H.C.J. 7957/04

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

v.

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

The Supreme Court Sitting as the High Court of Justice

[September 12 2004; March 31 2005; June 21 2005]

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

Petition for an *Order Nisi*

For Petitioners: Michael Sfard
Dan Yakir
Limor Yehuda

For Respondents no. 1-4: Anar Helman
Avi Licht

For Respondent 5: Baruch Heikin

JUDGMENT

President A. Barak:

Alfei Menashe is an Israeli town in the Samaria area. It was established approximately four kilometers beyond the Green Line. Pursuant the military commander's orders, a separation fence was built, surrounding the town from all sides, and leaving a passage containing a road connecting the town to Israel. A number of Palestinian villages are included within the fence's perimeter. The separation fence cuts them off from the

remaining parts of the Judea and Samaria area. An enclave of Palestinian villages on the "Israeli" side of the fence has been created. Petitioners are residents of the villages. They contend that the separation fence is not legal. This contention of theirs is based upon the judgment in *The Beit Sourik Case* (HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel,* 58(5) P.D. 807). The petition also relies upon the Advisory Opinion of the International Court of Justice at the Hague (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (International Court of Justice, July 9, 2004), 43 IL M 1009 (2004)). Is the separation fence legal? That is the question before us.

A. The Background and the Petition

1. Terrorism and the Response to It

1. In September 2000 the second *intifada* broke out. A mighty attack of acts of terrorism landed upon Israel, and upon Israelis in the Judea, Samaria, and Gaza Strip areas (hereinafter – *the area*). Most of the terrorist attacks were directed toward civilians. They struck at men and at women; at elderly and at infant. Entire families lost their loved ones. The attacks were designed to take human life. They were designed to sow fear and panic. They were meant to obstruct the daily life of the citizens of Israel. Terrorism has turned into a strategic threat. Terrorist attacks are committed inside of Israel and in the *area*. They occur everywhere, including public transportation, shopping centers and markets, coffee houses, and inside of houses and communities. The main targets of the attacks are the downtown areas of Israel's cities. Attacks are also directed at the Israeli communities in the *area*, and at transportation routes. Terrorist organizations use a variety of means. These include suicide attacks ("guided human bombs"), car bombs, explosive charges, throwing of Molotov cocktails and hand grenades, shooting attacks, mortar fire, and rocket fire. A number of attempts at attacking strategic targets ("mega-terrorism") have failed. Thus, for example, the intent to topple one of the Azrieli towers in Tel Aviv using a car bomb in the parking lot was frustrated (April 2002). Another attempt which failed was the attempt to detonate a truck in the gas tank farm at Pi Glilot (May 2003). Since the onset of these terrorist acts, up until mid July 2005, almost one thousand attacks have been carried out within Israel. In Judea and Samaria, 9000 attacks have been carried out. Thousands of attacks have been carried out in the Gaza Strip. More than one thousand Israelis have lost their lives, approximately 200 of them in the Judea and Samaria area. Many of the injured have become severely handicapped. On the Palestinian side as well, the armed conflict has caused many deaths and injuries. We are flooded with bereavement and pain.

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

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

Against this background, the idea of erecting a separation fence in the Judea and Samaria area, which would make it difficult for terrorists to strike at Israelis and ease the security forces' struggle against the terrorists, was formulated.

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

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

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

> "(2) The obstacle built pursuant to this decision, like its other segments in the 'seamline area', is a security means for preventing terrorist attacks, and does not reflect a political border, or any other border.
>
> (3) Local alterations of the obstacle route or of construction necessary for the overall planning of the route, shall be brought for approval to the Minister of Defense and the Prime Minister.
>
> (4) . . .
>
> (5) . . .
>
> (6) During the detailed planning, all efforts shall be made to minimize, to the extent possible, disturbance liable to be caused to the daily lives of Palestinians as a result of the construction of the obstacle."

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

4. The separation fence is an obstacle built of a number of components. "In its center stands a 'smart' fence. The purpose of the fence is to alert the forces deployed along it of any attempt to cross it. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Adjacent to the fence, a service road is paved. On the internal side of the electronic fence, there are a number of roads: a trace road (a strip of sand smoothed to detect footprints of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50–70 meters. Due to various constraints at certain points along the

route, a narrower obstacle, which includes only part of the components supporting the electronic fence, will be constructed. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. . . Various means to help prevent infiltration will be erected along the route of the obstacle. The IDF and the border police will patrol the separation fence, and will be called to locations of infiltration, in order to frustrate the infiltration and to pursue those who succeed in crossing the security fence" (*The Beit Sourik Case,* at p. 818).

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

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

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

This decision included additional segments of fence, whose legal examination had not yet been completed (in the area of Western Samaria, Ma'aleh Edumim, and the Judean Desert). As a result of the government decision, special teams were established to examine the crossings policy and the permit regime. According to the data relayed to us, part of the separation fence is inside of Israel or on the Green Line (approximately 150.4 km, which are 19.7% of the route). The part of the fence which is in the Judea and Samaria area leaves about 432 km^2, which are about 7.8% of the area of Judea and Samaria, on the "Israeli" (western) side of the fence. In this area live 8900 Palestinian residents, who will live under a permit regime; and 19,000 Palestinian residents in the Etzion Bloc area, where such a regime will not apply, and it will be possible to enter and exit freely, subject to security check, with no need to acquire permits or licenses of any kind. It is worth noting that this figure includes the Gush Etzion region (about 1.2% of the area of Judea and Samaria), the "fingers of Ariel" (about 2.0% of the area of Judea and Samaria) and Ma'aleh Edumim (approximately

1.2% of the area of Judea and Samaria). The staff work and the legal examination regarding these areas have not yet been completed. Nor have Jerusalem's municipal territory or no-man's-land been included in these figures, since they are not in Judea and Samaria.

7. All territory left on the "Israeli" (western) side of the fence in the framework of phase A – that is to say, the area between the fence and the State of Israel (hereinafter – *the seamline area*) – were declared a closed military area, pursuant to Territory Closure Declaration no. S/2/03 (seamline area) (Judea and Samaria), 5764-2003 (of October 2 2003), issued by the Commander of IDF Forces in the Judea and Samaria Area (hereinafter – *the declaration*). The seamline area in the phase A area is approximately 87 km^2, and about 5600 Palestinians and 21,000 Israeli residents live in it. The declaration forbade entrance and presence in the seamline area, while determining that the rule does not apply to Israelis or people holding permits from the military commander to enter the seamline area and be present in it. The declaration determined, regarding permanent residents, that people whose permanent residence is in the seamline area will be permitted to enter the seamline area and be present in it, subject to the requirement that they hold a written permit from the military commander testifying to the fact that their permanent place of residence is in the seamline area, and subject to the conditions determined in the permit. The military commander issued a general permit to enter the seamline area, for holders of foreign passports, holders of permits for work in an Israeli community within the seamline area, and for those who have a valid exit permit from the *area* into Israel. After about a half a year (May 27 2004), the declaration was amended (Territory Closure Declaration no. S/2/03 (Seamline Area) (Judea and Samaria) (Amendment no. 1), 5764 – 2004). According to the amended declaration, the rule forbidding entrance and presence in the seamline area does not apply to permanent residents in the seamline area or those with a work permit from the military commander. A general permit, for entrance into the seamline area and presence in it for any purpose, was granted to residents of the State of Israel. Palestinians living in the seamline area were issued a "permanent resident card" testifying that they are permanent residents of the seamline area. The permits make it possible to live in the seamline area and to move from it into the territories of the *area*, and back. Palestinians who are not permanent residents of the seamline area must acquire an entry permit. Such permits are granted for various reasons, including work, trade, agriculture, and education.

2. The Alfei Menashe Enclave

The Alfei Menashe enclave – the topic of the petition before us – is part of phase A of the fence. The decision regarding it was reached on June 23 2002. The construction of the fence was finished in August 2003. The fence circumscribes Alfei Menashe (population approximately 5650) and five Palestinian villages (population approximately 1200): Arab a-Ramadin (population approximately 250); Arab Abu-Farda (population approximately 120); Wadi a-Rasha (population approximately 120); Ma'arat a-Daba (population approximately 250), and Hirbet Ras a-Tira (population approximately 400) (*see* appendix). The fence which surrounds the enclave from the north is based, on its western side, upon the fence encircling the city of Qalqiliya (population approximately 38,000) from the south. This part of the fence passes north of highway 55, which is the enclave's connection to Israel. The northern part of the fence surrounds Alfei Menashe, Abu-Farda, and Arab a-Ramadin. The

Alfei Menashe enclave is unique for two reasons: First, it is based, in many places, upon the separation fence around the city of Qalqiliya and the villages of Habla and Hirbet Ras Atiyeh; second, the separation fence "brings" over to the "Israeli" (western) side not only Alfei Menashe, but also the five Palestinian villages.

9. There is one crossing and three agricultural gates in the fence surrounding the Alfei Menashe enclave, which connect the enclave to the *area*. The central connection between the enclave and the *area* is via "crossing 109", located on the northern side of the fence, on highway 55. Crossing 109 is close to the access point to the city of Qalqiliya, in the eastern fence surrounding Qalqiliya called DCO Qalqiliya. This point is not staffed, except for special cases, and it allows free passage between Qalqiliya and the *area*. Crossing 109 allows residents of the enclave to pass by foot and car, subject to security check, to the *area* and the city of Qalqiliya at all hours of the day. There are three additional gates in the Alfei Menashe enclave fence, two agricultural, through which one can pass by foot or car. The three gates are the Ras a-Tira gate (on the western side of the enclave, adjacent to the town of Hirbet Ras Atiyeh); the South Qalqiliya gate, and the Habla gate. At the time the petition was submitted, the three gates were generally opened three times a day for one hour. Now, the Ras a-Tira gate opens one hour after sunrise and is closed one hour before sunset. There is no change in the opening hours of the other gates. The enclave is connected, with territorial integrity, to Israel (with no checkpoint), and the crossing is made via highway 55, which connects Alfei Menashe to Israel. The road is mainly used by Israelis traveling to and leaving Alfei Menashe and by Palestinians with permits to enter Israel, or traveling within the boundaries of the enclave.

