At the Supreme Court Sitting as the High Court of Justice **HCJ 9961/03**
HCJ 639/04

Before:	**Honorable President D. Beinisch** **Honorable Vice President E. Rivlin** **Honorable Justice A. Procaccia**
The Petitioner in HCJ 9961/03:	**HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioner in HCJ 639/04:	**The Association for Civil Rights in Israel**
	v.
The Respondents in HCJ 9961/03:	**1. The Government of Israel** **2. The Prime Minister of Israel** **3. The Minister of Defense** **4. The Separation Fence Authority, Ministry of Defense** **5. The Military Commander in the West Bank Area** **6. Fence for Life – Public Movement for the Security Fence** **7. Shurat HaDin – Israel Law Center**
The Respondents in HCJ 639/04:	**1. Commander of the Military Forces in the Territories** **2. Head of the Civil Administration of the Judea and Samaria Area**
Petitions for *Order Nisi* and *Interim Order*	
Session date:	30 Shvat 5767 (February 18, 2007)
Representing the Petitioner in HCJ 9961/03:	Adv. Michael Sfard
Representing the Petitioner in HCJ 639/04:	Adv. Avner Pinchuk; Adv. Dan Yakir; Adv. Azem Bishara
Representing Respondents 1-5 in HCJ 9961/03 and the Respondents in HCJ 639/04:	Adv. Aner Helman
Representing Respondent 6 in HCJ 9961/03:	Adv. Ilan Tsion; Adv. Adi Barouch
Representing Respondent 7 in HCJ 9961/03:	Adv. Roi Cochavi

Judgment

President D. Beinisch:

General

1. In an attempt to fight the mighty terror attacks which were launched against Israel after the outbreak of the second intifada, the government of Israel decided in 2002 to construct a fence which would separate between the Judea and Samaria area (hereinafter: the **Area**) and the territory of the state of Israel, would make it harder for terrorists to injure the residents of Israel and would assist the security forces in their fight against terror (hereinafter: the **fence** or the **security fence**). Following this decision, many petitions were filed with this court which sought to bring about the cancelation of the government decision concerning the construction of the fence – on the general level as well as with respect to specific aspects concerning different segments of the route of the fence, with respect of which it was argued that they were harmful beyond security needs. In the judgments which were rendered in these petitions this court recognized the authority of the military commander to erect the security fence for the purpose of protecting the state. At the same time, the court outlined the rules which the military commander should follow while exercising his discretion in setting out the route of the fence and its different segments, and put such discretion under judicial review (For further discussion see HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5) 807 (2004) (hereinafter: **Beit Sourik**); HCJ 7957/04 **Zaharan Yunis Muhammad Mara'abe v. The Prime Minister of Israel**, IsrSC 60(2) 447 (2005) (hereinafter: **Mara'abe**)).

2. The petitions before us no longer seek to attack the mere erection of the security fence or any of its segments. They seek to revoke the unique scheme which was created as a result of the erection of the security fence in the route set out for this purpose, which raises practical and legal questions. A review of the diverse judgments of this court concerning the route of the fence indicates that certain segments of the fence were not erected on the Area's border line, but rather within the territories of the Area. Under these circumstances, parts of the Area were left "outside" the fence on its Israeli side, without any separation between them and the territory of Israel. These areas are referred to as the "seam zone" (hereinafter: the **zone** or the **seam zone**), and were declared by the military commander as a "closed military area" the entry into and the presence in which is subject – with the exception of a number of groups which received a general entry permit into the zone – to the receipt of a specific permit. The manner by which such specific permits are granted was established in a collection of unique arrangements which were established by the head of the civil administration, and which were referred to by the parties to the petitions as the "permit regime".

   The petitions before us seek to revoke the above declarations under which the seam zone was declared as a closed area and to consequently, have the permit regime, including all arrangements which were established there-under, revoked. Before we discuss the petitions, we will shortly present the proceedings which accompanied the seam zone declaration and the arrangements which were established there-under.

Factual background – seam zone declarations and ancillary directives which were issued by virtue of such declarations

3. The government decisions to erect the fence were realized between 2002 – 2009, and a security fence which created a barrier between the Judea and Samaria areas and the territory of Israel was erected during those years. The fence was erected in stages, which were accompanied by announcements of seizure of lands in Palestinian territories located west of the fence which was erected (on its "Israeli" side) and which were referred to as the "seam zone". As aforesaid, there is no barrier between the seam zone areas and the territory of Israel.

