian Authority ("Operation Defensive Shield"). Petitioners requested that the IDF be ordered to cease checking and removing the bodies of Palestinians that had been killed during the course of warfare in the Jenin refugee camp. Petitioners also requested that the IDF be ordered not to bury those ascertained to be terrorists in the Jordan valley cemetery. Petitioners request that the tasks of identifying and removing the bodies be the responsibility of medical teams and the Red Cross. Petitioners also request that the families be allowed to bring their dead to a quick and honorable burial.

Held: The Supreme Court held that the respondents were responsible, under international law, for the location, identification and burial of the bodies. As such, and according to guidelines that will be set out by respondent, teams will be assembled for the location, identification and removal of bodies. Respondent agrees that the Red Cross should participate in these activities and is prepared to consider positively the suggestion that the Red Crescent also participate, according to the discretion of the Military Commander. The identification process will be completed as quickly as possible and will ensure the dignity of the dead as well as the security of the forces. At the end of the identification process, the burial stage will begin.

Respondents' position was that the Palestinian side should perform the burials in a timely manner. Of course, successful implementation requires agreement between the respondents and the Palestinian side. If it becomes clear that the Palestinian side is refraining from bringing the bodies to an immediate burial, in light of the concern that such a situation will compromise national security, the possibility that respondents will bring the bodies to immediate burial will be weighed. Burials should be carried out in an appropriate and respectful manner, while ensuring respect for the dead. No differentiation will be made between bodies, and no differentiation will be made between the bodies of civilians and the bodies of armed terrorists.

Israeli Supreme Court Cases Cited:

[1] HCJ 2901/02 *The Center for the Defense of the Individual v. The Commander of the DF Forces in the West Bank* IsrSC 56(3) 19

[2] HCJ 2936/02 *Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank*, IsrSC 56(3) 3

[3] HCJ 2977/02 Adalah—*The Legal Center for the Arab Minority Rights in Israel v. The Commander of the IDF Forces in the West Bank*, IsrSC 56(3) 6.

[4] HCJ 3022/02 LAW—The Palestinian Organization for the Defence of Human Rights and the Environment v. The Commander of the IDF Forces in the West Bank IsrSC 56(3) 9

For the petitioner in HCJ 3114/02—Ihab Iraqi

For the petitioner in 3115/02—Saadi Usama

For petitioner 1 in HCJ 3116/02—Hasan Jubran

For petitioner 2 in HCJ 3116/02—Jamal Dkoar

For the respondents—Malchiel Blass, Yuval Rotman

JUDGMENT

President A. Barak

1. Since March 29, 2002, combat activities known as "Operation Defensive Shield" have been taking place in areas of Judea and Samaria. Their objective is to prevail over the Palestinian terror infrastructure and to prevent the recurrence of the terror attacks which have plagued Israel. In the context of this operation, on April 3, 2002, IDF forces entered the area of the city of Jenin and the refugee camp adjacent to it. According to respondents, an extensive terror infrastructure (in their words—a *bona fide* "Palestinian Military Industries") has developed in the city of Jenin and in the refugee camp. More than twenty three suicide bombers have come from that area—about one quarter of all terrorists who have executed suicide bombing attacks—including the attacks during Passover, the attack in the Matza Restaurant in Haifa, in the Sbarro Restaurant in Jerusalem, in the train station in Benyamina, the bus attack at the Mosmos junction, and the attack at the junction adjacent to Army Base 80.

2. As IDF forces entered the refugee camp, they found that a large proportion of the houses were empty. The civilian population was concentrated in the center of the camp. As IDF forces arrived, they appealed to residents to come out of their houses. According to the information before us, this call was not answered until the night of April 7, 2002. At that point, approximately one hundred people left the camp. In order to apprehend the terrorists and locate weapons and explosives, IDF forces began house to

house combat activity. This technique was adopted, among other reasons, in order to prevent casualties to innocent civilians. It became clear that the empty houses had been booby-trapped. As a result of this fighting, twenty three of our soldiers fell in battle. After several days of house-to-house combat, the army achieved control of the camp. According to respondents, during the fighting, after calls to evacuate the houses, bulldozers were deployed in order to destroy houses, and some Palestinians were killed.

3. Bodies of Palestinians remained in the camp. Until the camp was completely under IDF control, it was impossible to evacuate them. Once the camp was under control, explosive charges, which had been scattered around the refugee camp by Palestinians, were neutralized and removed. As of the submission of these petitions, thirty seven bodies had been found. Eight bodies were transferred to the Palestinian side. Twenty six bodies have yet to be evacuated.

4. The three petitions here ask us to order respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp. In addition, they request that the respondents be ordered to refrain from burying the bodies of those ascertained to be terrorists in the Jordan Valley cemetery. Petitioners request that the task of locating and collecting the bodies be given to medical teams and representatives of the Red Cross. In addition, they request that family members of the deceased be allowed to bring their dead to a timely, appropriate and respectful burial.

5. The petitions were submitted on Friday afternoon, April 12, 2002. We requested an immediate response from the Office of the State Attorney. That response was submitted on Friday evening. After reading the petitions and the response, we decided that arguments would be heard on Sunday, April 14, 2002. The President of the Court granted a temporary order forbidding, until after the hearing, the evacuation of the bodies from the places where they lay.

6. At the beginning of arguments this morning, April 14, 2002, a group of reserve soldiers who had served in the area of the Jenin refugee camp requested to be added as respondents to this petition. We read their submissions and heard the arguments of their attorney, Y. Caspi. We requested the state's position. The state responded that the reservists did not present anything that was not already present in the position of the state and, as such, there was no place to grant their request. As such, and according to our

procedures, we rejected the request to join as respondents to this petition. We allow the addition of a petitioner or respondent when their position adds to what has already been put before us. As the state correctly noted, this is not the case in this situation.

7. Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation and burial of the bodies. This is their obligation under international law. Respondents accept this position. Pursuant to this, and according to procedures that were decided upon, teams were assembled, including the bomb squad unit, medical representatives and other professionals. These teams will locate the bodies. They will expedite the identification process. They will evacuate the bodies to a central location. In response to our questions, respondents stated that they are prepared to include representatives of the Red Cross in the teams. In addition, they are willing to consider, according to the judgment of the Military Commander and in consideration of the changing circumstances, the participation of a representative of the Red Crescent in the location and identification process. We recommended that a representative of the Red Crescent be included subject, of course, to the judgment of the military commanders. Respondents also state that it is acceptable to them that local representatives will assist with the process of identification, following the location and evacuation of the bodies. Identification activities on the part of the IDF will include documentation according to standard procedures. These activities will be done as soon as possible, with respect for the dead and while safeguarding the security of the forces. These principles are also acceptable to petitioners.

8. At the end of the identification process, the burial stage will begin. Respondents' position is that the Palestinian side should perform the burials in a timely manner. Of course, successful implementation requires agreement between the respondents and the Palestinian side. If it becomes clear that the Palestinian side is refraining from bringing the bodies to an immediate burial, in light of the concern that such a situation will compromise national security, the possibility that respondents will bring the bodies to immediate burial will be weighed. Though it is unnecessary, we add that it is respondents' position that such burials be carried out in an appropriate and respectful manner, while ensuring respect for the dead. No differentiation will be made between bodies, and no differentiation will be made between the bodies of civilians and the bodies of armed terrorists. Petitioners find this position acceptable.

9. Indeed, there is no real disagreement between the parties. The location, identification and burial of bodies are important humanitarian acts. They are a direct consequence of the principle of respect for the dead—respect for all dead. They are fundamental to our existence as a Jewish and democratic state. Respondents declared that they are acting according to this approach, and this attitude seems appropriate to us. As we have stated, in order to prevent rumors, it is fitting that representatives of the Red Crescent be included in the body location process. It is also fitting, and this is acceptable to the respondents, that local Palestinian authorities be included in the process of the identification of the bodies. Finally, it is fitting, and this is the original position of the respondents, that burials should be performed respectfully, according to religious custom, by local Palestinian authorities. All these acts should be performed in as timely a manner as possible. All the parties are in agreement in this regard. Needless to say, all of the above is subject to the security situation in the field and to the judgment of the Military Commander.

10. Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to us all, as man was created in the image of God. All parties hope to finish the location, identification and burial process as soon as possible. Respondents are willing to include representatives of the Red Cross and, during the identification stage after the location and evacuation stages, even local authorities (subject to specific decision of the Military Commander). All agree that burials should be performed with respect, according to religious custom, in a timely manner.

11. Petitions claimed that a massacre had been committed in the Jenin refugee camp. Respondents strongly disagree. There was a battle in Jenin, a battle in which many of our soldiers fell. The army fought house to house and, in order to prevent civilian casualties, did not bomb from the air. Twenty three IDF soldiers lost their lives. Scores of soldiers were wounded. Petitioners did not satisfy their evidentiary burden. A massacre is one thing; a difficult battle is something else entirely. Respondents repeat before us that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement that we have arrived at is an expression of that position.

12. It is good that the parties to these petitions have reached an understanding. This understanding is desirable. It respects the living and the dead. It avoids rumors. Of course, the law applies always and immediately. Respondents informed us that, in all their activities, the military authorities

are advised by the Chief Military Attorney. This is how it should be. Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population. *See* HCJ 2901/02 [1]; HCJ 2936/02 [2]; HCJ 2977/02 [3]; and HCJ 3022/02 [4]. Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangered the lives of soldiers. Nor was it claimed that the temporary order endangered the lives of soldiers. On the contrary; the arrangement at which we arrived is an arrangement in which all are interested.

In light of the arrangement detailed above, which is acceptable to all parties before us, the petitions are rejected.

April 14, 2002

HCJ 3451/02

1. Mohammed Almandi
2. MK Ahmed Tibi
3. MK Mohammed Barakeh

v.

1. The Minister of Defense,
Mr. Benjamin Ben-Eliezer
2. The Chief Of Staff
3. The Commander of the Central
Command of the Israel Defense Forces

The Supreme Court Sitting as the High Court of Justice [April 25, 2002]
Before President A. Barak, Justices D. Beinisch, I. Englard.

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

Facts: This petition was submitted during IDF operations against the terrorist infrastructure in the areas of the Palestinian Authority ("Operation Defensive Shield"). It concerns the situation in the Church of the Nativity in Bethlehem, in which armed Palestinians had fortified themselves. In the church compound there were also unarmed Palestinian civilians, as well as clergymen. The clergymen, who were not in the same part of the compound as the Palestinians, received food, though the Palestinians did not. Petitioners requested that food be allowed into the compound. They asserted that preventing food from entering the compound was a violation of international law. Respondents reply that they are not preventing the civilians from exiting the compound—indeed, they are encouraging them to do so—and assuring them that no harm shall befall them. In response, petitioners asserted that the armed Palestinians were preventing the civilians from exiting the compound, and that the only way to ensure that food reached the civilians was to allow food into the compound for all inside.

Held: The Supreme Court held that Israel, finding itself in the middle of difficult battle against a furious wave of terrorism, is exercising its right of self defense under the Charter of the United Nations. This combat is being carried out according to the rules of international law, which provide principles and rules for combat activity. The Court found that, regarding the

treatment of the armed Palestinians, the state had not violated international law. The problem was with the unarmed civilians inside the Church compound, those that were not connected to terror. The Court held that, in view of the reality in the compound, in which there was a well providing a certain amount of water, and food, even if it was only basic, and in view of the willingness of the respondents to provide extra food to the civilians even if they do not leave the compound, the respondents had fulfilled their obligation under international law.

Treaties Cited:

The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949

Israeli Supreme Court Cases Cited:

[1] HCJ 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unreported decision)
[2] HCJ 168/91 *Marcus v. The Minister of Defense* IsrSC 45 (1) 467
[3] HCJ 3114/02 *Barake v. The Minister of Defense* IsrSC 56(3) 11
[4] HCJ 320/80 *Kawasma v. The Minister of Defense* IsrSC 35 (3) 113

Israeli Books Cited:

Y. Dinstein, The Laws of War (1983)

For the petitioners—Saadi Usama

For the respondent—Yochi Jensin

JUDGMENT

President A. Barak

1. On March 29, 2002, the government decided to carry out a military operation—"Operation Defensive Shield"—against the Palestinian terror infrastructure in Judea and Samaria. The goal of the operation was to prevent the recurrence of the terror attacks which have plagued Israel. In the context of this operation, IDF forces entered Bethlehem on April 14, 2002. As IDF forces entered Bethlehem, approximately thirty to forty wanted Palestinian

terrorists broke into the Church of the Nativity, shooting as they entered. According to information in the hands of the security services, these men are responsible for the murder of Israeli civilians. Scores of armed Palestinian security services personnel also burst into the church compound. In addition, a number of civilians, unarmed and unconnected to the others, also entered the church. In total, approximately two hundred Palestinians entered the compound. The armed Palestinians positioned themselves in the Basilica of the church.

2. The IDF surrounded the church compound. Several times, the IDF requested of all Palestinians, especially of the ill requiring medical care, to exit the compound. The message was conveyed to those in the compound that those who were not involved in terror activity, and who were not wanted by Israel, could leave the compound and go free. Those who were wanted—and these constituted a minority of the armed persons in the compound—were given the options of either standing trial in Israel or leaving Israel and the areas of the Palestinian Authority.

3. Many of those who entered the compound of the Church of the Nativity have since left. Those who left the compound included the wounded and the ill. These were examined by a medical team which had been set up adjacent to the church compound, and were evacuated to hospitals when necessary. Two bodies of armed persons were taken out for burial. In addition, a number of civilians, including nine youths, took advantage of the opportunity they were given and left the compound.

4. Initially, there were approximately forty eight clergymen in the Church of the Nativity. They congregated outside the basilica, in several compounds. The IDF, of course, allowed all clergymen the opportunity to leave the compound. Seventeen of them left the church. Water and food is being inserted into the compound for the clergymen, as per their needs. *See* HCJ 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unreported decision) [1].

5. Currently, negotiations toward a resolution of the situation are being conducted between the Palestinians in the compound and the State of Israel. The negotiations are being conducted by special teams that were established for that purpose. During these negotiations, the *La Custodia* [1] petition was filed. That petition contained demands to provide food, water, medicine and

other necessary items to the clergy in the church, to connect the compound to electricity and water and bring a doctor into the compound, and to allow two bodies in the compound to be removed. The petition was filed by the owner and possessor of the compound.

As arguments in the petition were being heard, negotiations were also being conducted on these same issues. As such, the *La Custodiai* [1] petition was rejected. There, Justice Strasberg-Cohen stated that "at the moment, the sides are in contact for the purpose of arriving at an arrangement. In the middle of a military operation, the Court should not interfere in such developments. In addition, as clarified by respondents, the IDF is doing all that is necessary to care for the clergy in a sensitive and humane manner." Regarding the substantive issue, this Court noted that the clergymen were already receiving all of the assistance that they had requested. We have already noted that seventeen priests, out of the forty eight in the compound, left of their own volition. Water and food are being brought in as necessary. Medication was brought in to the compound, according to prescriptions relayed by the clergymen to the IDF.

6. The petition before us was filed by the Governor of Bethlehem (petitioner 1), who is inside the compound, and by two Israeli Members of Knesset (petitioners 2 and 3). They request that medical teams and representatives of the Red Cross be allowed to enter the compound, in order to provide food and medicine. In addition, they request that medical teams and representatives of the Red Cross be allowed to collect the bodies in the compound and to provide medical care to the ill. They also request that ill persons requiring medical care be allowed to leave the compound. As noted, the solution to the problem of collection and burial of bodies has already been found. The problem of the ill that required medical treatment has also been solved. The only remaining problem is the issue of water and food for those in the compound. Even this problem has been solved, as far as the clergymen are concerned. As such, the problem reduces to the question of the Palestinians in the basilica.

7. Respondents have notified us that the IDF has disconnected most of the compound from water and electricity. However, to the best of the army's knowledge, there is a well in the compound, from which water is being pumped. In addition, in certain areas of the compound, electricity is being provided by a generator. Furthermore, Palestinians who left the compound

reported that there are bags of rice and beans inside. It is clear, however, that there is a shortage of food, and the petition here concerns that shortage.

8. Petitioners, during oral arguments of April 24, 2002, argued that the fact that Palestinians in the compound are being deprived of food is a severe breach of international law. Respondents reply that the petition is not justiciable. They assert that there is no justification for judicial intervention when the parties are in the middle of negotiations. Substantively, respondents argue that they are acting according to international law.

9. Israel finds itself in the middle of difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. *See* The Charter of the United Nations, art. 51. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "when the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. I dealt with this idea in HCJ 168/91 Marcus v. The Minister of Defense [2], at 470-71, noting:

> When the cannons roar, the muses are silent. But even under the roar of the cannons, the Military Commander must uphold the law. The strength of society in withstanding its enemies is based on its recognition that it is fighting for values that are worth defending. The rule of law is one of those values.

In HCJ 3114/02 *Barake, v. The Minister of Defense* [3], decided only a few days ago, during the height of combat activities in "Operation Defensive Wall," we stated:

> Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population.

The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. *See* HCJ 320/80 *Kawasma v. The Minister of Defense* [4], at 132. Moreover, the State of Israel is founded on Jewish and

democratic values. We established a state that upholds the law—it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these—the vision and the law—there lies only harmony, not conflict.

10. Indeed, the state argues that it is acting according to the rules of international law. These are humanitarian laws, which Israel honors. Respondent asserts that "the means used by the IDF towards the Palestinians in the Church of the Nativity are not forbidden by international law. These means are proportionate—we have refrained from the use of military force in order to enter the compound, and allow armed Palestinians to leave the compound at any time that they wish to do so and, if they do so without their weapons, they will not be hurt, but rather arrested." *See* para. 32 of respondents' brief. On this issue we were referred to Articles 17 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter - the Fourth Geneva Convention].

11. We examined the arguments of the parties regarding international law. We are convinced that as far as the armed Palestinians are concerned, there is no breach of these rules. The majority of our attention was directed towards the Palestinian civilians in the compound. These civilians are not armed, they are not government authorities, and there is no charge that they are connected with terrorism. How can their rights be ensured? Respondents' answer is that they are not preventing Palestinian civilians from exiting the compound, and are encouraging them to exit, while promising them that no harm shall befall them. Petitioners respond that, according to their information—information from Israeli sources, they claim—the armed Palestinians are preventing these civilians from exiting the compound, and the only way to ensure the provision of food to the civilians is by providing enough food for all who are in the compound. To this the state replies that there is enough food inside the compound now and that, in any case, there is no possibility to ensure that additional food brought into the compound will be consumed by the civilians only, and that, clearly, additional food will also be consumed by the armed persons.

This situation troubled us. On April 30, 2002, we held a special session in order to be updated on this issue. We asked how it can be ensured that extra food—beyond the essentials—be provided to the civilians who remain in the compound. We asked whether respondents would be willing to allow civilians

to leave the compound, receive extra food, and return to the compound. We received a positive answer. Like the clergy, who exit the church to tend to religious matters and then return, so unarmed civilians will be allowed to leave the compound, receive extra food according to their needs outside of the compound, and then return to the church. It appears to us that, in view of the reality in the compound, in which there is a well providing a certain amount of water, and food, even if it is only basic, and in view of the willingness of the respondents to provide extra food to the civilians even if they do not leave the compound, the respondents have fulfilled their obligation under international law. *See* Article 23(a) of the Fourth Geneva Convention; *see also* A. Rogers, Law on the Battlefield 62 (1996); Y. Dinstein, The Law of War 140 (1983).

12. Like many others, we hope that the events in the compound of the Church of the Nativity will come to an end quickly. It is difficult to describe the gravity of the taking of a holy place by armed Palestinians, the desecration of its sanctity and the holding of civilians hostage. Negotiations between the two sides are taking place in order to find a solution to the difficult situation which has been created. A solution to the problem must be found in the framework of these negotiations. Clearly, just as "this Court will take no position regarding the manner in which combat is being conducted," *see* HCJ 3114/02 [3], we will not conduct the negotiations and will not guide them. Responsibility for this issue rests on the shoulders of the executive branch and those acting on its behalf.

The petition is rejected.

Justice D. Beinisch

I agree.

Justice I. Englard

I agree with the opinion of my colleague, President A. Barak, and with his reasons. I would only like to add a few comments regarding the causes of this intolerable situation of the desecration of a Christian holy place—and not just any holy place, but one of the most ancient and significant holy places to the Christian communities. Who is responsible for the fact that thugs burst in, by force, to the ancient basilica and did "things that ought not to be done?" *Cf.* Genesis 34:7. Who had the obligation to protect this holy place and prevent its invasion by armed men? Who is responsible for the breach of the international law which requires the protection of religious and cultural treasures from combat activities and forbids their use for the purposes of war? See the provisions regarding holy places and cultural treasures in Geneva Protocol I, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977; and Geneva Protocol II, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977. Does this responsibility not rest on the shoulders of the Palestinian Authority which obligated itself to protect the holy places in areas under its control? Did the Palestinian Authority take substantial steps to prevent this desecration, and did it make an effort to end it immediately? We all deserve answers to these questions!

Decided according to the opinion of President Barak.

May 2, 2002

Detention

HCJ 3278/02 **The Center for the Defense of the Individual**

v.

The Commander of IDF Forces in the West Bank

HCJ 3239/02 **Marab**

v.

The Commander of IDF Forces in the West Bank

During March 2002, terrorist activities originating in the West Bank escalated significantly. As a result, the government decided, on March 29, 2002, to conduct a wide-ranging military operation in this area aimed at uprooting the terrorist infrastructure. This operation was known as "Defensive Shield."

As part of the operation, IDF troops were ordered to arrest local residents suspected of hostile activity. During the first days of the campaign, in April 2002, the number of Palestinians detained for interrogation reached 6,000. The two judgments presented next deal directly with legal questions relating to those detained by the army. The first judgment, HCJ 3278/02, addresses the conditions in the detention camps. The second judgment, HCJ 3239/02, examines the period of time which the IDF was legally permitted to hold the detainees without an interrogation, court hearing or access to legal counsel.

The IDF initially held all the detainees in temporary detention facilities. Those suspected of more serious offenses were transferred to the Ofer Camp, a detention camp erected near Ramallah, for more intensive interrogation. The petition brought before the High Court of Justice claimed that the conditions

of detention in the temporary facilities and in the Ofer Camp were unsuitable. In the temporary camps detainees were forced to sit on the grounds for hours with their hands and feet bound, without shelter and with no proper food or hygiene arrangements. Additionally it was claimed that personal effects were confiscated in a disorderly fashion and due to the lack of documentation it would be difficult to return belongings to the detainees after their release. According to the petition, harsh conditions prevailed at the Ofer Camp as well, where the detainees suffered from severe overcrowding and a lack of basic amenities.

In its submission before the Court, the state ultimately admitted that the army had not been adequately prepared to look after so many multitudes of detainees. However, by the time the petition reached the Court, on April 25, 2002, the conditions in the detention camps had already improved significantly due to the IDF's investing various resources towards this end.

The Court noted that the humanitarian provisions of the Geneva Convention were relevant to the case. Conditions of detention are clearly a part of this framework. Even those suspected of the most heinous of terrorist crimes are entitled to basic humanitarian standards. The Court noted that the rules of detention reflect the balance between the liberty of the individual and the society's public interest of protecting itself from those who rise up against it. Even though detention by nature entails a loss of liberty, this is no justification for the negation of human dignity.

The judgment listed obligations which must be fulfilled in order to safeguard the human dignity of detainees. These requirements were not fulfilled in the initial stages of the military operation and detentions. The Court ruled that there was no justification for this failure. The military operation was planned in advance and it should have provided for adequate conditions for all those who would inevitably be detained, whether in temporary or permanent detention facilities. However, within a short period of time the conditions of detention improved, and the minimum requirements were met and even surpassed. The Court noted that a mechanism should be established by the IDF to allow the investigation of individual and specific complaints regarding the conditions of detention.

The second judgment presented here addresses the legality of the order issued by the IDF West Bank military commander to detain security suspects.

Clearly the standard legal framework on this issue (which was formulated by the military commander) did not enable him to cope with such multitudes of detainees, since it demands that the detainees be brought swiftly before a military judge who reviews the legality of the detention. The security forces reached the conclusion that, due to the large number of detainees and the paucity of investigators, it was impossible to assemble the evidence against detainees rapidly and bring them before a judge.

For this reason the military commander issued Order 1500. According to this order (in its original form), a suspect could be detained for up to 18 days without appearing before a military judge. It also established that during this period of detention he would be denied legal counsel. Later the order was amended and the number of days allowed to pass without judicial review was reduced to 12 and without legal counsel to four days from the date of detention. Nevertheless, the detainee could still be held for eight days without any investigation into his suspected crimes. During the hearing of the petition, the order was amended once again, reducing the period that a suspect could be detained without interrogation to four days and without legal counsel to two days.

The Court ruled that the military commander is authorized to issue orders for the detention of people believed to pose a security threat. However the exercise of this authority must reflect the balance between human rights and security needs. It is not a blanket power to senselessly detain people just for the purposes of an investigation. Every detainee must be suspected of activities that endanger security, otherwise there is a situation of arbitrary detentions that are illegal under international law. Judicial review is an important part of the exercise of the authority to hold suspects, since it prevents arbitrary detentions.

The Court was prepared to take into account the unusual circumstances of the detentions in a military operation such as “Defensive Shield”. Obviously it was not possible to conduct judicial hearings immediately due to the sheer number of detainees. Nevertheless, the postponement of judicial review for 12 days remains illegal. This does not represent an appropriate balance between security needs and human rights. The same lack of balance is reflected by the order allowing the deferral of interrogation for up to eight days. The Court rejected the claim that there was a dearth of interrogators, since the provision of basic rights is a value of supreme importance and society must be prepared

to pay its price. However, a suitable balance was reflected by the military commander’s position in relation to the denial of legal counsel.

In light of these conclusions the Court struck down Order 1500 and its amendments as issued by the military commander, but delayed the enforcement of the ruling in order to allow the security forces to deal with the ramifications.

HCJ 3278/02

1. The Center for the Defense of the Individual founded by Dr. Lota Salzberger

2. Adalah – The Legal Center for Arab Minority Rights in Israel

3. The Association for Civil Rights in Israel

4. B'tselem – The Israeli Information Center of Human Rights in the Occupied Territories

5. Kanon – The Palestinian Organization for the Protection of Human and Environmental Rights

6. Addameer – Prison Support and Human Rights Association

7. Alhak – The Law in Service of Human Rights

v.

The Commander of IDF Forces in the West Bank

The Supreme Court Sitting as the High Court of Justice
[April 25, 2002; July 28, 2002, October 15, 2002]
Before President A. Barak and Justices D. Beinisch, I. Englard.

For the petitioners—Dan Yakir, Leah Tzemel, Tarek Ibrahim, Yossi Wolfson, Hisham Shabaita. For the respondents—Shai Nitzan.

JUDGMENT

President A. Barak

Facts

1. Beginning in September 2000, there was an increase in Palestinian terrorist activity against the Jewish community in Judea and Samaria, the Gaza Strip, and within Israel itself. Hundreds were killed and wounded. In reaction, the army initiated military activities. Hundreds of Palestinians were killed and wounded. Terrorist activity intensified in the beginning of 2002. In March of that year there was an increase of Palestinian terrorist activity. Approximately one hundred and twenty Israeli civilians were killed and hundreds were wounded. In response to the terrorist activity, the government decided, on March 29, 2002, to carry out a large-scale military operation. The goal of the operation, "Operation Defensive Shield," was to destroy the Palestinian terrorist infrastructure. During the operation, the Israel Defense Forces [hereinafter the IDF] entered many areas in Judea and Samaria which were under the control of the Palestinian Authority.