3. The Petition

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

11. Petitioners contend that the separation fence is not legal, and should be dismantled. They argue that the military commander is not authorized to give orders to construct the separation fence. That claim is based on the Advisory Opinion of the International Court of Justice at the Hague (hereinafter also "ICJ"). Petitioners also contend that the separation fence does not satisfy the standards determined in *The Beit Sourik Case*. On this issue, petitioners argue that the fence is disproportionate and discriminatory. Respondents ask that the petition be rejected due to a number of preliminary arguments (laches (delay), the "public" nature of the petition, and the lack of a prior plea to respondents). On the merits, respondents argue that the military commander is authorized to erect a separation fence, as ruled in *The Beit Sourik Case*. The Advisory Opinion of the International Court of Justice at the Hague makes no difference in this regard, since it was based upon a factual basis different from that

established in *The Beit Sourik Case*. Respondents also contend that the injury to the Palestinian residents satisfies the standards determined in *The Beit Sourik Case*.

4. The Hearing of the Petition

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

5. The Discussion Framework

13. The parties' arguments will be examined in five parts. In the first part we shall discuss the Supreme Court's caselaw regarding the military commander's authority, according to the law of belligerent occupation, to order the erection of the separation fence. This caselaw was developed by this Court in scores of judgments it has handed down since the Six Day War. In the second part we shall discuss the way this law was applied, in concrete implementation, in *The Beit Sourik Case*. In the third part, we shall discuss the Advisory Opinion of the International Court of Justice at the Hague. In the fourth part we shall discuss the Advisory Opinion's effect upon the standards in *The Beit Sourik Case*, and its ramifications for the normative outline as determined by this Court, and for the way this outline was implemented in *The Beit Sourik Case*. Finally, we shall examine whether the separation fence at the Alfei Menashe enclave satisfies the tests of the law.

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

1. Belligerent Occupation

14. The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the *area* is the military commander. He is not the sovereign in the territory held in belligerent occupation (*see The Beit Sourik*

Case, at p. 832). His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: first, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation (*see* HCJ 1661/05 *The Gaza Coast Regional Council v. The Knesset et al.* (yet unpublished, paragraph 3 of the opinion of the Court; hereinafter – *The Gaza Coast Regional Council Case*). In the center of this public international law stand the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – *The Hague Regulations*). These regulations are a reflection of customary international law. The law of belligerent occupation is also laid out in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*). The State of Israel has declared that it practices the humanitarian parts of this convention. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. We are aware that the Advisory Opinion of the International Court of Justice determined that *The Fourth Geneva Convention* applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of *The Fourth Geneva Convention* apply in the *area*, we are not of the opinion that we must take a stand on that issue in the petition before us. In addition to those two sources of international law, there is a third source of law which applies to the State of Israel's belligerent occupation. That third source is the basic principles of Israeli administrative law, which is law regarding the use of a public official's governing power. These principles include, *inter alia*, rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality. "Indeed, every Israeli soldier carries in his pack the rules of customary public international law regarding the law of war, and the fundamental rules of Israeli administrative law" (HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area*, 37(4) P.D. 785, 810; hereinafter *The Jami'at Ascan Case*).

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

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

> "the military commander is not authorized to order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to "annex" territories in the *area* to the state of Israel. The purpose of the separation fence cannot be to draw a political border. . . . the authority of the military commander

> is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the *area* has gone on for many years. This fact affects the scope of the military commander's authority. . . . The passage of time, however, cannot expand the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation" (*Id.,* at pp. 829-830).

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

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

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

1890/03 *The Bethlehem Municipality v. The State of Israel – The Ministry of Defense* (yet unpublished) – hereinafter *The Bethlehem Municipality Case;* HJC 10356/02 - *Hess v. Commander of the IDF Forces in the West Bank*, 58 (3) P.D. 443, 456 – hereinafter *The Hess Case*; *see also* D. Kretzmer "The Advisory Opinion: The Light Treatment of International Humanitarian Law" 99 *A.J.I.L.* 88, 97 (2005) – hereinafter *Kretzmer*; N. Keidar "An Examination of the Authority of Military Commander to Requisition Privately Owned Land for the Construction of the Separation Barrier" 38 *Isr. L. Rev.* 247 (2005) – hereinafter *Keidar*). Pursuant to regulation 52 of *The Hague Regulations*, the taking of possession must be for "needs of the army of occupation". Pursuant to §53 of *The Fourth Geneva Convention*, the taking of possession must be rendered "absolutely necessary by military operation". G. Von Glahn discussed the legality of taking possession of land, stating:

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

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

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

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

17. In *The Beit Sourik Case* and preceding case law, the Supreme Court held that the authority to take possession of land for military needs is anchored not only in regulations 43 and 52 of *The Hague Regulations* and in §53 of *The Fourth Geneva Convention*, but also in regulation 23(g) of *The Hague Regulations*. The Advisory Opinion of the International Court of Justice at the Hague determined that the second part of *The Hague Regulations*, in which regulation 23(g) is found, applies only during the time that hostilities are occurring, and that therefore it does not apply to the construction of the fence (paragraph 124). The International Court of Justice added that the third part of *The Hague Regulations* – which includes regulations 43 and 52 – continues to apply, as it deals with military government (§125). This approach of the International Court of Justice cannot detract from this Court's approach regarding the military commander's authority to take possession of land for constructing the fence.

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

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

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

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

> "as far as the need to preserve the security of the *area* and the security of the public in the *area* is concerned, the military commander's authority applies to all persons present in the boundaries of the *area* at any given time. This determination is a necessary deduction from the military commander's known and clear duty to preserve the security of the area and from his responsibility for preservation of the public peace in his area" (HCJ 2612/94 *Sha'ar v. The Commander of IDF Forces in the Judea and Samaria Area*, 48(3) P.D. 675, 679).

In another case I added:

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

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

19. Our conclusion is, therefore, that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*. It is not relevant whatsoever to this

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

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

In another case I stated:

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

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

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

20. Indeed, the legality of the Israeli settlement activity in the *area* does not affect the military commander's duty – as the long arm of the State of Israel – to ensure the life, dignity and honor, and liberty of every person present in the *area* under belligerent occupation (*see* Y. Shany "Capacities and Inadequacies: a Look at the Two Separation Barrier Cases" 38 *Isr. L. Rev.* 230, 243 (2005)). Even if the military commander acted in a manner that conflicted the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers. The ensuring of the safety of Israelis present in the area is cast upon the shoulders of the military commander (compare §3 of *The Fourth Geneva Convention*). Professor Kretzmer discussed this:

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

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

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

> "In our opinion, the Basic Laws grant rights to every Israeli settler in the area to be evacuated. This jurisdiction is personal. It is derived from the State of Israel's control over

> the area to be evacuated. It is the fruit of a view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation" (*Id.*, paragraph 80 of the opinion of the Court).

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

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

Thus it is, generally speaking. Thus it certainly is, when many of the Israelis living in the area do so with the encouragement and blessing of the government of Israel.

22. Of course, the scope of the human right of the Israeli living in the *area*, and the level of protection of the right, are different from the scope of the human right of an Israeli living in Israel and the level of protection of that right. At the foundation of this differentiation lies the fact that the *area* is not part of the State of Israel. Israeli law does not apply in the area. He who lives in the *area* lives under the regime of belligerent occupation. Such a regime is inherently temporary (*see* HCJ 351/80 *The Jerusalem District Electric Company v. The Minister of Energy and Infrastructure*, 35(2) P.D. 673, 690; *The Jami'at Ascan Case*, at p. 802; *The Beit Sourik Case*, paragraph 27; *The Gaza Coast Regional Council Case*, paragraph 8 of the opinion of the Court)). The rights granted to Israelis living in the area came to them from the military commander. They have no more than what he has - *Nemo dat quod non habet*. Therefore, in determining the substance of the rights of Israelis living in the *area*, one must take the character of the *area* and the powers of the military commander into account. This Court discussed that point in *The Gaza Coast Regional Council Case*, as it examined the impingement of the human rights of the Israelis evacuated from the Gaza Strip:

> "In determining the substance of the impingement and the rate of compensation, one must take into consideration the fact that the rights impinged upon are the rights of Israelis in territory under belligerent occupation. The temporariness of

> the belligerent occupation affects the substance of the right impinged upon, and thus also, automatically, the compensation for the impingement (*Id.,* paragraph 126 of the opinion of the Court).

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

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

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

23. Israel's duty to defend its citizens and residents, even if they are in the *area*, is anchored in internal Israeli law. The legality of the implementation of this duty is anchored in public international law, as discussed, in the provisions of regulation 43 of *The Hague Regulations*. In *The Beit Sourik Case*, this Court did not anchor the military commander's authority to erect the separation fence upon the law of self defense. The Advisory Opinion of the International Court of Justice at the Hague determined that the authority to erect the fence is not to be based upon the law of self defense. The reason for this is that §51 of the Charter of the United Nations recognizes the natural right of self defense, when one state militarily attacks another state. Since Israel is not claiming that the source of the attack upon her is a foreign state, there is no application of this provision regarding the erection of the wall (paragraph 138 of the Advisory Opinion of the International Court of Justice at the Hague). Nor does the right of a state to self defense against international terrorism authorize Israel to employ the law of self defense against terrorism coming from the *area*, as such terrorism is not international, rather originates in territory controlled by Israel by belligerent occupation. This approach of the International Court of Justice at the Hague is not indubitable (*see* R. Higgins *Problems and Process, International Law and How We Use It* 253 (1994); F. Frank "Terrorism and the Right of Self-Defense" 95 *A.J.I.L.* 839 (2001); J. J. Paust "Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond" 35 *Cornell Int'l L.J.* 533 (2002); A. C. Arend and