4. Thus, for instance, phase A of the security fence was approved by the government of Israel on June 23, 2002. It begins in the area of Salem village and continues to the Trans-Samarian highway adjacent to the ElKana settlement. Thereafter, and upon the completion of phase A, the commander of IDF forces in the Area signed, on October 2, 2003, a "Territory Closure Declaration No. S/2/03 (seam zone)(Judea and Samaria), 5764-2003" (hereinafter: the **first declaration** or the **declaration**), which provided that the seam zone of this phase would be declared as a "closed zone". This declaration did not apply to the segments of the fence in the northern and southern parts of Jerusalem, which were also erected within the framework of phase A. The opening statement of the declaration which clarifies the objective thereof, provides as follows:

> "Under my authority as the commander of IDF forces in the Judea and Samaria area and pursuant to sections 88 and 99 of the Order concerning Security Directives (Judea and Samaria)(No. 378) 5730-1970 (hereinafter - the **order**) and all other authorities vested in me by any law and the security legislation, and in view of the special security circumstances which exist in the Area and the need to take necessary measures to prevent terror attacks and the infiltration of terrorists from the Judea and Samaria areas into the state of Israel, I hereby declare as follows…".

The declaration itself provided that the seam zone would be a closed area, and that all persons would be prohibited from entering into and remaining therein, other than Israelis (as defined in the declaration), and individuals who were granted a permit by the commander of IDF forces in the Area or anyone on his behalf. In the amendment to the declaration dated May 27, 2004, this section was revised, and it was provided that the declaration would also apply to Israelis. The declaration also provided that in any event, the military commander would be entitled to order that the declaration concerning an entry permit into the seam zone would not apply to a certain person or categories of persons. Following this declaration, the military commander signed a "general entry permit into the seam zone" for a number of categories which were specified in the permit – a person who is not a resident of the Area and holds a foreign valid passport and a valid entry visa into Israel, a person who holds a valid employment permit in an Israeli settlement located in the seam zone and a person who holds a valid entry permit into Israel from the Area. The declaration further provides that "a person, who is 16 years of age and older, whose permanent place of residence, on the effective date of this declaration, is in the seam zone, will be entitled to enter the seam zone and remain therein, provided he holds a written permit, granted to him by myself or anyone on my behalf…". In addition, the amendment specified the general principles which would regulate the entrance and presence in the seam zone of persons under the age of 16 who were permanent residents of the seam zone. Later on, the declaration was further amended by an additional amendment, in which the names and numbers of the agricultural gates and crossings in the seam zone were revised to match the "report lines" used by the security forces.

5. By virtue of this declaration and the authority vested in him in section 7 of the declaration, the head of the civil administration issued a number of orders which consisted of rules and directives concerning the various permits under which Palestinian residents and others could enter into and remain in the seam zone, the processing procedures for the issuance of such permits and the travelling arrangements in and out of the zone which were established there-under. Over the years the orders were amended as a result of changes which took place in the route of the fence in different locations, and including, *inter alia*, as a result of judgments rendered by this court. Along these general directives, a collection of standing orders entitled "Standing Orders for the seam zone and the handling of an abuse of a seam zone permit" was established (hereinafter: the **Standing Orders**) which complemented the various rules that were issued. The Standing Orders present the gamut of arrangements which were established in more detail, and are intended to be used as a practicable tool for the processing of the various seam zone permit applications. The Standing Orders also consist of samples of the various application forms and the required documents for the submission thereof. The gamut of these arrangements, which will be specified in more detail below, and which were referred to by the parties to the petitions as the "permit regime", will stand at the heart of the petitions before us.

6. As specified above, over the years in which the erection of the security fence progressed, and along with its different phases, additional areas were declared as seam zone and the above rules were applied thereto. As of July 30, 2009 – the date on which the state filed its second updating notice – it may be said that the "seam zone" spans over areas along phases A, B, C and D of the security fence, as well as a certain section of the "surrounding Jerusalem" area, with the exclusion of a number of areas in which a continuous fence has not yet been erected. As indicated by state data (which were updated by notice dated July 30, 2009) the area of the seam zone currently spans, in total, 83,426 dunam along phases A and B of the fence and 36,112 dunam along phases C and D and surrounding Jerusalem.

The state emphasized that along phases A and B of the fence about 52,378 dunam of the seam zone area were private lands and the rest were state lands, and along phases C, D and "surrounding Jerusalem" about 19,284 dunam were private lands, about 727.6 dunam were in acquisition process by Israelis and the rest were state lands. The state has further noted that certain changes were expected to take place in the route of the fence in the future – either as a result of judgments rendered by this court or for other reasons – following which the area of the territories located within the seam zone was expected to decrease.

With respect to the **scope of the population** which resides in the seam zone area, the state noted that along phases A and B there were about 7,000 permanent Palestinian residents (mostly in the Eastern Barta'a area, the Alfei Menashe enclave and Khirbet Jabara). The state claimed that along phases C and D and "surrounding Jerusalem" there were only about 390 residents (190 of whom were residents of the Dahiat Al-Barid neighborhood north east of Jerusalem). However, the state noted in its updating notice dated May 25, 2009, that in the future changes may take place in different parts of the route of the fence – in its different phases – and that consequently the scope of the population which resided in the seam zone may decrease.

The Petitions

7. As will be specified below, the petitions before us and the responses thereto underwent considerable changes, which derived, *inter alia*, from changes in the route of the security fence following judgments rendered by this court, and as a result of normative changes in the arrangements which were adapted to the developments which took place in practice.