2. Within the framework of "Operation Defensive Shield," the army carried out a wide-ranging operation of detention. The IDF entered Palestinian cities and villages and detained many suspects. At the height of the activity about 6000 people were detained. Initially, the detentions were carried out in accordance with the standard criminal detention laws of the area, specifically Security Regulations Order 387 (Judea and Samaria)-1970. Since April 5, 2002, the detentions have been carried out under the authority of a special order—Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002 [hereinafter Order 1500]. During the first stage of these detentions, the detainees were brought to temporary facilities which were set up at brigade headquarters. Here the detainees were initially screened, a process the duration of which extended between a few hours and two days. At this point, a substantial number of the detainees were released. During the second stage, those who remained were transferred to a central detention facility in the area, located at Ofer Camp, for further investigation. Several days after the initiation of "Operation Defensive Shield," after the detention facilities at Ofer Camp were prepared, the temporary screening facilities were shut down and the initial screening stage also took place at Ofer Camp. The petition before us is directed against the detention conditions at both the initial temporary facilities and at Ofer Camp. In the third stage, some of the detainees were transferred to Kziot Camp. An additional petition directed against the detention conditions at Kziot, HCJ 5591/02, is pending before this Court and will be dealt with separately. A petition regarding the lawfulness of Order 1500 is also pending before this Court. *See* HCJ 3239/02. The current petition deals only with the temporary detention conditions at the brigade headquarters during the first stage, and the detention conditions during the second phase at Ofer Camp.

Petitioners' Arguments

3. The petitioners complain about the detention conditions at both the temporary facilities and at Ofer Camp. Regarding the temporary facilities, the petitioners claim that the detainees were forced to sit on the ground with their heads bent and their hands down, and that their hands were handcuffed in a rough manner, which caused fierce pains and bruise marks. Furthermore, petitioners claim that the detainees' eyes were covered, that, if they moved or raised their heads, they were exposed to the physical and verbal abuse of the supervising soldiers, that they remained in this difficult position for hours, and that, during this time, they were exposed to the rigors of the weather and were unable to sleep. Petitioners further assert that detainees were deprived of sustenance, that, though they were permitted to go to the bathroom, permission was not often granted, and that there was no documentation of the possessions that were taken from the detainees, including ID cards, cellular phones and cash.

4. The petitioners also complain about the inhumane conditions at Ofer Camp. They claim that the facilities are exceedingly overcrowded. The detainees were transferred into tents or "shelters," which do not shield the detainees against the rigors of the weather. The detainees were not supplied with sufficient mattresses, nor were the mattresses that were supplied of reasonable quality. Furthermore, petitioners assert that the detainees did not receive enough blankets, and that the food that they were provided with was insufficient and of poor quality. Meals were served in small bowls, without plates or other eating utensils. They were not provided with clothing. There were not enough bathroom stalls, nor were they supplied with sufficient toilet paper. The showers did not have hot water, nor was there sufficient soap. Furthermore, they assert that, other than painkillers, they received no medical treatment.

5. The petitioners ask that we order the respondent to provide minimal humane detention conditions – which will be reasonable and appropriate – both during the first stage of detention at the temporary facilities and also during the second stage of detention in Ofer Camp. These conditions must be both suitable and respectable. The petitioners also ask that we order the respondent to allow representatives of human rights organizations to visit Ofer Camp and observe the conditions of detention provided there.

Statement of the State Attorney

6. In the response brief submitted on April 24, 2002, the respondent notes that, at the beginning of "Operation Defensive Shield," due to the large number of persons being detained, it was impossible to provide all of the detainees with completely suitable detention conditions immediately. Therefore, for a relatively short period of time, not all of the detainees were provided with completely acceptable detention conditions. Nevertheless, the army equipped itself very quickly. Most of the temporary facilities were shut down. The conditions in Ofer Camp were improved such that all of the detainees are now provided with reasonable detention conditions which meet the standards recognized by both Israeli and international law.

7. Regarding the conditions in the temporary facilities, respondent notes that the detainees remained there only a short period of time – usually for only a few hours, and no longer than forty-eight. There, the detainees went through preliminarily interrogation and tentative screening. Respondent notes that the temporary facilities were not equipped for long-term detentions and that the conditions provided there were absolutely minimal. Nevertheless, respondent noted that, to the best of his knowledge, the detainees had been supplied with drinking water, sustenance and medical treatment by doctors on location. The detainees had access to the bathrooms. Regarding the handcuffs, it was emphasized that the manner of handcuffing of which the petitioners complain is prohibited, and that soldiers have no permission to employ such methods. Respondent asserts that each complaint will be dealt with individually. Regarding the failure to document the possessions seized from the detainees, it was noted that there had apparently been deficiencies in the matter at the beginning of the period, due to the lack of awareness of those running the facilities. The situation was quickly remedied, with an order being issued to document precisely all possessions seized from detainees. To the best of the respondent's knowledge, this order has been implemented. With respect to the complaint that the detainees should be held in a shelter shielded from the weather, the respondent points out that the temporary facilities were intended to hold detainees for very short periods of time. Some of the detainees were provided with shelter, whether in tents or in permanent buildings. With regard to the claim that the detainees were subject to the verbal and physical abuse of the soldiers, respondent asserts that such activity is prohibited. He adds that the detainees can complain about such matters to the commanders in the respective facilities.

8. As to Ofer Camp: respondent asserts that some of the detainees were moved there after an initial screening at the temporary facilities. When the temporary facilities were shut down, all of the detainees were moved to the Ofer Camp. Between March 29, 2002 and April 24, 2002, over the course of about three weeks, about 3,000 detainees were brought to the facility. After being screened and interrogated, about 1,420 of those detained were released, a figure that is correct as of April 22, 2002. About 240 detainees had been moved to other detention facilities as of that date, such that by April 24, 2002 approximately 1,340 detainees were being held in Ofer Camp. Ordinarily, Ofer Camp has the capacity to hold about 450 detainees. The facility is divided into five “detention divisions." Five tents, designed to hold 100 detainees each, are located in four of these divisions. Three tents are located in the fifth division, each designed to hold fifty persons.

9. The number of detainees transferred to Ofer Camp upon its opening greatly exceeded its standard or expanded capacity. In its standard capacity, Ofer is designed to hold 400 persons. In its expanded capacity, it is designed to hold 700 detainees, such that thirty, instead of twenty, detainees reside in each tent. A severe situation of overcrowding developed. In order to resolve this problem, four permanent shelters were quickly erected, using beams which had been found in the facility. These were to provide temporary shelter for detainees. These shelters were equipped with wooden beds and chemical toilets. Later, showers were also installed in the shelters. The shelters were prepared within a number of days. Thus, the most severe overcrowding problem, which had caused some detainees to remain without shelter for a short period of time, was temporarily resolved.

10. Along with the above-mentioned activity, three days after the initiation of “Operation Defensive Shield,” a decision was made to set up seven additional detention divisions in Ofer Camp. These areas were opened on April 24, 2002. They are designed to hold about 500 detainees. The detainees who had been residing in the shelters were moved to these divisions. Two more divisions are scheduled to be opened within the next few days. Detainees who are currently being held in the other detention divisions will be moved to the new divisions, thus relieving the overcrowding in the other facilities. The respondent is of the opinion that the facility, after being so expanded, provides reasonable detention conditions.

11. The respondent extensively covered the issue of the detention conditions at Ofer Camp. According to the respondent, as stated, since the completion of the construction activities on April 24, 2002, the issue of overcrowding no longer presents a problem. There are three bathrooms and three showers located in each of the detention divisions, and the water in the showers may be heated. The detainees are supplied with toilet paper, soap, toothbrushes and shaving brushes. The detainees sleep on wooden beds with mattresses, which are the same as those used by the IDF. Initially, the number of blankets available was insufficient. This problem was solved within a number of days, and each detainee is now supplied with at least three or four blankets. Regarding the issue of clothing, each detainee was originally supplied with one change of clothes. However, due to the large number of detainees, many of them soon found themselves lacking extra sets of clothing. This problem was resolved on April 23, 2002, when a sufficient quantity of clothing arrived at the facility. As of the time the response was submitted on February 24, 2002, each of the detainees had received at least one, if not two, changes of clothes. Each of the detainees is provided with a jacket. Regarding the issue of sustenance, during the first few days of the facility’s operation, the food lacked in quantity and variety. Within a matter of days, a sufficient amount of food was brought into Ofer Camp, and there is no longer a deficiency in the food supply. The food supplied is now sufficient and varied. A doctor is always available on location. As part of his induction into the facility, each detainee undergoes a medical examination. Medical inspections are carried out regularly. When it becomes necessary, detainees are moved to a hospital. After arriving at the facility, each detainee receives a postcard and is allowed to communicate the details of his detention, including his location, to his family. These postcards are transferred to the Palestinian Authority. Ofer Camp has two tents in which detainees may meet with their attorneys. Since April 14, 2002, the Red Cross has been allowed to enter the facility, and their representatives have been visiting the site without restriction. They converse with each of the detainees in the facility. They meet with the commanding officials and relate their comments about the detention conditions.

12. The respondent concluded by objecting to allowing the petitioners’ attorneys to visit Ofer Camp. He claimed that there are no legal grounds for such a request. As noted, representatives of the Red Cross visit the facility freely, and this ensures that an outside, international body supervises the facility.

The First Hearing – April 25, 2002

13. Upon receiving the respondent's response brief, we held the first hearing in this matter. The petitioners emphasized that the army should have prepared itself for the large number of persons who were to be detained, and that this oversight was a consequence of the army's disrespect towards the fundamental rights of the detainees. The petitioners complained about the sleeping difficulties caused by the wooden beds and thin mattresses. Three blankets are insufficient. The food is occasionally served cold. The detainees do not receive hot drinks. Petitioners reiterated their request that the petitioners' attorneys be allowed to visit Ofer Camp. The respondent stated that, regardless and independent of this petition, the army has learned the necessary lessons from its initial experiences. The facility is no longer overcrowded and its occupancy is decreasing daily. The sleeping conditions match the IDF standards. Each of the detainees receives four or five blankets, and upon request is provided with additional blankets. The food provided is sufficient and is in accordance with IDF nourishment charts.

14. During the oral arguments we asked whether the respondent would allow the petitioners' attorneys to visit Ofer Camp. The respondent pointed out that the attorneys do not have visitation rights. Nevertheless, the petitioner agreed to allow a joint visit, with both himself and the petitioners, to the facility. At the end of the hearing, we decided to postpone this proceeding to a later date. We noted before us that five representatives of the petitioners would be permitted to visit Ofer Camp, along with the respondent's attorney. We ordered that within five days after the visit, the petitioners' counsel should submit a statement. The respondent would then be granted five additional days to submit his response. We decided that the petition would be decided based on the contents of those statements.

15. Implementing the decision to allow the visit raised a number of difficulties. During their visit, petitioners' counsel requested that they be allowed to converse directly with the detainees. The respondent asserted that the visit was being allowed *ex gratia,* and that he had initially indicated that the visitors would not be allowed to converse with the detainees. He added that one of the petitioners' representatives, who had requested to meet with the detainees, was charged with disruption of legal proceedings for relaying messages illegally. The petitioners' attorneys could learn of the detainees' complaints from their individual lawyers, who are in constant contact with

them. In light of this response, the petitioners' attorneys refused to proceed with the visit. They requested that we order the respondent to allow the petitioners' attorneys to meet with representatives of the detainees during their visit. We decided to advise the parties, on May 8, 2002, that military personnel in the facility escort the visitors during their visit and decide, in exercise of their discretion, whether to allow the visitors to meet with representatives of the detainees.

16. Petitioners' attorneys visited Ofer Camp on May 22, 2002. Representatives of the State Attorney, the Judge Advocate-General and the commanders of the camp also attended. The visit included entrance into a standard detention division where the detainees reside and the detention division where the kitchen is located. Petitioners' attorneys were permitted to speak with a number of the detainees' representatives. The respondent informed us that, despite the agreement between the parties, the petitioners' representatives spread out among the tents and began talking to various detainees, disregarding the pleas made by the respondent's representatives.

17. After the visit we received supplementary statements from both parties. The petitioners noted that the physical conditions of the camp had been improved since the petition had been submitted. Nevertheless, the visit – which did not allow detailed or thorough observation of detention conditions – revealed a long list of issues which have yet to be resolved. According to the petitioners, the following principle problems surfaced: detainees do not receive sufficient medical treatment for their illnesses; the tents are overcrowded; twenty two detainees are held in each tent; other than the sleeping areas, there is no room for the detainees to move around; it is difficult to sleep on the thin five centimeter mattresses of the wooden beds; the heat in the tents is unbearable; the three showers and three bathrooms in each division are insufficient; the maintenance of the stalls is deficient; the quantity of clothing provided is insufficient; the detainees are not provided with games or reading materials, save the Koran. The petitioners' attorney listed other problems in a separate letter to the respondent.

18. In his supplementary statement, the respondent complained about the behavior of petitioners' counsel during their visit in the camp. His response also addressed the claims made by the petitioners. Regarding medical treatment, he noted that there is an infirmary in Ofer Camp, which employs a large staff of five doctors, medics and pharmacists. The stock of medications

is sufficient. A doctor or medic inspects every detainee as is necessary. When the medical treatment offered by the facility does not suffice, the detainee is moved to a hospital. With regard to the crowding in the tents, at the time of the visit 900 detainees were residing at the facility. At most, each tent held twenty-two detainees. The area of each tent is sixty square meters. The wooden beds are lined up along both sides of the tents. In the center of the tents, there is an empty space 1.4 meters wide for passage. The number of bathrooms and showers – three per 100 detainees – is absolutely reasonable, considering the fact that access to these six stalls is unlimited throughout the day. With respect to the claim regarding the absence of books and games, the respondent informed us that the Red Cross provides the detainees with both.

The Second Hearing – July 28, 2002

19. Upon receiving statements from both parties, we held a second hearing. The petitioners' attorneys limited their claims to the physical conditions in which the detainees were being held. They repeated the claims that they had presented in their supplementary statement, while complaining of the overcrowding and heat in the tents, the absence of dining tables which causes the detainees to eat on the floor, the sleeping difficulties, the insufficient quantity of clothing provided and the small number of bathrooms and showers.

20. The respondent admitted that, in fact, when the detentions first began, the detainees were not provided with minimal detention conditions. Nevertheless, within a matter of days these were improved, such that Ofer Camp now operates reasonably and satisfactorily. Five hundred and eighty detainees currently reside in the eight detention divisions. Regarding the congestion in the tents, he pointed out that each currently holds only fourteen detainees. There is a space of 45 centimeters between each of the beds. Sustenance is provided according to the IDF nourishment chart. Detainees who desire are permitted to have their own food brought in by visiting families. Every detainee is supplied with three sets of clothing. Some of the detainees prefer not to wear the military garments provided. They are permitted to wear their own clothing, which is brought to them by their families. The respondent added that the Red Cross regularly visits the facility, and that each detainee is free to speak with them. Every detainee is entitled to meet with his attorney who may lodge, in his name, concrete and specific complaints regarding his condition.

The Third Hearing – October 15, 2002

21. During the third and final hearing in this matter, the parties repeated their basic positions. The petitioners' attorney noted the difficult situation that the detainees faced in the first stages of detention. He claims that even now the detainees' rights are being violated. The overcrowding persists; the beds are unsuitable for sleeping; the bathrooms are inappropriate; a number of the faucets are malfunctioning and the facility is not equipped for the winter. In his response brief the respondent noted that, in the first stages of detention, "there was a big mess." In time¨ the conditions have been improved and they now meet legal requirements. With regard to crowding, it was indicated that the facility is designed to hold 1,100 persons, and it was now holds only 900 detainees. As such, overcrowding is no longer an issue. The beds meet IDF standards. The missing faucets were taken by the detainees themselves, and in any case had already been repaired. The facility is equipped for the winter, and the drainage problem has been solved.

The Normative Framework

22. The detention conditions in the area are primarily laid down by the Imprisonment Facility Operation (West Bank) Order 29-1967 [hereinafter, the Imprisonment Order]. This order provides directives regarding the conditions of imprisonment in the area. Most of its provisions, save the following three, have no bearing on the matter at hand. First, the order specifies that "prisoners shall be provided with appropriate nourishment that will guarantee the preservation of their health," Imprisonment Order, § 4; that "prisoners shall be provided with necessary medical treatment," Imprisonment Order § 5(a); and that "prisoners shall receive a receipt when their family identification and personal ID cards are taken," Imprisonment Order § 7.

23. These specific provisions are subject to the general principles of customary international law. They are also subject to the directives regarding detention conditions set out in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter, the Fourth Geneva Convention]. As is well-known, Israel considers itself bound by the humanitarian directives of this Convention. The respondent reiterated this commitment in his response to the petition before us. The directives of the Geneva Convention regarding detention conditions are clearly of a humanitarian nature; therefore they should be adhered to. The question of

whether or not the Basic Law: Human Dignity and Liberty applies to detention conditions in the area need not be answered here. The general principles of administrative law, which apply to Israeli soldiers in the area, are sufficient for this matter. *See* HCJ 393/82 *Jamait Askan v. IDF Commander in Judea and Samaria*, IsrSC 37(4) 785. According to these principles, the army must act, *inter alia*, reasonably and proportionately, while striking a proper balance between the liberty of the individual and the needs of the public. One may learn about the proper standards of reasonableness and proportionality from the Standard Minimum Rules for Treatment of Prisoners. These standards were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and were ratified by the United Nations in 1957 and in 1977. *See* HCJ 221/80 *Darvish v. The Prison Service*, IsrSC 35(1) 536, 539-40, [hereinafter *Darvish*]; HCJ 540-546/86 *Yosef v. Administrator of the Central Prison in Judea and Samaria*, IsrSC 40(1) 567, 573, [hereinafter *Yosef*]; HCJ 253/88 *Sajadia v. The Minister of Defense*, IsrSC 42(3) 801, 832, [hereinafter *Sajadia*]. These standards apply to all imprisoned persons, including detainees. Needless to say, these general standards must always be adjusted to the specific circumstances, with regard to time and place, while ensuring adherence to at least the bare minimum. Justice Bach has noted *in Sajadia*, at 832:

> One should not infer from this that all of the directives of the convention regarding the detention conditions of administrative detainees must be followed blindly. Each and every directive should be examined with regard to its significance, its indispensability, and its adjustment to the special circumstances of the detention facility which is the subject of our proceeding.

Furthermore, we do not deal here with the imprisonment conditions of prisoners held in prisons. We are dealing with the detention conditions of those being held in detention facilities in the area. These detainees were detained during warfare in the area. According to the security forces, the circumstances of the detentions are such that there is fear that the detainees endanger or are liable to endanger the security of the area, the security of IDF forces, or national security. *See* Order 1500 (the definition of “detainee.")

24. The basic point of departure for our discussion is the balancing point between the liberty of the individual and the security of the public. On the one hand are the rights of the individual who enjoys the presumption of innocence and desires to live as he wishes. On the other hand lies society’s need to

defend itself against those who rise up against it. Detention laws in general, and, more specifically, detention conditions, reflect this balance. Here we find the position that detainees should be treated humanely and in recognition of their human dignity. This is expressed in article 10 of the 1966 International Covenant on Civil and Political Rights. Israel is a member of this covenant. Article 10 of this covenant is generally recognized as reflecting customary international law. *See* N. S. Rodley, *The Treatment of Prisoners Under International Law* 27 2nd ed. 1999). The article states:

> All persons deprived of their liberty shall be treated with human dignity and with respect for the inherent dignity of the human person.

See also the first principle of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988). Israel acts according to this principle with regard to all prisoners and detainees. *See* CApp 7440/97 *State of Israel v. Golan*, IsrSC 52(1) 1; HCJL.A. 6561/97 *The State of Israel v. Mendelson*, IsrSC 52(5) 849; HCJL.A. 823/96 *Wanunu v. The Prison Service*, IsrSC 51(2) 873). Vice President H. Cohen expressed this principle in *Darvish*, at 538:

> Any person in Israel who has been sentenced to imprisonment, or lawfully detained, is entitled to be held under humane and civilized conditions. It is not significant that this right has yet to be explicitly stated in legislation; this is one of the fundamental human rights, and in a law-abiding democratic state it is so self-evident that it needs not be written or legislated.

Indeed, the nature of detention necessitates the denial of liberty. Even so, this does not justify the violation of human dignity. It is possible to detain persons in a manner which preserves their human dignity, even as national security and public safety are protected. *Compare Yosef*, at 573. Prisoners should not be crammed like animals into inadequate spaces. Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli government, in accord with its fundamental character: Jewish, democratic and humane. *Compare Yosef*, at 573.

25. In addition to these principles, we must consider the principles and regulations set forth in the Fourth Geneva Convention. Article 27 of the Fourth Geneva Convention sets out the point of departure for the convention:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honor, 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 against and against insults and public curiosity....
>
> 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.

Alongside this general directive, the Fourth Geneva Convention includes a number of directives which refer to specific conditions of detention. We shall examine those directives which are relevant to the petition before us, and which reflect the proper balance between the right of detainees and the security needs of the area. These directives apply to persons in “internment," meaning administrative detention. Apparently, these directives do not apply directly to detentions for the purpose of interrogation, though, indirectly, they do bear heavily on such situations. Thus, there is no reason not to refer to these directives in regard to the detention conditions before us. Some of the detainees being held at Ofer Camp, who are in the last stages of their detention, remain there on the authority of an administrative detention order. The aforementioned directives directly apply to those detainees. The Geneva Convention specifies that detention conditions must preserve the health and personal hygiene of the detainees, while protecting them from weather conditions. The detention facility should be properly lit and heated, especially in the late afternoon and until curfew; the sleeping areas should be sufficiently spacious and ventilated; and, in providing bedding, the weather conditions, as well as the age, gender and health conditions of the detainees, should be taken into account. Detainees should be provided with clean and hygienically maintained bathrooms. The detainees should receive a sufficient supply of soap and water for laundry and daily bathing; they should be provided with the necessary equipment to this end. Detainees shall have access to showers, as well as sufficient time for bathing. See Fourth Geneva Convention, art. 85. Detainees shall receive daily nourishment which is satisfactory in its quantity, quality and variety, such that it preserves their health and prevents the development of illnesses which originate in malnutrition; detainees shall be

allowed to prepare their own food; they shall be provided with a sufficient supply of drinking water. Fourth Geneva Convention, art. 89. Detainees shall be provided with sufficient changes of clothing, appropriate for the weather conditions. Fourth Geneva Convention, art. 90. An infirmary supervised by doctors shall be located in each detention area; detainees shall have unlimited access to medical authorities. Fourth Geneva Convention, art. 91. Detainees shall undergo medical inspections at least once a month. Fourth Geneva Convention, art. 92. The authorities will encourage learning and educational activities. They will also encourage the detainees to engage in sports and games. Sufficient space will be allotted for sporting activities. Fourth Geneva Convention, art. 94. Any items taken from the detainee at the time of his detention shall be returned to him upon his release. Family identification and personal ID cards shall not be seized without providing the detainee with a receipt. Detainees shall never remain without identification. Fourth Geneva Convention, art. 97. The disciplinary order in the detention facility must conform to the principles of humanity. The body and spirit of the detainees shall not be harmed. Fourth Geneva Convention, art. 100. The minimal standards of treating prisoners, which apply to all forms of detention, do not add significant provisions on the matters relevant to this petition. It is sufficient to note the following requirements: detainees require minimal space for sleeping, lighting and heating. Fourth Geneva Convention, reg. 10. Each detainee shall have his own bed. Fourth Geneva Convention, art. reg. 19. At least one hour of physical activity shall be allowed. Fourth Geneva Convention, art. 21. A doctor from the detention facility shall inspect the conditions of sanitation.

From the General to the Specific

26. In order to implement these specific principles and rules in this case, we must distinguish between the two stages of detention the detainees went through. First, we shall deal with the detention in the temporary facilities. This occurred during the first days of detention. The detainees were held at brigade headquarters, which was not adequately prepared for so many detainees. These special circumstances should be taken into account when examining whether the respondent maintained the necessary detention conditions. In referring to the issue of overcrowding in *Sajadia*, at 823, President Shamgar correctly stated:

The existence of extreme crowding at the beginning of the wave of detentions may be explained by the security need for the simultaneous imprisonment of many people.

Nevertheless, even in such a situation, everything must be done to preserve the minimal standards of detention conditions. These standards were not observed during the initial stages of detentions at the temporary facilities, and this conduct violated the detention order, the international laws which apply to the area and the fundamental principles of Israeli administrative law. It will suffice to note several blatant breaches of these standards: detainees' hands were handcuffed in a rough manner, which resulted in fierce pains and bruise marks; some of the detainees were kept outside for hours, as many as forty-eight, not sheltered from weather conditions and without sufficient access to bathrooms; their possessions were taken from them without being documented. These conditions of detention can not be justified, nor can other deviations from minimal standards be excused by the need to accommodate so many detainees in such a short period of time. The necessity was known in advance. It was expected. "Operation Defensive Shield" was planned in advance. One of its goals was to arrest as many suspected terrorists as possible. As such, the need for minimal detention conditions was a natural result of the goals of the operation. There was no surprise in the matter. There was the possibility of preparing appropriate divisions with suitable detention conditions. What was done a number of days after the beginning of the operation should have been done several days before it began. Indeed, security needs – which must always be taken into account – did not justify the inadequacies in the conditions of detention in the temporary facilities.

27. During the second phase, the detainees relocated to Ofer Camp. During the first days in which the detainees were received in Ofer Camp, some of the minimal requirements regarding detention conditions were not fulfilled. As we have seen, at the beginning of "Operation Defensive Shield," Ofer Camp's capacity was 450 detainees, with the option of expanding to 700. In fact, a much larger number of detainees were brought to the facility. The overcrowding was unbearable. A substantial number of detainees remained unsheltered, exposed to the rigors of weather conditions. Not all of the detainees received a sufficient supply of blankets. These circumstances did not satisfy minimal standards of detention conditions, and had no security justification.

28. Shortly after, Ofer Camp entered a period of routine operation, during which minimal requirements were satisfied. This was the situation when the respondent first submitted his statement on April 24, 2002, and at the time of the first hearing. Since then, additional improvements have been made. The current conditions essentially satisfy the minimal required conditions, and in some cases, the conditions in Ofer Camp even exceed such minimal requirements. Such a state of affairs is appropriate: "minimal conditions" guarantee, as their name suggests, only the necessary minimum. Israel, as a Jewish and democratic state, should aim to more than the minimum, and the respondent acted admirably in ensuring that, regarding certain matters, the conditions exceed minimum requirements. Even so, two matters still demand improvement. First the army should reconsider the issue of supplying tables at which the detainees may eat. The explanation offered for the absence of such tables – that the detainees will dismantle the tables and use them in such a way as will disturb security – is unconvincing. The detainees have not used the wooden beds in this manner, and there is no reason to believe they will do so with tables. Additionally, concrete tables may be deeply embedded in the ground, thus preventing the detainees from dismantling them. For those accustomed to eating at tables, the need for such tables is part of their human dignity. Detainees are not animals, and they should not be forced to eat on the ground. *See Yoseph,* at 575. It is of course possible that there is not enough space for tables, whether in or around the tents. This may require the expansion of the detention camp. The weight and position of this argument has not been explored before us, and we ask that the matter be reconsidered. Second, the respondent must ensure that books, newspapers and games be provided to the detainees. Minimal standards demand this, and the matter should not be left to the Red Cross. It is the respondent's duty, and fulfilling it does not interfere with security. Naturally, if the Red Cross has already supplied the detainees with these items, the respondent is no longer obligated to do so.

Detention Conditions and Judicial Review

29. This Court has always exercised wide-ranging judicial review concerning conditions of imprisonment and detention. The Court has done so regarding Israeli prisoners and detainees. It has done so regarding prisoners and detainees from the area. In all of these cases, the Court thoroughly investigated the arguments, even considering the smallest details of the conditions of detention. Thus, for example, *Darvish* dealt entirely with a

security prisoner's right to have a bed in his cell. When necessary, visits were arranged to the prison, *see Yosef*, or the detention facility, *see Sajadia*. Even so, our judicial review is not a substitute for constant review by the proper authorities in the army itself. In *Sajadia*, at 825, President Shamgar emphasized this with regard to Kziot Camp, which, like Ofer Camp, holds many detainees from the area:

> Considering the structure and function of the Court, it cannot perform continual inspection and supervision; however, constant inspection and proper supervision do allow for addressing and examining issues that may arise in a facility which holds such a large number of detainees. By determining procedures of supervision, it becomes easier to strike the proper balance between providing just and humane conditions, and the need to maintain internal order and discipline and preserve safety and security.