R. J. Beck *International Law and the Use of Force - Beyond the UN Charter Paradigm* (2000)). It stirred criticism both from the dissenting judge, Judge Buergenthal (paragraph 6) and in the separate opinion of Judge Higgins (paragraphs 33 and 34). Conflicting opinions have been voiced in legal literature. There are those who support the ICJ's conclusion regarding self defense (*see* I. Scobbie "Words My Mother Never Taught Me – In Defense of the International Court'" 99 *A.J.I.L.* 76 (2005). There are those who criticize the ICJ's views on self-defense (*see* M. Pomerance "The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial" 99 *A.J.I.L.* 26 (2005); Murphy "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse, Dixit* from the ICJ" 99 *I.J.I.L.* 62 (2005); Wedgwood "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self Defence" 99 *A.J.I.L.* 52 (2005); Gross "Combating Terrorism: Self-Defense, Does it Include Security Barrier – Depends Who You Ask" 38 *Corn. Int. L.J.* 569 (2005). We find this approach of the International Court of Justice hard to come to terms with. It is not called for by the language of §51 of the Charter of the United Nations (*see* the difference between the English and French versions, S. Rosenne 291 *General Course on Public International Law* 149 (2001)). It is doubtful whether it fits the needs of democracy in its struggle against terrorism. From the point of view of a state's right to self defense, what difference does it make if a terrorist attack against it comes from another country or from territory external to it which is under belligerent occupation? And what shall be the status of international terrorism which penetrates into territory under belligerent occupation, while being launched from that territory by international terrorism's local agents? As mentioned, we have no need to thoroughly examine this issue, as we have found that regulation 43 of *The Hague Regulations* authorizes the military commander to take all necessary action to preserve security. The acts which self defense permits are surely included within such action. We shall, therefore, leave the examination of self defense for a future opportunity.

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

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

> "His human dignity, the sanctity of his life, and his status as a free person . . . one must not take his life or his dignity as a person, and one must defend his dignity as a person . . . the military commander's duty according to the basic rule is twofold: first, he must refrain from acts which hurt the local residents. That is his 'negative' duty; second, he must take

> the action necessary to ensure that the local residents will not be hurt. That is his 'positive' duty" (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385, 394).

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

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

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

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

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

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

> "Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or

> threats thereof and against insults and public curiosity. . . . the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

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

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

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

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

> "We need not decide whether, and to what extent, the international conventions on human rights apply in the Judea and Samaria area . . . Suffice it to say that in the framework of the military commander's duty to exercise his discretion reasonably, he must also take into account the interests and rights of the local population, including the need to minimize the impingement of its freedom of movement; and that, respondents do not contest" (*The Bethlehem Municipality Case* (yet unpublished, paragraph 15)).

We shall adopt a similar approach. Indeed, we need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the *area*. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights (on this question *see* T. Meron *Human Rights and Humanitarian Norms as Customary Law*

(1989); *Human Rights and Humanitarian Law: The Quest for Universality* (D. Warner ed. 1997); J. Frowein "The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation" 28 *Isr. Y. H. R.* 1 (1998); D. Schindler "Human Rights and Humanitarian Law: Interrelationship of the Laws" 31 *Am. U. L. Rev.* 935 (1982)). However, we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.

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

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

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

> "The first need is military, and the other is a civilian-humanitarian need. The first concerns itself with providing for the safety of the military force holding the area, and the second – with responsibility for maintaining the well being of the residents. On the latter subject, the military commander is charged not only with preservation of the order and safety of the residents, but also with defense of their rights, and especially the constitutional human rights granted them. The concern for human rights stands at the center of the humanitarian considerations which the military commander must weigh" (*The Hess Case*, at p. 455).

29. These considerations – security needs on the one hand and the needs of the local population on the other – conflict each other. Thus is usually the case. Thus certainly is the case regarding the construction of the fence. What is the military commander to do in this situation? The answer is that he must create a balance between the conflicting considerations. Indeed, like in many other areas of law, the solution is not found in "all" or "nothing"; the solution is in locating the proper balance between the clashing considerations. The solution is not to assign absolute weight to one of the considerations; the solution is to assign relative weights to the various considerations, while balancing between them at the point of decision (*see* HCJ 953/83 *Levy v. The Commander of the Southern District of the Israeli Police*,

38(2) P.D. 393). "In performing his task of preserving order and safety, the commander of the area must ensure, therefore, the critical security interests on the one hand, and protect the interests of the civilian population in the area on the other . . . between these foci of responsibility, a proper balance is needed" (*The Hess Case,* at p. 456). Indeed, "The law of belligerent occupation recognizes the military commander's power to preserve the security of the area and to thus defend the safety of his state and its citizens. However, it makes exercise of this authority conditional upon the proper balance between them and the rights, needs, and interests of the local population" (*The Beit Sourik Case*, at p. 833).

4. Proportionality

30. How shall this balancing be performed? The answer is that this balancing raises no problem unique to belligerent occupation. It is a part of a general problem in law (*see* A. Barak *A Judge in A Democratic Society* 262 (2004)[Hebrew]). The solution to it is universal. It is found, *inter alia*, in general principles of law, including reasonableness and good faith. One of these basic principles which balances between a proper and fitting goal and the means for realizing it is the principle of proportionality (*see The Hess Case*, at p. 461; *The Bethlehem Municipality Case*, paragraph 15; *The Beit Sourik Case*, at p. 836; *The Gaza Coast Regional Council Case*, paragraph 102 of the opinion of the Court). This principle draws its strength from international law and from the fundamental principles of Israeli public law. The principle of proportionality is based on three subtests which fill it with concrete content. The first subtest calls for a fit between goal and means. There must be a rational link between the means employed and the goal one is wishing to accomplish. The second subtest determines that of the gamut of means which can be employed to accomplish the goal, one must employ the least harmful means. The third subtest demands that the damage caused to the individual by the means employed must be of appropriate proportion to the benefit stemming from it. Note that "at times there is more than one way to satisfy the proportionality demand. In such situations, a zone of proportionality (similar to the zone of reasonableness) should be recognized. Any means which the administrative body chooses from within the zone is proportional" (*The Beit Sourik Case*, at p. 840).

5. The Scope of Judicial Review

31. In a long line of judgments, the Supreme Court has determined the standards for the scope of judicial review of decisions and acts of the military commander in territory held under belligerent occupation. This judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law (§15(3) of Basic Law: The Judiciary). In determining the scope of judicial review, it was decided on the one hand that the Court does not substitute the discretion of the military commander with its own discretion. "It is but obvious that the Court does not slip into the shoes of the deciding military official . . . in order to replace the commander's discretion with the discretion of the Court" (Shamgar P. in HCJ 1005/89 *Aga v. The Commander of IDF Forces in the Gaza Strip Area*, 44(1) P.D. 536, 539). The Court does not examine the wisdom of the decision, rather its legality (*see* HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385, 393). This is appropriate from the point of view of separation of

powers. On the other hand it was determined that the Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiceable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. "Security considerations" or "military necessity" are not magic words (*see* HCJ 7015/02 *Ajuri v. The Commander of IDF Forces in the West Bank*, 56(6) P.D. 352, 375; HCJ 619/78 *"Al Taliyeh" Weekly v. The Minister of Defense*, 33(3) P.D. 505, 512; *The Jami'at Ascan Case*, at p. 809; HCJ 3114/02 *Barakeh, M.K. v. The Minister of Defense*, 56(3) P.D. 11, 16). This is appropriate from the point of view of protection of human rights.

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

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

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

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

> route's harm to the local residents is proportional. That is our expertise (*Id.*, at p. 846).

C. The Beit Sourik Case

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

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

34. The second question discussed by the Supreme Court regarded the legality of the orders issued in order to take possession of the land upon which the fence was built. The various seizure orders were examined on their merits. The Court found that there had been no defect in the process of issuing the orders or in the process of allowing the submission of appeals. The Court determined that the military commander is authorized – according to the international law which applies in the *area* – to take possession of land, needed for military purposes, subject to his duty to pay compensation. The Court relied upon regulations 23(g) and 52 of *The Hague Regulations*, and upon §53 of *The Fourth Geneva Convention*. The Court held that "the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers" (*Id.*, at p. 832).

35. The third question discussed by the Court was the legality of the route chosen for the construction of the separation fence. The Court discussed the need to achieve a balance between the security-military needs and the rights of the protected residents. Regarding the security-military needs, the Court stated that it assigns special weight to the military opinion of the military commander, with whom the responsibility for security lies. Regarding the rights of the protected persons, the Court relied upon the humanitarian law set out in *The Hague Regulations* and *The Fourth Geneva Convention*. In the discussion of the appropriate balance, a considerable part of the judgment was devoted to the question of proportionality. A comparison was made between the intensity of harm to security (without the security fence) and the harm to the local residents (caused by the security fence). The Court held that the test for proportionality is an objective one. "This is a legal question, the expertise for which belongs to the Court" (*Id.*, at p. 841). Against this background, the Court examined the five segments of the fence (according to the five seizure orders). Each fence segment was examined separately, as the separation fence's "proportionality varies according to local conditions" (*Id.*, at p. 846). Also examined, however, was the compound harm caused to the lives of the local population by all the fence segments together. Some of the fence segments were found to be proportionate. Others were found to be disproportionate. The basis of the determination of lack of proportionality was the third subtest of proportionality. The question posed by this subtest is whether "the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand[s] in reasonable (proper) proportion to the security benefit from the construction of the fence along that route" (*Id.*, at p. 850). According to that subtest, it was determined, regarding one of the fence segments, that the separation fence "undermines the delicate balance between the duty of the military commander to preserve security and his duty to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under international humanitarian law" (*Id.*, at p. 850). One fence segment was held to be disproportionate, since "the farmers' way of life is impinged upon most severely. The regime of licensing and gates, as set out by the military commander, does not solve this problem" (*Id.,* at p. 854). A third fence segment was found to be disproportionate, as it created "a veritable chokehold, which will severely stifle daily life" (*Id.*, at p. 855). Regarding all fence segments found to be disproportionate, the Court stated that "[t]he injury caused by the separation fence is not restricted to the lands of the residents and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population" (*Id.*, at p. 861). The result was that those parts of the fence found to be disproportionate were annulled.