   These proceedings commenced on November 6, 2003, about a month after the commander of IDF forces signed the first seam zone declaration (within the framework of phase A of the security fence) when HaMoked for the Defence of the Individual filed the petition in HCJ 9961/03 (hereinafter: **HaMoked petition**). In this petition several remedies were requested most of which concerned the legality of the route of the security fence in certain areas. In addition, it was requested that the seam zone declaration and the rules promulgated there-under be revoked. On January 21, 2004 the Association for Civil Rights in Israel filed a petition in HCJ 639/04 which focused on the seam zone issue, and also sought to revoke the seam zone declaration and the various rules and instructions which were issued there-under (hereinafter: the **ACRI petition**).

8. When the above petitions were filed, a number of general petitions concerning the route of the security fence were pending before the court. Some of the petitions concerning the fence had a direct impact on the issues raised in the petitions before us. Therefore, the handling of the petitions discussed in our judgments was made with a constant examination of the judgments rendered in the various fence files, and their impact on the issues concerning the "seam zone". Accordingly, for instance, following the **Beit Sourik** judgment (rendered on June 30, 2004), the state notified that the commander of IDF forces in the Area appointed a team which examined the arrangements that applied to the seam zone during the period which preceded the judgment, and recommended to make changes therein. As a result of these changes the relevant legislation was updated and certain arrangements which applied to the seam zone underwent changes. This development has naturally affected the relevant legal and factual infrastructure of the petitions before us, and consequently the handling of the petitions was delayed until the relevant legislation updates were completed and the state's updating notices in that regard were delivered.

   On September 15, 2005, and during the period in which the petitions were pending, the court rendered its judgment in **Mara'abe**, in which decisions were made on many issues which were raised in the original petitions before us. In view of all of the legal and factual changes, the scope of the dispute had to be redefined, following which the amended petitions currently pending before us were filed.

9. On November 13, 2006 – and following previous decisions in which it was held that the petitions would be regarded as if an *order nisi* was issued therein – the state filed a consolidated response in both petitions. Respondent 6 and respondent 7, with respect of which a decision to join them as respondents to the petitions was made as early as 2004, also filed their responses (respectively – on November 27, 2006 and January 21, 2007). Thereafter, the file was scheduled for a hearing which was held before us on February 18, 2007.

   On February 12, 2009 the state was requested to submit within 45 days an updating notice regarding certain factual aspects concerning the petitions, which was submitted in two parts – the first on May 25, 2009 and then on July 30, 2009. The petitioners responded to these updating notices.

   At this present time, as we have before us all of the above information, the time has ripened to give our decision in the petitions.

Petitioners' arguments in summary

10. Originally, the premise underlying the petitions was petitioners' request that an order for the revocation of the declaration to close the zone and the permit regime which was consequently applied be issued by us, since they were inherently illegal. According to the petitioners, the declaration is illegal for a number of reasons, and it seems that these reasons may be divided into two main groups of arguments:

    The first group of arguments constitutes a sort of a "general argument" which opposes the policy that was applied to the seam zone as a whole, i.e., the mere decision to close the zone and apply a regime according to which a permit of the military commander is required in order to enter the zone and remain therein. In this regard it was argued by the petitioners that the permit regime was infected by an inherent excess-of-power due to the fact that it deprived the protected residents of the Area which was under belligerent occupation of their lands and entailed permanent changes and annexation of territories in a manner which contravened international law. This argument is entrenched in petitioners' position that the seam zone (as well as the security fence) seek to realize unacceptable political objectives, and are not intended to serve security needs for self defense purposes.

    On this general level it was further argued that the decision to close the zone constituted a prohibited collective punishment under the rules of international humanitarian law, and that the prohibition which was imposed on Palestinian residents who did not have in their possession an entry permit into the zone constituted a wrongful discrimination based on group affiliation as opposed to foreign residents and Israelis on whom a prohibition to enter the seam zone was not imposed. According to HaMoked for the Defence of the Individual, this discrimination amounts to Apartheid.

    The second group of arguments is also partly directed against the policy which was applied as a whole, but is more closely related to another level of argumentation, which departs from the general and principle level of argumentation against the seam zone declaration and the legality of the arrangements which were applied *de facto* to the seam zone, under the "permit regime". The basic argument on this level is that the permit regime severely and disproportionately infringes on the human rights of the Palestinian residents. Hence, the petitioners claim, that the rights of the Palestinian residents to freedom of movement, freedom of occupation, livelihood and dignity, the right to family life, education, health and property are violated. It is also argued in this regard that the deprivation of the rights is made without a due process.

    The state, of its part, referred in detail to all of the above arguments – as will be further elaborated below – but at the same time also found it necessary to emphasize its position that the petitions should be summarily rejected due to the generality thereof.

The preliminary argument – are the petitions general?

11. It was argued by the state that in order to enable the court to examine the proportionality of the injury caused by the application of the permit regime, the petitioners should have presented the specific injury caused to the local inhabitants in each and every segment of the zone, so that it would be possible to examine whether the specific balancing made by the military commander between all relevant considerations in each one of these segments satisfied the proportionality requirements, similar to the manner which was employed by the court in the various fence petitions which were filed with it. Under these circumstances, in view of the fact that the petitions oppose the permit regime in its entirety and do not point at specific injuries, it is impossible – according to the state – to conduct such an examination, and hence, the petitions should be summarily rejected.

