HCJ 9593/04

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

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

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

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

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

Petition granted.

Legislation cited:
Basic Law: Human Dignity and Liberty, 5752-1992, ss. 2, 3, 4.

Security Measures (Judaea and Samaria) (no. 378) Order, 5730-1970, s. 90.

Israeli Supreme Court cases cited:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[22] HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; **IsrSJ 7 109**.
[23] HCJ 2431/95 *Salomon v. Police* [1997] IsrSC 51(5) 781.
[24] HCJ 3641/03 *Temple Mount Faithful v. HaNegbi* (unreported).
[25] HCJ 166/71 *Halon v. Head of Osfiah Local Council* [1971] IsrSC 25(2) 591.

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

JUDGMENT

Justice D. Beinisch

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

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

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

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

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

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

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

On 14 January 2005 the respondents filed their response to the application. In the response, it was emphasized that according to the fundamental position of the Attorney-General, the rule is that the Palestinian inhabitants in the territory of Judaea and Samaria should be allowed free access to the agricultural land that they own and that the IDF Commander is

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

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

4. In their reply to the order, the respondents discussed the difficult security position in the area and reviewed some of the serious security incidents that recently took place in the areas adjacent to the petitioners' villages. The respondents said that in many places in Judaea and Samaria Israeli towns had been built close to Palestinian villages and that this proximity had been exploited in the past to carry out attacks against the Israeli towns. The respondents also said that during the ploughing and harvesting seasons the fear of attacks increases, since at these times the Palestinian farmers wish to cultivate the agricultural land close to the Israeli towns and hostile terrorist elements exploit the agricultural activity in order to approach the Israeli towns and attack them. In view of this complex

position, the respondents discussed the need to impose balanced and proportional restrictions on both the Israeli and the Palestinian inhabitants of Judaea and Samaria in order to minimize the loss of human life on both sides. The respondents again emphasized that the principle that guides their action is the duty to allow the Palestinian residents in Judaea and Samaria free access to their agricultural land and the duty to protect this right. The respondents gave details in their reply of the rules that they have formulated in order to implement this principle and the respondents mainly emphasized the change that has occurred in the security outlook in so far as dealing with the areas of conflict is concerned: whereas in the past the prevailing outlook was that all the areas of conflict — both those characterized by harassment of Palestinians by Israelis and those where the presence of Palestinians constituted a danger to Israelis — should be closed, now areas of conflict are closed only where this is absolutely essential in order to protect Israelis (para. 16(a) of the statement of reply). According to the reply, the Palestinians will no longer be protected against harassment by Israeli residents by means of a closure of areas to Palestinians but in other ways. The methods that will be adopted for the aforesaid purpose are an increase in security for the Palestinian farmers, operating a mechanism for coordinating access to the agricultural land and closing the areas of conflict to prevent the entry of Israelis into those areas at the relevant times. The respondents also said that the problematic areas of conflict, whose closure was required in order to protect the Israeli residents, would not be closed absolutely during the harvesting and ploughing seasons, but in a manner that would allow the Palestinian farmers access to them, by coordinating this and providing security. During the rest of the year, the Palestinians would only be required to advise the DCO of their entry into the areas of conflict. The respondents argued that the aforesaid principles have led to a significant reduction in the restrictions on the access of Palestinians to their land, both with regard to the size of the area that is closed and with regard to the amount of time during which the area is closed. Thus, with regard to the village of Yanun (which is represented by the first petitioner), it was decided to close a piece of land with an area of only 280 dunams, instead of 936 dunams in 2004; with regard to the village of Aynabus (the second petitioner), no land would be closed at all (after in the original reply of the respondents it was said that an area of 218 dunams would be closed); with regard to the village of Burin (the third petitioner), two areas amounting to only approximately 80 dunams would be closed; with regard to the village of A-Tuani (the sixth petitioner), three areas amounting to approximately 115 dunams would be closed; and in the area of

the village of Al-Jania (the seventh petitioner), several pieces of land with a total area of 733 dunams would be closed.