A similar problem now lies before us. During oral arguments, various suggestions were made. It seems that we are compelled to repeat the recommendation made in *Sajadia* by President Shamgar, to which all the justices there – both Vice-President M. Elon as well as Justice G. Bach – agreed (*Sajadia*, at 825-26):

> As such, we find it appropriate to direct the respondents' attention towards the need to determine efficient manners of inspection and supervision. Our suggestion is that the respondent consider nominating a permanent advisory committee, which will carry out constant inspection and will report and advise the respondent on the matter of the detention conditions in the Kziot detention facility. The head of the committee can be a senior military judge from the military tribunal units, and the committee may consist of experts from the fields of medicine, psychology, and jailing management.

Unfortunately, according to the information we have received, it seems this suggestion has not been put into action. We ask that this recommendation be brought to the attention of the military's Chief of Staff. We are confident that he will act to ensure its implementation.

30. Even more so: constant supervision and inspection are not substitutes for detainee petitions and judicial review. These other options are available to detainees in Israel. *See* Prisons Ordinance [New Version]-1971, § 62A(a). Amending security legislation in order to allow such similar review should be considered. Of course, such an arrangement would not replace judicial supervision by the High Court of Justice. It would, however, provide alternative relief, which would justify limiting the judicial review of this Court to those cases where the situation has not been resolved through these other methods.

Petition Denied.

Justice D. Beinisch

I agree.

Justice I. Englard

I agree.

Petition Denied.

December 18, 2002

HCJ 3239/02

1. Iad Ashak Mahmud Marab

2. Ahsan Abed Al Ftah Id Dahdul

3. Weesam Abed Al Ftah Id Dahdul

4. Center for the Defense of the Individual founded by Dr. Lota Salzberger

5. B'tselem—The Israeli Information Center of Human Rights in the Occupied Territories

6. The Association for Human Rights in Israel

7. Physicians for Human Rights

8. Adalah—The Legal Center for Arab Minority Rights in Israel

9. Kanon—The Palestinian Organization for the Protection of Human and Environmental Rights

10. Public Committee Against Torture

v.

1. The Commander of IDF Forces in the West Bank

2. Judaea and Samaria Brigade Headquarters

The Supreme Court Sitting as the High Court of Justice
[April 18 2002, July 28 2002]
Before President A. Barak and Justices D. Dorner, I. Englard.

For the petitioner —Lila Margalit
For the respondent —Anar Hellman

JUDGMENT

President A. Barak

The Facts

1. Since September 2002, Palestinians have carried out many terrorist attacks against Israelis, both in Judaea and Samaria as well as in Israel. The defense forces have been fighting this terrorism. To destroy the terrorist infrastructure, the Israeli government decided to carry out an extensive operation, "Operation Defensive Shield." As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judaea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations. As of May 5, 2002, about 7000 persons had been detained in the context of this operation. Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time. Initial screening was done in temporary facilities which were set up at brigade headquarters. Those who were not released after this screening were moved to the detention facility in Ofer Camp. The investigation continued and many more were released. A number of the detainees were then moved to the detention facility in Kziot. As of May 15, 2002, of the 7000 persons who had been detained since the start of "Operation Defensive Shield," about 1600 remained in detention.

2. The detentions were initially carried out under the regular criminal detention laws of the area, under the Defense Regulations Order (Judaea and Samaria) (Number 378)-1970 [hereinafter Order 378]. It soon became clear that Order 378 did not provide a suitable framework for screening thousands of persons detained within a number of days. Thus, on May 5, 2002, respondent no. 1 promulgated a special order: Detention in Time of Warfare (Temporary Order) (Judaea and Samaria) (Number 1500)-2002 [hereinafter Order 1500].

3. Order 1500 established a special framework regarding detention during warfare. The order applied to a "detainee," which was defined as follows:

> Detainee —one who has been detained, since March 29, 2002, in the context of military operations in the area and the circumstances of his detention raise the

> suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public.

The principal innovation of Order 1500 may be found in section 2(a):

> Notwithstanding sections 78(a)-78(d) of the Defense Regulations Order (Judaea and Samaria) (Number 378)-1970 [hereinafter the Defense Regulations Order], an officer will have the authority to order, in writing, that a detainee be held in detention, for up to 18 days [hereinafter the detention period].

Under this section, officers are authorized to order the detention of a detainee for a period of 18 days, and a judicial detention order is not required. In order to continue holding a detainee beyond 18 days, however, a judge must be approached. Section 2(d) of Order 1500 relates explicitly to this matter:

> Continuing to hold a detainee in detention for investigative purposes, beyond the detention period, will be done under the authority of a detention order issued by a judge, in accordance with section 78(f) of the Defense Regulations Order.

During the first 18-day period of detention, detainees have no option to be heard by a judge. This is due to the fact that under section 78(i) of Order 378, a judge's authority to order the release of detainees is limited to those detained who have been detainees in accordance with those specific sections. However, the detainees in question were not detained under these regulations, but rather under the terms of Order 1500, which explicitly grants authority to detain "[n]otwithstanding sections 78(a)-78(d)" of Order 378. In this specific regard, Order 1500 differs from Order 378 in two ways. First, an officer has the authority to order the detention of a detainee for a period of 18 days himself, and need not obtain a judicial order. Second, during that detention period, there is no judicial review of the detention order. Of course, an officer has the authority to release the detainee before the detention period has passed. *See* Order 1500, § 2(c).

Order 1500 also differs from Order 378 is a second manner. Under Order 1500, "a detainee shall not meet a lawyer during the detention period." *See* Order 1500, § 3(a). However, "meeting between a detainee and his lawyer after the detention period may only be prevented by the authorities in accordance with section 78C(c)(2) of the Defense Regulations Order." *See* Order 1500, § 3(b). Thus, after the 18-day detention period has passed, meetings with lawyers shall be allowed, unless disallowed by the standard procedures of Order 378. Under this law, the relevant authority may, in a written decision, prevent a meeting between a detainee and his lawyer for an additional period of 15 days, if it has been convinced that such is necessary for the security of the area or for the benefit of the investigation.

Finally, Order 1500 adds that "a detainee shall be given the opportunity to raise claims opposing his detention within eight days." *See* Order 1500, § 2(b). As such, during the first eight days of his detention, a detainee may be held without being given the opportunity to be heard. Order 1500, which was issued on April 5, 2002, was to be valid for two months.

4. As we have seen, Order 1500 states that in order to hold a detainee for a period which exceeds the 18-day detention period, a judge must be approached. This judge proceeds under the provisions of the standard detention law. *See* Order 1500, § 2(3) of Order 1500. It became clear, however, that there are many detainees who have been screened, yet have not been brought before a judge, despite the fact that their 18-day detention period has passed. To rectify this situation, an additional order was issued on May 1, 2002: Detention in Time of Warfare (Temporary Order) (Amendment) (Judea and Samaria) (Number 1502)-2002 (hereinafter Order 1502). This order provided that section 2(d) of Order 1500 shall be marked subsection (1), after which shall be inserted subsection (2), which would provide that:

> (2) Any person who has been detained under sub-section (1) for a period which exceeds the detention period, whose detention is necessary for further investigation and who has not been brought before a judge in accordance with subsection (d)(2), shall be brought before one as soon as possible, and, in any event, no later than May 10, 2002.
>
> A detainee who has not been brought before a judge within this period of time shall be released, unless there stands a cause for his detention under any other law.

Order 1502 also provided that its provisions would remain in effect until May 10, 2002.

5. Aside from Order 378, which is concerned with criminal detention, and Order 1500 (as amendment by Order 1502), which is concerned with

detention during times of warfare and which was specially issued within the context of "Operation Defensive Shield," there also exist defense regulations which apply to the area and deal with administrative detention. The main order in this regard is the Administrative Detentions Order (Temporary Order) (Judaea and Samaria) (Number 1226)-1988 [hereinafter Order 1226]. This order has undergone numerous amendments. After the issue and amendment of Order 1500, Order 1226 was amended accordingly. Issues concerning these orders do not stand before us.

6. To conclude this review of the relevant defense regulations, it should be noted that Order 1500 was to remain in effect for a period of two months. See Order 1500, § 5. As this expiration date approached, the order was extended by Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 2) (Judaea and Samaria) (Number 1505)-2002 [hereinafter Order 1505]. This subsequent order made a number of significant changes in Order 1500. First, the definition of "detainee" was modified. The new definition was set in section 2:

> Detainee—one who has been detained in the context of the war against terrorism in the area, while the circumstances of his detention raise the suspicion that he endangers or may endanger the security of the area, IDF security, or the public security.

Second, the period of detention without judicial review was shortened. The 18-day period set by Order 1500 was replaced with a 12-day detention period. Third, a detainee could only be prevented from meeting with his lawyer for a period of "four days from his detention." *See* Order 1500 4(a). Furthermore, it provided that if the investigators wished to prevent such a meeting after the four-day detention period, they must act in accordance with section 78C(c) of Order 378. Thus, the "head of the investigation" may first be appealed to. The head of the investigation, if he is of the opinion that such is necessary for the security of the area or for the benefit of the investigation, he may, in a written decision, order that the detainee be prevented from meeting with his lawyer for a period of up to 15 days from the day of his detention. After these periods have elapsed, such a meeting may be prevented for an additional 15 days.

7. Order 1505 was to expire on April 9, 2002. Its validity was extended until January 4, 2003 in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 3) (Judea and Samaria) (Number 1512)-2002 [hereinafter Order 1512].

Petitioners' Arguments

8. Petitioners argued in their original petition that Order 1500 is illegal. It allows for mass detentions without the individual examination of each case, without clear grounds for detention, and without judicial review. It unlawfully prevents meetings between a detainee and a lawyer for a period of 18 days, without allowing for judicial review of this decision. It unlawfully permits detention for a period of 8 days without allowing the detainee's claims to be heard. Petitioners claim that arrangement is in conflict with the Basic Law: Human Dignity and Liberty. The petitioners apply these general claims to the specific cases of petitioners 1-3.

9. We received additional briefs from the petitioners after the issue of Order 1502. In these briefs, petitioners argued that Order 1500 and Order 1502 are unlawful, as they are in conflict with international humanitarian law and human rights law. In this regard, the petitioners rely upon the Covenant on Civil and Political Rights-1966 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949. The petitioners claim that international law recognizes only two types of detentions: regular "criminal" detention and preventive detention (internment). According to the petitioners, Order 1500 creates a third type of detention: prolonged mass detention for the purpose of screening the detainees. This third type is not recognized by international law and is unlawful. Lawful detention, whether "regular," "preventive" or "administrative," must be based on individual reasons related to a specific person. Order 1500 and Order 1502, petitioners argue, allow for collective detention. In summarizing their arguments, the petitioners note that "Order 1500 severely violates fundamental basic human rights. It allows for arbitrary detention, precludes judicial review over decisions regarding detention and isolates those detained under the order from the outside world for a prolonged period of time."

10. In additional oral arguments which were heard after the issue of Order 1505 on May 5, 2002, petitioners asserted that their claims apply to Order 1505 as well. They claim that the three orders unlawfully violate freedom, due process and the principle of proportionality.

The State's Response

11. In the state's original response to the petition, on May 5, 2002, it noted that the Palestinian terrorists had based themselves in population centers. In carrying out their activities, they did not hesitate to use women and children, sometimes dressed in civilian garb, and often carried concealed explosives on their bodies. Under these circumstances, it was often impossible to distinguish, in real-time and during combat situations, between members of terrorist organizations and innocent civilians. As such, persons who were found at sites of terrorist activity or combat, under circumstances which raised the suspicion of their involvement in these activities, were detained. About 7000 persons were so detained between the initiation of the operation and this suit. As a result, it was decided that the standard detention laws—which are concerned with policing activities, and not with combat situations—did not provide a suitable framework for the need to detain a large number of persons whose identities were often unknown. Respondents added that many of the detainees were released, and, as of May 5, 2002—the date the response was submitted—about 1,600 persons remained in detention.

12. Regarding Order 1500, the state asserted in its response that, due to the large number of detainees and limited resources, the initial process of investigation and screening under Order 1500 could last up to 18 days. Occasionally, the process could last for over 18 days. Order 1502 was issued to provide a legal framework for this situation. Respondents further claimed that Order 1500, as well as Order 1502, accord with the international laws of warfare and detention, specifically article 43 of the Hague Convention Regarding the Laws and Customs of War on Land-1907 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War-1949.

In addition, the state claimed that the temporary prevention of meetings with a lawyer is lawful. The state argues that while military activities continue—especially while IDF forces find themselves in hostile territory, in an attempt to uproot the terrorist infrastructure—it is unthinkable that their lives should be endangered due to the possibility that messages may be passed from the detention facilities to the outside world. This is especially true when the screening processes are unfinished and it is unclear which of the detainees will remain in detention, whether criminal or administrative, when the screening is concluded. Finally, the respondents assert that, regardless of

whether the Basic Law: Human Dignity and Liberty applies to the orders in question, Order 1500, as well as Order 1502, are in accordance with the limitations clause of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 8.

13. On June 11, 2002, in additional briefs, the respondents drew attention to Order 1505, which was issued on April 6, 2002. This order reduced the detention period from 18 to 12 days. The period during which meetings with a lawyer could be prevented was shortened from 18 days to 4 days. The respondents assert that these changes became possible due to the easing of military activities in the area. Nevertheless, the respondents are of the opinion that, due to the current state of affairs in the area, such as the war against terrorism—which places an unprecedented and prolonged burden on the security and investigatory authorities—and the large number of detainees being held, which is substantially higher than the amount of persons detained before "Operation Defensive Shield," it is practically impossible to be satisfied with the standard detention framework of Order 378.

With regard to the prevention of meetings with a lawyer, the respondents assert that, under the current circumstances and considering the number of persons currently being detained, it is possible to restrict the prevention period to four days. Further, respondents claim that the amendment of Order 1500 does not change the fact that the original text of Order 1500 was also reasonable and proportionate under the circumstances. The amendment promulgated under Order 1505 only entered the realm of possibility as a result of the decreased number of detainees and changes in the nature of the military activities. Respondents add that Order 1500 does not allow for mass detentions in the absence of any individual basis for detention. They assert that Order 1500 also requires individualized grounds, based on individual circumstances and suspicion. As such, Order 1500 should not be characterized as a third type of detention, aside from and in addition to criminal and administrative detention. Moreover, according to the respondents, Order 1500 is not administrative detention. It is a type of detention intended to allow for initial clarification and criminal investigation. The respondents analyze the laws of warfare and conclude that Orders 1500, 1502 and 1505 are legal under those laws.

14. In the additional oral pleadings which were conducted on July 28, 2002—during which Order 1505 was already effective—the respondents reiterated their

claim that Order 1500, as well as Order 1505, do not create a third type of detention. According to respondents, they provide for a regular form of criminal detention, in accordance with the special circumstances of warfare.

15. In approaching the task of writing our judgment, it became clear that no *order nisi* had been issued under this petition. We asked the parties whether they would be willing to continue as if such an order had been issued. Petitioners, of course, agreed; respondents objected. Under these circumstances, we issued an *order nisi* on December 15, 2002, ordering the respondents to submit their final response within 10 days. The petitioners were given ten additional days to respond to the respondents' response. We added that the judicial panel would decide whether additional oral pleadings would be necessary.

16. After a number of continuances, we received an affidavit in response from respondent no. 1 on January 13, 2002. In this affidavit, the respondent explained the reason behind the issuance of Order 1512, *see supra* par. 7. He informed us that terrorist activities persist and that the IDF is responding with military operations. For example, between September and the end of December 2002, approximately 1,600 terrorist attacks were carried out. During this period, 84 citizens and residents were killed. Over 400 citizens and residents were wounded. About 2,050 persons suspected of terrorist activity were detained in Judea and Samaria. Consequently, respondent 1 decided to extend Order 1500—as it had been extended in Order 1505—for an additional period of time in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 4) (Judea and Samaria) (Number 1518)-2003 [hereinafter Order 1518], after concluding that security reasons demanded such an extension. The extension is valid until April 5, 2003.

17. Aside from extending the validity of the amended Order 1500, Order 1518 also makes two significant modifications. First, it specifies that meetings between a detainee and his lawyer will be prevented for a period of "two days from the day of his detention." *See* Order 1518, § 3. As was mentioned, previously, such meetings could be prevented for a maximum of four days. Second, the detainee was given the opportunity to voice his claims "no later than within four days of his detention." *See* Order 1518, § 2. As noted, under Order 1500—and similarly under Orders 1505 and 1512—a detainee could be held for a period of eight days without being given the opportunity to voice his claims before the detaining authority. Respondent 1

asserted that these amendments had been made after consultation "and not without hesitation." It was reemphasized that the General Security Service, which is responsible for investigating detainees suspected of terrorist activities, could not have prepared for the dramatic increase in the number of detainees since "Operation Defensive Shield" in March 2002. Respondent asserted that, even today, the logistical constraints of investigations demand that a detainee not be permitted to meet with his lawyer for a period of forty-eight hours and that there be guidelines regarding the length of the "screening process." He emphasized that these guidelines are reasonable and proportionate. Respondent noted that the war against terrorism demands professional and specialized skills, and is not akin to regular police investigation. The process of training General Security Service investigators is exceptionally lengthy. Consequently, it was practically impossible to prepare for the increase in terror which began in March 2002, and which continues today. Respondent repeated that merely investing financial resources would not solve this problem. In conclusion, respondent requested that, if the information offered does not suffice to reject this petition, we hear, *ex parte*, from the General Security Service itself, a detailed description of the objective constraints which required the issuance of Order 1500. These restraints also required that the amended order be extended for an additional period. The respondents assert that Order 1500 cannot be deemed illegal before we hear this classified data.

The Issues Raised

18. An examination of this petition indicates that petitioners have raised four issues. First, petitioners contest the authority to detain. The petitioners claim that Orders 1500, 1502, 1505, 1512 and 1518 unlawfully create a new type of detention—the orders allow mass detention and free the authorities from examining each case individually. Second, petitioners contest the lack of any possibility of judicial intervention. The petitioners claim that the detention period without possibility of judicial intervention—18 days under Order 1500 and 12 days under Orders 1505, 1512 and 1518—lacks proportion and, as such, is illegal. Third, petitioners contest the prevention of meetings with lawyers—such meetings can be for a period of 18 days under Order 1500, 4 days under Order 1505, and two days under Order 1518. Petitioners claim that such prevention lacks proportion and, as such, is illegal. Fourth, petitioners contest the fact that detainees cannot voice their claims before the detaining authority. Petitioners cannot voice their claims for a period of eight

days under Orders 1500, 1505 and 1512, and for a period of four days under Order 1518. Petitioners claim that this order is illegal. We shall deal with each of these claims, beginning with the first.

The Authority to Detain for the Purpose of Investigation

19. Detention for the purpose of investigation infringes upon the liberty of the detainee. Occasionally, in order to prevent the disruption of investigatory proceedings or to ensure public peace and safety, such detention is unavoidable. A delicate balance must be struck between the liberty of the individual, who enjoys the presumption of innocence, and between public peace and safety. Such is the case with regard to the internal balance within the state—between the citizen and his state—and such is the case with regard to the external balance outside the state—between a state that is engaged in war and persons detained during that war. Such is the case with regard to this balance in time of peace, and such is the case with regard to this balance in time of war. Thus, the general provision of Article 9.1 of the International Covenant on Civil and Political Rights (1966), which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

The prohibition is not against detention, but rather against arbitrary detention. The various laws which apply to this matter, whether they concern times of peace or times of war, are intended to establish the proper balance by which the detention will no longer be arbitrary.

20. This approach accords with Israeli Law. Man's inherent liberty is at the foundation of the Jewish and democratic values of the State of Israel. "Personal liberty is a primary constitutional right, and from a practical point of view, is a condition for the realization of other fundamental rights." HCJ 6055/95 *Tzemach v. Minister of Defense*, at 261 (Zamir, J.) Nevertheless, this is not an absolute right. It may be restricted. A person may be detained for investigative purposes—in order to prevent the disruption of an investigation or to prevent a danger to the public presented by the detainee—where the proper balance between the liberty of the individual and public interest justifies the denial of that right. The balance demands that the detaining authority possess an evidentiary basis sufficient to establish suspicion against the individual detainee. Such is the case with regard to "regular" criminal

detention, whether for investigative purposes or until the end of the proceedings. *See* sections 13, 21 and 23 of the Criminal Procedure (Enforcement Authorities-Detentions) Law-1996. Such is the case with regard to administrative detention. *See* section 2 of the Emergency Powers (Detentions) Law-1979, and HCJ *Citrin v. IDF Commander in Judea and Samaria* (unreported case); HCJ 1361/91 *Masalem v. IDF Commander in Gaza Strip*, at 444, 456; HCJ 554/81 *Branasa v. GOC Central Command*, at 247, 250; HCJ 814/88 *Nassrallah v. IDF Commander in the West Bank*, at 265, 271; HCJ 7015/0 *Ajuri v. IDF Commander in the West Bank*, at 352, 371.

Moreover, it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty. Detention is the exception. The general rule is one of freedom. Confinement is an exception. *See* Crim.App. 2316/95 *Ganimat v. State of Israel*, at 649. There is no authority to detain arbitrarily. There is no need, in the context of this petition, to decide to what extent these principles apply to internal Israeli law regarding detention in the area. It suffices to state that we are convinced that internal Israeli law corresponds to international law in this matter. Furthermore, the fundamental principles of Israeli administrative law apply to the commander in the area. See HCJ *Jamit Askhan Al-Maalmon v. IDF Commander in Judea and Samaria.* The fundamental principles which are most important to the matter at hand are those regarding the duty of each public authority to act reasonably and proportionately, while properly balancing between individual liberty and public necessity.

21. International law adopts a similar approach concerning occupation in times of war. On the one hand, the liberty of each resident of occupied territory is, of course, recognized. On the other hand, international law also recognizes the duty and power of the occupying state, acting through the military commander, to preserve public peace and safety; *see* Article 43 of the Annex to the Hague Convention Regulations Respecting The Laws and Customs of War on Land-1907 [hereinafter Hague Regulations]. In this framework, the military commander has the authority to promulgate security legislation intended to allow the occupying state to fulfill its function of preserving the peace and protecting the security of the occupying state, and the security of its soldiers. *See* Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter the Fourth Geneva Convention]. Consequently, the military commander has the

authority to detain any person suspect of committing criminal offences, and any person he considers harmful to the security of the area. He may also set regulations concerning detention for investigative purposes—as in the matter at hand—or administrative detention—which is not our interest in this petition. Vice-President M. Shamgar, in HCJ 102/82 *Tzemel v. Minister of Defense*, at 369, stated in this regard:

> Among the authority of a warring party is the power to detain hostile agents who endanger its security due to the nature of their activities… Whoever endangers the security of the forces of the warring party may be imprisoned.

True, the Fourth Geneva Convention contains no specific article regarding the authority of the commander to order detentions for investigative purposes. However, this authority can be derived from the law in the area and is included in the general authority of the commander of the area to preserve peace and security. This law may be changed by security legislation under certain circumstances. Such legislation must reflect the necessary balance between security needs and the liberty of the individual in the territory. An expression of this delicate balance may be found in Article 27 of the Fourth Geneva Convention:

> 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… 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.

Moreover, Article 78 of the Fourth Geneva Convention provides that residents of the area may, at most, be subjected to internment or assigned residence. This appears to allow for the possibility of detention for the purpose of investigating an offence against security legislation. We would reach this same conclusion if we were to examine this from the perspective of international human rights law. International law, of course, recognizes the authority to detain for investigative purposes, and demands that this authority be balanced properly against the liberty of the individual. Thus, regular criminal detention is acceptable, while arbitrary detention is unacceptable. Orders such as Orders 378 and 1226 were issued with this in mind.

22. The petitioners argued that Order 1500, as well as Orders 1502, 1505, 1512 and 1518, establish a new type of detention, aside from standard criminal detention and administrative detention. Petitioners assert that his new type of detention allows for detention without cause, and should thus be nullified. Indeed, we accept that the law which applies to the area recognizes only two types of detention: detention for the purpose of criminal investigation, as in Order 378, and administrative detention, as in Order 1226. There exists no authority to carry out detentions without “cause for detention." In *Tzemel*, at 375, Vice-President Shamgar expressed as much after quoting the provisions of Article 78 of the Fourth Geneva Convention:

> The discussed Article allows for the imprisonment of persons, who, due to their behavior or personal data, must be detained for definitive defense reasons. As is our custom, we hold that every case of detention must be the result of a decision which weighs the interests and data regarding the person who is being considered for detention.

Detentions which are not based upon the suspicion that the detainee endangers, or may be a danger to public peace and security, are arbitrary. The military commander does not have the authority to order such detentions. *See Prosecutor v. Delalic*, Tribunal for the Former Yugoslavia, IT-96-21. *Compare also* section 7(1) of the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism: “A person suspected of terrorist activities may only be arrested if there are suspicions." With this in mind, we turn to Order 1500.

23. Under Order 1500, an order may be given to hold a detainee in detention. Order 1500 defines a “detainee” as follows:

> Detainee—one who has been detained, since March 29, 2002, during warfare in the area, and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF or the public.

A similar provision exists in Order 1505:

> Detainee—one who has been detained in the area during antiterrorism activities, while the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, IDF security or the public.

From these provisions, we find that under Order 1500 as well as Order 1505—and similarly under Orders 1512 and 1518—detention may only be carried out where there is a "cause for detention." The cause required is that the circumstances of the detention raise the suspicion that the detainee endangers or may be a danger to security. Thus, a person should not be detained merely because he has been detained during warfare; a person should not be detained merely because he is located in a house or village wherein other detainees are located. The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.

Of course, the evidentiary basis for the establishment of this suspicion varies from one matter to another. When shots are fired at the defense forces from a house, any person located in the house with the ability to shoot may be suspect of endangering security. This basis may be established against a single person or a group of persons. However, this does not mean that Orders 1500, 1505, 1512 or 1518 allow for "mass detentions," just as detaining a group of demonstrators for the purpose of investigation, when one of the demonstrators has shot at police officers, does not constitute mass detention. The only detention authority set in these orders is the authority to detain where there exists an individual cause for detention against a specific detainee. It is insignificant whether that cause applies to an isolated individual or if it exists with regard to that individual as part of a large group. The size of the group has no bearing. Rather, what matters is the existence of circumstances which raise the suspicion that the individual detainee presents a danger to security. Thus, for example, petitioner 1 was detained, as there is information that he is active in the Popular Front for the Liberation of Palestine, a terrorist organization. He recruited people for the terrorist organization. Petitioner 2 was detained because he is active in the *Tanzim*. Petitioner 3 was detained because he is a member of the *Tanzim* military. Thus, an individual cause for detention existed with regard to each of the individual petitioners.

24. Thus, the amended Order 1500 is included in the category of detention for investigative purposes. It is intended to prevent the disruption of investigative proceedings due to the flight of a detainee whose circumstances of detention raise the suspicion that he is a danger to security. The difference

between this detention and regular criminal detention lies only in the circumstances under which they are carried out. Detention on the authority of the amended Order 1500 is carried out under circumstances of warfare, whereas regular criminal detention is carried out in cases controlled by the police. In both cases, we are dealing with individual detention based on an evidentiary basis that raises individual suspicion against the detainee. For these reasons, we reject the petitioners' first claim.

Detention Without Judicial Intervention

25. Petitioners' second claim relates to the detention period. The claim does not concentrate on the length of the period *per se,* since the length of the period is determined by the needs of the investigation. The claim focuses on the period between the detention and the first instance of judicial intervention. Under Order 1500, this period lasts 18 days; the petitioners claim that this period is excessive. Moreover, they claim that there are a number of detainees who have yet to be brought before a judge despite the fact that the 18-day period has passed. In order to rectify this situation Order 1502 was issued, under which such detainees are to be brought before a judge as soon as possible and no later than May 10, 2002, *see supra*, para. 12. The petitioners claim that, under the authority of this latter order, some detainees were held for a period of 42 days without judicial intervention. The petitioners also assert that Order 1505, under which the detention order may prevent judicial intervention for a period of 12 days, is also illegal, as the period specified there is also excessive. This period remains valid unders Order 1512 and Order 1518.