36. After the judgment in *The Beit Sourik Case* was handed down, the issue went back to the military commander. He reexamined the route which had been under discussion in that case. He made alterations to it, which, in his opinion, implement the content of the judgment. Eight petitions against the legality of the new route are pending. In seven of them, the Arab residents are petitioning against the new route (HCJ 5683/04 *The Beit Sira Village Council et al. v. The Government of Israel*; HCJ 426/05 *The Bidu Village Council v. The Government of Israel*; HCJ 2223/05 *Abd el Wahab Kandil et al. v. The Military Commander of the Judea and Samaria Area*; HCJ

3758/04 *Agraib v. The Government of Israel*; HCJ 8264/05 *Hadur et al. v. The Military Commander of the Judea and Samaria Area*; HCJ 8265/05 *Saker Ibrahim Abdalla v. The Military Commander of the Judea and Samaria Area*; HCJ 8266/05 *Jamal v. The Military Commander*). In one of the petitions, an Israeli settlement petitions against the new route (HCJ 1767/05 *The Har Adar Local Council v. The Ministry of Defense*). These petitions are yet pending, as we have been asked to examine – in an expanded panel - the Advisory Opinion of the International Court of Justice at the Hague, and its effect upon the normative outline as set out in *The Beit Sourik Case*. It is to these questions which we now turn.

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

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

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

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

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

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

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

According to this description, approximately 975 km^2 (which are 16.6%) of the West Bank, containing 237,000 Palestinians, will end up between the Green Line and the barrier (220,000 of whom in East Jerusalem). When the entire route of the barrier is completed, an additional 160,000 Palestinians will be in isolated enclaves, with the barrier almost completely encircling communities and tracts of land. The planned route contains 320,000 Israelis (178,000 in East Jerusalem). As the report continues, the Secretary-General describes the format of the barrier. He notes that out of 180 km of the barrier already constructed or being constructed, 8.5 km are concrete walls, which the Israeli army sees as "gunfire protection walls". They are generally found where Palestinian population centers abut Israel, such as the towns of Qalqiliya and Tulkarm, and parts of Jerusalem. The report further describes the phases of construction of the barrier. Phase A runs 123 km (from the north end to Elkana). Much of Phase A construction deviates from the Green Line, and incorporates Israeli settlements. According to UN officials' estimations, approximately 56,000 Palestinians have been put into enclaves - encircled areas that open into the West Bank. Approximately 5300 Palestinians are in "closed areas" between the barrier and the Green Line. These people require permits or identity cards. The enclaves include Qalqiliya (population 41,606) and, to its south, a cluster of three villages with about 7300 residents. Phase B of the barrier is 45 km long, at the northern part of the Green Line to the Jordan Valley. It does not incorporate any settlements and does not create Palestinian enclaves. The Secretary-General 's report also describes the plan for the barrier in Jerusalem. Further on in the report, the route of the barrier from Elkana to the Ofer Camp military base is described. It includes two "depth barriers" that together create enclaves encompassing 29,000 acres and 72,000 Palestinians in 24 communities. The route deviates up to 22 km from the Green Line. It includes a number of large settlements, including about 52,000 settlers in the "Ariel salient". The government decision does not explain the nature of the barrier around this area. Last described is the southern part of the barrier, 115 km long, which cuts several kilometers into the West Bank, to encompass the Gush Etzion settlement bloc and the settlement of Efrat. An enclave is created with around 17,000 Palestinians. The construction of the fence in this area has not yet begun.

39. The Secretary-General's report describes the way in which land is requisitioned to build the barrier, including the possibility of petitioning the High Court of Justice. It is noted that the orders expire on December 31 2005, but that they are renewable. The report also describes the orders closing the area between the Green Line and the barrier ("Closed Areas"), pursuant to which there is no entrance into the closed area, and no one is allowed to be present in it. This order will affect 73 km^2 and 5300 Palestinians, living in 15 communities. The order introduces a new system of residency status in the closed area. Only upon issuance of a permit or ID card by IDF will residents of the closed area be able to remain in it. Israeli citizens and residents can remain in the closed area and move freely to the closed area, from it,

and within it, with no need for a permit. At the date the report was written, most residents of the closed area had received permits for one month, three months, or six months. All those that have a permit enter and exit through gates which open for 15 minutes, three times a day. It is mentioned that if the Palestinian residents are denied regular access to their land, jobs and services, there is a concern that they will leave the area.

40. The final part of the Secretary-General's report examines the humanitarian and socio-economic impact of the barrier. According to the report, the barrier appears likely to deepen the fragmentation of the West Bank, which began with the closure system imposed after the outbreak of hostilities in September/October 2000. The barrier dramatically increased the damage to the communities resulting from the closure system. According to a report of the Palestinian Central Bureau of Statistics, the barrier has separated 30 localities from their health services, 22 localities from their schools, 8 localities from their primary water sources, and 3 localities from the electricity network. The report states that the Palestinians living in the enclaves are facing some of the harshest consequences of the barrier's construction and route. Thus, for example, the city of Qalqiliya is encircled by the barrier, with entrance and exit possible from only one gate. Thus the town is isolated from almost all its agricultural land. The villages surrounding it are separated from their markets and services. Thus, for example, at the UN hospital in Qalqiliya, a 40% drop in caseloads has been noted. The report further notes that completed barrier sections have had a serious impact on agriculture. Tens of thousands of trees have been uprooted. Farmers, separated from their land, and often also from their water sources, must cross the barrier via the controlled gates. Recent harvests have perished due to the irregular opening and closing times of the gates. According to the Secretary-General's report, the barrier has severely restricted movement and access for thousands of urban Palestinians in Jerusalem. The wall at Abu Dis has already affected the access to jobs and essential social services, notably schools and hospitals. The north part of the barrier in Jerusalem has damaged long standing commercial and social connections of tens of thousands of people. This phenomenon will be repeated along much of the route through Jerusalem. The report states that some Jerusalem identity card holders are outside the barrier, and some of West Bank identity card holders are within the barrier. This raises concerns about the future status of residency for Palestinians in occupied East Jerusalem under current Israeli laws. The report states that if Israel persists in construction of the barrier, some of its economic and humanitarian impact can be limited if Israel allows regular movement through a series of 41 gates to Palestinians living east of the barrier who need to access their farms, jobs, or services in the closed area. Such access cannot compensate for incomes lost from the barrier's destruction of property, land, and businesses. This raises concerns over violations of the rights of the Palestinians to work, health, education, and an adequate standard of living. At the end of the report appears a short summary of the positions of the government of Israel and of the PLO.

41. The Secretary-General's report was prepared before the General Assembly resolution. After that resolution, the Secretary-General added a written statement updating his report (on January 29 2004). In the Secretary-General's written statement, the Secretary-General repeated some of the data from his first report, and gave an update regarding the developments in the three months which had passed since it was filed. The statement reported that at the time of its writing, 190 km of the

barrier had been completed, and two main crossing terminals had been built. The Secretary-General's written statement surveys the various segments of the barrier, according to the phase of construction to which they belong. Phase A, according to the updated data, 150 km long, includes a double barrier around the Baka Sharqiya enclave. The written statement notes, regarding this enclave, that according to the original route completed in July 2003, the barrier was erected east of the Green Line, such that the enclave included about 6700 Palestinians. At the end of November 2003, Israel began to build a new barrier along the Green Line, west of the enclave. Part of the new barrier passes through the town of Nazlat Issa, where a wall 800 m long has been built. The United Nations has been informed that the east side of the barrier will eventually be pulled down. The Secretary-General's written statement further states than south of Tulkarm, on the Green Line, a major crossing terminal is being built, modeled after the Karni crossing in the Gaza Strip. The written statement notes that Israel has removed the permanent checkpoint at the east entrance to Qalqiliya. In addition, in mid January 2004, construction started on underpasses connecting Qalqiliya to Habla, under the access road to Alfei Menashe. Regarding phase B, the written statement mentions the completion of barrier segments running along the Green Line or adjacent to it, from the Gilboa Mountains to the Al Mutilla valley. In January 2004, construction began on an additional segment, in the direction of the Jordanian border. A third segment is planned to run south and away from the Green Line, toward the Taysir village. The written statement notes that Israeli officials informed the UN that this segment may not be completed. The written statement further updates regarding construction of the crossing terminal at Jalameh, north of Jenin, which is to serve as the primary point of entry between Israel and the northern West Bank. The written statement further describes phase C of the barrier, including its three sub-phases (phase C1 – from Elkana to the Ofer Camp military base; phase C2 – the Ariel salient; and phase C3 – "the depth barriers"). Construction has begun of 4 km of phase C1, mostly near the Green Line, out of 40 planned kilometers. The remainder of the planned route deviates from the Green Line, reaching up to 7 km inside the West Bank. Phase C3 includes two planned "depth barriers", up to 9 km inside the West Bank – one east of the Ben Gurion airport and the other along the planned highway 45. It was noted that the exact components of the "depth barriers" had not yet been determined, but that if they are constructed, they will create two enclaves containing 72,000 Palestinians living in 24 communities. The UN was informed that this segment will to be the last to be built.

42. A considerable part of the Secretary-General's written statement is devoted to the barrier in East Jerusalem. The statement mentions that construction of the barrier in the southeast of the city had begun at the end of November 2003, along the municipal boundary determined by Israel. The barrier runs 6 km beyond the Green Line, from El Ezaria to Har Homa. In residential areas, like El Ezaria, the wall is built to a height of 9 m. This segment cuts El Ezaria off from Jerusalem, and splits the village of Abu Dis into two. At least 35,000 people will live east of the barrier along this segment, which has no gates. The entrance into Jerusalem by those with Jerusalem identity cards will be allowed via a checkpoint beneath the eastern slope of the Mount of Olives. Another concrete wall has been constructed south of Abu Dis. The Secretary-General's written statement also spoke of a number of roads which are planned or being constructed adjacent to the barrier around Jerusalem, which will result, *inter alia*, in the separation of Palestinian traffic from Israeli traffic. The written statement concludes with a description of the obstacle planned in the north of

Jerusalem, which will separate the Al-Ram village from Jerusalem. The UN was informed that changes in the route of highway 45 in this area are being considered. Finally, the written statement noted that the government of Israel was continuing to erect the barrier along the route approved by the cabinet (on October 1 2003). Moreover, noted the written statement, additional components, such as crossing terminals, roads, underpasses, and gates were being constructed.