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

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

6. After receiving the respondents' reply and the petitioners' response to it, two additional hearings were held in the case, and at the end of these the respondents were asked to file supplementary pleadings, including replies to the petitioners' claims that there is no access to the agricultural land during the current harvesting season and that nothing is done with regard to the complaints of residents of the petitioning villages with regard to harassment against them. In the supplementary pleadings of 26 September 2005, the respondents discussed at length the deployment of the army and the police for the 2005 olive harvest. In reply to the questions of the court, the respondents said, *inter alia*, that in the course of the deployment a plan is being put into operation to determine days on which security will be provided for the areas of conflict, which has been formulated in coordination with the Palestinians; that several control mechanisms have been formulated with the cooperation of the civil administration, the police and the Palestinian Authority, whose purpose is to provide a solution to the problems that arise during the harvest; that the forces operating in the area will be strengthened in order to guard the agricultural work; that the police forces have taken action to improve their ability to bring lawbreakers to justice; that orders have been issued to the IDF forces, emphasizing the fundamental principle that the farmers should be allowed to go to harvest the olives and that they should ensure that the

harvest takes place in a reasonable manner; and that there was an intention to make closure orders for Israeli areas only, together with restriction orders for certain Israeli inhabitants who had been involved in the past in violent actions.

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

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

7. The petitioners, for their part, filed on 30 November 2005 an additional supplementary statement, in which they said that during the olive harvest season of 2005 there had indeed been a certain change for the better from the viewpoint of the respondents' deployment. In this regard, they discussed how

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

8. Shortly thereafter, on 2 January 2006, the petitioners filed an application to hold an urgent hearing of the petition. This was in response to several very serious incidents in which more than two hundred olive trees were cut down and destroyed on the land of the village of Burin. In the application it was stated that despite repeated requests to the respondents, no activity was being carried out by them at all to protect the petitioners' trees and that no measures were being taken to stop the destruction of the trees. It was also claimed in the application that the ploughing season was about to begin and that the respondents were not taking the necessary steps in order to allow the residents of the petitioning villages safe access to their agricultural land and were not taking any action to prevent attacks and harassment by the Israeli inhabitants.

9. In consequence of what was stated in the application, the petition was set down for a hearing. Shortly before this hearing, a statement was filed by the respondents, in which it was claimed that the incidents in which the olive trees were ruined were being investigated intensively by the competent authorities, but at this stage evidence has not been found that would allow the filing of indictments in the matter. It was also stated that the phenomenon of violent harassment by Israeli residents against Palestinian farmers had recently been referred to the most senior level in government ministries and that a real effort was being made to find a solution to the problem. In addition, it was stated that the Chief of Staff had orders several steps to be

taken in order to reduce the phenomenon of the harassment of Palestinian farmers, including increased enforcement at the places where law and order were being violated, adopting administrative measures against lawbreakers and reducing the number of weapons held by the Israeli inhabitants of Judaea and Samaria. It was also stated that the deputy prime minister at that time, Mr Ehud Olmert, ordered the establishment of an inter-ministerial steering committee that would monitor the law enforcement operations carried out as a part of the measures taken to prevent acts of violence perpetrated by Israeli inhabitants in Judaea and Samaria.

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

Deliberations

General

11. The petition before us has raised the matter of a very serious phenomenon of a violation of the basic rights of the Palestinian residents in the territories of Judaea and Samaria and of significant failures on the part of the respondents with regard to maintaining public order in the territories. As we have said, the claims raised by the petitioners are of two kinds: *one claim* relates to the military commander denying the Palestinian farmers access to their land. In this matter, it was claimed in the petition that the closure of the area deprives the Palestinian residents of their right to freedom of movement and their property rights in a manner that is unreasonable and disproportionate and that violates the obligations imposed on the military commander under international law and Israeli administrative law. It was also claimed that it was not proper to protect the Palestinian farmers in a way that denied them access to their land. In addition it was claimed that closing the areas to the Palestinians was done on a regular basis without a formal closure order being made under section 90 of the Security Measures Order and

therefore the denial of access to the land was not based upon a lawful order. *The main additional claim* that was raised in the petition addressed the failure of the respondents to enforce the law in the territories of Judaea and Samaria. The essence of the claim was that the respondents do not take action against the Israeli inhabitants in the territories that harass the Palestinian farmers and harm them and their property. In addition to these general claims, the petition also includes specific claims that required immediate action in concrete cases where access was being denied, and these claims were dealt with immediately (see para. 1 above).