And indeed, according to the rule which was established by this court in its judgments, we do not usually give a general remedy, when no specific cases of specific injured parties are presented to us (see HCJ 1759/94 **Srozberg v. Minister of Defense**, IsrSC 55(1) 625, 628 (1994); HCJ 1901/94 **MK Uzi Landau v. Jerusalem Municipality**, IsrSC 48 (4) 403 (1994)), with the exception of extraordinary cases in which, despite the generality of the petition, the court would still find that it should be heard on its merits due to the fact that it concerned a major and broad legal issue which was suitable for the legal proceeding (and compare: HCJ 10026/01 **Adalah v. The Prime Minister of Israel**, IsrSC 57(3) 31, 48 (2003)).

Under the circumstances of the case pending before us, we did not find reason to accept the preliminary argument which was raised by the state and deny the petitions for being general, in view of the fact that the petitions which were filed with us – even if they challenge a broad legal scheme and a comprehensive set of arrangements – also raise considerable legal issues which may be decided on based on the factual and legal infrastructure presented to us by the petitioners. Furthermore, it seems that, in any event, the petitions pending before us did not seek to rectify a specific injury in a specific area of the seam zone, but rather to cause the revocation of the seam zone declarations and the arrangements applied there-under. The infrastructure laid before us is sufficient for the purpose of discussing most of these aspects.

However, as will be further elaborated below, indeed, petitioners' choice to focus on general argumentation levels did not enable us to examine some of the aspects raised by them in these petitions. As will be further emphasized below, nothing herein may prevent the examination of specific aspects within the framework of petitions which may be filed with this court by individuals who may argue to have been specifically injured by the implementation of the permit regime, in a manner similar to that by which we have examined similar aspects within the framework of specific petitions which were filed with us over the years, either regarding the security fence or the seam zone.

Therefore, we did not find reason to summarily reject the petitions for being general, and we have decided to examine them on their merits.

Discussion

The starting point; The security fence and the seam zone – a joint factual and legal reality

12. Needless to elaborate on the severe security situation confronted by the state of Israel since 2000 – when the second intifada broke out. In dozens of petitions which were filed with this court during the past decade, we have discussed, in different contexts, the complexity of this security situation and the challenges faced by the state of Israel in its fight against the terror which was directed against its inhabitants. And it was so stated in this context in **Mara'abe,** by the President **A. Barak**:

> In September 2000 the second *intifada* broke out. A mighty attack of acts of terror was launched against Israel, and the Israelis in the Judea and Samaria area and the Gaza Strip (hereinafter – the **Area**). Most of the terror attacks were directed at civilians. They attacked men and women, elderly people and young infants. 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. Terror attacks are committed inside Israel and in the Area. They occur everywhere, including public

> transportation, shopping centers and markets, coffee shops, and in houses and settlements. The main targets of the attacks are Israel's city centeres. Attacks are also directed at the Israeli settlements 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, the 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 in Pi Glilot (May 2003). Since the onset of these terror attacks, 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." [pages 484-485 of the judgment].

Among the steps taken by the government of Israel in an attempt to fight the severe terror attack, a decision was made to erect the security fence in the Area, with the intent that it would serve as a barrier between the territories of Israel and the territories of the Palestinian Authority and would thus make it harder on the Palestinian terror infrastructure to injure Israelis. This court held in consistent judgments, that according to the rules of international law, and in view of the fact that the decision was based on clear security reasons, the commander of the Area had the authority to issue orders concerning the erection of the security fence (see, for instance, the **Beit Sourik** matter). In addition it was held that this authority also extended to the erection of the fence on territories within the Area, when this was justified by security reasons (and see, for instance, HCJ 4825/04 **Muhammad Khaled Alian v. The Prime Minister** (not published yet, March 16, 2006)(hereinafter: **Alian**).

Naturally, as a result of the recognition of the authority of the military commander to erect the security fence on territories within the Area, in several segments along the route of the fence, access to Israeli territories from certain parts of the territories of the Area which border Israeli territories and which are not separated there-from by any barrier, is easy and readily available. As aforesaid, these areas constitute the seam zone. In handling different petitions which were filed against different segments of the route of the security fence, this court was exposed to the seam zone issue and the permit regime which was applied to these areas. Indeed, in those petitions the legality of the seam zone permit regime was not directly challenged, but in a considerable number of petitions this court approved the route of the fence although a seam zone was created thereby, as described above, taking into consideration the fact that the application of the permit regime affected the analysis of the proportionality of the route of the fence which was chosen, referring to the reduction of the injury inflicted on persons who remained in the seam zone or who had any connection therewith. Thus, for instance, it was held by the court in **Alian**:

> "16. The conclusion according to which it is impossible to establish an alternative geographic route for the fence which is less injurious does not, in and of itself, terminate the proportionality analysis in its second sense. **In the examination of the injury caused by the fence, the geographic route and the permit and movement and traffic regime to the lands which remained west of the fence are interrelated**.
>
> 17. Is the severity of the injury inflicted on the residents of the communities of Budrus and Shuqba which stems from the erection of the separation fence in the route which was chosen by the military commander proportionate to the security benefit which arises from the erection of the fence in that same route?
> **…**
> **…**one cannot say that this is a disproportionate severe injury …the damage to property is considerably small and the damage is being properly compensated for. The permit regime allows access to the lands which remain west of the fence. The route of the fence in the area does not cut off the residents of the villages from essential services, does not leave Palestinian residents in the seam zone, and does not create "a veritable chokehold, which severely stifles daily life"… [paragraphs 16-17 of the judgment rendered by the President **A. Barak**. Emphasis added – D.B.].

And in HCJ 10309/06 **Alfei Menashe Local Council v. The Government of Israel** (not published yet, August 29, 2007) (hereinafter: **Alfei Menashe**), we stated as follows:

> "… the route severely injures the Palestinians who reside in the northern villages, since alternative A leaves the two villages within the seam zone. However, we were not convinced that the injury was disproportionate. The two villages are adjacent to road 55. The two villages together consist of about 400 inhabitants. The respondents undertook to act for the purpose of making the living conditions of the inhabitants reasonable. The access of all inhabitants of the villages to the Qalqiliya area is made possible through crossing 109, which is open 24 hours a day. In addition, the passage of students, transportation and medical services is also facilitated. Under the circumstances of the matter, one cannot say that the injury inflicted on the petitioners is not proportionate to the security benefit which arises from the fence that protects road 55, which serves thousands of passengers on a daily basis." [paragraph 19 of the judgment].

13. All of the above clearly indicates that over the years a real connection was created in our judgments between the security fence issue (and the judgments rendered in that regard) and the seam zone issue. This connection clearly stems from said judgments, but it is also mandated by the logic of things and the main purpose of the security fence, which obligates the establishment of a legal framework which would apply to the territories of the seam zone and would enable the military commander to effectively control and supervise the individuals who enter these

territories, the passage from which into the territory of Israel is free and open. In the absence of such framework, there is a concern that the objective of the security fence would not be realized.

The petitioners disagree with the above. According to them, the connection created by the state between the route of the fence and the permit regime is not obligatory, and other solutions which may realize the security objective may be pointed at. However, it seems that this argument made by the petitioners focuses on the level of the possible alternatives for the prevailing government policy in the seam zone, and does not relate to the fact that a material connection which cannot be ignored of exists between the zone and the security fence issue. In a certain sense, an implied recognition of the need to find, in practice, some unique arrangement for the complex situation in the seam zone, for security reasons, arises from petitioner's argument.

14. Therefore, we accept the position of the state according to which a close connection exists between the security fence issue and the legal determinations pertaining thereto, and the seam zone issue. This connection directly affects the legal framework within which the petitions before us operate, and as will be elaborated below, it may also give a legal solution to many of the arguments raised by the petitioners, mostly to the arguments which belong to the first group of arguments, which challenges, as aforesaid, the mere policy in the seam zone as a whole. Nevertheless, it is clear that the mere existence of a connection between the route of the fence and the existence of a seam zone, even where the route which was chosen was approved and satisfied the tests of this court, does not end our discussion, since we are still obligated to examine whether the solution which the state chose to adopt in the seam zone areas complies with the requirements of the law.

The legality of the permit regime

The authority of the military commander to close the area

15. In the center of the unique policy which was applied to the seam zone – against which these petitions are directed – stands the decision of the military commander to close the seam zone in a manner which requires a permit for each entry thereto. This court has long recognized the authority of the military commander to close a certain territory within the Area, in accordance with the rules of international law which apply to the Area. Thus, for instance, it was held in HCJ 9593/04 **Rashed Morar v. Commander of IDF Forces in Judea and Samaria** (not published yet, June 26, 2006) (hereinafter: **Morar**) paragraph 12 of the judgment:

> "The Judaea and Samaria Area is held by the state of Israel under belligerent occupation and there is no dispute that the military commander who is in charge of the Area on behalf of the state of Israel, is authorized to close the entire Area, or any part thereof, and thereby to prevent anyone from entering or leaving the closed area. This power of the military commander is derived from the rules of belligerent occupation under public international law and from the obligations of the military commander to provide for the safety and security of the residents of the Area and to maintain public order in the Area. (See: Article 23(g) and Article 52 of the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 (hereinafter: the **Hague Regulations**); Article 53 of the Fourth Geneva Convention

> relative to the Protection of Civilian Persons in Times of War, 1949 (hereinafter: the **Fourth Geneva Convention**); HCJ 302/72 **Hilo v. Government of Israel**, IsrSC 27(2) 169, 178 - 179 (hereinafter: **Hilo**). This power of the military commander is also enshrined in security legislation in section 90 of the Security Measures Order (see, for instance, HCJ Hilo, pp. 174, 179; HCJ 6339/05 **Matar v. Commander of IDF Forces in the Gaza Strip**, IsrSC 59(2) 846, 851-852)."