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

44. The Dugard report opens and closes with the finding that the fact must be faced, that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security. The report describes the process of building the wall. It points out that Palestinians between the wall and the Green Line will effectively be cut off from their land and workplaces, schools, health clinics, and other social services. As a result, many Palestinians are leaving their homes and moving into the Palestinian territory beyond the wall. There is a real concern of the creation of a new generation of refugees or internally displaced persons. In the opinion of the *rapporteur*, the construction of the wall is nothing other than *de facto* annexation of territory. The construction of the wall should be seen in the context of the building of settlements and the annexation of East Jerusalem. Settlements in East Jerusalem and the West Bank are the principal beneficiaries of the wall, and approximately half of the 400,000 settler population will be incorporated on the Israeli side of the wall. This data, along with the high cost of the wall, confirm the permanent nature of the wall. Therefore, beyond the fact that the wall violates Palestinians' freedom of movement, restricts their access to education and health facilities, and results in the unlawful taking of Palestinian property, the wall also violates two of the most fundamental principles of international law: the prohibition on the forcible acquisition of territory, and the right to self determination. The construction of the wall creates facts on the ground. Despite the refrain from use of the term, the wall is annexation for all intents and purposes. Thus the prohibition against forcible acquisition of territory – a prohibition mentioned in many international conventions, including the UN Charter - is violated. This prohibition applies irrespective of whether the territory is acquired as a result of an act of aggression or in self-defense. The building of the wall violates the Palestinians' right to self determination. The realization of the right to self determination requires territorial sovereignty. The construction of the wall substantially reduces the already small territory within which the Palestinians can exercise their right to self determination. Israel responded to the Dugard report (on April 2 2004).

45. Ziegler calls the security fence an "apartheid fence". The building of the wall constitutes a violation of the obligation to respect the Palestinians' right to food, since it cuts the Palestinians off from their agricultural land, water wells, and other means of subsistence. The report mentions that the fence route deviates considerably from

the Green Line, and is a *de facto* annexation of territory on Israel's part. The report presents data from the "B'tselem" organization, according to which 72,200 Palestinians in 36 communities will be cut off from their lands. 128,500 people in 19 communities will be put in enclaves and almost completely imprisoned by the winding route of the wall, including 40,000 residents of Qalqiliya. 11,700 people in 13 communities will be trapped in military closed areas between the wall and the Green Line, cut off from the Palestinian areas, but forbidden from entering Israel. As a result of the construction of the wall, Israel will effectively annex most of the west aquifer system which provides 51% of the West Bank water resources. As a result of their detachment from means of existence, many residents will be forced to leave their homes. According to the estimate, between 6000 and 8000 residents have already left the area of Qalqiliya. The report refers to the government's position that residents will be allowed to appeal the expropriation of lands. However, the writer notes that all appeals made to the military Appeals Committee at the time of writing have been rejected, although the area expropriated was reduced in some of the cases. In any case, the report adds, the speed at which the wall is being built (work continues 24 hours a day) makes it difficult to allow for proper judicial process. The *rapporteur* concludes with a finding that if the wall continues to be built as planned, it will bite off almost half of the area remaining for the future Palestinian State. Thus, the possibility of establishing a viable Palestinian state will be eliminated, and the Palestinians right to food will be denied. Israel responded to the Zeigler report (on November 26 2003).

2. The ICJ's Jurisdiction and Discretion

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

3. The Legality of the Fence in International Law

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

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

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

upon the Palestinian's right to self determination, a right which Israel must respect. Judge Higgins, in her separate opinion, criticized the ICJ's finding that the fence impedes upon the Palestinian's right to self determination. Judge Kooijmans noted, in his separate opinion, that the ICJ would have done well to have left the question of self determination to the political process.

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

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

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

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

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

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

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

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

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

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

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

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

1. The Legal Status of the Advisory Opinion

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

1920-1996 1754 (3rd ed. 1997)). The ICJ's interpretation of international law should be given its full appropriate weight.

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

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

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

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

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

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

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

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

4. The Difference in the Factual Basis

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

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

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

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

> "In his affidavit he stated that 'the objective of the security fence is to allow effective confrontation of the array of threats stemming from Palestinian terrorism. Specifically, the fence is intended to prevent the unchecked passage of residents of the *area* into Israel and their infiltration into certain Israeli communities located in the *area*. The choice of the topographic route was derived from the security consideration' (affidavit of April 15 2004, sections 22-23). The commander of the *area* detailed his considerations behind the choice of the route. He noted the necessity that the fence pass through territory that topographically controls its surroundings; that it pass through a route as flat as possible, which will allow surveillance of it; and that a 'security zone' be established which will delay infiltration into Israel. These

> are security considerations *par excellence*. In an additional affidavit which was submitted to us, Major General Kaplinsky testified that 'it is not a permanent fence, but rather a fence erected temporarily, for security needs' (affidavit of April 19 2004, section 4). We have no reason to give this testimony less than its full weight, and we have no basis for not believing in the sincerity of the military commander's testimony" (p. 830).

We concluded our discussion on this question, stating:

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

63. The security-military necessity is mentioned only most minimally in the sources upon which the ICJ based its opinion. Only one line is devoted to it in the Secretary-General's report, stating that the decision to erect the fence was made due to a new rise in Palestinian terrorism in the Spring of 2002. In his written statement, the security-military consideration is not mentioned at all. In the Dugard report and the Zeigler report there are no data on this issue at all. In Israel's written statement to the ICJ regarding jurisdiction and discretion, data regarding the terrorism and its repercussions were presented, but these did not find their way to the opinion itself. This minimal factual basis is manifest, of course, in the opinion itself. It contains no real mention of the security-military aspect. In one of the paragraphs, the opinion notes that Israel argues that the objective of the wall is to allow an effective struggle against the terrorist attacks emanating from the West Bank (paragraph 116). That's it. In another paragraph, the ICJ discusses the force of §53 of *The Fourth Geneva Convention*, according to which it is prohibited for an occupier state to harm local property, "except where such destruction is rendered absolutely necessary by military operations". Regarding that, the ICJ stated:

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

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

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

The ICJ concluded its position, holding:

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

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

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

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

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

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

> "[To] reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant

> facts bearing directly on issues of Israel's legitimate right of self defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subject, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings basely touches on that subject" (paragraph 3).

In his separate opinion, Judge Kooijmans stated his opinion that:

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

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

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

Judge Owada quotes the statement in the Advisory Opinion that, on the basis of the material before the ICJ, it is not convinced that the fence route is necessary for achieving the security objectives (pargraph 137 of the Advisory Opinion), and adds:

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

65. We need not determine, nor have we a sufficient factual basis to determine, who is to blame for this severe oversight. Is it the dossier of documents submitted to the ICJ? Is it the oversight of the State of Israel itself, or was it the ICJ's unwillingness to use the data submitted to it by Israel and other data in the public domain? Or maybe it is the method of examination, which focused on the fence as a totality, without examining its various segments (see paragraph 70, infra)? Whatever the reason may be, the reality is that the ICJ based its opinion on a factual basis regarding impingement of Palestinian residents' rights, without the factual basis

regarding the security-military justification for this impingement. In contrast, in *The Beit Sourik Case*, an expansive factual basis was laid before the court, both regarding the impingement upon the local residents' human rights and regarding the security-military needs. This comprehensive factual basis made it possible for the Court to decide that certain parts of the separation fence violate the rules of international law, and that other parts of the fence do not violate those rules. Thus, we have the first explanation for the difference between the conclusions of the ICJ and the conclusions of this Court in *The Beit Sourik Case*.

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

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

Later in the judgment the Court held:

> "The damage caused by the separation fence is not restricted

> to the lands of the residents and to their access to these lands. The damage is of a wider scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the ties between the local residents and the urban centers (Bir Nabbala and Ramallah). These ties are difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence" (p. 861).

Against this background - and balancing with the security-military needs – it was decided which fence segments illegally violate the rights of the local population according to international law, and which fence segments are legal.

67. The ICJ based its factual findings regarding impingement upon the local residents' rights, upon the Secretary-General's report and his supplemental documents, and upon the Dugard report and the Zeigler report (see paragraph 133 of the opinion). In their arguments before us, State's counsel noted that the information relayed to the ICJ in these reports is far from precise. We shall discuss some of these arguments of the State:

(a) The ICJ quotes data relayed by a special committee, according to which 100,000 dunams of agricultural land were seized for construction of the first phase of the obstacle. The State contends that this figure is most exaggerated. According to its figures, the area seized for the construction of phase A of the fence is 8300 dunams, 7000 of which is private land.

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

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

(d) A number of paragraphs in the opinion discussed the city of Qalqiliya. The ICJ quotes the Dugard report, according to which the city is sealed off from all sides. Residents are allowed to exit and enter through one military gate which is open from 7am to 7pm. This conclusion contradicts the Secretary-General's written statement, according to which there is no checkpoint at the entrance to the city. The State adds that two open access roads now lead to the city of Qalqiliya. Part of the obstacle east of the city was dismantled. Parts of the Dugard report and the Zeigler report, according to which 6000 to 8000 residents left the city of Qalqiliya and 600 stores were closed in that city, were mentioned in the opinion. The State contends that since

April 2004, approximately 90% of the stores which closed have been reopened. Regarding residents' leaving, in the State's opinion, it is very difficult to reach a clear cut conclusion on this issue. The ICJ's opinion held, on the basis of the Secretary-General's report, that as a result of the building of the wall, a 40% drop in caseload at the UN hospital in Qalqiliya had been recorded. From a graph submitted to us by the State it appears that the number of hospitalization days in 2004 is higher than that of 2002. The conclusion is that it cannot be said that the separation fence brought to a decrease in the number of hospitalized patients. The graph also shows that in 2003 there was a considerable rise in the number of beds in hospitals. In addition, a new private hospital was opened in Qalqiliya in 2003, and the Palestinian Authority also opened a hospital in 2002. In the opinion of the State, it is reasonable to assume that the opening of the new hospitals affected the caseload of the UN hospital in Qalqiliya.