The proceedings in the petition before us were spread out over several hearings; the purpose of this was to allow the respondents to take action to solve the problems that were arising and to find a solution to the claims raised before us, under the supervision of the Attorney-General and subject to the judicial scrutiny of the court. We thought it right to give the respondents time to correct what required correction, since there is no doubt that the reality with which they are confronted is complex and difficult and that the tasks imposed on them are not simple. Regrettably, notwithstanding the time that has passed, it does not appear that there has been any real change in the position and it would seem that no proper solution has been found to the serious claims of the Palestinian farmers concerning the violation of their right to cultivate their land and to obtain their livelihood with dignity, and to the injurious acts of lawbreaking directed against them. At the hearings that took place before us, a serious picture emerged of harm suffered by the Palestinian residents and contempt for the law, which is not being properly addressed by the authorities responsible for law enforcement. Therefore, although some of the claims that were raised in the petition were of a general nature, we have seen fit to address the claims raised by the petitioners on their merits.

Denying access to land

12. The territories of Judaea and Samaria are held by the State of Israel under belligerent occupation and there is no dispute that the military commander who is responsible for the territories on behalf of the state of Israel is competent to make an order to close the whole of the territories or any part thereof, and thereby to prevent anyone entering or leaving the closed area. This power of the military commander is derived from the rules of belligerent occupation under public international law; the military commander has the duty of ensuring the safety and security of the residents of the territories and he is responsible for public order in the territories (see

art. 23(g) and art. 52 of the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 (hereafter: 'the Hague Regulations'); art. 53 of the Convention relative to the Protection of Civilian Persons in Times of War, 1949 (hereafter: 'the Fourth Geneva Convention'); HCJ 302/72 *Hilo v. Government of Israel* [1], at pp. 178-179). This power of the military commander is also enshrined in security legislation in section 90 of the Security Measures Order (see, for example, *Hilo v. Government of Israel* [1], at pp. 174, 179; HCJ 6339/05 *Matar v. IDF Commander in Gaza Strip* [2], at pp. 851-852). In our case, the petitioners do not challenge the actual existence of the aforesaid power but the manner in which the military commander directs himself when exercising his power in the circumstances described above. Therefore the question before us is whether the military commander exercises his power lawfully with regard to the closure of agricultural areas to Palestinian residents who are the owners or who have possession of those areas.

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

The purpose of adopting the measure of closing areas

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

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

See also HCJ 10356/02 *Hass v. IDF Commander in West Bank* [3], at pp. 455-456 {64-65}. It should be emphasized that the duty and authority of the

military commander to ensure security in the territory apply with regard to all the persons who are present in the territory that is subject to belligerent occupation. This was discussed by this court, which said:

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

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

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

The relevant criteria when exercising the power to close areas

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

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

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

examined differently from restrictions that are imposed on a person's freedom of movement within the area connected to his home and the former cannot be compared to the latter (see HCJ 2481/93 *Dayan v. Wilk* [11], at p. 475).

As we have said, an additional basic right that should be taken into account in our case is, of course, the property rights of the Palestinian farmers in their land. In our legal system, property rights are protected as a constitutional human right (s. 3 of the Basic Law: Human Dignity and Liberty). This right is of course also recognized in public international law (see HCJ 7862/04 *Abu Dahar v. IDF Commander in Judaea and Samaria* [12], at para. 8 and the references cited there). Therefore, the residents in the territories held under belligerent occupation have a protected right to their property. In our case, there is no dispute that we are speaking of agricultural land and agricultural produce in which the petitioners have property rights. Therefore, when the petitioners are denied access to land that is their property and they are denied the possibility of cultivating the agricultural produce that belongs to them, their property rights and their ability to enjoy them are thereby seriously violated.