26. Judicial intervention with regard to detention orders is essential. As Justice I. Zamir correctly noted:

> Judicial review is the line of defense for liberty, and it must be preserved beyond all else.

HCJ 2320/98 *El-Amla v. IDF Commander in Judea and Samaria,* at 350.

Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. *See Brogan v. United Kingdom* (1988) EHRR 117, 134. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of

detention. *See* AMA 10/94 *Anon. v. Minister of Defense*, at 105. Internal Israeli law has established clear laws in this regard. In “regular” criminal detention, the detainee is to be brought before a judge within 24 hours. *See* section 29(a) of the Criminal Procedure (Enforcement Powers-Detentions) Law-1996. In this case, the order is issued by the judge himself. In “administrative” detention, the detention order is to be brought before the president of the district court within 48 hours. *See* section 4 (a) of the Emergency Powers (Detentions) Law-1979. The decision of district court president is an integral part of the development of the administrative detention order. *See* AMA 2/86 *Anon. v. Minister of Defense*, at 515.

Similarly, in detaining an “unlawful combatant," the detainee is to be brought before a justice of the district court within 14 days of the issuance of the imprisonment order by the Chief of Staff. *See* section 5 of the Imprisonment of Unlawful Combatants Law-2002. With regard to the detention of military soldiers, section 237A of the Military Justice Law-1955 provided that the detainee is to be brought before a military justice within 96 hours. We reviewed this provision and concluded that it was unconstitutional, as it unlawfully infringed upon personal liberty, and was not proportionate. *See Tzemach.* Subsequent to our judgment, the law was amended, and it now provides that, in detaining a military soldier under the Military Justice Law, the detainee is to be brought before a judge within 48 hours. What is the law with regard to detentions carried out in the area?

27. International law does not specify the number of days during which a detainee may be held without judicial intervention. Instead, it provides a general principle, which is to be applied to the circumstances of each and every case. This general principle, which pervades international law, is that the question of detention is to be brought promptly before a judge or other official with judiciary authority. *See* F. Jacobs and R. White, *The European Convention on Human Rights* 89 (2nd ed., 1996). Thus, for example, Article 9.3 of the Covenant on Civil and Political Rights-1966 provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power.

This provision is perceived as part of customary international law. *See* N. Rodley, *The Treatment of Prisoners Under International Law* 340 (2nd ed., 1999). A similar provision may be found in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which was ratified by the UN General Assembly in 1988 (hereinafter the Principles of Protection from Detention or Imprisonment). Principle 1.11 provides:

> A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.

According to the interpretation of the UN Human Rights Committee, “[D]elays must not exceed a few days." *See* Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), quoted by Rodley, *Id*., at 335. On a similar note, Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms-1950 provides:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(C) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

In one of the cases in which the European Court of Human Rights interpreted this provision, *Brogan v. United Kingdom*, EHRR 117, 134 (1988), it stated:

> The degree of flexibility attaching to the notion "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority.

In that case, the British authorities had been holding a number of detainees who had been detained with regard to terrorist activities in Northern Ireland. They were released after four days and six hours, without having been brought before a judge. The European court determined that, in so doing, England had violated its duty to bring the detainees before a judge promptly. A number of additional cases were similarly decided. *See McGoff v. Sweden*, 8 EHRR 246 (1984); *De Jong v. Netherlands*, 8 EHRR 20 (1984); *Duinhoff v. Netherlands*, 13 EHRR 478 (1984); *Koster v. Netherlands*, 14 EHRR 196

(1991); *Aksoy v. Turkey*, 23 EHRR 553 (1986) *See also Human Rights Law and Practice* 121-22 (Lester and Pannik eds.,1999).

28. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter the Fourth Geneva Convention] includes a general provision under which:

> 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 Fourth Geneva Convention does not include provisions which specify set detention periods or occasions for judicial intervention with regard to detention. It only includes provisions concerning administrative detention (internment). The first provision, Article 43, which applies to detentions carried out by the occupying state, provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

The second provision, Article 78, which applies to detentions carried out in the occupied territory, provides:

> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.

There are no additional provisions which relate to this matter, or to the issue of judicial intervention into detention which is not administrative.

29. Finally, there is security legislation relating to “regular” criminal detention and administrative detention, in the area. With regard to “regular” criminal detention, Order 378 provides that a police officer, who has reasonable reason to believe that a crime has been committed, has the

authority to issue a detention order for a period of up to 18 days. *See* section 78(3). Following the recommendations of the *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Landau Commission)*, Order 378 was amended, and the detention period without judicial intervention was reduced to 8 days. In a petition submitted in this matter, the Court held that “at this time, there is no room for this Court to intervene to reduce the maximum period of detention permitted before bringing persons detained in the territories before a military judge." HCJ 2307/00 *Natsha v. IDF Commander in the West Bank* (unreported case).

With regard to administrative detention in the area, such detentions were initially carried out under the Emergency Defense Regulations, which apply to the area. Later on, provisions regarding administrative detention were included in the Defense Regulations Order (Judea and Samaria) (Number 378)-1970. Under these provisions, if a person was detained on the authority of an administrative order, he was to be brought before a judge within 96 hours. *See* section 87B(a). These provisions were suspended by Order 1226. This Order provided that any person who had been administratively detained would be brought before a judge within 8 days. With the issuance of Order 1500, this was changed, and this provision was substituted by one which provided that an administrative detainee should be brought before a judge within 18 days. With the issuance of Order 1505, Order 1226 was once again amended, and it provided that, if an administrative detention order was issued against a person who had been detained formerly under Order 1500, his case was to be brought for judicial review within 10 days of his detention.

30. Against this normative background, which demands prompt judicial review of detention orders, the question again arises whether the arrangement established in Order 1500—under which a person may be detained for a period of 18 days without having been brought before a judge—is legal. Similarly, is the arrangement established in Order 1505 legal? This arrangement—which was unaffected by Order 1512 or Order 1518—provided that a person may be detained for a period of 12 days without being brought before a judge. In answering these questions, the special circumstances of the detention must be taken into account. “Regular” police detention is not the same as detention carried out “during warfare in the area,” Order 1500, or “during anti-terrorism operations,” Order 1505. It should not be demanded that the initial investigation be performed under conditions of warfare, nor

should it be demanded that a judge accompany the fighting forces. We accept that there is room to postpone the beginning of the investigation, and naturally also the judicial intervention. These may be postponed until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly. Thus, the issue at hand rests upon the question: where a detainee is in a detention facility which allows for carrying out the initial investigation, what is the timeframe available to investigators for carrying out the initial investigation without judicial intervention?

31. In this regard, the respondents claim before us that it was necessary to allow the investigating officials 18 days—and after Order 1505, 12 days—to carry out "initial screening activities, before the detainee's case is brought before the examination of a judge." This was due to the large number of persons being investigated, and constraints on the number of professional investigators. In their response, the respondents emphasized that "during the warfare operations, thousands of people were apprehended by the IDF under circumstances which raised the suspicion that they were involved in terrorist activities and warfare. The object of Order 1500 was to allow the 'screening' and identification of unlawful combatants who were involved in terrorist activities. This activity was necessary due to the fact that the terrorists had been carrying out their activities in Palestinian population centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violation of the laws of warfare." *See* para. 51 of the response brief from May 15, 2002. The respondents added that it is pointless to bring detainees before a judge when they have not yet been identified and the investigative material against them has not yet undergone the necessary processing. This initial investigation, performed prior to bringing the detainee before the judge, is difficult and often demands considerable time. This is due, among other reasons, to "the lack of cooperation on the part of those being investigated and their attempts to hide their identities, their hostility towards the investigating authorities due to nationalistic and ideological views, the inability to predetermine the time and place of the detentions, the fact that most of the investigations are based on confidential intelligence information which cannot be revealed to the person being investigated, and the difficulty of reaching potential witnesses." *See* para. 62 of the response brief from June 11, 2002.

32. The respondents thus claim that the investigating authorities must be allowed the time necessary for the completion of the initial investigation. This will, of course, not exceed a period of 18 days, under Order 1500, or 12 days, under Order 1505, as it was amended in Orders 1512 and 1518. In this timeframe, all those detainees against whom there is insufficient evidence will be released. Only those detainees whose initial investigation has been completed, such that the investigation is ready for judicial examination, will remain in detention.

In our opinion, this approach is in conflict with the fundamentals of both international and Israeli law. This approach is not based on the presumption that investigating authorities should be provided with the minimal time necessary for the completion of the investigation, and that only when such time has passed is there room for judicial review. The accepted approach is that judicial review is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" part of the detention process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.

Indeed, the laws regarding detention for investigative purposes focus mainly on judicial decisions. In a "natural" state of affairs, the initial detention is performed on the authority of a judicial order. See H. Zandberg, *Interpretation of the Detentions Law* 148 (2001). Of course, this state of affairs does not apply to the circumstances at hand. It is natural that the initial detention not be carried out on the authority of a judicial order. It is natural that the beginning of the initial investigation in the facility be performed within the context of the amended Order 1500. Judicial review will naturally come later. Even so, everything possible should be done to ensure prompt judicial review. Indeed, the laws of detention for investigative purposes are primarily laws which guide the judge as to under what circumstances he should allow the detention of a person and under what circumstances he should order the detainee's release. Judicial detention is the norm, while detention by one who is not a judge is the exception. This exception applies

to the matter at hand, since, naturally, the initial detention is done without a judicial order. Nevertheless, everything possible should be done to pass the investigation over to the regular track rapidly , placing the detention in the hands of a judge and not an investigator. Indeed, the authority to detain as set by Order 1500, as well as the detention authority under Orders 1505, 1512 and 1518, is not unique. This detention authority is part of the regular policing authority. *See* para. 24. Otherwise it could not be conferred upon an authorized officer. This nature of the detention authority affects its implementation. Like every detention authority, it must be passed over to the regular track of judicial intervention as quickly as possible.

33. Of course, such judicial intervention takes the circumstances of the case into account. In evaluating the detention for investigative purposes, the judge does not ask himself whether there exists *prima facie* evidence of the detainee's guilt. That is not the standard which needs to be tested. At this primary stage, there must be reasonable suspicion that the detainee committed a security crime and reasonable reason to presume that his release will disturb security or the investigation. Regarding this reasonable suspicion, Justice M. Cheshin stated:

> "Reasonable suspicion" will exist even if it is not supported by *"prima facie* evidence for proving guilt," where there is evidence which connects the suspect to the crime at hand to a reasonable extent that justifies, in the balancing of the interests on each side, allowing the police the opportunity to continue and complete the investigation.

VCA 6350/97 *Rosenstien v. State of Israel* (unreported case); VCA 157/02 *Tzinman v. State of Israel* (unreported case).

Indeed, the judge may often learn of the existence of reasonable suspicion from the circumstances of the detention themselves, which raise the suspicion that the individual detainee presents a danger to the security of the area. *See* the definition of detainee in Orders 1500 and 1505. The judge will review the circumstances and examine whether they raise reasonable suspicion that the crime has been committed. He will, of course, consider additional materials submitted to him. He will inquire into the intended course of investigation and the difficulties of the investigation—whether they be the lack of manpower or difficulties in the investigation itself—in order to be convinced that the investigators are truly in need of additional time for their investigation. All these will ensure that the decision regarding continuation of the detention, even if it is only based upon initial investigative materials, will not be made by the investigating authority, but rather by a judicial official. This is the object which lays at the base of both the international and Israeli regulation of detention for investigative purposes.

It is possible that, in the end, the judge will decide to allow the continuation of the detention, as would an authorized officer. This is irrelevant, since the judge's intervention is intended to guarantee that only the proper considerations be taken into account, and that the entire matter be examined from a judicial perspective. This is the minimum required by both the international and Israeli legal frameworks. President Shamgar, in HCJ 253/88 *Sajadia v. Minister of Defense*, at 819-820, expressed the same in reference to judicial review over administrative detention, which also applies to the matter at hand:

> It would be proper for the authorities to act effectively to reduce the period of time between the detention and the submission of the appeal, and the judicial review.

Of course, this does not mean that the judicial review should be superficial. On the contrary, "it is highly significant that a judge thoroughly examine the material and ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination." President Shamgar in *Sajadia*, at 820. In exercising his discretion, in each and every case, the judge will balance security needs, on the one hand, and individual liberty, on the other. He will keep in mind President Shamgar's words in *Sajadia*, at 821, which were said with reference to administrative detention, but apply to our case as well:

> Depriving one of his liberty, without the decision of a judicial authority, is a severe step, which the law only allows for in circumstances which demand that such be done for overwhelming reasons of security. Proper discretion, which must be exercised in issuing the order, must relate to the question of whether each concrete decision regarding detention reflects the proper balance between security needs—which have no other reasonable solution—and the fundamental tendency to respect man's liberty.

34. With this in mind, we are of the opinion that detention periods of 18 days, under Order 1500, and 12 days, under Orders 1505, 1512 and 1518, exceed appropriate limits. This detention period was intended to allow for initial investigation. However, that is not its proper function. According to the normative framework, soon after the authorized officer carries out the initial detention, the case should be transferred to the track of judicial intervention. The case should not wait for the completion of the initial or other investigation before it is brought before a judge. The need to complete the initial investigation will be presented before the judge himself, and he will decide whether there exists reasonable suspicion of the detainee's involvement to justify the continuation of his detention. Thus, Order 1500, as well as Orders 1505, 1512 and 1518, unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect.

35. How can this problem be resolved? We doubt that it would be suitable to substitute the periods of detention without judicial intervention set in Order 1500 and the amended Order 1505 with a shorter predetermined detention period. As we have seen, everything rests upon the changing circumstances, which are not always foreseeable. It seems that, due to the unique circumstances before us, the approach adopted by international law, which avoids prescribing set periods and instead requires that a judge be approached promptly, is justified. In any case, this is a matter for the respondents and not for us. Of course, presumably, this means that it will be necessary to enlarge substantially the staff of judges who will deal with detention. It was not argued before us that there is a lack of such judges. In any case, even if the claim had been raised before us, we would have rejected it and quoted President Shamgar's words in *Sajadia*, at 821:

> What are the practical implications of what has been said? If there are a large number of detainees, it will be necessary to increase the number of judges. Difficulty in organizing such an arrangement, which will increase the number of judges who are called to service in order that a detainee's appeal be heard promptly and effectively, cannot justify the length of the period during which the detainee is held before his case has been judicially reviewed. The current emergency conditions undoubtedly demanded large-scale deployment of forces to deal with the riots occurring in Judea, Samaria and the Gaza Strip, and the matter at hand—the establishment of a special facility in Kziot—is an example of this deployment of forces. However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened. If the large number of appeals so demands, ten or more judges may be called upon to review the cases simultaneously, and not only the smaller number of judges who are currently treating these matters. Such is the case—aside from the differences which stem from the nature of the matter—with regard to prosecutors as well. The number of prosecutors may also be increased, due to the need to hasten the appeal proceedings and the preparations thus involved.

Notably, under international law, judicial intervention may be carried out by a judge or by any other public officer authorized by law to exercise judicial power. This public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee. *See Ireland v. United Kingdom*, 2 EHRR 25 (1978); *Schiesser v.* Switzerland, 2 EHRR 417 (1979).

36. Thus, we hold the 18-day detention period without judicial oversight under Order 1500, and the 12-day detention period without judicial oversight under Orders 1505, 1512 and 1518, to be null and void. They will be substituted by a different period, to be set by the respondents. To this end, the respondents should be allowed to consider the matter. Therefore, we hold that this declaration of nullification will be effective six months from the date at which this judgment is given. *Compare Tzemach*, at 284. We have considered respondents' request to present us with classified information. We are of the opinion that such is neither appropriate nor desirable. We hope that the half-year suspension will allow for the reorganization required by both international and internal law.

Preventing Meetings with a Lawyer

37. Order 378 distinguishes between a "regular" criminal detainee and a detainee suspect of committing a crime set out in security legislation, with regard to the issue of meeting with a lawyer. In the case of the former, the detainee is allowed to meet and consult with his lawyer. *See* section 78B(a). The meeting may only be prevented if the detainee is currently under investigation or subject to other activities connected to the investigation, and even then the delay is only for "a number of hours." *See* section 78B(d). The prevention may be extended for security reasons for up to 96 hours from the time of detention. This is not so in the latter case, of one suspected of a security crime. In this case, the head of the investigation may order that the

detainee be prohibited from meeting with a lawyer for a period of 15 days from the day of his detention, if the head of the investigation is of the opinion that such is necessary for the security of the area or for the benefit of the investigation. *See* section 78C(c). An approving authority may order that the detainee not be allowed to meet with a lawyer for an additional 15 days, if it is convinced that such is necessary for the security of the area or the benefit of the investigation.

38. Order 1500 altered the arrangement set out in Order 378. Section 3 of Order 1500 provides:

> (a) Despite that which is stated in sections 78(b) and 78(c) of the Defense Regulations Order, a detainee shall not meet with a lawyer during the detention period.

(b) At the end of the detention period, a meeting between a detainee and a lawyer shall only be prevented on the order of an approving authority, in accordance with section 78C(c)(2) of the Defense Regulations Order.

Thus, Order 1500 substituted the 15-day detention period set by Order 378, during which a detainee was prevented from meeting with a lawyer, with an 18-day prevention period. After these 18 days, we return to Order 378, and an approving authority may order that the detainee not be allowed to meet with a lawyer for a period of up to 15 days.

39. Order 1505 modified this arrangement. It included two new provisions. First, the original period of preventing the meeting with a lawyer was shortened to four days. *See* section 4 (a). Second, at the end of those four days, the head of the investigation may order that the detainee not be allowed to meet with his lawyer for an additional period of up to 15 days, if the head of the investigation is of the opinion that such is necessary for the security of the area or the benefit of the investigation. Afterwards, returning to the regular track, an approving authority may order that the detainee not be allowed to meet with a lawyer for an additional period of up to 15 days. Thus, the arrangement set in Order 1500, which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 33 days inclusive—18 days on the authority of the Order itself and an additional 15 days on the authority of the decision of an approving authority—was substituted by a new arrangement which allowed for the prevention of a meeting between a

detainee and a lawyer for a period of 34 days inclusive—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority.

40. Another change occurred in this regard with the issue of Order 1518, which further reduced the initial period during which a meeting with a lawyer could be prevented to two days. *See* section 3. Thus, the period for preventing a meeting, which had formerly been 34 days under Order 1505—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority, was now 32 days.

41. Are the arrangements set out in Orders 1500, 1505 or 1518 in accord with international law? Upon inspecting international law, one finds that the International Covenant on Civil and Political Rights-1966 does not include an explicit provision referring to this matter. The provision which most closely relates to this matter may be found in Article 14.3 of the Covenant, which applies to any person who has been criminally charged. It provides, in this regard, that the accused must be guaranteed a facility in which he can prepare his defense with an attorney, *see* sub-section (b), and that in court, he will be defended by an attorney, sub-section (d). A more explicit provision may be found in the Principles of Protection from Detention or Imprisonment. Principle 18.1 provides that:

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

This principle has an exception which is significant to the matter at hand. Under Principle 18.3:

> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

42. The Fourth Geneva Convention does not include any explicit provision regarding meetings with a lawyer. There is, of course, the general provision in

Article 27 of the Convention, quoted above in para. 28, which protects the dignity and liberty of the residents of the territory, but which, at the same time, provides that the hostile state may take necessary security measures. Aside from this general provision, the provision most closely related to this matter may be found in Article 113 of the Convention:

> The Detaining Powers shall provide all reasonable facilities for the transmission, through the Protecting Power or the Central Agency provided in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or dispatched by them.
>
> In all cases, the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

This right is subject to security arrangements. Pictet expressed this in noting:

> It was important, however, that these facilities for the transmission of documents should not serve as a pretext for the giving of information for subversive purposes; hence the wording "all reasonable facilities," which enables suspicious correspondence to be eliminated.

See J. S. Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 471-472. In summarizing this issue, Vice-President Shamgar, in Tzemel, at 377, noted:

> That which is stated in Article 113 and in the interpretation of the Red Cross International Committee, which was subsequently published, indicates that the defense considerations of the detaining power are legitimate considerations.

Another provision of the Fourth Geneva Convention, Article 72, which relates to a detainee who has been criminally charged, provides:

> Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

43. Thus, under both Israeli and international law, the principle that meetings between detainees and attorneys should generally be permitted constitutes the normative framework in which the legality of the arrangement should be examined. This stems from every person's right to personal liberty. *See* HCJ 3412/91 *Sophian v. Commander of the IDF Forces in the Gaza Strip*, at 847; HCJ 6302/92 *Rumhiah v. Israeli Police Department*, at 212. Nevertheless, such rights are not absolute. In *Sophian*, at 848, Vice-President M. Elon correctly noted:

> The right to meet with a lawyer, like other fundamental rights, is not an absolute right, but rather a relative right, and it should be balanced against other rights and interests.

Thus, a meeting between a detainee and a lawyer may be prevented if significant security considerations justify the prevention of the meeting. I expressed this in *Rumhiah*, at 213:

> Preventing a meeting between a detainee and his lawyer is a serious injury to the detainee's right. Such an injury is tolerable only when it is demanded by security and essential for the benefit of the investigation. Regarding the benefit of the investigation—which is the respondents' claim in the matter before us—it is essential to find that allowing the meeting between the detainee and the lawyer will frustrate the investigation. It was correctly noted that "it is insufficient that it would be more comfortable, beneficial or desirable," HCJ 128/84, at 27. It must be shown that such is necessary and essential to the investigation.

International law does not prescribe set maximum periods during which meetings may be prevented. These should be inferred from the specific circumstances, according to tests of reasonability and proportionality. A similar approach has been adopted in the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism. These Guidelines provide:

> The imperative of fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to the arrangements for access to and contact with counsel.

44. It may be inferred from this that the detainee should not be allowed to meet with his lawyer so long as the warfare continues. This Court recently stated as much:

It is inconceivable that the respondent should allow meetings with persons during warfare or close to it, when there exists a suspicion that they endanger or may be a danger to the security of the area, the security of the IDF forces or the security of the lawyers. This remains the case until conditions develop as to allow for the consideration of the individual circumstances of each and every detainee.

HCJ 2901/02 The Center for the Defense of the Individual founded by Dr. Lota Salzbereger v. IDF Commander in the West Bank (unreported case).

What is the law where the detainee is already in an organized detention facility, and conditions which allow for the consideration of the individual circumstances of each and every detainee have developed?

45. Our answer is that the standard rule in this situation should be that the fundamental right of meeting with a lawyer should be realized. However, significant security considerations may prevent this. Thus, for example, the respondent noted in his response that a meeting with a lawyer may be prevented where there is suspicion that "the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility." *See* para. 54 of the response brief from 5.5.2002. We are in agreement with this. There is also room to prevent a meeting when it may damage or disrupt the investigation. It should be emphasized, however, that advancing the investigation is not a sufficient reason to prevent the meeting. "The focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented." HCJ 4965/94 *Kahalani v. Minister of Police* (unreported case) (Goldberg, J.).

Thus, "it is insufficient that it is comfortable, beneficial or desirable to prevent a meeting with a lawyer. The expression 'is required' indicates that there must be an element of necessity which connects the decision to the reasons it is based upon." HCJ 128/84 Hazan v. Meir, at 27 (Shamgar, P.) With this in mind, we are of the opinion that there are no flaws in the arrangements set in Orders 1500, 1505 and 1518 regarding the prevention of meetings with lawyers.

46. Before concluding this matter, we wish to relate to one of the petitioners' claims. The claim is that, by preventing meetings with lawyers on the authority of Order 1500, 1505 or 1518, the detainees remain

incommunicado for a period of 18 days, under Order 1500; 4 days, under Order 1505; or two days, under Order 1518. We reject this claim. Even if meetings with lawyers are prevented, this does not justify the claim that the detainee is isolated from the outside world. It is sufficient to note that when the detainees are moved to the detention facility, which occurs within 48 hours of their detention during warfare, they have the right to be visited by the Red Cross, and their families are informed of their whereabouts. At any time, they may appeal to the High Court of Justice in a petition against their detention. *See* section 15(d)(1) of the Basic Law: The Judiciary. Not only may the detainee himself appeal to the Court, but his family may also do so. Furthermore, under our approach to the issue of standing, any person or organization interested in the fate of the detainee may also do so. Indeed, the petition before us was submitted by, among others, seven associations or organizations that deal with human rights. Their claims were heard and the issue of standing was not even raised in these proceedings. Under these circumstances, it cannot be said that those detained on the authority of Order 1500, *a fortiori* those detained on the authority of Order 1505, and certainly not those who were detained on the authority of Order 1518, are in a state of isolation from the outside world.

Detention Without Investigation

47. Section 2(b) of Order 1500 provides:

> The detainee shall be given the opportunity to voice his claims within eight days of his detention.

This provision remains valid under Order 1505. Section 2 of Order 1518 shortens this period of detention without investigation to four days. The petitioners claim that the provision itself is illegal. They assert that it constitutes an excessive violation of the detainee's liberty, it undermines the right to liberty and denies due process, and that it may lead to mistaken or arbitrary detainments. Conversely, the respondents claim that the significance of the provision is that it compels the investigators to question the detainee within eight days, in order to make an initial investigation of his identity and hear his account of his detention. This period cannot be shortened due to the large number of detainees, on the one hand, and the constraints limiting the number of professional investigators, on the other. It was noted before us that the investigating officials have limited capabilities, and that they are not equipped

to deal with such a large number of detainees in a more compact schedule.

48. We accept that investigations should not be performed during warfare or during military operations; nor can the detainee's account be heard during this time. The investigation can only begin when the detainee, against whom there stands an individual cause for detention, is brought to a detention facility which allows for investigation. Moreover, we also accept that at a location which holds a large number of detainees, some time may pass before it is possible to organize for initial investigations. This, of course, must be done promptly. It is especially important to begin the investigation rapidly at this initial stage, since simple facts such as age, circumstances of detention and identity, which may determine whether the detention should be continued, may become clear at this stage. Of course, often this initial investigation is insufficient, and the investigation must continue. All of this must be done promptly.

Respondents are of course aware of this. Their argument is simple: there is a lack of professional investigators. Unfortunately, this explanation is unsatisfactory. Security needs, on the one hand, and the liberty of the individual, on the other, all lead to the need to increase the number of investigators. This is especially true during these difficult times in which we are plagued by terrorism, and even more so when it was expected that the number of detainees would rise due to "Operation Defensive Shield." Regarding the considerations of individual liberty that justify such an increase, Justice Dorner has stated:

> Fundamental rights essentially have a social price. The preservation of man's fundamental rights is not only the concern of the individual, but of all of society, and it shapes society's image.

Ganimat, at 645. In a similar spirit, Justice Zamir, in *Tzemach*, at 281, has noted:

> A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget. The protection of human rights often has its price. Society must be ready to pay a price to protect human rights.

Such is the case in the matter at hand. A society which desires both security and individual liberty must pay the price. The mere lack of investigators cannot

justify neglecting to investigate. Everything possible should be done to increase the number of investigators. This will guarantee both security and individual liberty. Furthermore, the beginning of the investigation is also affected by our holding that the arrangements according to which a detainee may be held for 18 days without being brought before a judge, under Order 1500, and for 12 days, under Orders 1505, 1512 and 1518, to be illegal. Now, the detainee's own appeal to a judge will require that the investigation be carried out sooner.

49. We conclude, from this, that the provisions of section 2(b) of Order 1500 and section 2 of Order 1518 are invalid. The respondents must decide on a substitute arrangement. For this reason, we suspend our declaration that section 2(b) of Order 1500 and section 2 of Order 1518 are void. It will become valid only after six months pass from the date of this judgment. *Compare Tzemach*, at 284. Here too, we considered the respondents' request to present us with confidential information, *see supra* para. 36, and here too we are of the opinion that such is neither appropriate nor desirable. This suspension period should be utilized for reorganization, which should be in accord with international and Israeli law.