However, needless to reiterate and emphasize what has already been said in many judgments rendered by this court, that the mere existence of power was not sufficient and that we should examine whether the power to close the area under the circumstance of the matter pending before us was lawfully exercised. This will be done by a twofold examination: firstly, an examination of the purpose for which the power is exercised and the various considerations which the military commander should take into account while making an order to close the area, and in the second stage an examination of the proper balancing of the considerations and whether such balancing was carried out by the military commander under the circumstances of the matter pending before us (and see the above mentioned **Morar**).

(A) The purpose for which the measure of closing the area is used

16. With respect to the first aspect which concerns the purpose for which the measure of closing the area is used, as specified above, and in view of the close connection between the security fence and the seam zone, it may be said that the decision to close the seam zone is based on a clear security purpose, which complements the original purpose of the security fence. The above also arises from judgments rendered by this court in the past, under similar circumstances (see **Mara'abe**, pp. 546-547).

The petitioners raise a far reaching argument, according to which the security purpose is nothing but a camouflage for another purpose – the slow emptying of the closed area from its Palestinian inhabitants and their deprivation of their lands for the purpose of thickening the Israeli settlements in the area, in a manner which amounts to a prohibited annexation under the rules of international law. We shall firstly note, that these arguments were presented to us without any real substantiation, other than the argument that the mere closure of the territories of the seam zone, in and of itself, injures the Palestinian inhabitants, particularly those having a personal connection and interest to enter the territories of the zone. Beyond that, the state argues that arguments of this sort have already been raised and rejected several times in the past in various proceedings concerning the route of the fence, within the framework of which the petitioners in the various petitions tried to convince the court that the security fence was erected for political rather than for security reasons, and that similar to the contentions made in the petitions pending before us, the decision was intended to cause a prohibited annexation of territories of the Area.

In this regard, the state correctly argues that already in **Beit Sourik**, the first judgment which has broadly discussed the issue of the legality of the security fence, the court rejected the argument according to which the erection of the fence was founded on political considerations, and stated as follows:

> "We have no reason to assume that the objective is political rather than security-based. Indeed, the petitioners did not carry the burden and did not persuade us that the considerations

behind the construction of the separation fence were political rather than security-based..." [**Beit Sourik**, page 831].

In its judgment in **Mara'abe**, which was rendered later on, the court responded to the argument that the erection of the fence was founded on political considerations as established in the advisory opinion of the international court in Hague, and in this context President Barak reiterated the determination made by him in **Beit Sourik** and stated as follows:

> "98. In **Beit Sourik** 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 the construction of the fence was not political. This is our conclusion in the petition before us as well. Here as well, we were persuaded that the decision to erect the fence was made in view of the reality of severe terrorism which has plagued Israel since September 2000.
>
> …
>
> 100. On the basis of all the material at our disposal, we have reached the conclusion that the decision to erect the fence was founded on a security consideration, to prevent the infiltration of terrorists into the state of Israel and into the Israeli settlements in the Area. The separation fence constitutes a central security component in Israel's fight against Palestinian terrorism." [pp. 546-549].

Later, in the **Alfei Menashe** judgment, we have discussed an argument similar to petitioners' arguments before us concerning a prohibited annexation:

> "…petitioners' legal argument is that alternative A **contravenes the principles of international law since it creates a *de facto* annexation of the land which remained west of the fence**; due to the absence of a legitimate military need which justifies the erection of the fence in certain segments thereof; and due its disproportionate violation of the fundamental rights of protected citizens. It is argued that the route of the fence creates a territorial continuity between the state of Israel and the Alfei Menashe settlement. In the "seam zone", severe limitations are imposed on the Palestinians, who are not entitled to enter it without a permit. In practice, the fence creates a permanent change in the enclave's territory…" [paragraph 9 of the judgment, emphasis added – D.B.].

In this proceeding too, we did not find that petitioners' arguments undermined the legality of the erection of the fence, as we were convinced – based on the determinations made in the **Mara'abe** *[sic]* judgment - that the erection of the fence was founded on clear security considerations, as follows:

> "We do not take lightly the injuries to the Palestinian inhabitants which arise from the construction of the fence in its new route too. About 2,500 dunam of privately owned land are left behind

> the fence and in the seam zone. **This injury is required for security reasons**. However, even if this is a severe injury it cannot be said that it is disproportionate. **We accept respondents' position according to which there is a security need which justifies the seizure of these lands**. We were convinced that no alternative route exited which inflicted a lesser injury and which could realize the security objective…" [paragraph 18 of the judgment, emphasis added – D.B.].

Hence, the above indicates that the court has recognized in its judgment that the erection of the security fence was founded on security considerations rather than on inappropriate political considerations. This obviously obligates an individual examination of each and every segment – whether there is a segment the route of which was chosen for an extraneous considerations - as was done in the past in petitions which were filed with us, but as a general rule this is the guiding legal situation which applies to the case pending before us as well.