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

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

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

16. There is no doubt that in cases where the realization of human rights creates a near certainty of the occurrence of serious and substantial harm to public safety, and when there is a high probability of harm to personal security, then the other human rights yield to the right to life and physical integrity (HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [13], at p. 454; *Hass v. IDF Commander in West Bank* [3], at p. 465 {76}). Indeed, in principle, where there is a direct conflict, the right to life and physical integrity will usually prevail over the other human rights, including also the right to freedom of movement and property rights. The court addressed this principle in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [14], where it said:

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

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

The balance between the relevant considerations

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

18. The centrality of the principle of proportionality in the actions of the military commander has been discussed by this court many times (see, for

example, HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [15], at pp. 836-841 {293-298}). The manner in which the military commander exercises his power to close agricultural areas in the territories inherently results in a violation of the rights of the Palestinian residents and therefore this violation should satisfy the principle of proportionality. According to the proportionality tests, the military commander has the burden of showing that there is a rational connection between the measure adopted and the purpose (the first subtest of proportionality); he is required to show that, of the various appropriate measures that may be chosen, the measure adopted causes the least possible harm to the individual (the second test); and he is also required to show that adopting the aforesaid measure is proportionate to the benefit that arises from employing it (the third subtest).

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

Protecting the security of Israeli inhabitants

20. In so far as the protection of the security of the Israeli residents is concerned, the respondents argued that in order to achieve this purpose, in a period when brutal and persistent terrorist activity is taking place, the closure

of areas near Israeli towns so that Palestinians cannot enter them is needed in order to prevent the infiltration of terrorists into those towns and the perpetration of acts of terror against the persons living there. The respondents explained that the access of the Palestinian farmers to agricultural land adjoining the Israeli towns is exploited by the terrorist organizations to carry out attacks against the Israeli towns, and that the presence of the Palestinian farmers on the land adjoining the Israeli towns serves the terrorists as a cloak and helps them to infiltrate those areas. The proximity of the agricultural land to Israeli towns is exploited particularly in order to carry out attempts to infiltrate the Israeli towns, for the purpose of carrying out attacks in them, and also for the purpose of long-range shooting attacks. Because of this, the respondents explained that there is a need to create a kind of barrier area, into which entry is controlled, and thus it will be possible to protect the Israeli inhabitants in an effective manner.

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

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

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

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

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

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

Protecting the security of Palestinian farmers

22. As we said above, the purpose of maintaining order and security in the territories has two aspects, and for each of these we should examine the

proportionality of the use of the measure of closing areas. We discussed above the proportionality of the military commander's use of the power to close areas to achieve the first aspect — the protection of the security of the Israeli inhabitants. Now we should consider whether the military commander has exercised his power proportionately also with regard to the second aspect of the purpose — providing protection for the security of the Palestinian farmers.

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

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

In our case, as we have said, assuming that the violation of the Palestinians' right of access to their land is done for the proper purpose of protecting their lives, we should consider whether the closure of the agricultural areas to the Palestinians in order to protect *them* is a proportionate violation of their rights. After studying the written pleadings and hearing the arguments of the parties, we have reached the conclusion that in the prevailing circumstances the exercising of the military commander's power to close land to Palestinians for the purpose of protecting *them* is disproportionate. Of course, no one disputes that closing the area and preventing the access of Palestinians to their land does achieve a separation

between them and the Israeli inhabitants and thereby protects the Palestinian farmers. But the use of the power of closure for the purpose of protecting the Palestinian inhabitants violates the right of the Palestinian inhabitants to freedom of movement and their property rights to a disproportionate degree and it does not satisfy the subtests of the principle of proportionality. We shall explain our position below.

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

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

26. It should be noted that now we have found that the measure adopted is not at all appropriate or suited to the purpose for which it was intended (the first test of proportionality), we are not required to examine whether the measure is consistent with the other tests of proportionality. Nonetheless we should point out that in the circumstances of the case it is also clear that the measure adopted is not the least harmful measure, nor is it proportionate to the benefit that arises from it (the two remaining tests of proportionality). In this regard, it should be stated that the respondents themselves discussed in their responses other measures that could be adopted in order to realize the purpose of protecting the Palestinian inhabitants when they wish to cultivate their land. *Inter alia*, the respondents mentioned their intention to increase the security given to the Palestinian inhabitants when carrying out the agricultural work by means of increasing the forces in the area, and also their intention to issue restriction orders against certain Israeli inhabitants who were involved in the past in acts of violence and who, in the military

commander's opinion, present a danger. The use of these measures and other additional measures that were mentioned by the respondents is likely to achieve the purpose of protecting the Palestinian inhabitants who wish to cultivate their land without disproportionately violating the right of the Palestinian farmers to freedom of movement on their land and their property rights.