The petition is denied in part, with regard to the authority to detain provided in Orders 1500, 1505, 1512 and 1518, and with regard to the prevention of meetings between detainees and lawyers. The petition is granted in part in the sense that we declare the provision of section 2(a) of Order 1500, as later amended by Order 1505 and extended by Orders 1512 and 1518, the provision of section 2(b) of Order 1500 and the provision of section 2 of Order 1518 to be null and void. This declaration of nullification will become effective six months after the day on which this judgment is given.

Justice D. Dorner

I agree.

Justice I. Englard

I agree.

Decided as stated in the opinion of President A. Barak.

February 5, 2003

Assigned Residence

H.C.J. 7015/02 **Ajuri**

v.

The Commander of IDF Forces in the West Bank

The next judgment addresses the legality of the IDF's policy of imposing "assigned residence" in the West Bank. Israel's security services have sought effective measures to deter suicide bombers from carrying out their murderous plans. This is a most difficult task. After all, what can you do to discourage a person who has made up his or her mind to commit suicide by carrying out a terror attack?

One of the policies that have been formulated, in consultation with the Attorney-General, is assigned residence for the family of suicide bombers. Under this scheme, family members of a bomber living in the West Bank are sent to the Gaza Strip. The security forces hope that this prospect will be a deterrent for potential bombers. Legally speaking, such deportations may be carried out only following serious terrorist incidents and where the family members are themselves involved in terrorist activity.

When this measure was employed against three relatives of suicide bombers, the three petitioned the High Court of Justice, claiming it is illegal under international public law.

It is important to note the cooperation of legal authorities with the security forces even at the earliest stages, before the security measure is subjected to a judicial decision. In formulating the policy, the security forces relied on the opinion of the Attorney-General. Additionally, the army's internal judicial bodies examined the decision to adopt the measure against the three petitioners in particular. Once again, this expresses the fundamental approach of the Israeli legal system that the war on terror must be waged within the framework of the law and not outside the law.

The Supreme Court addressed the petition with an expanded panel of nine justices. The legal discussion centered primarily on the appropriate interpretation of section 78 of the Fourth Geneva Convention. The military authorities claimed that assigned residence is legal pursuant to this section and thus subjected the case to international norms reflected in the convention. The Court emphasized that assigned residence is a legal measure but that there are conditions attached to its implementation. For example, the person to be transferred must pose a foreseeable security risk. Assigned residence should not be employed as a punishment for past deeds, but as a preventive measure. Clearly this kind of policy can cause harm to the innocent, but that is not its objective. In addition, the measure must be imposed in a proportional manner.

As is clear from the judgment, it is no simple task to strike the appropriate balance between the desire to deter suicide bombers (who are invariably difficult to deter) and the obligation to safeguard the rights of the local civilian population, including the relatives of the terrorists. After applying the criteria explained above to the particular cases of the petitioners, the Court held that two of the petitioners' requests should be denied, while the third should be allowed.

HCJ 7015/02

1. Kipah Mahmad Ahmed Ajuri
2. Abed Alnasser Mustafa Ahmed Asida
3. Centre for the Defence of the Individual

v.

1. The Commander of IDF Forces in the West Bank
2. The Commander of IDF Forces in the Gaza Strip
3. Bridget Kessler

HCJ 7019/02

1. Amtassar Muhammed Ahmed Ajuri
2. Centre for the Defence of the Individual
3. Association for Civil Rights in Israel

v.

1. The Commander of IDF Forces in Judaea and Samaria
2. The Commander of IDF Forces in the Gaza Strip
3. Bridget Kessler

The Supreme Court sitting as the High Court of Justice
[3 September 2002] Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, T. Strasberg-Cohen, D. Dorner, Y. Türkel, D. Beinisch.

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

Facts: The IDF Commander in Judaea and Samaria made orders requiring three residents of Judaea and Samaria to live, for the next two years, in the Gaza Strip. The orders were approved by the Appeals Board. The three residents of Judaea and Samaria petitioned the High Court of Justice against the orders.

The petitioners argued that the orders were contrary to international law. In particular the petitioners argued that Judaea and Samaria should be regarded as a different belligerent occupation from the one in the Gaza Strip, and therefore the orders amounted to a deportation from one territory to another, which is forbidden under international law (art. 49 of the Fourth Geneva Convention).

The respondents, in reply, argued that the orders complied with international law. The respondents argued that the belligerent occupation of Judaea, Samaria and the Gaza Strip should be considered as one territory, and therefore the orders amounted merely to assigned residence, which is permitted under international law (art. 78 of the Fourth Geneva Convention).

A further question that arose was whether the IDF commander could consider the factor of deterring others when making an order of assigned residence against any person.

Held: Article 78 of the Fourth Geneva Convention empowers an occupying power to assign the place of residence of an individual for imperative reasons of security. Assigned residence is a harsh measure only to be used in extreme cases. However, the current security situation in which hundreds of civilians have been killed by suicide bombers justifies the use of the measure in appropriate cases.

Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power, and they are regarded as one entity by all concerned, as can be seen, inter alia, from the Israeli-Palestinian interim agreements. Consequently, ordering a resident of Judaea and Samaria to live in the Gaza Strip amounts to assigned residence permitted under art. 78 of the Fourth Geneva Convention, and not to a deportation forbidden under art. 49 of the Fourth Geneva Convention.

An order of assigned residence can be made against a person only if there is a reasonable possibility that the person himself presents a real danger to the security of the area. If he does not, considerations of deterring others are insufficient for making an order of assigned residence. But if such a danger does exist, the IDF commander is authorized to make an order of assigned residence, and he may consider the deterrent factor in deciding whether actually to make the order or not.

The Appeals Board found that the petitioner in HCJ 7019/02 had sewn explosive belts. The Appeals Board found that the first petitioner in HCJ 7015/02 had acted as a lookout for a terrorist group when they moved explosive charges. In both these cases, the Supreme Court held that the deeds of the petitioners justified assigned residence, and it upheld the orders. However, with regard to the second petitioner in HCJ 7015/02, the Appeals Board found only that he had given his brother, a wanted terrorist, food and clothes, and had driven him in his car and lent him his car, without knowing for what purpose his brother needed to be driven or to borrow his car. The Supreme Court held that the activities of the second petitioner were insufficient to justify the measure of assigned residence, and it set aside the order of assigned residence against him.

HCJ 7019/02 — petition denied.

HCJ 7015/02 — petition of the first petitioner denied; petition of the second petitioner granted.

Legislation cited:

Defence (Emergency) Regulations, 1945, r. 119. Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, ss. 84(a), 84A, 86, 86(b)(1), 86(e), 86(f). Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002. Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002.

International conventions cited:

Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, arts. 49, 78. Fourth Hague Convention respecting the Laws and Customs of War on Land, 1907.

Israeli Supreme Court cases cited:

[1] HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank* IsrSC 56(3) 3.
[2] HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank* IsrSC 56(3) 28.
[3] HCJ 3451/02 *Almadani v. Minister of Defence* IsrSC 56(3) 30.
[4] HCJ 393/82 *Almashulia v. IDF Commander in Judaea and Samaria* IsrSC 37(4) 785.

[5] HCJ 102/82 *Zemel v. Minister of Defence* IsrSC 37(3) 365.
[6] HCJ 574/82 *El Nawar v. Minister of Defence* (unreported).
[7] HCJ 615/85 *Abu Satiha v. IDF Commander* (unreported).
[8] HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank* IsrSC 42(2) 4.
[9] HCJ 7709/95 *Sitrin v. IDF Commander in Judaea and Samaria* (not reported).
[10] HCJ 1361/91 *Mesalem v. IDF Commander in Gaza Strip* IsrSC 45(3) 444.
[11] HCJ 554/81 *Beransa v. Central Commander* IsrSC 36(4) 247.
[12] HCJ 814/88 *Nasralla v. IDF Commander in West Bank* IsrSC 43(2) 265.
[13] HCJ 2006/97 *Janimat v. Central Commander* IsrSC 51(2) 651.
[14] CrimApp 4920/02 *Federman v. State of Israel* (unreported).
[15] CrimFH 7048/97 *A v. Minister of Defence* IsrSC 54(1) 721.
[16] HCJ 159/94 *Shahin v. IDF Commander in Gaza Strip* IsrSC 39(1) 309.
[17] HCJ 8259/96 *Association for Protection of Jewish Civil Rights v. IDF Commander in Judaea and Samaria* (unreported).
[18] HCJ 253/88 *Sejadia v. Minister of Defence* IsrSC 43(3) 801.
[19] HCJ 5667/91 *Jabrin v. IDF Commander in Judaea and Samaria* IsrSC 46(1) 858.
[20] HCJ 5510/92 *Turkeman v. Minister of Defence* IsrSC 42(1) 217.
[21] HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* IsrSC 50(1) 353.
[22] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* IsrSC 49(5) 1.
[23] HCJ 3643/97 *Stamka v. Minister of Interior* IsrSC 53(2) 730.
[24] HCJ 4644/00 *Jaffora Tavori v. Second Television and Radio Authority* IsrSC 54(4) 178.
[25] HCJ 4915/00 *Communications and Productions Co. Network (1988) v. Government of Israel* IsrSC 54(5) 451.
[26] HCJ 1030/99 *Oron v. Knesset Speaker* (not yet reported).
[27] HCJ 3114/02 *Barake v. Minister of Defence* IsrSC 56(3) 11.
[28] HCJ 680/88 *Schnitzer v. Chief Military Censor* IsrSC 42(4) 617; IsrSJ 9 77.
[29] HCJ 619/78 *'Altaliya' Weekly v. Minister of Defence* IsrSC 33(3) 505.
[30] HCJ 4541/94 *Miller v. Minister of Defence* IsrSC 49(4) 94.
[31] HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* IsrSC 44(1) 536.

[32] HCJ 24/91 *Rahman v. IDF Commander in Gaza Strip* IsrSC 45(2) 325.
[33] HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* (unreported).
[34] HCJ 168/91 *Morcos v. Minister of Defence* IsrSC 45(1) 467.
[35] HCJ 2161/96 *Sharif v. Home Guard Commander* IsrSC 50(4) 485.
[36] HCJ 390/79 *Dawikat v. Government of Israel* IsrSC 34(1) 1.

English cases cited:
[37] *Liversidge v. Anderson* [1941] 3 All ER 338.

Jewish Law sources cited:
[38] Deuteronomy 24, 16.

For the petitioners in HCJ 7015/02 — L. Zemel, Y. Wolfson. For the petitioners in HCJ 7019/02 — D. Yakir, M. Hazan. For respondents 1-2 in both petitions — A. Helman, S. Nitzan.

JUDGMENT

President A. Barak

The military commander of the Israel Defence Forces in Judaea and Samaria made an 'order assigning place of residence'. According to the provisions of the order, the petitioners, who are residents of Judaea and Samaria, were required to live for the next two years in the Gaza Strip. Was the military commander authorized to make the order assigning place of residence? Did the commander exercise his discretion lawfully? These are the main questions that arise in the petitions before us.

Background

1. Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents: the elderly, children, men and women. More than six hundred citizens and residents: of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in one month alone — March 2002 — 120 Israelis were killed in attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.

2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judaea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. Indeed, 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 in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions (see HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank* [1]; HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank* [2]; HCJ 3451/02 *Almadani v. Minister of Defence* [3], at p. 36).

3. In its struggle against terrorism, Israel has undertaken — by virtue of its right of self-defence — special military operations ("Operation Protective Shield," which began in March 2002 and "Operation Determined Path," which began in June 2002 and has not yet ended). The purpose of the operations was to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks. In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. Within the framework of these operations, many reserve forces were mobilized; heavy weapons, including tanks, armoured personnel carriers, assault helicopters and aeroplanes, were used.

4. The special military operations did not provide an adequate response to the immediate need to stop the grave terrorist acts. The Ministerial Committee for National Security sought to adopt several other measures that were

intended to prevent further terrorist acts from being perpetrated, and to deter potential attackers from carrying out their acts. The opinion of the Attorney-General was sought; in his opinion of 19 July 2002, the Attorney-General determined the legal parameters for the actions of the security forces. Consequently, the Ministerial Committee for National Security met on July 31, 2002 and decided to adopt additional measures, in accordance with the criteria laid down by the Attorney-General.

5. One of the measures upon which the Ministerial Committee for National Security decided — all of which within the framework of the Attorney-General's opinion — was assigning the place of residence of family members of suicide bombers or the perpetrators of serious attacks and those sending them from Judaea and Samaria to the Gaza Strip, provided that these family members were themselves involved in the terrorist activity. This measure was adopted because, according to the evaluation of the professionals involved (the army, the General Security Service, the Institute for Intelligence and Special Tasks (the *Mossad*) and the police), these additional measures might make a significant contribution to the struggle against the wave of terror, resulting in the saving of human life. This contribution is two-fold: *first*, it can prevent a family member involved in terrorist activity from perpetrating his scheme (the preventative effect); second, it may deter other terrorists — who are instructed to act as human bombs or to carry out other terror attacks — from perpetrating their schemes (the deterrent effect).

The Amending Order assigning place of residence

6. In order to give effect to the new policy, on August 1, 2002 the military commander of the IDF forces in Judaea and Samaria amended the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970 (hereafter — the Original Order). This Order determined provisions, *inter alia*, with regard to special supervision (s. 86). These allow instructions to be given that a person should be placed under special supervision. According to the provisions of the Original Order, no authority should be exercised thereunder unless the military commander is of the opinion "that it is imperative for decisive security reasons" (s. 84(a)). An order of special supervision may be appealed before the Appeals Board (s. 86(e)). The Appeals Board is appointed by the local commander. The chairman of the Appeals Board is a judge who is a jurist. The Board's role is to consider the order made under this section and to make recommendations to the military commander. If a person appeals an

order and the order is upheld, the Appeals Board will consider his case at least once every six months, whether that person submitted a further appeal or not (s. 86(f)). The application of the Original Order was limited to Judaea and Samaria. The amendment that was made extended its application to the Gaza Strip as well (the Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002 (hereafter — the Amending Order)). The provisions of the Amending Order (s. 86(b)(1) after the amendment) provide:

> **Special supervision and assigning a place of residence**
>
> a. A military commander may direct in an order that a person shall be subject to special supervision.
>
> b. A person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:
>
> (1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.

In the introduction to the Amending Order it is stated that is was made "in view of the extraordinary security conditions currently prevailing in Judaea and Samaria, and because reasons of security in Judaea and Samaria and public security so require, and because of the need to contend with acts of terror and their perpetrators." It was also stated in the introduction that the order was made "after I obtained the consent of the IDF military commander in the Gaza Strip." Indeed, in conjunction with the Amending Order, the IDF commander in the Gaza Strip issued the Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002. Section 86(g) of this order provided that:

> Someone with regard to whom an order has been made by the military commander in Judaea and Samaria under section 86(b)(1) of the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, within the framework of which it was provided that he will be required to live in a specific place in the Gaza Strip, shall not be entitled to leave that place as long as the order is in force, unless the military commander in Judaea and Samaria or the military commander in the Gaza Strip so allow.

Under the Amending Order, orders were made assigning the place of residence of the three petitioners before us. Let us now turn to these orders and the circumstances in which they were made.

The proceedings before the military commander and the Appeals Board

7. On August 1, 2002, the IDF commander in Judaea and Samaria (hereafter — the Respondent) signed orders assigning the place of residence of each of the petitioners. These orders state that they were made under the Amending Order and after obtaining the consent of the IDF commander in the Gaza Strip. They also state that they were made because the Respondent is of the opinion that "they are essential for decisive security reasons, and because of the need to contend with acts of terror and their perpetrators." These orders require each of the petitioners to live in the Gaza Strip. The orders state that they will remain valid for a period of two years. The orders further state that they may be appealed to the Appeals Board. Underlying each of the orders are facts — which we will consider below — according to which each of the petitioners was involved in assisting terrorist activity that resulted in human casualties. In the opinion of the Respondent, assigning the place of residence of the petitioners to the Gaza Strip will avert any danger from them and deter others from committing serious acts of terror. The petitioners appealed the orders before the Appeals Board. A separate hearing was held with regard to the case of each of the petitioners, before two Appeals Boards. Each of the Boards held several days of hearings. The Boards decided on August 12, 2002 to recommend to the Respondent that he approve the validity of the orders. The Respondent studied the decision of the Boards and decided on the same day that the orders would remain valid. On August 13, 2002, the petitions before us were submitted against the Respondent's decision.

The proceedings before us

8. When the petitions were submitted before us, a show-cause order was issued on the same day in both petitions. An interim order was also issued, which prevented the forcible assignment of the place of residence of the petitioners to the Gaza Strip until further decision. When the state's response was received, a hearing was held on August 19, 2002 before a panel of three justices. The panel decided to hear the two petitions together. It also decided to grant the petitioners' application to submit two opinions by international law experts on the subject of the petitions, one by Prof. Schabas and the other by Ms. Doswald-Beck and Dr. Seiderman. Finally, it decided to expand the panel. The panel was indeed expanded in accordance with that decision, and on August 26, 2002 a hearing was held at which arguments were heard from the parties.

9. Counsel for the petitioners argued before us that the Amending Order, the individual orders issued thereunder and the decisions of the Appeals Boards should be set aside, for several reasons. *First*, there were defects in the proceedings that took place before the Respondent and the Appeals Board (in HCJ 7015/02). *Second*, there was an inadequate factual basis for the decisions of the respondents and there was no justification for the harsh measure ordered against them — especially when its purpose was merely deterrence. *Third*, the Amending Order was made without authority, because the Respondent was not competent to make an order concerning the Gaza Strip. Finally — and this argument was the focus of the hearing before us — the Amending Order is void because it is contrary to international law. Counsel for the Respondent argued before us that the petitions should be denied. According to him, the Amending Order, and the individual orders made thereunder, are proper, and they and the proceeding in which they were made are untainted by any defect. The respondent was competent to make the Amending Order, and the individual orders are lawful, since they are intended to prevent the petitioners from realizing the danger that they present, and they contain a deterrent to others. The orders are proportionate. They are lawfully based on the factual basis that was presented to the commander and the Appeals Boards. According to counsel for the Respondent, the Amending Order and the orders made thereunder conform to international law, since they fall within the scope of article 78 of the Fourth Geneva Convention of 1949 (Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949; hereafter — the Fourth Geneva Convention).

10. Before the hearing began, Mrs. Bridget Kessler made an application to be joined as a respondent to the petitions. We granted the application. Mrs. Bridget Kessler is the mother of Gila Sara Kessler, of blessed memory, who was murdered in the terrorist attack on June 19, 2002 at the French Hill crossroads in Jerusalem. The attack was perpetrated by a suicide bomber who blew himself up near a bus stop. The explosion killed seven Jews, including Mrs. Kessler's nineteen-year-old daughter, who merely wanted to go home from work. Mrs. Kessler spoke before us quietly and evocatively. She regarded herself as the representative of all those who were harmed by the

terrorist attacks that have befallen us. She emphasized the moral aspect in assigning the residence of the petitioners to the Gaza Strip, and supported the position of counsel for the Respondent. Another applicant asked to be joined as a respondent, but he did not trouble to come on the date fixed, and his application was denied without any consideration of it on the merits.

11. In the course of their arguments, counsel for the petitioners applied to submit before us affidavits of the petitioners. These affidavits were unsigned. The purpose of submitting them was to declare their position with regard to their personal circumstances. We dismissed this application both because of the procedural defects in the affidavits and also because they contained nothing that added anything to the actual arguments of the petitioners. At the end of the arguments of counsel for the Respondent, he asked us to hear General Ashkenazi, the Deputy Chief-of-Staff, with regard to the security background that was the basis for the Respondent's decision. We denied this application. Our position is that the security position was presented in full before the Appeals Boards that gave expression to it, and there was no reason for an extension of this framework.

12. As we have seen, the arguments before us concern various aspects of the decision of the Respondent and the Appeals Board. We should state at the outset that we found no basis to the arguments about procedural defects in the decision of the Respondent or in the decisions of the Appeals Boards. We do not think that in the proceedings that took place before the Boards (mainly in the case of the petitioners in HCJ 7015/02) there were defects that justify setting aside the proceeding or its conclusions. The same is true of the arguments regarding prejudice on the part of the Board; not being given a full opportunity to be heard; *prima facie* ignoring factual and legal arguments and the Board hearing the Respondent's witnesses; this is also the case with regard to not hearing certain witnesses or cross-examining them and allowing the Respondent to submit material. We have studied these arguments, the decisions of the Board and the material before us. We are satisfied — for the reasons stated in the state's reply — that the proceeding that took place was duly held and it does not justify our intervention in this framework, and that the defects that occurred — according to the petitioners — do not justify in themselves setting aside the decisions that were made, either by the Boards or by the commander. Indeed, the main matters on which the parties concentrated their arguments — and on which we too will focus — concern the following three questions: *first*, was the military commander competent,

under the provisions of international law, to make the Amending Order? This question concerns the authority of a military commander under international law to make arrangements with regard to assigning a place of residence. *Second*, if the answer to the first question is yes, what are the conditions required by international law for assigning a place of residence? This question concerns the scope of the military commander's discretion under international law in so far as assigning a place of residence is concerned. *Third*, do the conditions required by international law for making the orders to assign a place of residence exist in the case of the petitioners before us? This question concerns the consideration of the specific case of the petitioners before us in accordance with the laws that govern their case. Let us now turn to consider these questions in their proper order.

The authority of the military commander to assign a place of residence

13. Is the military commander of a territory under belligerent occupation competent to determine that a resident of the territory shall be removed from his place of residence and assigned to another place of residence in that territory? It was argued before us that the military commander does not have that authority, if only for the reason that this is a forcible transfer and deportation that are prohibited under international law (article 49 of the Fourth Geneva Convention). Our premise is that, in order to answer the question of the military commander's authority, it is insufficient to determine merely that the Amending Order (or any other order of the commander of the territory) gives the military commander the authority to assign the place of residence of a resident of the territory. The reason for this is that the authority of the military commander to enact the Amending Order derives from the laws of belligerent occupation. They are the source of his authority, and his power will be determined accordingly. I discussed this in one case, where I said:

> From a legal viewpoint, the source for the authority and the power of the military commander in a territory subject to belligerent occupation is in the rules of public international law relating to belligerent occupation *(occupatio bellica)*, and which constitute a part of the laws of war (HCJ 393/82 *Almashulia v. IDF Commander in Judaea and Samaria* [4], at p. 793).

In this respect, I would like to make the following two remarks: *first*, all the parties before us assumed that, in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law

concerning belligerent occupation apply (see, in this regard, HCJ 102/82 *Zemel v. Minister of Defence* [5], at p. 373; HCJ 574/82 *El Nawar v. Minister of Defence* [6]; HCJ 615/85 *Abu Satiha v. IDF Commander* [7]; *second*, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law; hereafter — the Fourth Hague Convention). With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention — which in his opinion does not reflect customary law — does not apply to Judaea and Samaria. Notwithstanding, Mr. Nitzan told us — in accordance with the long-established practice of the Government of Israel (see M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 *Isr. Y. H.* R. 1971) — that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that, for the purpose of the petitions before us, we are assuming that humanitarian international law — as reflected in the Fourth Geneva Convention (including article 78), and certainly the Fourth Hague Convention — applies in our case. We should add that, alongside the rules of international law that apply in our case, the fundamental principles of Israeli administrative law, such as the rules of natural justice, also apply. Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue. Therefore the question remains: is the military commander competent under the rules of belligerent occupation to determine provisions regarding the forcible assigned residence of a person from his place of residence to another place in the territory under his control?

14. The fundamental premise is that the displacement of a person from his place of residence and his forcible assignment to another place seriously harms his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships (see M. Stavropoulou, 'The Right not to be Displaced', 9 *Am. U. J. Int'l L. & Pol'y*, 1994, at pp. 689, 717). Several basic human rights are harmed as a result of an involuntary displacement of a person from his home and his residence being assigned to another place, even if this assigned residence does not involve him crossing an international border (see F. M. Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, 1998, 14). These human rights derive in part from the internal law of the various countries, and are in part enshrined in the norms of international law.

15. The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. Therefore they may be restricted in order to uphold similar rights of other members of society. They may be restricted in order to further proper social goals which will in turn further human rights themselves. Indeed, human rights and the restriction thereof derive from a common source, which concerns the right of a person in a democracy.

16. The extent of the restriction on human rights as a result of the forcible assignment of a person's residence from one place to another varies in accordance with the reasons that underlie the assigned residence. Assigned residence caused by combat activities (whether because of an international dispute or because of a civil war) cannot be compared to assigned residence caused by a disaster (whether natural or of human origin) (see R. Cohen and F. M. Deng, *Masses in Flight: the Global Crisis of Internal Displacement*, 1998). In the case before us, we are concerned with the assigned residence of a person from his place of residence to another place in the same territory for security reasons in an area subject to belligerent occupation. The extent of the permitted restriction on human rights is determined, therefore, by the humanitarian laws contained in the laws concerning armed conflict (see D. Fleck ed., *The Handbook of Humanitarian Law in Armed Conflict*, 1995). These laws are mainly enshrined in the Fourth Hague Convention and the Fourth Geneva Convention. We will now turn to these laws.

17. We were referred to various provisions in the Fourth Hague Convention (mainly article 43) and in the Fourth Geneva Convention (mainly articles 49 and 78). In our opinion, the case before us is governed entirely by the provisions of article 78 of the Fourth Geneva Convention:

Article 78

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

This provision concerns assigned residence. It constitutes a special provision of law *(lex specialis)* to which we must refer and on the basis of which we must determine the legal problems before us. Whatever is prohibited thereunder is forbidden even if a general provision may *prima facie* be interpreted as allowing it, and what is permitted thereunder is allowed even if a general provision may *prima facie* be interpreted as prohibiting it (see J. Stone, *No Place, No Law in the Middle East* 1969, at p. 17). Indeed, a study of the Amending Order itself and the individual orders made thereunder shows that the maker of the Order took account of the provisions of article 78 of the Convention, and acted accordingly when he made the Amending Order and the individual orders. The Respondent did not seek, therefore, to make a forcible transfer or to deport any of the residents of the territory. The Respondent acted within the framework of 'assigned residence' (according to the provisions of article 78 of the Fourth Geneva Convention). Therefore we did not see any reason to examine the scope of application of article 49 of the Fourth Geneva Convention, which prohibits a forcible transfer or a deportation. In any event, we see no need to consider the criticism that the petitioners raised with regard to the ruling of this court, as reflected in several decisions, the main one being HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank* [8], with regard to the interpretation of article 49 of the Fourth Geneva Convention. We can leave this matter to be decided at a later date.

18. Article 78 of the Fourth Geneva Convention does not deal with a forcible transfer or deportation. It provides a comprehensive and full

arrangement with regard to all aspects of assigned residence and internment of protected persons. This provision integrates with several other provisions in the Fourth Geneva Convention (arts. 41, 42 and 43) that also discuss internment and assigned residence. When the place of residence of a protected person is assigned from one place to another under the provisions of art. 78 of the Fourth Geneva Convention, it is a lawful act of the military commander, and it does not constitute a violation of human rights protected by humanitarian international law. Indeed, art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may 'at most' carry out.

The conditions for exercising the authority of the military commander with regard to assigned residence

19. Article 78 of the Fourth Geneva Convention stipulates several (objective and subjective) conditions with which the military commander must comply, if he wishes to assign the place of residence of a person who is protected by the Convention. We do not need, for the purposes of the petitions before us, to consider all of these conditions. Thus, for example, art. 78 of the Fourth Geneva Convention stipulates an objective condition that a regular procedure for exercising the authority must be prescribed; this procedure shall include a right of appeal; decisions regarding assigned residence shall be subject to periodic review, if possible every six months. These provisions were upheld in the case before us, and they are not the subject of our consideration. We should add that, under the provisions of art. 78 of the Fourth Geneva Convention, someone whose place of residence was assigned "shall enjoy the full benefit of article 39 of the present convention." We have been informed by counsel for the Respondent, in the course of oral argument, that, if in the circumstances of the case before us the Respondent is subject to duties imposed under the provisions of art. 39 of the Convention, he will fulfil these duties. Two main arguments were raised before us with regard to the conditions stipulated in art. 78 of the Fourth Geneva Convention. Let us consider these. The *first* argument raised before us is that art. 78 of the Fourth Geneva Convention refers to assigned residence within the territory subject to belligerent occupation. This article does not apply when the assigned

residence is in a place outside the territory. The petitioners argue that assigning their residence from Judaea and Samaria to the Gaza Strip is removing them from the territory. Consequently, the precondition for the application of art. 78 of the Fourth Geneva Convention does not apply. The petitioners further argue that in such circumstances the provisions of art. 49 of the Fourth Geneva Convention apply, according to which the deportation of the petitioners is prohibited. The *second* argument raised before us concerns the factors that the military commander may take into account in exercising his authority under the provisions of art. 78. According to this argument, the military commander may take into account considerations that concern the danger posed by the resident and the prevention of that danger by assigning his place of residence (preventative factors). The military commander may not take into account considerations of deterring others (deterrent factors). Let us consider each of these arguments.