17. The stipulations made in the judgments concerning the recognition of the security objective of the fence, directly affect our case, since the state has also clarified in its response that the seam zone was an essential ancillary product of the route of the security fence, and that **it was meant to be a complementary component in achieving the security objectives of the fence**. In view of the nature and character of the seam zone, being an area which is not separated from the territory of Israel by any barrier, it is difficult not to accept the argument that there is a security need to establish a mechanism which would enable a close supervision of those who enter through it and which would assist the security forces and improve their ability to fight Palestinian terror threats the purpose of which is to cause harm to Israel and its inhabitants. All of the above also explicitly arise from the declared objective which is set forth in the seam zone declaration, as specified above.

Under this state of affairs, the petitioners were unable to substantiate the argument, even under the circumstances of the case pending before us, that the decision to close the seam zone was founded on a different objective – other than the security one. Therefore, petitioners' argument that the permit regime is founded on unacceptable political objectives which point at its illegality must be rejected.

18. As aforesaid, under the circumstances of the case at hand we were convinced that the decision to close the zone following the erection of the fence and the establishment of a "seam zone" was founded on a security objective. This security objective conforms with the authorities conferred upon the military commander of the Area under the laws of belligerent occupation, and under his obligation to ensure "public order and safety" (see Article 43 of the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 (hereinafter: the **Hague Regulations**), and it constitutes one layer of the complex web of considerations which should be taken into consideration by the military commander. And it was so held in this regard in **Mara'abe**:

> "…indeed, in exercising his authority pursuant to the laws of belligerent occupation, the military commander must "ensure the public order and safety." In this framework, he must take into account, <u>on the one hand</u>, considerations of state security, military security, and the personal security of anyone who is present in the Area. <u>On the other hand,</u> he must take into account the human rights of the local Arab population." [page 506].

And see also Beit Sourik, page 833, HCJ 393/82 **Jam'iat Iscan v. Commandeer of IDF Forces in the Judea and Samaria Area**, IsrSC 37(4) 785, 794-795 (1982).

19. However, as indicated by the above statements made in **Mara'abe** and in other similar contexts, it is obvious that the security consideration is not the only consideration which the military commander is obligated to consider while excising his said authority, although it is an essential consideration. Against this consideration, the military commander must ensure that the human rights of the Palestinians under his control in an area which is under belligerent occupation, who are protected residents under international law, are properly protected.

It seems that on the theoretical level there is no dispute between the state and the petitioners concerning the set of considerations which the military commander should take into account in addition to the security consideration. The dispute between the parties mostly pertains to the manner by which the military commander balanced the different considerations in making the decision to close the area and apply the permit regime. This argument was widely discussed by the petitioners in their petitions, since, according to them, in making the decision to close the area and apply the permit regime, the military commander acted contrary to the obligations imposed on him towards the protected residents, in violation of the balance between the different considerations which he must take into account, and in violation of fundamental principles of international humanitarian law and the laws of belligerent occupation. This violation leads, according to the petitioners, to a severe and disproportionate violation of many human rights of the protected residents.

The legal source which establishes the rights of protected residents

20. This is the place to note, that the petitioners dedicated a long part for their detailed arguments concerning the legal sources which gave rise to the rights of the Palestinian inhabitants, and referred on this matter to the provisions of the Fourth Hague Convention and the humanitarian provisions of the Geneva Convention relative to the Protection of Civilian Person in Times of War, 1949 (hereinafter: the **Fourth Geneva Convention**), the various human rights covenants (including the international covenant on Civil and Political rights from 1966 of which Israel is a party) and the Israeli legislation. Following the above, the petitioners elaborated on their positions concerning the application of human rights covenants in the areas under belligerent occupation, and requested that a judicial decision be rendered on this issue.

These arguments are not new with us, as they were raised in the past in many petitions which were filed with this court. In those petitions the court chose not to decide on this issue, when it was willing to assume, without making a decision on this issue, that such covenants applied to the Area.

And thus, for instance, it was held by us in **Mara'abe**:

> "Can the rights of protected residents be entrenched in the international covenants on human rights, the central of which is the International Covenant on Civil and Political Rights, 1966, to which Israel is a party…
>
> … When this question arose in the past in the Supreme Court, it was left open, and the Court was willing, without making a decision on this matter, to rely upon the international covenants.
>
> … We shall also adopt a similar approach. Indeed, we need not, in the framework of the petition before us, take a stance

> regarding the applicability of the international covenants on human rights in the Area. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights…
>
> **However, we shall assume – without making a decision on the matter – that the international covenants on human rights apply to the Area"** [pp. 505-506 of the judgment, emphasis added – D.B.].

We have further noted in this context in HCJ 1890/03 **Bethlehem Municipality v. State of Israel – Ministry of Defense** (not published yet, February 3, 2005)(hereinafter: **Bethlehem**) that:

> "We are not called upon to decide the question of whether and to what extent… the international human rights covenants apply to the Judaea and Samaria Area… It is sufficient for us to say that within the framework of the duty of the military commander to exercise his discretion reasonably, he must also take into account, among his considerations, the interests and rights of the local population, including the need to minimize the scope of harm inflicted on their freedom of movement, and this, as aforesaid, is not disputed by the respondents." [paragraph 15 of the judgment].