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

Denying access — summary

28. The inescapable conclusion is therefore that the manner in which the military commander exercised his discretion to deny Palestinians access to agricultural areas that belong to them, in order to realize the purpose of protecting their security, is not consistent with the proportionate measure test that governs the respondents, and therefore it is unacceptable. As a rule, the military commander should carry out his duty to protect the security of the Palestinian inhabitants in another manner, and not by closing the agricultural areas, provided that his command responsibility is not prejudiced. The 'conflict areas,' which are closed to the Palestinians in order to protect the Palestinians themselves, should therefore remain open to the movement of Palestinians and the respondents should adopt all the measures that are required in order to ensure the security of the Palestinians farmers in those areas. The protection of the Palestinians should be afforded by providing proper security, giving clear instructions to the military forces and the police with regard to how they should act, and imposing restrictions that will be

effective against those persons who harass the Palestinians and break the law. With regard to the closure of areas belonging to Palestinian inhabitants when the purpose that is being sought is the protection of the Israeli inhabitants against terrorist activity, in such a case the measure of closure may be proportionate, provided that the military commander exercises his power on the smallest scale possible and while observing the rules set out above.

Law enforcement in the territories of Judaea and Samaria

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

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

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

the creation of the Samaria and Judaea division of the police, which operates in the territories under the control of the military commander and deals with all the issues that concern policing in those territories.

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

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

> 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, *and shall be protected especially against all acts of violence or threats thereof* and against insults and public curiosity' (emphasis supplied).

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

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

respondents ought therefore to act with greater force against the lawbreakers so that this phenomenon is eradicated.

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

33. In view of the aforesaid, we pondered at length the order that this court should issue with regard to enforcement of the law in the territories. 'Law enforcement is a fundamental element of the rule of law… it is one of the main functions of any government. The competent authorities may not shirk this duty' (HCJ 551/99 *Shekem Ltd v. Director of Customs and VAT* [21], at p. 125). It need not be said that there is no need for this court to issue an order that directs the respondents to enforce the law and carry out their duties (*ibid*.). This is especially the case where the respondents themselves confirm their commitment to protect the rights of the petitioners and promise to act in so far as possible in order to carry out their duties. There is therefore

no doubt that the respondents should act with all the means at their disposal in order to protect the security of the Palestinian farmers who come to work on their land and they should act in order to protect the property rights of the petitioners so that they are not violated unlawfully. Even though the court does not have the power to determine the size of the forces that will be allotted for these tasks and what operations will be carried out, we do have the power to say that the protection of the security and property of the local inhabitants is one of the *most fundamental* duties imposed on the military commander in the territories. We are aware that the declaration of intentions made by counsel for the respondents in this matter is not mere words. We are persuaded that the establishment of the inter-ministerial committee and the experience in dealing with law enforcement in the territories are steps that were chosen in good faith and in recognition of the duty of imposed on the army and the police operating in the territories. But plans and intentions are one thing and results another, and the results do not indicate success in the field of enforcement.

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

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

> 'We accept the premise that in the absence of effective law enforcement there is also no effective government. In an atmosphere in which everyone does what seems right in their own eyes, without being subject to any real risk that he will be brought to justice if he oversteps what is permitted, the propriety of the actions of the authorities responsible for effective control of the territories is impaired. The Supreme Court said years ago that the rule of law cannot be created *ex nihilo* and is not merely a matter of theory. It should be expressed in a concrete and daily manner in the existence of binding normative arrangements and in enforcing these in practice with respect to everyone…' (p. 243 of the Shamgar Committee Report).

Summary

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

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

Justice E. Rivlin

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

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

Justice S. Joubran

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

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

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

view of the importance attributed to the protection of property rights in our legal system.

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

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

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

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

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

6. In this context I accept the determination that there may be exceptional cases in which the great probability of danger to human life, as well as the scope of the anticipated harm, may justify closing a certain area for fixed period on the basis of definite and specific intelligence. But in order that

these exceptional cases do not become the rule, we cannot agree to preventative measures of a sweeping closure of large areas for lengthy periods of time.

Petition granted.
30 Sivan 5766.
26 June 2006.