Assigned residence within the territory subject to belligerent occupation

20. It is accepted by all concerned that art. 78 of the Fourth Geneva Convention allows assigned residence, provided that the new place of residence is in the territory subject to belligerent occupation that contains the place of residence from which the person was removed. The provisions of art. 78 of the Fourth Geneva Convention do not apply, therefore, to the transfer of protected persons outside the territory held under belligerent occupation. This is discussed by J. S. Pictet in his commentary to the provisions of art. 78 of the Fourth Geneva Convention:

> … the protected persons concerned… can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself (J. S. Pictet, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,* 1958, at p. 368).

It was argued before us that the Gaza Strip — to which the military commander of Judaea and Samaria wishes to assign the place of residence of the petitioners — is situated outside the territory.

21. This argument is interesting. According to it, Judaea and Samaria were conquered from Jordan that annexed them — contrary to international law — to the Hashemite Kingdom, and ruled them until the Six Day War. By contrast, the Gaza Strip was conquered from Egypt, which held it until the Six Day War without annexing the territory to Egypt. We therefore have two separate areas subject to separate belligerent occupations by two different military commanders in such a way that neither can make an order with regard to the other territory. According to this argument, these two military commanders act admittedly on behalf of one occupying power, but this does not make them into one territory.

22. This argument must be rejected. The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, which says:

> The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.

This provision is repeated also in clause 31(8) of the agreement, according to which the "safe passage" mechanisms between the area of Judaea and Samaria and the area of the Gaza Strip were determined. Similarly, although this agreement is not decisive on the issue under discussion, it does indicate that the two areas are considered as one territory held by the State of Israel under belligerent occupation. Moreover, counsel for the Respondent pointed out to us that "not only does the State of Israel administer the two areas in a coordinated fashion, but the Palestinian side also regards the two areas as one entity, and the leadership of these two areas is a combined one." Indeed, the purpose underlying the provisions of art. 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory. In this territory there are two military commanders who act on behalf of a single occupying power. Consequently, one military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree to receive that protected person into the area under his

jurisdiction. The result is, therefore, that the provisions of art. 78 of the Fourth Geneva Convention do apply in our case. Therefore there is no reason to consider the provisions of art. 49 of that Convention.

The considerations of the area commander

23. The main question that arose in this case — and to which most of the arguments were devoted — concerns the scope of the discretion that may be exercised by the occupying power under the provisions of art. 78 of the Fourth Geneva Convention. This discretion must be considered on two levels: *one level* — which we shall consider immediately — concerns the factual considerations that the military commander should take into account in exercising his authority under the provisions of art. 78 of the Fourth Geneva Convention. The *other* level — which we shall consider later — concerns the applicability of the considerations that the military commander must take into account to the circumstances of the cases of each of the petitioners before us.

24. With regard to the first level, it is accepted by all the parties before us — and this is also our opinion — that an essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others. Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror. This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents (see Pictet, *ibid.*, at p. 257). Therefore these measures may be adopted only in extreme and exceptional cases. Pictet rightly says that:

> In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately… their exceptional character must be preserved (*ibid.*, at pp. 367, 368).

He adds that it is permitted to adopt a measure of assigned residence only towards persons whom the occupying power "considers dangerous to its security" (*ibid.*, at p. 368). This approach — which derives from the provisions of the Convention — was adopted by this court in the past. We have held repeatedly that the measures of administrative internment — which is the measure considered by art. 78 of the Fourth Geneva Convention together with assigned residence — may be adopted only in the case of a "danger presented by the acts of the petitioner to the security of the area" (HCJ 7709/95 *Sitrin v. IDF Commander in Judaea and Samaria* [9]; see also HCJ 1361/91 *Mesalem v. IDF Commander in Gaza Strip* [10] at p. 456; HCJ 554/81 *Beransa v. Central Commander* [11] at p. 250). In one case Justice Bach said:

> The respondent may not use this sanction of making deportation orders merely for the purpose of deterring others. Such an order is legitimate only if the person making the order is convinced that the person designated for deportation constitutes a danger to the security of the area, and that this measure seems to him essential for the purpose of neutralizing this danger (HCJ 814/88 *Nasralla v. IDF Commander in West Bank* [12], at p. 271).

This conclusion is implied also by the construction of the Amending Order itself, from which it can be seen that one may only adopt a measure of assigned residence on account of a danger presented by the person himself. But beyond all this, this conclusion is required by our Jewish and democratic values. From our Jewish heritage we have learned that "Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing" (Deuteronomy 24, 16 [38]). "Each person shall be liable for his own crime and each person shall be put to death for his own wrongdoing" (*per* Justice

M. Cheshin in HCJ 2006/97 *Janimat v. Central Commander* [13], at p. 654); "each person shall be arrested for his own wrongdoing — and not for the wrongdoing of others" (per Justice Y. Türkel in CrimApp 4920/02 *Federman v. State of Israel* [14]). The character of the state of Israel as a democratic, freedom-seeking and liberty-seeking state implies that one may not assign the place of residence of a person unless that person himself, by his own deeds, constitutes a danger to the security of the state (cf. CrimFH 7048/97 A .v. *Minister of Defence* [15], at p. 741). It should be noted that the purpose of assigned residence is not penal. Its purpose is prevention. It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger. This was discussed by President Shamgar, who said:

> The authority is preventative, i.e., it is prospective and may not be exercised unless it is necessary to prevent an anticipated danger… The authority may not be exercised… unless the evidence brought before the military commander indicates a danger that is anticipated from the petitioner in the future, unless the measures designed to restrict his activity and prevent a substantial part of the harm anticipated from him are adopted (*Beransa v. Central Commander* [11], at p. 249; see also *Abu Satiha v. IDF Commander* [7]©.

Of course, we are aware that assigning the residence of a person who constitutes a danger to the security of the state is likely to harm his family members who are innocent of any crime. That is not the purpose of assigned residence, although it may be its consequence. This is inevitable, if we wish to maintain the effectiveness of this measure (cf. Janimat v. Central Commander [13], at p. 653).

25. What is the level of danger that justifies assigning a person's place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that — even if inadmissible in a court of law — shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory (see Pictet, at p. 258, and the examples given by him, and also HCJ 159/94 *Shahin v. IDF Commander in Gaza Strip* [16][a] *Sitrin v. IDF Commander in Judaea and Samaria* [9]; HCJ 8259/96 *Association for Protection of Jewish Civil Rights v. IDF Commander in Judaea and Samaria* [17]; HCJ 253/88 *Sejadia v. Minister of Defence* [18], at p. 821). Moreover, just as with any other measure, the measure of assigned residence must be exercised proportionately. "There must be an objective relationship — a proper relativity or proportionality — between the forbidden act of the individual and the measures adopted by the Government" (HCJ 5667/91 *Jabrin v. IDF Commander in Judaea and Samaria* [19], at p. 860; *see* also HCJ 5510/92 *Turkeman v. Minister of Defence* [20], at p. 219). An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure were not exercised against him (see HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [21], 364); the measure adopted must be the one that causes less harm; and it is usually necessary that the measure of assigned residence is proportionate to the benefit deriving from it in ensuring the security of the territory (cf. HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [22]; HCJ 3643/97 *Stamka v. Minister of Interior* [23]; HCJ 4644/00 *Jaffora Tavori v. Second Television and Radio Authority* [24]; HCJ 4915/00 *Communications and Productions Co. Network (1988) v. Government of Israel* IsrSC 54(5) 451 [25]; HCJ 1030/99 *Oron v. Knesset Speaker* (not yet reported) [26]).

26. Within the framework of proportionality we should consider two further matters that were discussed by President Shamgar in a case that concerned the administrative internment of residents from Judaea and Samaria, where he said:

> The internment is designed to prevent and frustrate a security danger that arises from the acts that the internee may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger) (*Sejadia v. Minister of Defence* [18], at p. 821).

These remarks are also relevant to the issue of assigned residence. Therefore each case must be examined to see whether filing a criminal indictment will not prevent the danger that the assigned residence is designed to prevent. Moreover, the measure of assigned residence — as discussed in art. 78 of the Fourth Geneva Convention — is generally a less serious measure than the measure of internment. This matter must be considered in each case on its merits, in the spirit of Pictet's remarks that:

> Internment is the more severe… as it generally implies an obligation to live in a camp with other internees. It must not be forgotten, however, that the terms "assigned residence" and "internment" may be differently interpreted in the law of different countries. As a general rule, assigned residence is a less serious measure than internment (*ibid.*, at p. 256).

27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others. Notwithstanding, when assigning a place of residence is justified because a person is dangerous, and the question is merely whether to exercise this authority, there is no defect in the military commander taking into account considerations of deterring others. Thus, for example, this consideration may be taken into account in choosing between internment and assigned residence. This approach strikes a proper balance between the essential condition that the person himself presents a danger — which assigned residence is designed to prevent — and the essential need to protect the security of the territory. It is entirely consistent with the approach of the Fourth Geneva Convention, which regards assigned residence as a legitimate mechanism for protecting the security of the territory. It is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of 'human bombs' that is engulfing the area.

28. Before we conclude the examination in principle as to the conditions prescribed by art. 78 of the Fourth Geneva Convention, we ought to point out once again that the occupying power may make use of the measure of assigned residence if it "considers it necessary, for imperative reasons of security". A similar test appears in the Amending Order — which, without doubt, sought to comply with the requirements of the Fourth Geneva Convention and the Fourth Hague Convention — according to which the military commander may adopt the measure of assigned residence "if he is of the opinion that it is essential for decisive security reasons" (s. 84A of the Amending Order). These provisions give the military commander broad discretion. He must decide whether decisive security reasons — or imperative reasons of security — justify assigned residence. In discussing this, Pictet said:

> It did not seem possible to define the expression "security of the State" in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence (*ibid.*, at p. 257).

Note that the considerations that the military commander may take into account are not merely "military" reasons (see, for example, arts. 5, 16, 18, 53, 55, 83 and 143 of the Fourth Geneva Convention). Article 78 of the Fourth Geneva Convention extends the kind of reasons to "reasons of security" (see, for example, arts. 9, 42, 62, 63, 64 and 74 of the Fourth Geneva Convention). Indeed, the Fourth Geneva Convention clearly distinguishes between "imperative reasons of security" and "imperative military reasons." The concept of reasons of security is broader than the concept of military reasons.

29. The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in art. 78 of the Fourth Geneva Convention and the Amending Order. The military commander may not, for example, order assigned residence for an innocent person who is not involved in any activity that harms the security of the state and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the state, if that person no longer presents any danger that assigned residence is designed to prevent. Indeed, the military commander who wishes to make use of the provisions of art. 78 of the Fourth Geneva Convention must act within the framework of the parameters set out in that article. These parameters create a "zone" of situations — a kind of "zone of reasonableness" — within which the military commander may act. He may not deviate from them.

30. The Supreme Court, when sitting as the High Court of Justice, exercises judicial review over the legality of the discretion exercised by the military commander. In doing so, the premise guiding this court is that the military commander and those carrying out his orders are public officials carrying out a public office according to law (*Almashulia v. IDF Commander in Judaea and Samaria* [4], at p. 809). In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security

considerations. We do not adopt any position with regard to the manner in which security matters are conducted (cf. HCJ 3114/02 *Barake v. Minister of Defence* [27], at p. 16). Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld (see HCJ 680/88 *Schnitzer v. Chief Military Censor* IsrSC 42(4) 617 [28], at p. 640). This was well expressed by Justice Shamgar in one case that considered the extent of judicial review of the considerations of the military commander in Judaea and Samaria:

> The respondents' exercising of their powers will be examined according to criteria applied by this court when it exercises judicial review of an act or omission of any other branch of the executive, but this of course while taking into account the duties of the respondents as required by the nature of their function (HCJ 619/78 *'Altaliya' Weekly v. Minister of Defence* [29], at p. 512).

Admittedly, "security of the state" is not a "magic word" that prevents judicial review (see the remarks of Justice Strasberg-Cohen in HCJ 4541/94 *Miller v. Minister of Defence* [30], at p. 124). Nonetheless, "an act of state and an act of war do not change their nature even if they are subject to judicial review, and the character of the acts, in the nature of things, sets its seal on the means of intervention" (*per* Justice M. Cheshin in *Sabiah v. IDF Commander in Judaea and Samaria* [21], at p. 369). Therefore, we will not be deterred from exercising review of the decisions of the military commander under art. 78 of the Fourth Geneva Convention and the Amending Order merely because of the important security aspects on which the commander's decision is based. Notwithstanding, we will not replace the discretion of the military commander with our discretion. We will consider the legality of the military commander's discretion and whether his decisions fall into the "zone of reasonableness" determined by the relevant legal norms that apply to the case. This was discussed — in the context of exercising r. 119 of the Defence (Emergency) Regulations, 1945, in the Gaza Strip — by President Shamgar, who said:

> But it should be understood that the court does not put itself in the shoes of the military authority making the decision… in order to replace the discretion of the commander with the discretion of the court. It considers the question whether, in view of all the facts, the use of the said measure lies within the scope of the measures that may be regarded, in the circumstances of the case, as reasonable, taking into account the acts of those involved in the activity that harms the security of the area whose case is being considered by the court (HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [31], at p. 539).

Thus, for example, we are not prepared to intervene in the decision of the Respondent that assigned residence constitutes an important mechanism for ensuring security in the territory. In this matter the petitioners argued before us that this measure is ineffective. This argument was considered in detail by the Appeals Boards, and they rejected it. Before us the Respondent presented the general picture in its entirety, and he gave examples of cases in which serious terrorist activity was prevented by taking account of considerations such as that of assigned residence. In such circumstances, we will not replace the discretion of the Respondent with our own discretion (see HCJ 24/91 *Rahman v. IDF Commander in Gaza Strip* [32], at p. 335; *Janimat v. Central Commander* [13], at p. 655). Against this background, we will now turn to consider the specific cases that are before us. The Respondent assigned the place of residence of the three petitioners before us. Let us therefore consider the case of each petitioner.

From the general to the specific

Amtassar Muhammed Ahmed Ajuri (HCJ 7019/02)

31. Amtassar Muhammed Ahmed Ajuri (an unmarried woman aged 34) is the sister of the terrorist Ahmed Ali Ajuri. Much terrorist activity is attributed to the brother, Ahmed Ali Ajuri, including sending suicide bombers with explosive belts, and responsibility, *inter* alia, for the terrorist attack at the Central Bus Station in Tel-Aviv in which five people were killed and many others were injured. The Appeals Board (chaired by Col. Gordon), in its decision of August 12, 2002, held — on the basis of privileged material presented to it and on the basis of testimonies of members of the General Security Service — that the petitioner directly and substantially aided the unlawful activity of her brother, which was intended to harm innocent citizens. The Board determined that there was more than a basis for the conclusion that the petitioner knew about the forbidden activity of her brother — including his being wanted by the Israeli security forces — and that she knew that her brother was wounded when he was engaged in preparing explosives, and *prima facie* she also knew that her brother was armed and had hidden an assault rifle in the family apartment. It was also held that the petitioner aided her brother by sewing an explosive belt. The Board pointed

out that, on the basis of privileged evidence, which it found "reliable and up-to-date," it transpired that the petitioner had indeed aided her brother in his unlawful activity. It held that this was a case of "direct and material aid in the preparation of an explosive belt, and the grave significance and implications of this aid were without doubt clear and known [to the petitioner]." Admittedly, the petitioner testified before the Board that she was not involved in anything and did not aid her brother, but the Board rejected this testimony as unreliable. It pointed out that "we found her disingenuous and evasive story totally unreasonable throughout her testimony before us, and it was clear that she wished to distance herself in any way possible from the activity of her brother… her disingenuous story left us with a clear impression of someone who has something to hide, and this impression combines with the clear and unambiguous information that arises from the privileged material about her involvement in preparing an explosive belt." For these reasons, the appeal of the petitioner to the Appeals Board was denied. It should also be pointed out that in the Respondent's reply in the proceeding before us — which was supported by an affidavit — it was stated that "the petitioner aided her brother in the terrorist activity and, *inter alia*, sewed for his purposes explosive belts" — explosive belts, and not merely one explosive belt.

32. It seems to us that, in the case of the petitioner, the decision of the Respondent is properly based on the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. Very grave behaviour is attributed to the petitioner, and the danger deriving therefrom to the security of the state is very real. Thus, for example, the petitioner prepared more than one explosive belt. It was argued before us that the petitioner did not know about her brother's activity. This story was rejected by the Appeals Board, and we will not intervene in this finding of the Appeals Board. The behaviour of the petitioner is very grave. It creates a significant danger to the security of the area, and it goes well beyond the minimum level required by the provisions of art. 78 of the Fourth Geneva Convention and the Amending Order. Indeed, assigning the place of residence of the petitioner is a rational measure — within the framework of the required proportionality — to reduce the danger she presents in the future. We asked counsel for the state why the petitioner is not indicted in a criminal trial. The answer was that there is no admissible evidence against her that can be presented in a criminal trial, for the evidence against her is privileged and cannot be presented in a criminal trial. We regard this as a satisfactory answer. Admittedly, the petitioner is subject to administrative internment (which will end in October 2002).

However the possibility of extending this is being considered. It seems to us that the choice between administrative internment and assigned residence, in the special case before us, is for the Respondent to make, and if he decided to terminate the administrative internment and determine instead assigned residence, there is no basis for our intervention in his decision. This is the case even if his decision was dictated, *inter alia*, by considerations of a general deterrent, which the Respondent was entitled to take into account.

Kipah Mahmad Ahmed Ajuri (the first petitioner in HCJ 7015/02)

33. Kipah Mahmad Ahmed Ajuri (hereafter — the first petitioner) (aged 38) is married and is the father of three children. He is the brother of the petitioner. His brother is, as stated, the terrorist Ahmed Ali Ajuri, to whom very grave terrorist activity is attributed (as we have seen). The petitioner before us admitted in his police interrogation (on July 23, 2002) that he knew that his brother Ali Ajuri was wanted by the Israeli security forces "about matters of explosions" and was even injured in the course of preparing an explosive charge. The first petitioner said in his interrogation that his brother stopped visiting his home because he was wanted, and also that he carried a pistol and had in his possession two assault rifles. Later on during his interrogation (on July 31, 2002) he admitted that he knew that his brother was a member of a military group that was involved "in matters of explosions." He also said that he saw his brother hide a weapon in the family home under the floor, and that he had a key to the apartment in which the group stayed and prepared the explosive charges. He even took from that apartment a mattress and on that occasion he saw two bags of explosives and from one of these electric wires were protruding. On another occasion, the first petitioner said in his police interrogation that he acted as look-out when his brother and members of his group moved two explosive charges from the apartment to a car that was in their possession. On another occasion — so the first petitioner told his interrogators — he saw his brother and another person in a room in the apartment, when they were making a video recording of a person who was about to commit a suicide bombing, and on the table in front of him was a Koran. The first petitioner said in his interrogation that he brought food for his brother's group.

34. In his testimony before the Appeals Board, the first petitioner confirmed that he knew that his brother was wanted and that he knew his friends. He testified that he did indeed have a key to his brother's apartment

and that he removed a mattress from it , although he did not know that the apartment was a hide-out. He confirmed in his testimony that he went to the apartment and saw two bags there. He confirmed that he saw his brother make a video recording of someone when a Koran was on the table, and that on another occasion he saw his brother finish hiding an assault rifle in the floor of the house. The first petitioner confirmed in his testimony that he saw his brother and his friends remove from the residential house two bags, and that he was told that they contained explosives, although he said that he was not asked to be a look-out or warn those present.

35. The Appeals Board examined the statements of the first petitioner and also the evidence presented to it and the testimony that it heard. It held in its decision (on August 12, 2002) that the first petitioner was indeed involved in the activity of his brother Ali Ajuri. The Appeals Board held, as findings of fact for the purpose of its decision, that the first petitioner did indeed act as stated in his statements during the interrogation, and not merely as he said in his testimony. In this respect, the Board pointed out the fact that the first petitioner was aware of his brother's deeds, his brother's possession of the weapon and hiding it. The Board also held that the first petitioner knew of the hide-out apartment, had a key to it and removed a mattress from it. The Board held that the first petitioner knew about the explosive charges in the apartment and did indeed act as a look-out when the charges were moved. The Board further pointed to the occasion when the first petitioner brought food to the members of the group, after he saw them make a video recording of a youth who was about to perpetrate a suicide bombing. The Board said that "the gravity of the deeds and the extensive terrorist activity of [the first petitioner's] brother is very grave. The involvement of [the first petitioner] with his brother is also grave, and it is particularly grave in view of the fact that [the petitioner] does not claim that his wanted brother forced him to help him, from which it follows that he had the option not to help the brother and collaborate with him."

36. We think that also in the case of the first petitioner there was no defect in the decision of the Respondent. The first petitioner helped his brother, and he is deeply involved in the grave terrorist activity of that brother, as the Appeals Board determined, and we will not intervene in its findings. Particularly serious in our opinion is the behaviour of the first petitioner, who acted as a look-out who was supposed to warn his brother when he was involved at that time in moving explosive charges from the apartment where

he was staying — and from which the first petitioner took a mattress in order to help his brother — to a car which they used. By this behaviour the first petitioner became deeply involved in the grave terrorist activity of his brother, and there is a reasonable possibility that he presents a real danger to the security of the area. Here too we asked counsel for the Respondent why the first petitioner is not indicted in a criminal trial, and we were told by him that this possibility is not practical. The measure of assigning the place of residence of the first petitioner is indeed a proportionate measure to prevent the danger he presents, since the acts of this petitioner go far beyond the minimum level required under the provisions of art. 78 of the Fourth Geneva Convention. Since this is so, the respondent was entitled to take into account the considerations of a general deterrent, and so to prefer the assigned residence of this petitioner over his administrative internment. There is no basis for our intervention in this decision of the Respondent.

Abed Alnasser Mustafa Ahmed Asida (the second petitioner in HCJ 7015/02)

37. Abed Alnasser Mustafa Ahmed Asida (hereafter — the second petitioner) (aged 35) is married and a father of five children. He is the brother of the terrorist Nasser A-Din Asida. His brother is wanted by the security forces for extensive terrorist activity including, *inter alia*, responsibility for the murder of two Israelis in the town of Yitzhar in 1998 and also responsibility for two terrorist attacks at the entrance to the town of Immanuel, in which 19 Israelis were killed and many dozens were injured. The second petitioner was interrogated by the police. He admitted in his interrogation (on July 28, 2002) that he knew that his brother was wanted by the Israeli security forces for carrying out the attack on Yitzhar. The second petitioner said that he gave his brother food and clean clothes when he came to his home, but he did not allow him to sleep in the house. He even said that he gave his private car to his brother on several occasions, although he did not know for what purpose or use his brother wanted the car. He further said that he stopped giving his brother the car because he was afraid that the Israeli security forces would assassinate his brother inside his car. On another occasion, he drove his wanted brother to Shechem (Nablus), although on this occasion too the second petitioner did not know the purpose of the trip. The second petitioner also said that he saw his brother carrying an assault rifle. On another occasion he helped another wanted person, his brother-in-law, by giving him clean clothes, food and drink when he visited him in his home, and

even lent him his car and drove him to Shechem several times. While the second petitioner claimed that he did not know for what purpose the car was used and what was the purpose of the trips to Shechem, the second petitioner told the police that he drove his brother to the hospital when he was injured in the course of preparing an explosive charge and he lent his car — on another occasion — in order to take another person who was also injured while handling an explosive charge; at the same time, the second petitioner claimed in his interrogation that he did not know the exact circumstances of the injury to either of those injured.

38. In his evidence before the Appeals Board, the second petitioner confirmed that he knew that his brother was wanted. He testified that he did indeed drive his brother, but that he did not give him the car. He testified that he saw his brother with a weapon and that he wanted to give him food during the brief visits to him, but he did not have time. The Appeals Board, in its decision (on August 12, 2002), held that the second petitioner did indeed know of the deeds of his brother and that he possessed a weapon and that he was in close contact with him, including on the occasions when he gave him — at his home — clean clothes and food. The Board held that the second petitioner did not only drive his wanted brother in his car, but also lent the car to his brother and to another wanted person. The Board pointed out that "we are not dealing with minor offences," but it added that "the contact between the [second petitioner] and his brother and his material help to him… are significantly less grave than those of [the first petitioner]." The Board added, against this background, that "we direct the attention of the area commander to the fact that his personal acts are less grave than those of [the first petitioner], for the purpose of the proportionality of the period."

39. We are of the opinion that there was no basis for assigning the place of residence of the second petitioner. Admittedly, this petitioner was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. His behaviour does not contain such a degree of involvement that creates a real danger to the security of the area, thereby allowing his place of residence to be assigned. This petitioner claimed — and the Appeals Board did not reject this — that he did not know what use his brother made of the car that the second petitioner made available to him, and that he did not know, when he

drove his brother, what was the brother's purpose. It should be noted that we think that the behaviour of the second petitioner — even though it derived from close family ties — was improper. It is precisely that help that family members give to terrorists that allows them to escape from the security forces and perpetrate their schemes. Nonetheless, the mechanism of assigned residence is a harsh measure that should be used only in special cases in which real danger to security of the area is foreseen if this measure is not adopted (cf. HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* [33]). We do not think that the case of the second petitioner falls into this category. It seems to us that the danger presented to the security of the area by the actions of the second petitioner does not reach the level required for adopting the measure of assigned residence. It appears that the Appeals Board was also aware of this, when it considered the possibility of reducing the period of the assigned residence. In our opinion, the case of the second petitioner does not fall within the "zone of reasonableness" prescribed by art. 78 of the Fourth Geneva Convention and the Amending Order, and there is no possibility of assigning the residence of this petitioner. Admittedly, we are prepared to accept that assigning the place of residence of the second petitioner may deter others. Nonetheless, this consideration — which may be taken into account when the case goes beyond the level for adopting the mechanism of assigned residence — cannot be used when the conditions for exercising art. 78 of the Fourth Geneva Convention and the Amending Order do not exist.

Conclusion

40. Before we conclude, we would like to make two closing remarks. *First*, we have interpreted to the best of our ability the provisions of art. 78 of the Fourth Geneva Convention. According to all the accepted interpretive approaches, we have sought to give them a meaning that can contend with the new reality that the State of Israel is facing. We doubt whether the drafters of the provisions of art. 78 of the Fourth Geneva Convention anticipated protected persons who collaborated with terrorists and "living bombs." This new reality requires a dynamic interpretive approach to the provisions of art. 78 of the Fourth Geneva Convention, so that it can deal with the new reality.