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

69. The difference in the factual bases was affected by the difference between the proceedings which took place in the ICJ and the proceedings in *The Beit Sourik Case* (*see Weston*, at p. 24). In the proceedings before the ICJ, the injured parties did not

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

70. We would especially like to point out an important difference in the scope of examination. Before the ICJ, the entire route of the fence was up for examination. The factual basis which was laid before the ICJ (the Secretary-General's report and written statement, the reports of the *special rapporteurs*) did not analyze the different segments of the fence in a detailed fashion, except for a few examples, such as the fence around Qalqiliya. The material submitted to the ICJ contains no specific mention of the injury to local population at each segment of the route. We have already seen that this material contains no discussion of the security and military considerations behind the selection of the route, or of the process of rejecting various alternatives to it. These circumstances cast an unbearable task upon the ICJ. Thus, for example, expansive parts of the fence (approximately 153 km of the 763 km of the entire fence, which are approximately 20%) are adjacent to the Green Line (that is, less than 500 m away). An additional 135 km – which are 17.7% of the route – are within a distance of between 500 m and 2000 m from the Green Line. Between these parts of the route and the Green Line (the "seamline area") there are no Palestinian communities, nor is there agricultural land. Nor are there Israeli communities in this area. The only reason for establishing the route beyond the Green Line is a professional reason related to topography, the ability to control the immediate surroundings, and other similar military reasons. Upon which rules of international law can it be said that such a route violates international law? Other parts of the fence are close to the Green Line. They separate Palestinian farmers and their lands, but the cultivated lands are most minimal. Gates were built into the fence, which allow passage, when necessary, to the cultivated lands. Can it be determined that this arrangement contradicts international law *prima facie*, without examining, in a detailed fashion, the injury to the farmers on the one hand, and the military necessity on the other? Should the monetary compensation offered in each case, and the option of allocation of alternate land (as ruled in *The Beit Sourik Case* (*Id.*, at p 860)) not be considered? There are, of course, other segments of the fence, whose location lands a severe blow upon the local residents. Each of these requires an exacting examination of the essence of the injury, of the various suggestions for reducing it, and of the security and military considerations. None of this was done by the ICJ, and it could not have been done with the factual basis before the ICJ.

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

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

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

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

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

73. Our point of departure was that the basic normative foundation upon which the ICJ and the Supreme Court based their judgments is a common one. Despite that, the two courts reached different conclusions. The ICJ held, in its opinion, that the route of the wall contradicts international law, as a majority of it passes through the West Bank. The Supreme Court in *The Beit Sourik Case* ruled in its judgment that a sweeping answer to the question of the legality of the fence according to international law should not be given, and that each segment of the fence route should be examined separately. Against this background, it was decided in *The Beit Sourik Case*, that part of the route discussed in that petition sits well with international law and that part of it violates international law. We asked ourselves: what is the explanation for this difference? We answered that question by saying that the difference stems from the factual basis that was laid before the ICJ, which was different from that which was laid before the Court in *The Beit Sourik Case*. We also noted that the difference in the model of proceedings also contributed to the different results. Against this background, we must answer the following question: what is the effect the Advisory Opinion of the ICJ on the future approach of the Supreme Court on the question of the legality of the separation fence according to international law, as determined in *The Beit Sourik Case*?

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

F. The Separation Fence at the Alfei Menashe Enclave

1. The Enclave

75. The Alfei Menashe enclave is an 11,000 dunam area (see the appendix to this judgment). It includes Alfei Menashe (population 5650) and five Palestinian villages (Arab a-Ramadin (population approximately 180); Arab Abu Farde (population approximately 80); Wadi a-Rasha (population approximately 180); Ma'arat a-Dara (population approximately 250) and Hirbet Ras a-Tira (population approximately 400); total population of the five villages is approximately 1200). The enclave is located on the "Israeli" side of the separation fence. It is part of the seamline area. The enclave and Israel are territorially contiguous, meeting at highway 55. Exit from the enclave into the *area*, by car and foot, is through one crossing ("crossing 109") to

Qalqiliya. This crossing is open at all hours of the day. The separation fence also includes three gates (the Ras a-Tira gate; the South Qalqiliya gate; and the Habla gate). At first, we shall discuss petitioners' arguments and the state's response in detail. Then, we shall examine the arguments and the answers to them according to the standards determined in *The Beit Sourik Case*.

2. Petitioners' Arguments

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

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

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

provide them and their agricultural lands with water. The fence and associated permit system make access to regional civil services very difficult, and damage economic potential and existing social structure.

79. According to the expert opinion, the fence has a substantial effect on the Palestinian villages' continued functioning in all areas of life. As far as economy and employment are concerned, hundreds of dunams of the villages and thousands of dunams of the cultivated agricultural lands, mostly olive groves, were expropriated for the construction of the fence. The fence cut off farmers' access to markets in Habla and Qalqiliya. It also decreased access to all sources of employment in the West Bank. In the area of employment there is, therefore, a substantial rise in unemployment, and a trend of finding undesirable jobs requiring no skills in Alfei Menashe. In the area of education, the fence makes students' access to schools in Habla and Ras Atiyeh very difficult, and within a year a substantial rise in dropout level was noted in the education system. In the area of health, only partial and irregular health services are now provided in the villages. The fence cut the villages off from health and medical services, and access of emergency vehicles from the Habla area has been cut off. In terms of family and social ties as well, the fence's damage has been severe. The permit regime cuts enclave residents off from their relatives and friends, from ceremonies and family events, and threatens to disenfranchise them of their status and connections in Palestinian society. As time goes on, this is likely to lead to abandonment of the villages and the cessation of the present communities' existence.

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

Israel. Cutting the ties between the residents living in the enclave and those living beyond it creates a new geopolitical entity.

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

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

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

3. The State's Response

84. In its first response to the petition (of September 9 2004), respondents announced that as a result of the judgment in *The Beit Sourik Case*, staff work is being done in order to examine the patterns of life in the seamline area. They announced that there is a most reasonable possibility that there will be alterations to the arrangements in the seamline area. Improvements in the arrangements will decrease the injury to the residents and affect the balancing point between the rights

of the residents and the security needs. Respondents requested that the proceedings in the petition be stayed, in order to allow them to formulate their position. In these circumstances, it was contended that the petition, as a petition demanding the dismantling of the fence, is *prima facie* an early petition, and that it is appropriate to wait for the formulation of final decisions. However, respondents emphasized that the decisive need for the existence of a fence in this area leads to the conclusion that, in any case, no order to dismantle the fence in the Alfei Menashe area should be issued.

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

86. On the merits, respondents argue that there is no justification for altering the Alfei Menashe route. The fence indeed changed the reality of life for the residents of the villages left on the Israeli side of the fence. This stems from the decisive security need to defend the citizens of Israel against terrorist attacks. The injury to the residents of the villages is proportionate, considering the decisive security need to leave the fence where it is. Respondents noted that just prior to construction of the fence, the military commander's civil administration collected data regarding the enclave residents and their way of life, and that on the basis of the collected data, they issued permits to the residents of the enclave which enable them to live in the enclave and move to the *area* from it, and back. Today, there are approximately 1200 permits in force, held by the residents of the enclave. Respondents informed us that the permits are soon to be replaced with permanent identity cards for seamline area residents, which will be valid as long as the declaration is in force. Approximately 1065 entrance permits have also been issued, for workers of international organizations, infrastructure workers, traders, educators, medical services, and similar purposes. The Commander of IDF Forces in the *area* recently decided that the various permits will be replaced by a uniform permit, valid for a two year period (the

current permits are valid for a period up to three months). The permits allow entry into the enclave through four gates.

87. In their response, respondents discussed a list of infrastructure and logistic improvements intended to relieve the situation of the residents of the villages to the extent possible. First, crossing 109, located at the north end of the enclave near the eastern entrance to Qalqiliya, is open constantly, all day long. Permanently on site is a representative of the coordination and liaison administration, whose role is to handle problems which may arise. Second, the eastern entrance to Qalqiliya (DCO Qalqiliya) is open to free movement, and at present, no checkpoint operates there (except in the case of a security alert). Thus, those wishing to enter or exit Qalqiliya are spared the prolonged wait at the city entrance. Exit from the enclave through passage 109 and through the entrance into Qalqiliya are thus free. Third, close to the time the petition was submitted, an underpass connecting Habla to Qalqiliya was opened under highway 55. Fourth, The Commander of IDF Forces decided to keep the agricultural fence at Ras a-Tira, which connects the enclave to Habla and Ras Atiyeh, open longer, so that the gate will be open to travel by foot and car during most hours of the day. For that purpose, a specialized military force will be allocated, which will also ensure more precise opening hours of the two additional agricultural gates. Fifth, respondents are running transportation, funded by the civil authority, of all pupils living in the enclave who go to school beyond it. Sixth, a permanent staff of doctors, equipped with entrance permits, visits the enclave villages through crossing 109, according to a regular schedule. In the case that urgent medical care is needed, it is possible to travel to Qalqiliya and other areas through crossing 109, which is open at all hours of the day. Seventh, the coordination and liaison administration, in coordination with an international organization by the name of ANERA, commenced a project to connect the villages of Ras a-Tira and Hirbet a-Daba to the water system. The rest of the villages also enjoy regular supply of water. Eighth, approval has been given, in principle, for a plan to improve the access road from the villages to crossing 109 and for a plan to improve the road which goes along highway 55, in order to make it passable and safe for wagons.