41. *Second*, the State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundred have been killed. Thousands have been injured. The Arab population in Judaea and Samaria and the Gaza Strip is also suffering unbearably. All of this is because of acts or

murder, killing and destruction perpetrated by terrorists. Our heart goes out to Mrs. Kessler, who lost her daughter in a depraved terrorist act and to all the other Israelis who have lost their beloved ones or have themselves been severely injured by terrorist attacks. The state is doing all that it can in order to protect its citizens and ensure the security of the region. These measures are limited. The restrictions are, first and foremost, military-operational ones. It is difficult to fight against persons who are prepared to turn themselves into living bombs. These restrictions are also normative. The State of Israel is a freedom-seeking democracy. It is a defensive democracy acting within the framework of its right to self-defence — a right recognized by the charter of the United Nations. The state seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law. As a result, not every effective measure is also a lawful measure. Indeed, the State of Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available. The well-known saying that "In battle laws are silent" (*inter arma silent leges* — Cicero, *pro Milone* 11; see also W. Rehnquist, *All the Laws but One*, 1998, at p. 218) does not reflect the law as it is, nor as it should be. This was well-expressed by Lord Atkin in *Liversidge v. Anderson* [37], at p. 361, when he said:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which… we are now fighting, that the judges… stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

Indeed, "… even when the cannons speak, the military commander must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values" (HCJ 168Ø91 *Morcos v. Minister of Defence* [34], at p. 470). "We have established here a law-abiding state, that realizes its national goals and the vision of generations, and does so while recognizing and realizing human rights in general, and human dignity in particular" (HCJ 3451/02 *Almadani v. Minister of Defence* [3], at p. 35). This was well expressed by my colleague, Justice M. Cheshin, when he said:

> We will not falter in our efforts on behalf of the rule of law. We committed ourselves by our oath to dispense justice, to be the servants of the law, and to be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law makes its voice heard (*Sabiah v. IDF Commander in Judaea and Samaria* [21], at p. 369).

Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and state security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the state. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so. I discussed this in one case, where I said:

> The decision has been placed at our door, and we must rise to the challenge. It is our duty to protect the legality of executive acts even in difficult decisions. Even when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what forbidden, what is lawful and what unlawful. And where there is law, there are also courts that determine what is permitted and what forbidden, what is lawful and what unlawful. Part of the public will be happy with our decision; another part will oppose it. It is possible that neither the former nor the latter will read the reasoning. But we shall do our work. "This is our duty and this is our obligation as judges." (HCJ 2161/96 *Sharif v. Home Guard Commander* IsrSC [35], at p. 491, citing the remarks of then-Vice-President Justice Landau in HCJ 390/79 *Dawikat v. Government of Israel* [36], at p. 4).

The result is that we are denying the petition in HCJ 7019/02, and the petition in HCJ 7015/02, in so far as it concerns the first petitioner. We are making the show-cause order absolute with regard to the second petitioner in HCJ 7015/02.

Vice-President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice M. Cheshin

I agree.

Justice T. Strasberg-Cohen

I agree.

Justice D. Dorner

I agree.

Justice Y. Türkel

I agree.

Justice D. Beinisch

I agree.

HCJ 7019/02 — petition denied.

HCJ 7015/02 — petition of the first petitioner denied; petition of the second petitioner granted.

September 3, 2002

Recent Important Judgments: IDF Operations in Rafah; Israel's Security Fence

HCJ 4764/04 **Physicians for Human Rights**

v.

The Commander of IDF Forces in the Gaza Strip [The Rafah Case]

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

v.

The Government of Israel [The Fence Case]

The unfortunate persistence of violent confrontations between the State of Israel and the Palestinians gave rise to several further cases before the High Court of Justice. Two judgments of particular importance are presented here: the case addressing the fighting in Rafah (HCJ 4764/04) and the ruling on the security fence (HCJ 2056/04).

Rafah

In early May 2004, a wide-ranging military operation was conducted by the IDF in the Rafah area in the Gaza Strip. It followed the killing and maiming of many soldiers in clashes with Palestinian terrorist elements, while IDF units patrolled the southern border of the Strip with Egypt in an attempt to thwart the smuggling of weapons into the Gaza Strip, primarily via underground tunnels.

This time the IDF was prepared from the outset for the humanitarian problems which tend to accompany such military operations. The army demonstrated readiness to maintain contact with the human rights

organizations observing the situation in the field. It formed a Local Coordinating Office designed to help resolve humanitarian problems and which had liaisons accompanying the combat units.

The Court and the sides had to act swiftly. The petition, which claimed violations of various aspects of international humanitarian law, was lodged while the fighting continued. The hearing was set for the next day, and most of the judgment was intended to guide the army effective immediately.

The important principle established in this judgment implants an accepted binding norm of international public law in internal Israeli law. According to this norm the IDF must fulfill two basic obligations. First, it must refrain from activities that harm local residents, while taking into account considerations of time and space. This is the passive duty of avoiding damage. Second, it has an active duty to take measures to ensure that the local residents will not be harmed.

In light of these two duties, the Court examined the petition's claims regarding inappropriate provisions of food, water and medicines to the areas under IDF control. It ruled that the army was obligated to facilitate the repair of electricity lines which were damaged, to help with the evacuation of the wounded and allow the burial of the dead. This ruling once again illustrates the general principle which the Israeli Supreme Court has consistently upheld: even intensive combat operations must be carried out within the law and pursuant to principles of international law in particular.

The Security Fence

The next judgment (HCJ 2056/04) brought in this booklet is one of the most central rulings handed down on an issue that has attracted much attention in recent years — the security fence. It is a wide-ranging and very detailed judgment, and due to space limitations we present here only an abstract.

The initiative to construct the security fence was born in the year 2002, when the need to control the ability of Palestinians to infiltrate unchecked into Israeli areas became critical. The fence is supposed to serve several purposes. It is designed to prevent unmonitored entry into Israeli areas and protect Israelis living on both sides of the pre-1967 ceasefire lines. The fence is also designed to create a "security corridor" that will allow security forces to catch terrorist infiltrators before they reach Israeli areas. Security bodies claim that its route must pass through various strategic areas in order to allow troops to patrol its length effectively and to ensure their safety.

After the route of the fence was set, many petitions protesting it were brought before the Court. Some of them objected to specific sections of the fence due to harm caused to local Palestinian residents. Some of them objected in principle to the very idea of a fence in the West Bank and to the state of affairs it would create.

The judgment brought here in abstracted form represents the first time the Israeli Supreme Court addressed the issue in a comprehensive manner. The Court ruled that the motive to construct the fence was security-related and was not a political move to annex territory. However this is not the end of the story. The question remains whether the state has the authority to construct the fence within the West Bank. Should the answer to this question be positive, this would raise another question of whether security needs and the interests and rights of the local population have been appropriately balanced.

In this ruling the Court did not deal exhaustively with the first question (the question of authority), due to the fact that the sides did not discuss this intensively. The primary significance of the judgment relates to the second issue — the question of balance. Regarding this question, the Court held that the fence was a serious blow to the local population. Thus it was ruled that the principle of proportionality (that weighs between security needs and harm to the local population) obligates the state to forego certain aspects of its plans in order to minimize the damage to the local population.

The security fence issue stood in all its complexity before the Supreme Court, and this judgment represents the first significant ruling in a series that are expected to be handed down on the issue in the future.

HCJ 4764/04

1. Physicians for Human Rights

2. The Association for Civil Rights in Israel

3. The Center for the Defense of the Individual – Founded by Dr. Lota Salzberger

4. B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories

v.

The Commander of IDF Forces in the Gaza Strip [the Rafah Case]

The Supreme Court Sitting as the High Court of Justice [May 30, 2004]
Before President A. Barak and Justices J. Türkel, D. Beinisch.

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

For petitioners—Fatma Al-Aju. For respondents— Anner Helman, Yuval Roitman - Office of the State Attorney.

JUDGMENT

President A. Barak

Is the State of Israel, during the current military operations in Rafah, fulfilling its duties under international humanitarian law? This is the question before us.

Background

1. Since May 18, 2004, combat activities have been conducted in the area of Rafah in the Gaza Strip. See HCJ 4573/04 *Al-Besioni v. Commander of the IDF Forces;* HCJ 4584/04 *Shakfhat v. Commander of the IDF Forces in the Gaza Strip;* HCJ 4694/04 *Abu-Amra v. Commander of the IDF Forces in the Gaza Strip*. According to respondent, these combat activities, broad in scope, are directed against the terrorist infrastructure in that area. Their central objective is to locate the underground tunnels which are used to smuggle arms from the Egyptian side of Rafah to the Palestinian side. In addition, the military operations are aimed at arresting those wanted for terrorist activity and locating arms caches in the Rafah area. The activity includes battles against armed opponents. Explosive charges and gunfire have been directed against the Israel Defense Forces (IDF).

2. The city of Rafah consists of several neighborhoods. Most of the military operations took place in the neighborhood of Tel A-Sultan. The IDF also entered the neighborhood of Brazil. Between the time that this petition was submitted (May 20, 2004), and heard the next morning (May 21, 2004), the IDF withdrew from these two neighborhoods. The neighborhoods, however, remained surrounded and controlled by the IDF.

3. Before the start of the military operations, the IDF, having learned from similar operations in the past, took three steps in anticipation of any humanitarian problems that could arise. First, a "Humanitarian Hotline" was established. The Hotline was to serve as a contact for organizations outside the area of operations. Human rights organizations, for example, would be able to contact the Hotline and immediate efforts would be made to resolve specific humanitarian problems. Second, a District Coordination Office ("DCO") was established. The DCO was to stay in constant communication with the Palestinian Ministry of Health, the Red Crescent, the International Red Cross and local hospitals. The DCO, headed by Col. I. Mordechai, would resolve humanitarian problems that had arisen as a result of the operations. Third, a liaison officer of the Coordination Office was placed with every battalion in the area of operations. The liaison officer was to contend with humanitarian problems, such as the evacuation of Palestinian casualties.

The Petition

4. Petitioners are four human rights organizations. They point to harm that has been caused to the local civilian population in Rafah as a result of the military operations – the demolition of houses and injuries caused to civilians. The petition asks that the IDF allow medical teams and ambulances to reach and evacuate the wounded in Rafah, that such evacuation not require coordination with the Hotline, that medical teams be neither threatened nor

harmed, and that the transport of medical equipment into Rafah be allowed. The petition further asks that electricity and water provisions be restored to the neighborhood of Tel A-Sultan, that the IDF allow the provision of food and medicines to the residents of that neighborhood, and that a medical team of Petitioner 1 be allowed to enter hospitals in the Gaza Strip and assess the medical situation there. Finally, petitioners ask that a full investigation be made into an incident in which a number of residents were killed when a crowd of protesting civilians was shelled. Moreover, petitioners ask for an order prohibiting the shelling of civilians, even when among them are armed combatants, who do not pose an immediate threat to life.

Respondent's Answer

5. Respondent asks that the petition be denied. It emphasizes that military operations, including battles with armed combatants, continue in the area. Therefore, this Court should exercise caution in its judicial review of the actions of the security authorities. These actions lie at the outer limits of the reach of the judiciary. As to the substance of the petition, respondent asserts that underground tunnels from the Egyptian to the Palestinian side of the city constituted a central link in the smuggling of arms into the Gaza Strip. These arms are used against the IDF and Israeli communities both inside the Gaza Strip and outside of it. The purpose of the current IDF operations is to break up the Palestinian terror infrastructure in the area: to locate underground tunnels, to detain wanted terrorists and to locate arms caches. During the operations, there occurred intensive battles between the IDF and combatants armed with explosive devices and other weapons.

In both its written briefs and its oral arguments, respondent emphasized that the IDF has made strong efforts to take the needs of the local population into consideration. These efforts led to the establishment of the Hotline and the District Coordination Office. Even so, the situation remains complex – armed combatants operate from within the population, employing houses as cover from which to fire on the IDF forces, and this presents difficult situations for the IDF. Despite these problems, however, the IDF is fulfilling its obligations towards the civilian population, and is doing everything possible to minimize the damage caused. Respondent supplied detailed

responses to each of the petitioners' claims. It also asserts that the petition's description of the situation is based on Palestinian sources, whose sole purpose is to paint the humanitarian picture as being far more grim than reality.

The Proceeding

6. The petition was submitted on Thursday, May 20, 2004. Hearings were scheduled for the next morning, May 21, 2004. We ordered respondent to reply to the petition. Both sides, as well as the head of the District Coordination Office and the Judge-Advocate General, were present at the hearing. The head of the Coordination Office described situations that he had dealt with. Several times during the hearing he requested some moments to determine the real-time situation in Rafah. He contacted his liaisons in Rafah; these would provide details, which he would relay back to the Court.

At the end of the hearing we suggested an arrangement regarding the burial of the dead. *See infra* para. 25. The State Attorney provided its updated answer regarding this arrangement on Sunday, May 23, 2004. On May 24, 2004, we ordered petitioners to respond to this answer. Before we received petitioners' response, we received an additional answer from the respondent. Petitioners' response, which concerned the burial of the dead and the provision of electricity to Rafah, was received the same day. Respondent's answer to this latter response was received on May 27, 2004, following the IDF withdrawal from Rafah on May 24, 2004, which returned the civil and security control in the city to the Palestinian Authority.

Judicial Review

7. "Israel is not an isolated island. She is a member of an international system." HCJ 5592/02 *Yassin v. Commander of the Kziot Military Camp*. The military operations of the IDF are not conducted in a legal vacuum. There are legal norms – of customary international law, of treaties to which Israel is party, and of the fundamental principles of Israeli law – which set out how military operations should be conducted. In HCJ 3451/02 *Almandi v. The Minister of Defense*, I noted that:

> Israel finds itself in the middle of a difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. *See* The Charter of the United

> Nations, art. 51. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "When the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. See HCJ 320/80 *Kawasma v. The Minister of Defense*, at 132. Moreover, the State of Israel is founded on Jewish and democratic values. We established a state that upholds the law—it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these—the vision and the law— there lies only harmony, not conflict.

Indeed, all of the IDF's operations are subject to international law. For example, in HCJ 3114/02 *Barake v. Minister of Defense* I noted that "[e]ven in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population."

8. In general, the judicial review of this Court is exercised *ex post facto*. A petition is submitted against an action that has already been taken. Occasionally, a significant period of time can elapse between the time the action is taken and before that action is examined by this Court. This, however, is not the case here. Petitioners have not requested that we examine the legal import of military operations that have already concluded. The purpose of this petition is to direct the present actions of the military. This is *ex ante* judicial review, exercised while military operations are currently underway. This imposes certain constraints on the Court. Of course, petitions that look towards the future are not novel to us. For example, in HCJ 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, we examined the legality of guidelines that allowed for the imposition of moderate physical pressure on suspects of an investigation. The purpose of our review there was not to examine actions that had been taken in the past, but to review investigations that were underway at that time. Even so, the current petition is unique in that it asks us to review military operations while they are underway and while IDF soldiers are subject to the dangers inherent to combat. As such, it is appropriate to emphasize that:

> Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangered the lives of soldiers.

Barake, at 16. The same applies here: humanitarian concerns have been resolved, without endangering the lives of soldiers or the military operations. Subject to this caveat, the situation before us is no different than other situations where this Court has reviewed the legality of military operations.

9. We do not review the wisdom of the decision to take military action. We review the legality of the military operations. As such, we presume that the operations in Rafah are necessary from a military standpoint. The question before us is only whether these military operations adhere to domestic and international law. The fact that operations are necessary from a military standpoint does not automatically mean that they fulfill legal requirements. Of course, with regard to issues of military concern, we do not stand in the stead of the military commander, and we do not substitute our discretion for his own. That is his expertise. We examine the legal import of his decisions. That is our expertise.

The Normative Framework

10. The military operations of the IDF in Rafah, to the extent that they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 [hereinafter – the Hague Convention] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter – the Fourth Geneva Convention]. In addition, they are also governed by the principles of Israeli administrative law. See HCJ 393/82 Almasualiah v. Commander of the IDF Forces in the West Bank; HCJ 358/88 Association for Civil Rights in Israel v. GOC Central Command. According to these principles, the IDF must act with integrity (both substantive and procedural), with reasonableness and proportionality, and appropriately balance individual liberty and the public interest. See HCJ 3278/02 The Center for the Defense of the Individual v. The Commander of the IDF Forces in the West Bank.

11. For our purposes, the central injunction of international humanitarian law applicable in times of combat is that civilian 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." Fourth Geneva Convention, § 27. *See also* the Hague Convention, § 46. This normative framework was formulated by Gasser:

> Civilians who do not take part in hostilities shall be respected and protected. They are entitled to respect for their persons, their honour, their family rights, their religious convictions, and their manners and customs. Their property is also protected. *See* Hans Peter Gasser, Protection of the Civilian Population, in The Handbook of Humanitarian Law in Armed Conflicts 211 (D. Fleck, ed., 1995).

The basic assumption of this injunction is the recognition of the importance of man, the sanctity of his life, and the value of his liberty. *Compare* The Basic Law: Human Dignity and Liberty, § 1; J.S. Pictet, Commentary: Fourth Geneva Convention 199 (1958). His life may not be harmed, and his dignity must be protected. This basic duty, however, is not absolute. It is subject to "such measures of control and security in regard to protected persons as may be necessary as a result of the war." *See* Fourth Geneva Convention, § 27. These measures may not "affect the fundamental rights of the persons concerned." *See* Pictet, at 207. These measures must be proportionate. See Fleck, at 220. The military operations are directed against terrorists and hostile combatants. They are not directed against civilians. *See* Fleck, at 212. When civilians, as often happens, enter a zone of combat – and especially when terrorists turn civilians into "human shields" – everything must be done in order to protect the dignity of the local civilian population. The duty of the military commander is double. First, he must refrain from operations that may cause harm to the civilian population. This duty is formulated in the negative. Second, he must take all measures required to ensure the safety of civilians. This latter duty calls for positive action. *See* Fleck, at 212. Both these duties – which are not always easily distinguishable – should be reasonably and proportionately implemented given considerations of time and place.

12. Together with this central injunction regarding civilians' human dignity during times of combat, international humanitarian law imposes several specific obligations. These obligations do not exhaust the fundamental principle. They only constitute specific expressions of that principle. We shall note two of these obligations that are relevant to the case at hand.

1. *The Provision of Food and Medicines*: "The Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." The Fourth Geneva Convention, § 55; Pictet, at 300. As such, the Red Cross and other humanitarian organizations must be allowed to provide food and medicines. The Fourth Geneva Convention, § 59. Free passage of these consignments must be allowed. Id.; *See also Id*., at § 23. Of course, the consignments may be searched to ensure that they are intended for humanitarian concerns. Id, at § 59.

2. *Medical Supplies:* The proper operation of medical establishmentsmust be ensured. Fourth Geneva Convention, § 56. Persons engaged in searching for the wounded must be protected. *Id*., at § 20. The Red Cross and the Red Crescent must be allowed to pursue their activities in accordance with the principles of the International Red Cross. *Id*., at § 63.

From the General to the Particular

13. In their briefs and in their oral arguments, petitioners presented a list of respondent's violations of international humanitarian law. We ordered respondent to reply to each item on this list, both in writing and during oral arguments. We also received updated replies from Col. Mordechai. We will now turn to each of these specific topics.

Water

14. Petitioners asserted that the entrance of tanks into the neighborhood of Tel A-Sultan has wrecked the water infrastructure and, as a result, the provision of water in all of Rafah has been disrupted. As of oral arguments, one of the wells had been repaired, but a severe water shortage persisted. Petitioners ask that we order respondent to restore the provision of water to the neighborhood of Tel A-Sultan. During oral arguments Col. Mordechai confirmed that the wells in the neighborhood of Tel A-Sultan have indeed been damaged. Repairs have been delayed as the Palestinian repair team, wary of the hostilities, did not want to enter Tel A-Sultan. Later, under the initiative of Col. Mordechai, the Red Cross entered the neighborhood and most wells were repaired. In areas where running water is as yet unavailable, as in Tel A-Sultan, the military has allowed water tankers to enter. Currently, there are five water tankers in Tel A-Sultan, and residents may reach them without

difficulty. As he was explaining the situation to us, it was reported to Col. Mordechai – and he, in turn, reported to us – that six additional water tankers had entered the neighborhood. Similarly, we have been informed that all the wells have been repaired. Diesel fuel has been brought into the neighborhood to allow the pumping of water from the wells. As such, there is currently running water in all neighborhoods of Rafah.

15. It is the responsibility of the military commander to ensure the provision of water in the area of combat activities. This includes not only the responsibility to ensure that no damage is caused to the sources of water, but also the positive obligation to provide water in areas of shortage. Everything should be done in order to ensure the provision of water; sources of water must be repaired with due speed. Water tankers should be provided if no running water is available. As Col. Mordechai has informed us, these issues have been resolved. Of course, the lessons learned here must serve the army in the future.

Electricity

16. Petitioners claim that Rafah's neighborhoods are without electricity. An attempt to connect the Tel A-Sultan neighborhood failed, and the entire city is without electricity. They ask that we order respondent to restore electricity to the affected areas. During oral argument, Col. Mordechai informed us that electricity in the southern Gaza Strip comes from Israel. The electric infrastructure was damaged during the course of combat activities. The IDF – in coordination with the Rafah municipality – is working on repairing the damage. The repairs take time, as the workers occasionally have difficulty finding the source of the problem. In addition, the battles taking place on the scene make the proper reestablishment of the electrical network difficult. At the moment, there is electricity in the great majority of Rafah, and everything will be done to ensure that electricity is restored to the entire area. In light of all this, we believe that this Court need not make any additional orders concerning this issue.

On May 24, 2004, petitioners informed us that several houses in Rafah remained without electricity. The equipment necessary to repair the network is not available in Gaza, and must be imported from Israel. The closure of

Karni Crossing, however, has prevented the equipment from being imported. After the withdrawal of the IDF, and after military operations had ceased, respondent informed us (May 27, 2004) that Rafah had been returned to the civilian and security control of the Palestinian Authority, and that the area is no longer under the control of the IDF. Moreover, we were informed that the required materials may be brought in through Karni Crossing, as long as arrangements are made with the appropriate authorities in the IDF.

Medical Equipment and Medicines

17. Petitioners claimed that there is a severe shortage of medicines, medical equipment and donated blood in the A-Najar hospital, which, although located outside the area of combat, serves the area which is controlled by the IDF. The shortage was reported by the hospital to Professor Donchin, a member of Petitioner 1 (Physicians for Human Rights). Petitioner 1 prepared a vehicle full of medicines, bandages and donated blood. The vehicle is waiting outside Erez Crossing, and it is not permitted to enter the Gaza Strip. Petitioners request that we order respondent to allow the supply of medicines to the residents in the Tel A-Sultan neighborhood. They also request that we order respondent to allow the passage of vehicles carrying medical equipment between Rafah and the hospitals outside of it, in Khan Younis and Gaza City. Col. Mordechai mentioned in his written response that medicines and medical equipment are being allowed to be brought into the Rafah area. There is nothing preventing the transfer of medical equipment from one area to another. The international border crossing at Rafah, which had been closed due to the combat, was opened for this specific purpose, in order to enable trucks bearing medical equipment from Egypt to enter the Gaza Strip area. In his oral response Col. Mordechai added that the entrance to the combat zone is through Karni Crossing. Any medical equipment brought to that gate will be transferred immediately to its destination, on condition that it is not accompanied by Israeli civilians, for fear that they may be taken hostage. As to the situation regarding medicines in the hospital, Col. Mordechai claimed that he has been in contact, at his own initiative, with the hospital director. At first, he was told of the shortage of donated blood and of basic medical equipment. After a short while, he was told that donated blood had been received and that there was no longer a shortage. The shortage of first aid equipment, he reported, continues. That same night a truck with medical equipment from Tunisia entered the Gaza Strip from Egypt. In addition, four Red Cross trucks with medicines entered via Karni Crossing.

Col. Mordechai remains in direct contact with the Red Cross regarding this issue. Every request for the supply of medicines is received and expedited. During the battles, oxygen tanks were allowed to be taken out of Gaza, filled in Israel, and returned to the hospital. In response, petitioners noted that contact had just been made between Petitioner 1 and the Red Cross, and that the vehicle prepared by them, and the equipment upon it, will be brought to its destination. Respondent informed us that he had just gotten word that four trucks with medical equipment had passed through Karni Crossing.

18. It is the duty of the military commander to ensure that there is enough medical equipment in the combat zone. This is surely his obligation towards his soldiers; but his obligation is also towards the civilian population under his control. In the framework of the preparation for a military operation, this issue – which is always to be expected – must be taken into account. In this regard, both the local medical system as well as the ability of local hospitals to give reasonable medical care during combat must be examined in advance. Medical equipment must be prepared in advance in case of shortage; provision of medical equipment from different sources must be allowed in order to relieve the shortage; contact must be maintained, to the extent possible, with the local medical services. The obligation is that of the military commander, and the receipt of assistance from external sources does not release him from that obligation. *Compare* the Fourth Geneva Convention, § 60. However, such external assistance is likely to lead to the fulfillment of the obligation, *de facto*. It seems to us now that this issue is reaching solution and we do not think that there is a need for additional remedies from this court.

Food

19. According to petitioners, a full curfew and sealing off of some of the neighborhoods of Rafah were imposed along with the commencement of military activity. These are lifted and imposed intermittently, according to the area in which combat is taking place at any given time. In the neighborhood of Tel A-Sultan, continuous combat has been taking place since the morning of May 18, 2004. For three days now, the curfew has cut the residents of the neighborhood off from the outside world. They suffer a shortage of water (*see supra* para. 14), medicine (*see supra* para. 17), and food. In four Rafah neighborhoods, there is no milk or basic food products. Contact with other neighborhoods – which would solve the problem – is denied by the IDF; nor is food provided to the area. Petitioners ask that we order respondent to allow

food supply to the residents of the neighborhood of Tel A-Sultan. In his response, Col. Mordechai mentioned that, when a curfew is imposed, standard procedure is to allow restocking of food 72 hours from the curfew's commencement. In this case, the IDF allowed trucks laden with food, prepared by the Red Cross, into the area within 48 hours. Food stations were designated in different parts of the neighborhoods, and food was distributed to the residents. For this purpose, the IDF is in contact with the mayor of Rafah and with the Ministries of the Palestinian Authority. During the day, additional food trucks were allowed in. Every request from an outside source to supply food will be approved and expedited. The same applies to milk. In Col. Mordechai's opinion, there is currently no shortage of food. He emphasized that, even before the operation, UNRWA was allowed to fill its warehouses with food.

20. On the normative level, the rule is that a military commander that takes over an area by way of combat must provide for the nutritional needs of the local residents under his control. The specific details of this obligation depend, of course, upon the current state of the combat. However, it is prohibited for combat to cause the starvation of local residents under the control of the army. *See Almandi*, at 36. On the practical level, it seems to us that the food problem has been solved. Nonetheless, we must note once again, that just like the medicine problem, the issue of food for the civilian population must be part of any advance planning for a military operation. The full responsibility for this issue lies with the IDF. The IDF is, of course, likely to be assisted by international organizations, such as the Red Cross and UNRWA. However, the actions of the latter do not relieve the army, which has effective control of the area, from its basic obligation towards the civilian population under its control. *Compare* the Fourth Geneva Convention, § 60.

Evacuation of Casualties

21. Petitioners claim that, as the military operation commenced, the road from Rafah to Khan Younis was blocked in both directions. That morning, ambulances evacuating casualties from Rafah to Khan Younis did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped or advanced enough to treat the tens of wounded arriving. Due to the blocking of the road, the lives of many wounded are in danger. Moreover, evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside of Rafah is allowed only on the condition that the

name and identification number of the wounded person and the license number of the ambulance intended to evacuate him are provided. Whereas the demand for the license number of the ambulance is possible to satisfy – though with difficulty – it is impossible to provide the name and identification number of the wounded. The reason for this is that many of the wounded are not conscious and their identity is not known. As such, ambulances are unable to evacuate unidentifiable casualties. Moreover, the entrance of additional ambulances into the A-Sultan neighborhood is prevented due to the excavations that the IDF is carrying out in the area. In one instance, shots were even fired on an ambulance of the Red Crescent. Petitioners request that we order the IDF to refrain from hurting or threatening the medical teams or civilians engaged in the evacuation of casualties. They also request that medical teams and Palestinian ambulances be allowed to reach the wounded in Rafah in order to evacuate them to hospitals. Finally, they request that we order respondent to allow the transfer of wounded in ambulances from the hospital in Rafah to other hospitals in the Gaza Strip with no need for advance permission, or provision of the identities of the wounded.

22. In his written response, Col. Mordechai stated that the IDF allows the entrance of ambulances and medical teams into Rafah to evacuate casualties. The evacuation is coordinated with Red Cross and Red Crescent officials, the Palestinian Civilian Liaison office, various UNRWA officials, different Palestinian officials, and Israeli human rights organizations that contacted the Humanitarian Hotline. On the whole, IDF forces are not preventing the entrance of ambulances into the Rafah area or the passage of ambulances from the Rafah area to the Khan Younis area. Regarding the demand for the identification of the ambulances and the wounded, Col. Mordechai mentioned, in his written response, that these demands are based on the desire to ensure that Palestinian medical teams are indeed transferring people who are wounded, and that the vehicles are indeed ambulances and not vehicles used for other purposes. In past experience, Palestinian terrorists have used ambulances for terrorist activities, including the transportation of armed Palestinians and the smuggling of arms from one area to another. During oral arguments, Col. Mordechai added that a Coordination Office Officer is attached to each battalion. One of his main duties is to insure the orderly evacuation of the wounded, in coordination with the ambulance teams. During the operation, more than eighty ambulances have passed from the northern Gaza Strip to Rafah in the south. The IDF permits the passage of any ambulance, provided that such passage is coordinated with it. The search of

the ambulance – to ensure that forbidden combat equipment is not being transferred from one area to another – is completed in a matter of minutes. The evacuation of the wounded is not contingent upon the relaying of their names and identification numbers. Those whose identities are not known are also being evacuated. However, if it is possible to receive the name and identity number, this information is requested and received. Col. Mordechai mentioned, regarding the evacuation of wounded to locations outside of Rafah, that more than 40 ambulances have exited Rafah, heading north. Every ambulance requesting exit is allowed to do so. All that is required is coordination regarding the route. As for the shooting upon an ambulance, Col. Mordechai stressed that it was not intentional. There are clear instructions that shooting on ambulances is prohibited. “Ambulances are out of bounds” – so stated Col. Mordechai before us. Col. Mordechai informed us that tens of ambulances passed with no harm done to them. It is to be regretted if a single exception occurred. Wireless contact exists between ambulance drivers and officers of the DCO, by which proper coordination between forces maneuvering in the field and ambulances is maintained. When the passage of an ambulance is prevented by dirt piled on the road, all is done – after coordination – to bring a bulldozer to remove the obstacle.

23. There is no disagreement regarding the normative framework. The army must do all possible, subject to the current state of the combat, to allow the evacuation of local residents wounded during combat activities. On this issue, Justice Dorner gave the ruling of this court more than two years ago in HCJ 2936/02 *Physicians for Human Rights v. Commander of IDF Forces in the West Bank:*

> [O]ur combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill and the bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the state. This stance is required not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.

In HCJ 2117/02 *Physicians for Human Rights v. Commander of IDF Forces in the West Bank*, Justice Dorner stated:

> [I]nternational law provides protection for medical stations and personnel against

> attack by combat forces … [It is forbidden], under all circumstances, [to] attack stations and mobile medical units of the "Medical Service," that is to say, hospitals, medical warehouses, evacuation points for the wounded and sick, and ambulances …. However, the "Medical Service" has the right to full protection only when it is exclusively engaged in the search, collection, transport and treatment of the wounded or sick …. [P]rotection of medical establishments shall cease if they are being "used to commit, outside their humanitarian duties, acts harmful to the enemy," on condition that "a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded."

It appears to us that the passage of ambulances to and from Rafah proceeded properly. This was made possible, among other means, by the contact between the IDF – via officers of the DCO – and the ambulances. This contact was proper, and it was put into effect properly. In addition, ambulances move freely to and from the area. The demand of the IDF regarding the license plate numbers of ambulances is reasonable. It is appropriate not to make the transfer of wounded contingent upon the relaying of their names and identification numbers. However, we see no fault in the attempt to receive this information when it is attainable, assuming that receipt of this data is not a condition for transport outside of the combat area and does not cause unreasonable delay in transport. The single instance of shooting on an ambulance was an exception. We have been convinced that the instructions forbidding such activity are clear and unequivocal. It seems to us, therefore, that as far as this issue is concerned, the petition has been satisfied.

Burying the Dead

24. Petitioners' attorney maintains that, at A-Najar Hospital in Rafah, there are 37 bodies of residents that were killed during the course of the IDF operation. It is not possible to bury them due to the restrictions imposed by the army. In his response before us, Col. Mordechai noted that, as far as the army is concerned, there is no impediment to the burial of the dead in cemeteries. These are located, to the best of his knowledge, outside the neighborhood of Tel A-Sultan and, as such, the burials can be carried out immediately. In their response, petitioners noted that the funerals had not been conducted because the army has surrounded the neighborhood of Tel A-Sultan, and is not allowing relatives of the dead to participate in the funerals. Col. Mordechai admitted that this is true.

25. This response does not satisfy us. We noted that a solution to this problem must be found quickly. Thus, for example, we asked why the relatives, whether all or some or some of them, are not being allowed to participate in the funerals. Col. Mordechai promised us an answer to this question. In an updated statement we received on May 23, 2004, we were informed by respondent, on behalf of Col. Mordechai, that respondent had decided (on May 21, 2004) to allow a number of family members of all those killed to leave the Tel A-Sultan neighborhood in order to conduct funerals. This proposal was rejected by the Palestinians. That statement also noted that on that same day (May 21, 2004) respondent had offered, as a goodwill gesture, to allow two vehicles from each family to leave the area of Tel A-Sultan in order to participate in their relatives' funerals. This proposal was also rejected by the Palestinians. On Saturday (May 22, 2004) respondent was prepared, as a goodwill gesture and in response to a request by the Red Cross, to allow the family members of all of the dead to leave the neighborhood in order to take part in funeral ceremonies, without limit on number, provided that the funerals not all be conducted at the same time. The Palestinians rejected this proposal as well. On Sunday (May 23, 2004) respondent announced that he was prepared, as a goodwill gesture, and in coordination with the Palestinian Authority, to allow several buses to leave the neighborhood in order to allow family members to take part in their relatives' funerals. According to respondent, the Palestinians had begun organizing the buses needed to transport those family members leaving Tel A-Sultan for the funerals. A complementary statement from the respondent (dated May 25, 2004) informed us that the attempt (on May 23, 2004) to transport family members out of the neighborhoods on organized buses for the funerals had not been successful due to the opposition of the Palestinians. Respondent added that on that same day (May 23, 2004), after IDF troops pulled out of the Tel A-Sultan neighborhood, 22 funerals took place, and there had been no impediment to the participation of family members who reside in the neighborhood of Tel A-Sultan, as traffic between the neighborhood and the area where the funerals took place was not held up by the IDF.

26. In their response of May 24, 2004, petitioners reported, after discussions with the mayor of Rafah, that the residents of Rafah had indeed refused the IDF's proposals, and that this had significantly limited the participation of families in the funerals. The residents preferred to perform the funerals after the curfew was lifted in order to ensure that the prayer for the dead was recited and that a temporary structure would be erected for the

mourners so that they could receive those who come to comfort them, in line with Islamic law. We were further informed that the mayor of Rafah had announced that, since the end of the closure on Tel A-Sultan, the residents of Rafah had begun organizing a mass funeral for 23 dead. The funeral would take place in the afternoon and was expected to continue until the late afternoon due to the large number of dead.

27. The problem of burying the dead was resolved. Nevertheless, there are lessons to learn from the incident. Our assumption is that the fundamental principle that the dignity of local residents must be protected, as enshrined in section 27 of the Fourth Geneva Convention, encompasses not only local residents who are living, but also the dead. Compare Fourth Geneva Convention, §130; *see* Pictet, at 506; *see also* HCJ 3436/02 *The International Custodian of Terra Santa v. The Government of Israel*, at 22, 25. Human dignity includes the dignity of the living and the dignity of the dead. The same applies with regard to domestic Israeli law. *See* CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*, at 464; FH HCJ 3299/93 *Wikselbaum v. The Minister of Defense*, at 195; CA 6024/97 *Shavit v. Rishon Lezion Jewish Burial Society*, at 600. "The protection of the dead and their dignity is just like the protection of the living and their dignity." *See* Justice J. Türkel in HCJ 81/66 *The Inspector-General of The Israel Police v. Ramla Magistrate Court Judge Mr. Baizer*, at 337, 353. The military commander is duty-bound to search for and locate dead bodies. *See* HCJ 3117/02 *The Center for the Defense of the Individual – Founded by Dr. Lota Salzberger v. The Minister of Defense*, at 17, 18. After bodies are found, he is obligated to ensure that they are accorded a dignified burial. In the Barake case, which discussed the duty of the military commander regarding dead bodies during army operations, we stated:

> Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation and burial of the bodies. This is their obligation under international law. Respondents accept this position… The location, identification, and burial of bodies are important humanitarian acts. They are a direct consequence of the principle of respect for the dead—respect for all dead. They are fundamental to our existence as a Jewish and democratic state. Respondents declared that they are acting according to this approach, and this attitude seems appropriate to us… Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to us all, as man was created in the image of God. All parties hope to finish the location, identification, and burial process as soon as possible. Respondents are willing to include representatives of the Red Cross and, during the identification stage after the location and evacuation stages, local authorities as well (subject to specific decision of the military commander). All agree that burials should be performed with respect, according to religious custom, in a timely manner. *Id*, at 15.

The army attempted to act according to these principles in the case at hand. The dead were identified and transferred to A-Najar Hospital. At both these stages the Red Cross and the Red Crescent were involved. The problem here, however, concerned burial. Respondent was obviously prepared to bury the dead, but it believed that it had discharged this duty by transferring the bodies to A-Najar Hospital. This was not the case. The duty of the respondent is to ensure a dignified burial for the bodies. To this end, he must negotiate with the local authorities, to the extent that they are functioning, and find respectful ways to carry out this duty. As is clear from the information presented to us, the main difficulty which arose was the participation of the relatives of the dead. This matter was in the power of the respondent, whose forces controlled all entrances and exits to Tel A-Sultan, and respondent was obviously limited by security considerations. Apparently, the later proposals should have been proposed earlier. The changing position of respondent indicates that it did not prepare for the situation in advance, and it improvised the proposed solutions on the spot. This should not have happened. Preparations for dealing with the dead should have been planned in advance. Clear procedures should be fixed regarding the different stages of the process. Of course, if, at the end of the day, the dead are in a hospital and their relatives refuse to bury them, they should not be forced to do so. Nevertheless, everything should be done in order to reach an agreement on this matter.

Shelling of the March

28. Petitioners claim that on Wednesday, May 19, 2004, thousands of Palestinians from Rafah participated in a quiet and non-violent procession. They marched in the direction of Tel A-Sultan. Some of the participants were armed and masked. The marchers included men and women, both children and adults. Many of the marchers held food and water, which they intended to bring to the residents of Tel A-Sultan, who had been completely cut off from all outside contact for three days. While they were marching three or four tank shells and two helicopter missiles were fired towards them. According to reports from the marchers, the fire came only from the direction Tel Al-Zuareb

observation post, a post manned by the IDF. The fire towards the marchers caused the deaths of eight civilians. About half of the casualties were minors. Petitioners ask that we order a probe of the incident by Military Police Investigations. They also ask that we order respondent to issue an unequivocal order absolutely forbidding the shooting or shelling of civilian gatherings, even if there are armed elements among them, if they do not pose an immediate danger to life.

29. Respondent informed us that an initial investigation was conducted immediately. It found that there was a mishap while firing tank shells towards an abandoned building, and the eight Palestinians were killed by shrapnel. One of them was an armed activist of the Islamic Jihad. The other seven victims were completely innocent. It was emphasized that there is a great deal of arms in Rafah, including armor-piercing weapons. It was also emphasized that, in the past, terrorists have often attempted to use civilians as cover to strike at the IDF. It was also feared that the protesters would climb onto the armored vehicles with soldiers inside them. The procession took place in a combat zone. Among the marchers were armed elements. In initial negotiations with the protesters, the attempt was made to halt the procession. The attempt failed. Afterwards, deterrents were employed. These also failed and the procession continued on its way. It was then decided to fire hollow shells toward the abandoned building.

The full investigation is yet to be completed. With its completion the material will be passed on to the Judge-Advocate General, who will decide on the matter. Respondent added that IDF rules of engagement for opening fire, which also address situations of civilian gatherings, incorporate the legal and ethical stance of preventing harm to the innocent. Nevertheless, he reiterated that this was a situation of active warfare and danger to troops in an area densely populated with civilians, where the combatants do not differentiate themselves from the civilian population, but conceal themselves within it. The deliberate use of the population as a human shield, in contravention of the basic rules of combat, constitutes a war crime.

30. The investigation of this tragic event has not yet been completed. All the material will be passed on to the IDF Judge-Advocate General. Under these circumstances, there is no call, at this stage, for any action on our part. Petitioners must wait for the findings of the investigation and the decision of the Judge-Advocate General. It may be assumed that lessons will be drawn,

and if there is a need for a change in the instructions that are given to the troops, this will be implemented. At this stage, in the absence of facts, we can only repeat the obvious: the army must employ all possible caution in order to avoid harming a civilian population, even one that is protesting against it. The necessary precautions are, obviously, a function of the circumstances, such as the dangers posed to the civilians and the soldiers. *Compare* CA 5604/94 *Khemed v. The State of Israel.*

The Requested Remedies

31. In their petition, Petitioners listed seven remedies that they requested from us, *see supra* 4. Regarding six of these seven, we have examined the specific issues detailed by petitioners. *See* para. 14 (water), para. 15 (electricity), para. 16 (medical equipment and medicines), para. 18 (food), para. 20 (evacuation of wounded), para. 27 (investigation of the fire on the march). The final request remains. This is petitioners' request that we order respondent to allow the entry of a delegation of three doctors from Petitioner 1 (Physicians for Human Rights) into hospitals in the Gaza Strip, in order to provide for their medical needs, and bring in equipment and suitable medical practitioners.

32. In his written response, Col. Mordechai noted that any delegation of doctors from petitioner 1 or any other authorized body may enter the area and visit the hospitals. The single condition that respondent insists upon is that there be no Israelis among the visiting doctors. This is due to fear of harm to them or their group, an occurrence which could complicate the security situation further. In this context, he noted that there is already a team from the International Committee of the Red Cross in the field, and that the head of the International Red Cross Bureau in Israel is in direct contact with the IDF. During oral arguments, respondent added that there is no impediment to the visit of non-Israeli doctors who are employees of Israeli hospitals. Moreover, there is nothing stopping doctors employed in hospitals in Judea and Samaria, or hospitals in the Gaza Strip, from visiting and investigating the situation. These proposals did not satisfy petitioners, who insisted that Israeli doctors be authorized to enter hospitals in the Gaza Strip.

33. Regarding this matter, we do not find any flaw in the position of respondent. We are convinced that respondent's stance is purely security-related, and that he has no motivations that are not founded on a concern for

security issues. Indeed, fears for the welfare of Israelis who enter the Gaza Strip in general, and combat zones in particular, are justified. Respondent has enforced a similar rule even when no military operation was under way, and this stance was deemed legal. This was the case regarding the entry of Knesset members into the Gaza Strip, *see* HCJ 9293/01 *Barake v. The Minister of Defense*, at 509. It was so even with regard to the entrance of doctors from Petitioner 1 into the Gaza Strip, see HCJ 3022/02 *Physicians for Human Rights v. The Commander of the IDF Forces in the Gaza Strip*, at 39. Israel has a duty to protect its citizens. It does not forfeit this duty because some citizens are "prepared to take the risk." The state remains responsible for the safety of its citizens, and it must do its utmost to return them safely to Israel. Allowing the entrance of Israeli doctors to a combat zone in Gaza creates a real danger to the safety of the doctors and to the interests of the state. There is no reason to place the state in this danger. It has been noted that there should be no difficulty for Petitioner 1 to find three non-Israeli doctors – be they from Gaza itself, Judea and Samaria, Israel or the rest of the world – who will be prepared to carry out for it the required inspection. In this matter the petition is denied.

The Future

34. According to the humanitarian principles of international law, military activities require the following: First, that the rules of conduct be taught to, and that they be internalized by, all combat soldiers, from the Chief of General Staff down to new recruits. *See Physicians for Human Rights*, at 5. Second, that procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat. An examination of the conduct of the army while fighting in Rafah, as detailed in the petition before us – and we have nothing other than what has been presented to us – indicates significant progress compared to the situation two years ago. *See Barake; Physicians for Human Rights* and other decisions. This is the case regarding the implementation of the duty to ensure water, medical equipment, medicines, food, evacuation of the wounded and the burial of the dead. This is also the case regarding the preparation of the army, and the design of procedures that allow humanitarian obligations to be satisfied. The establishment of the Humanitarian Hotline and the District Coordination Office, as well as the assignment of a liaison officer of the Coordination Office to every battalion, greatly aided the implementation of humanitarian principles.

35. In the framework of our discussion regarding the internalization of humanitarian laws, we emphasize that it is the duty of the military commander not only to prevent the army from harming the lives and dignity of the local residents (the "negative" duty: *see supra* para. 11). He also has a "positive" duty (*para*. 11). He must protect the lives and dignity of the local residents. For example, regarding the burial of local residents, the military commander was satisfied that the corpses were transferred to A-Najar Hospital. But this was not enough. He is obligated to do his utmost to ensure that the bodies be brought to a dignified burial according to local custom. He must make prior arrangements in order to ensure there are sufficient supplies of food and water. Damage to the water supply is something that can be anticipated from the outset, and if it cannot be avoided, a solution to this problem must be prearranged. Supplies of medicines, medical equipment and food should also be prepared in advance. Harm to local residents is expected and if, despite every effort to limit this, in the end there will be casualties among residents, this must be prepared for from the outset. Respondent should not rely solely on international and Israeli aid organizations to solve these problems, though their aid is important. The recognition that the basic duty belongs to the military commander must be internalized, and it is his job to adopt different measures from the outset so that he can fulfill his duty on the battlefield.

36. Additional measures should be adopted so that the established institutional arrangements (*see supra para*. 3) will be more effective. We were informed that those who called the Humanitarian Hotline had to wait many hours. Col. Mordechai noted several times that some issues should have been referred to him, and not to the Humanitarian Hotline. The lack of information led, on several occasions, to inefficiency in aid efforts by third parties. Thus, for example, a vehicle of Petitioner 1 laden with medical equipment and medicines waited at Erez Crossing while the entrance point was Karni Crossing. However, at Karni Crossing their entrance was again denied, since Israeli doctors were among the passengers in the vehicle, and the army was only prepared to allow the entry of non-Israeli doctors. These issues and others need to be addressed. It is possible that the Humanitarian Hotline needs to be expanded, and there needs to be more effective communication between it and the District Coordination Office and the Coordination Office's liaison officers placed with the combat battalions. It is possible that there is a need, with regard to international and Israeli organizations whose humanitarian involvement is anticipated, to bypass the Humanitarian Hotline and facilitate direct contact with the DCO. It is possible that there is a need to take other

measures. This matter is for the respondent to address; it must learn from the events of the day.

37. With the conclusion of the arguments in the petition, we ordered that the military staff in the area ensure that they solve not only the problems raised by petitioners, but also anticipate new problems that, in the nature of things, will arise in the future. For this reason it has been decided that Col. Mordechai will appoint a senior officer who will remain in direct contact with petitioners. This is the least that should have been done at the time the events were unfolding. The main thing is that it must be done now in order to learn lessons from the episode.

38. Before we conclude we wish to inform petitioners' attorney Fatima Al-Aju that she presented the position of petitioners clearly and responsibly. Respondent's attorneys, Anar Helman and Yuval Roitman, also provided us with the most comprehensive and up-to-date information possible in a very short space of time. We also express thanks to Col. Mordechai, who was good enough to explain to us the details of the area and the activities of respondent and, to the best of his ability, translated humanitarian standards into practical language.

The outcome is, therefore, that the petition is granted regarding six of petitioners' seven requests. The seventh request – the entry of Israeli doctors from Petitioner 1 to the area in general and A-Najar Hospital in particular – is denied, due to the danger to the doctors. In this matter one must be satisfied by the proposal of respondent – which has been rejected by petitioners – that non-Israeli doctors (whether from the Gaza Strip, Judea and Samaria, Israel, or anywhere else in the world), will be allowed to enter the area.

Justice J. Türkel

I concur.

Justice D. Beinisch

I concur with the opinion of the President. I also concur with his conclusions regarding the principles of the IDF's obligation to satisfy its responsibilities – under customary international law, under treaties to which Israel is a party, and under the fundamental principles of domestic Israeli law

– towards the civilian population in combat areas. Similarly, I also concur with regard to the particulars at issue here: that the situation regarding the requested remedies was clarified by a close investigation of the facts together with our holding regarding the specific obligations of the IDF to enable the civilian population to continue its routine, especially regarding the provision of medicines, food, medical assistance, water, electricity, evacuation of casualties and burial of the dead.

As such, I join the President's conclusion that all military operations require advance preparation regarding all issues concerned with the civilian population in the combat zone. Such advance preparation will take into account humanitarian obligations towards the civilian population, the possibility of harm to it, and consequences that must be prevented or – at the least – minimized.

Even if it is impossible to forecast the course of military operations, there is no doubt that the basic needs of the civilian population in the combat zone – whose lives and property stand a substantial chance of being harmed – can be predicted. As such, in planning military activities, the humanitarian obligations towards the civilian population, which is caught between the cynical exploitation of terrorists and the military operations seeking to uproot that terrorist infrastructure, must be taken into account. The military forces operating within that population bear the two responsibilities outlined by the President: the obligation to refrain, to the extent possible, from harming civilians, and the positive obligation to ensure that these civilians are not harmed. In any case, the IDF must minimize, to the extent possible, the suffering of those in the combat zone. This is all subject to the requirements of the military operation, and does not diminish the military commander's obligation to protect the lives of soldiers under his command.

If these obligations are not satisfied, the doors of this Court remain open – in times of war as in times of peace – to those injured (In practical terms, the injured may be represented by organizations). At the same time, the difficulty of employing judicial review as combat continues reduces the effectiveness of that review and makes intervention by the Court difficult.

As the President noted, this court does not examine the wisdom of the military operations. Neither does it intervene in decisions concerning when military action should be taken. Judicial review, as it requires detailed

clarification of a situation, is constrained during times of combat. First, from a practical standpoint, the fact that the Court must review an ever-changing battle situation and deliver its opinion swiftly, makes verification of the party's claims and clarification of the factual situation difficult. As distinct from regular petitions, where the factual situation can be laid out before the Court, judicial review exercised during combat activities requires a unique type of process, and the current petition constitutes a stark example of that. The facts here were clarified, and they changed and developed, during combat itself. During arguments, the parties stood in contact with and reported from the combat zone. These reports, as they came in, changed the factual situation before us. The President's opinion details how this occurred in practice. In such situations, judicial review is an inadequate tool with which to review real-time developments and to grant effective and efficient remedies.

Second, judicial review during active combat brings the Court closer to the zone of combat, and requires a new balance between conflicting values – between the fact that the Court will not intervene in the combat activity itself, and between the need to ensure, at the same time, that combat proceeds according to humanitarian obligations. These constraints do not deter the Court from exercising judicial review in real-time and from handing down orders. Judicial review is exercised despite these constraints. This is not the first time that we have examined the implementation of humanitarian principles during combat, as the cannons roar and the sounds of fire are still being heard.

In these circumstances, a heavy burden is placed on the combat forces. Even so, the burden does not excuse the duty, and the military commander must prepare in advance in order to satisfy his obligations. As such, I concur with the President that institutional arrangements must be fashioned that will allow the implementation of humanitarian principles during times of combat. This will require an infrastructure and logistical planning before military operations are commenced. Medical equipment and medicines must be provided and means of transporting these to the battle zone must be made available. Essential services such as water and food must be provided to the civilian population. Substitutes for the civilian infrastructure that will be damaged must be prepared. Appropriate arrangements for the evacuation of casualties must be provided. This also applies to other issues that can be predicted. The ability to determine the needs of the civilian population must be provided for; arrangements for coordination between the military and

humanitarian organizations, local governments, and bodies that represent the population must be prepared. These are difficult in the current circumstances: where the civilian population is hostile, where that population recoils from actions that may be interpreted as cooperation, and where terrorists cynically exploit that population for their own purposes. This reality, however, is the reality in which the military commander must satisfy his humanitarian obligations.

Even if, in Israel's difficult reality, the following does not guarantee an optimal solution, it will promise improvement: the establishment of detailed guidelines, of logistical planning, of rules for the security forces in their interaction with the civilian population, and of a mechanism for direct communication with the bodies that act on behalf of that population. These will ensure that the harm caused to the civilian population is minimized, that international and Israeli law is followed, that effective solutions will be found, and that the need to resort to judicial review in order to protect the law will be reduced.

Decided as per the opinion of President Barak.

May 30, 2004

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

v.

1. The Government of Israel [The Fence Case]

2. The Commander of IDF Forces in the West Bank

ABSTRACT OF THE JUDGMENT

This petition was submitted by several Palestinian villages and their inhabitants. It attacks the legality of orders issued by the Israel Defense Forces (IDF) Commander in the West Bank. The orders were to take possession of plots of land for the purpose of erecting a separation fence. The path of the portion of the fence discussed in the petition is approximately forty kilometers long and located west and northwest of Jerusalem (starting in the west at Maccabim and Beit Sira villages, going through Har Adar, Beit Sourik and Bidu villages, and ending at Giv'at Ze'ev township and Beit Daku village). The petition attacked the legality of eight separate orders, each referring to several kilometers of the fence and together comprising the entire forty kilometers at issue.

The Supreme Court delivered today (June 30, 2004) a judgment concerning the challenged portion of the fence. The judgment was written by President (Chief Justice) A. Barak; Vice-President E. Mazza and Justice M. Cheshin concurred. The Court divided its discussion into two parts, each addressing a separate question. The first question concerns the legal authority of the IDF Commander to build a fence in the West Bank. The second question concerns the proportionality of the fence's path (i.e., assuming that the IDF Commander has the authority to build the fence, does the fence's path reflect a proper balance of security considerations and humanitarian considerations).

Petitioners and respondents did not deal with the question of authority exhaustively. The Court found that this complex question was not adequately developed by the parties and, in its own discussion, referred only to the arguments that the parties did bring. The Court ruled that, were the reasons for building the fence political, then the fence would violate public international law. But the Court rejected petitioners' claim that the reasons for building the fence were political. The Court accepted respondents' claim that the fence was built for reasons of national security. Those reasons could justify taking possession of plots of land in the West Bank.

Even with the authority to build the fence, the IDF Commander still has a legal duty to balance properly between security considerations and humanitarian ones. This duty relates to the second question, the question of proportionality, to which the Court devoted the bulk of its discussion. The Court held that the legal duty of proportionality is found in both Israeli administrative law and public international law.

The Court accepted the IDF Commander's position regarding the security aims of the fence, rejecting the contrary position of the Council for Peace and Security (a private organization composed of retired military commanders that submitted a brief on the appropriate security aims, and hence the proper path, of the fence). The Court did so because the IDF Commander is accountable to the general public, while the Council is not. The Court ruled, however, that the IDF Commander did not exercise his discretion proportionately. Although he took account of the grave security considerations at stake, he did not take adequate account of the fence's infringement on the lives of 35,000 local inhabitants. Building the fence requires seizing thousands of dunams of land. The fence's current path would separate landowners from tens of thousands of dunams of land, and the planned regime of authorizations to access that land would not substantially reduce the harm. The fence's current path would generally burden the entire way of life in petitioners' villages. Both petitioners and the Council offered alternative paths. Respondents claimed that those paths would exact substantial costs in terms of national security. The Court held that this reduction in security must be endured for the sake of humanitarian considerations. The additional margin of security achieved by the current path of the fence is not equal to the current path's additional infringement on the local inhabitants' rights and interests. The current balance between security considerations and humanitarian considerations is disproportionate. The Court ruled that the IDF Commander should reduce the infringement upon the local inhabitants, even if it cannot be totally avoided, by altering the path of the fence in most areas complained of in the petition.

Given this reasoning, the Court accepted the petition with regard to six of

the orders (Orders No. 104/03, 103/03, 84/03 (the Western part), 108/03, 109/03, 110/03 (the part concerning Beit Daku village)). Those orders are void due to disproportionality. The petition was denied with regard to one order (Order No. 105/03) concerning the Western part of the path. The last order (107/03), concerning Har Adar village, was returned to respondents for further consideration in light of the principles developed in the judgment.