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

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

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

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

91. Respondents claim that the military commander is authorized to defend the Israeli communities in the *area* both pursuant to international law and pursuant to internal Israeli administrative and constitutional law. Israel's right – which is also her duty – to defend her citizens, is the fundamental legal source which grants it the right and the duty to defend its citizens living in the *area*. Respondents are of the opinion that the construction of the obstacle satisfies the restrictions in the law of belligerent occupation. The military commander is required, pursuant to rules of international law, to protect all present in the area held under belligerent occupation, and that includes Israeli citizens living in the *area* or traveling on the roads in the *area*. The duty of the military commander to protect those present in the occupied territory is not limited to those defined as "protected" in *The Fourth Geneva Convention*. This duty is not conditional upon the legal status of the Israeli communities in the *area* in terms of international law, which will be decided in the permanent status agreement between Israel and the Palestinian Authority. Respondents note that the political agreements between Israelis and Palestinians also leave the authority to protect the Israeli citizens in the *area* in the hands of the State of Israel, until the issue is arranged in the permanent status agreement. The internal security legislation in the *area* also reflects Israel's responsibility for the security of the Israelis in the *area*. On this point, respondents refer to §6 of the Interim Agreement Implementation Proclamation (Judea and Samaria)(No. 7). An additional source of the duty to protect the Israelis in the *area* is the Israeli administrative law and the Basic Laws of the State of Israel. The state claims that the military commander is obligated to protect the basic rights of Israeli citizens (both those pursuant to the Basic Laws and those stemming from "common law"). Exercise of the authority must be proportionate. The military commander is therefore authorized to protect Israeli citizens in the *area*, and even to impinge upon other rights for that purpose, as long as the impingement is a proportional one which stems exclusively from the security purpose.

4. Petitioners' Response to Respondents' Response

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

5. The Alfei Menashe Local Council's Response

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

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

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

7. The Preliminary Arguments

95. In its response, the state raised three preliminary arguments. The first is a claim of laches (delay) in petitioning the Supreme Court. The state argues that construction of the separation fence in the Alfei Menashe enclave was concluded approximately a year and a half prior to the filing of the petition. Petitioners could have attacked the land seizure orders which were served to them at the end of 2002 and the beginning of 2003. At the same time, surveys along the planned route were held for the residents, and they were given the opportunity to appeal the route. Even after that – previous to or during fence construction work – it was possible to petition this Court. In petitioners' response to the state's response, petitioners state that their awareness of the damage came about only after daily life in the enclave entered its regular pattern. In any case, due to the severe affront to the rule of law, the laches claim should not be accepted. In our opinion, petitioners are right. We accept their claim that they could not assess the scope of the impingement upon their rights before life in the Alfei Menashe enclave entered a regular pattern. Only when the permit regime had been formulated; only when the opening and closing hours of the gates had been set; only when the cutoff from health, education, and commerce institutions in Qalqiliya and in Habla began to take their toll – only then was it possible to know what the scope of the damage was. In fact, even at the time the petition was filed, the pattern of life in the enclave had not yet reached its final format. Respondents themselves announced that there is a most reasonable possibility that there will be alterations to the arrangements in the seamline area, and in that context they even claimed that "the petition is early". In this state of affairs, the fact that petitioners waited for the formulation of the regular pattern of life in the seamline area does not provide a basis for a claim of laches.

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

97. The third preliminary argument is that petitioners did not make a direct plea to respondents before their petition to the Court. This argument is rejected. As it appears from the material before us, petitioner no. 7 (The Association for Civil Rights in Israel) wrote (on March 10 2004 and July 19 2004) to the Prime Minister and the Minister of Defense. In these pleas, that petitioner raised the main points of its

opposition to the fence route at the Alfei Menashe enclave, emphasizing the severe injury to the residents of the villages (in the first letter) and the disproportionate level of injury (in the second letter, written after *The Beit Sourik Case*). This is sufficient to satisfy the direct plea requirement.

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

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

> "The decision to erect the separation fence was made on April 14 2002 by the Council of Ministers on National Security, in order 'to improve and reinforce the operational assessments and capabilities in the framework of confronting terrorism, and in order to frustrate, obstruct, and prevent infiltration of terrorism from Judea and Samaria into Israel'. This decision was approved after a government debate on June 23 2002, in which the decision was made to erect a 116 kilometer long obstacle, particularly in sensitive areas through which terrorists – sowing destruction and blood – often passed in order to commit terrorist attacks. The final route of the obstacle was selected by security and military officials, in cooperation with relevant professionals, and was approved by the Committee of Ministers on National Security on August 14 2002.
>
> The seamline area is intended to block passage of suicide bombers and other terrorists into the State of Israel. According to the view of the security and military officials responsible for this subject, the creation of a seamline area is a central component of the fight against terrorism originating in the Judea and Samaria area. To the extent that the obstacle will not create a hermetic seal against terrorist infiltration, the purpose of the obstacle is to delay the infiltration into Israel for a period of time which might allow security forces to reach the point of infiltration, and thus create a geographic security area which will allow the combat forces to pursue the terrorists before they enter the state.

> There is no doubt that the creation of a seamline area injures the Palestinian residents in that area. Agricultural land is being and will be seized for construction of the obstacle, which is liable to harm residents' ability to utilize their lands; their access to the land is also liable to be impeded. Such harm is a necessity of the hour, and it is a result of the combat situation in the *area* which has continued for more than two years – a situation which has cost many human lives" (HCJ 8172/02 *Abtasam Muhammad Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished)).

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

100. On the basis of all the material at our disposal, we have reached the conclusion that the reason behind the decision to erect the fence is a security consideration, of preventing terrorist infiltration into the State of Israel and into the Israeli communities in the *area*. The separation fence is a central security component in Israel's fight against Palestinian terrorism. The fence is inherently temporary. The seizure orders issued in order to erect the fence are limited to a definite period of a few years. So it also appears from the government decisions, whose reliability we have no basis for doubting, including the decision of February 20 2005, which brought about a change in the separation fence route as a result of the judgment in *The Beit Sourik Case.* This change was especially apparent in phases C and D of the separation fence, which had not yet been constructed, or was in stages of construction. So it also appeared from the affidavits submitted to us and from the rest of the material at our disposal. Thus, for example, according to the figures of the General Security Service, in the (approximately) 34 months between the outbreak of the armed conflict and until the

completion of the first part of the separation fence, the terrorist infrastructure committed 73 mass murder attacks in the Samaria area, in which 293 Israelis were killed, and 1950 injured. Since the completion of the separation fence – that is, the year between August 2003 and August 2004 – the terrorist infrastructure succeeded in committing five mass murder attacks, in which 28 Israelis were killed and 81 injured. Comparison between the year prior to commencement of work on the separation fence (September 2001 – July 2002) and the year after construction of the fence (August 2003 – 2004) indicates an 84% drop in the number of killed and a 92% drop in the number of wounded. The respondents brought to our attention an example of the security efficacy of the separation fence. The Islamic Jihad organization wished to detonate a suicide bomber from the Jenin area at a school in Yokneam or Afula. The suicide bomber and his guide left Jenin in the early morning, and intended to reach Wadi Ara, and from there, Afula or Yokneam. In the pre-separation fence era the terrorists' job was easy. The seamline area was wide open, and one could easily reach Wadi Ara. This route is now sealed. Therefore, the terrorist had to travel to Wadi Ara through a much longer route, through an area where the separation fence had not yet been constructed, a detour which lengthened the route from 27 km to 105 km. The long detour allowed the security forces to gather intelligence, arrange the forces and locate the two terrorists *en route*. After they were caught, the explosive belt was located, and the attack was avoided. This is only one of various examples brought to our attention. They all indicate the security importance of the fence and the security benefit which results from its construction.

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

9. The Scope of the Injury to the Local Residents

102. Respondents accept that "the security fence erected in the Alfei Menashe area altered the reality of life for the residents of the villages west of the fence" (paragraph 44 of the supplementary statement of December 5 2004). There is disagreement between petitioners and respondents regarding the scope of this injury. We shall discuss a number of central components of the fabric of life, including education, health, employment, movement, and social ties.

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

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

105. Petitioners claim that the construction of the separation fence had a severe effect upon the employment status of the residents of the enclave villages. About ten percent of the lands of the village of Ras a-Tira are on the other side of the fence. Eight dunams of hothouses belonging to residents of the village of Wadi a-Rasha are located on the other side of the separation fence. The residents of the village of Arab a-Ramadin make their living primarily from growing sheep. The fence separates the village and its pasture grounds. The residents of the village of a-Daba make their living from agriculture (production of olive oil, and vegetable and other seasonal crop growing). The fence separates the village from its agricultural lands. The residents of the village of Abu-Farda made their living from cattle and goat commerce. After construction of the fence, the village was cut off from the pasture grounds and the customers, who are unable to reach it. The residents of the village had no choice but to sell the cattle. Some residents of the villages worked as Palestinian Authority officials in Qalqiliya. Due to the separation fence, they have difficulty reaching their place of work. Many of the workers who worked in agriculture lost their jobs, due to their inability to reach their jobs at the times necessary for agriculture. They have found jobs as workers in Alfei Menashe. In their response, respondents mention that

the residents of the villages are able to get to the cities and villages of the West Bank through the crossing and gates in the separation fence. Farmers can pass through the agricultural gates at Habla and Ras a-Tira. Respondents add that most of the agricultural lands of enclave residents are located within the enclave itself. A significant part of the families living in the villages of the enclave make their living from work in the Alfei Menashe community.

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

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

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

extended. The gates are open for a longer time during periods of intensive agricultural cultivation, like during the olive picking season.

109. In the separation fence at the Alfei Menashe enclave there are one crossing and three gates. The crossing ("crossing 109") is open at all hours of the night and day, every day of the year. Enclave residents can pass through it, after a security check, by foot or by car, to Qalqiliya and all other parts of Judea and Samaria, whether for employment purposes or for any other reason. From Qalqiliya, it is possible to continue on to Judea and Samaria with no additional checkpoint. It should also be mentioned that a new underpass connecting Qalqiliya to Habla has been opened. It passes under highway 55, which leads to Alfei Menashe. Movement through this underpass is unrestricted. In addition to the underpass, there are three gates in the enclave: the Ras a-Tira gate, the Habla gate, and the South Qalqiliya gate. The Ras a-Tira gate connects the enclave to Habla and to Ras a-Atiyeh. It was decided that it would be open from one hour after sunrise until one hour before sunset. Both other gates are open three times a day for one hour. The farmers can reach their lands through these gates.

10. The Proportionality of the Injury to the Local Residents

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

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

112. Is the second subtest (the least injurious means) satisfied? Is it possible to ensure the security of Israelis through a different fence route, whose impingement upon the rights of the local residents would be a lesser one? Petitioners answer this question in the affirmative. According to their argument, it is possible to protect the Israelis through a fence constructed on the Green Line. We cannot accept this

argument. In their arguments before us, respondents correctly noted that construction of the separation fence on the Green Line would leave Alfei Menashe on the eastern side of the fence. It would be left vulnerable to terrorist attacks from Qalqiliya, Habla, and the remaining cities and villages of Samaria. Movement from it to Israel and back would be vulnerable to acts of terrorism. Indeed, any route of the fence must take into account the need to provide security for the 5650 Israeli residents of Alfei Menashe.

113. Against this background arises the question whether the security objective behind the security fence could not be attained by changing the fence route such that the new route would encircle Alfei Menashe, but would leave the five villages of the enclave outside of the fence. Such a route would create a natural link between the villages of the enclave and Qalqiliya and Habla. It would create a link to the array of civil services which were provided to the residents prior to the construction of the fence. Most of the injuries to the residents of the villages would be avoided. Indeed, the lives of the residents under to the present route are difficult. The enclave creates a chokehold around the villages. It seriously damages the entire fabric of life. The alteration to the route, which will remove the villages from the enclave, will reduce the injury to the local residents to a large extent. If it is not possible to remove all five villages from the enclave, is it possible for most of them to be removed from it? Indeed, based upon the factual basis as presented to us, the existing route of the fence seems strange. We shall begin with the southwest part of the enclave. We are by no means persuaded that there is a decisive security-military reason for setting the fence route where it presently is. Why is it not possible to change the route in a way that the three villages in this part (Wadi a-Rasha, Ma'arat a-Daba, and Hirbet Ras a-Tira), or most of them, remain outside of the fenced enclave? There is a planning scheme, which has been filed, for the development of Alfei Menashe in the direction of the southwestern part of the enclave. But as Mr. Tirza, who presented the enclave map to us, stated before us, that is not a consideration which should be taken into account. We shall now turn to the northern and northwestern part of the enclave. Why should the villages of Arab a-Ramadin and Arab Abu-Farde not remain outside of the fence? A main consideration in this issue might be the need to defend highway 55, which connects Alfei Menashe to Israel. On this issue, Mr. Tirza noted that the location of highway 55 raises security problems. Israelis have been shot on it from the direction of Qalqiliya. We learned from the material before us, that according to the original plan, the segment of highway 55 which connects Alfei Menashe to Israel was to be cancelled. Instead, a new road was supposed to be paved, which would connect Alfei Menashe to Israel, southwest of the enclave, adjacent to the Matan community inside the Green Line. Petitioners argue – an argument which is supported by the material they submitted to us – that this plan was not approved due to the opposition of the Matan community, who thought that it would harm its quality of life. Mr. Tirza noted before us that the road connecting Alfei Menashe to Israel (highway 55) should be viewed as a temporary road. In this state of affairs, we were by no means convinced that it is necessary, for security-military reasons, to preserve the northwest route of the enclave. If this route will indeed be altered, it will have an additional implication, in that it will be possible to cancel the two gates separating Qalqiliya and Habla, and reconnect them into a large urban bloc, as it was in the past, and not make due only with the new underpass which connects them.

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

115. Has the third condition of the proportionality test (narrow proportionality) been satisfied? In order to answer this question, we must determine whether the existing route of the separation fence at the Alfei Menashe enclave has an alternative route which provides Israelis (in Israel and Alfei Menashe) the required level of security. If such an alternative route exists, we must examine the intensity of injury to the fabric of life of the village residents. Thus, for example, if it is possible, according to the security considerations, to reduce the route of the fence so that the enclave will contain only Alfei Menashe, then there is no doubt that the additional security provided by the existing route (compared to the alternate route) does not measure up to the additional injury which the existing route (compared to the alternate route) causes to the local residents (for "relative" implementation of narrow proportionality: *see The Beit Sourik Case*, at p. 840).

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

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

road connecting Alfei Menashe to Israel to another location in the south of the enclave, should be examined.

Justice D. Beinisch:

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

Justice A. Procaccia:

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

Justice E. Levy

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

Justice A. Grunis:

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

Justice M. Naor:

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

Justice S. Jubran:

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

Justice E. Chayut:

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

Vice President M. Cheshin:

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

2. International law has undergone many welcome revolutionary changes in recent decades. I remember that 50 years ago – when I was a young student at the Faculty of Law of the Hebrew University of Jerusalem – the subject of Public International Law (as opposed to Private International Law) was a negligible and peripheral subject (even though it was taught as a required course). Public International Law was not seen by us – we the students – as worthy of the title "law", and the institutions of the international community, including the International Court of Justice, received the same treatment. The years passed, and public international law got stronger and began to stand on its own two feet as a legal system worthy of the title "law". That is the case, at least, as far as certain areas or certain states on the face of the globe are concerned. It is fortunate that public international law has developed in that way, although the road is long before it will turn into a legal system of full standing; as a legal system whose norms can be enforced against those who violate them. In the same context, we should know and remember that the International Court of Justice at the Hague, even when asked to write an Advisory Opinion, is still a court. Indeed, when the ICJ sits in judgment as the giver of an advisory opinion, the proceedings before it are not regular adversary proceedings, and its decision does not have immediate operative force – as opposed to the decision of a regular court. However, the way in which the ICJ writes its opinion is the way of a court; the proceedings of the ICJ are, in principle, like the proceedings of a court; and the judges sitting in judgment don the robes of a judge in the way familiar to us from regular courts. Take these procedural distinguishing marks away from the ICJ, and you have taken away its spirit as a court. For we have no lack of political forums.

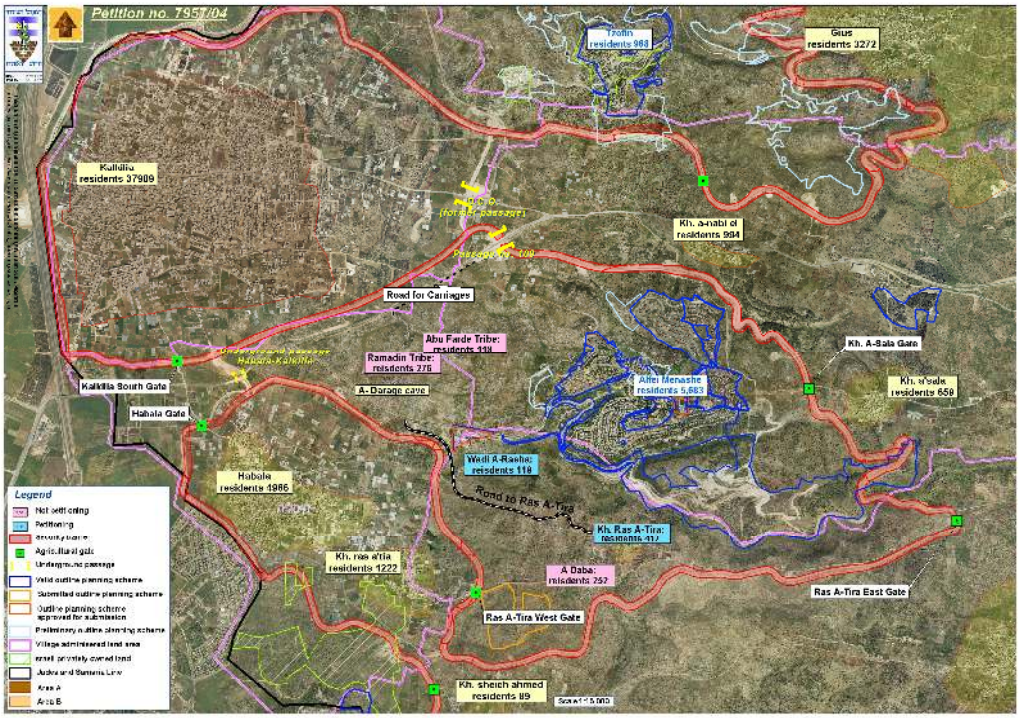
3. I read the majority opinion of the International Court of Justice at the Hague, and, unfortunately, I could not discover those distinguishing marks which turn a document into a legal opinion or a judgment of a court. Generally, and without going into piecemeal detail, there are two main parts to the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

4. As we saw in my colleague's survey, the factual basis upon which the ICJ built its opinion is a ramshackle one. Some will say that the judgment has no worthy factual basis whatsoever. The ICJ reached findings of fact on the basis of general statements of opinion; its findings are general and unexplained; and it seems that it is not right to base a judgment, whether regarding an issue of little or great importance and value, upon findings such as those upon which the ICJ based its judgment. The generality and lack of explanation which characterize the factual aspect of the opinion are not among the distinguishing marks worthy of appearing in a legal opinion or a judgment. Moreover, generality and lack of explanation infuse the opinion with an emotional element, which is heaped on to an extent unworthy of a legal opinion. I might add that in this way, the opinion was colored by a political hue, which legal decision does best to distance itself from, to the extent possible. And if all that is not

enough, there is the ICJ's almost complete ignoring of the horrible terrorism and security problems which have plagued Israel - a silence that the reader cannot help noticing – a foreign and strange silence. I can only agree with Judge Buergenthal, and partly with Judge Higgins, Judge Kooijmans, and Judge Owada, that the factual basis upon which the judgment was built is inadequate to the point that it is inappropriate to pass judgment upon it, even by way of opinion. As Judge Buergenthal wrote (paragraph 1 of his opinion):

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

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

Decided according to the judgment of President A. Barak.

Given today, September 15 2005.