Hence, the fact that we have left the question concerning the applicability of the human rights covenants to the Area undecided, did not prevent us from examining in the past, to the extent possible under prevailing circumstances, the rights of the protected residents both under the humanitarian covenants and the human rights covenants, as we shall also do in the petitions before us.

21. In this context it should be mentioned that the array of rights which the military commander is obligated to protect is broad, and encompasses "the variety of human rights" (**Mra'abe**, page 503)

> Within the framework of his responsibility for the welfare of the residents of the Area the military commander must also strive to properly protect the constitutional human rights of the local inhabitants under the limitations of the prevailing conditions and factual circumstances on the scene… the protected constitutional rights consist, *inter alia*, the right to freedom of movement, freedom of religion and worship and the right to property. The military commander must exercise his authorities to maintain safety and public order in the Area while protecting human rights".
>
> (HCJ 10356/02 **Haas v. Commander of IDF Forces in the West Bank**, IsrSC 58(3) 443 (2004), page 461).

In addition, and this was also emphasized by the state in its response, in any event, all of petitioners' arguments concerning ostensible violations of human rights covenants are similar to their arguments concerning ostensible violations of international humanitarian law which constitutes the normative basis which applies to the regime in the Area. Hence, for this reason also we need not address the question of the applicability of international human rights covenants to the Area for the purposes of this petition.

In view of the above, we did not find it necessary, at this present time, to decide on petitioners' arguments on this level, and as we have acted in the past, we will be willing to assume, for discussion purposes, that the international covenants on human rights apply to the Area, to the extent they may be implemented under the prevailing circumstances in the Area, and that the military commander is obligated to protect the human rights of the inhabitants of an area under belligerent occupation, in their entirety, to the extent it does not contradict the security situation and the conditions under which the area is held. In any event the state does not dispute its said duty, and it seems that it is even aware of the fact the decision to close the zone and apply the permit regime thereto violates various rights of the local population.

22. Indeed, it is difficult to disagree that the declaration of the areas of the seam zone as closed areas, as well as the mere erection of the security fence, severely encumber the Palestinian inhabitants, and in particular, inflict a severe injury on innocent inhabitants who happen to be in the seam zone against their will due to the fact that they live or work in the zone, as their businesses or fields and agricultural lands remained locked within the zone. The application of the permit regime, and the need to obtain a permit in order to enter and leave the zone, imposes a clear restriction on the freedom of movement of the inhabitants of the Area within this zone, and restricts the accessibility of the inhabitants – to their homes, lands and businesses located within the seam zone. As will be further specified below, this state of affairs creates a reality which makes it difficult to maintain the routine of family life, social life, commerce and work, both of the inhabitants who live in the seam zone and of those who are related to them but do not live therein.

However, as is known, the rights with which we are concerned are relative rights which may be restricted in view of additional considerations and interests, such as considerations of national security, public order and rights of others (**Mara'abe**, page 504), and as was already noted in **Morar**: "The balancing of the different values should be made in a manner that would minimize the scope of the injury to the required degree… and a proper balance should be maintained between the duty to protect public order and personal safety and the duty to protect the realization of human rights (paragraph 16 of the judgment).

Therefore, one should examine, with maximum care, the second aspect which is required for the purpose of determining whether the authority to close the area was lawfully exercised, which is the question of whether, in making his decision to close the area, the military commander has properly balanced the various considerations.

(B) The various considerations and the balancing thereof

23. The decision to make an order to close the zone for security reasons is found on the one end of the axis of the considerations under the circumstances of the matter pending before us, whereas the measures taken to minimize the injury inflicted on the Palestinian inhabitants as a result of the decision to close the area, is found on its other end. In the midst of these measures is the **collection of arrangements** that were established under the permit regime, which – according to the state – should provide an adequate solution to the population which has a vital interest to enter and remain in the seam zone, along **practicable aspects** which concern the manner by which the permit regime is applied *de facto*, commencing from the applications' processing procedure and ending with the prevailing movement and traffic regime. We shall therefore, concisely review the various arrangements which were established by the respondents, and for discussion purposes, we shall differentiate between the various population groups to which the permits apply. It should be noted that during the years these arrangements underwent changes, and we shall herein refer to their current version.

The main arrangements which were established

(A) <u>The arrangements concerning permanent residents in the seam zone</u>

24. The arrangements concerning inhabitants who hold permanent resident cards in the seam zone were established in the "**Directives Regarding Permit to Permanent Resident in the Seam Zone Area**" (hereinafter: the "**permanent resident directives**"). Section 2 of said directives provides as follows:

> **Issuance of permanent-resident permit**
>
> 3. (a) A permanent-resident permit shall be issued by a competent authority:
>
> 1. to a person lawfully present in the region who was 12 years or older **on the effective date of the declarations** and with respect to whom it was proved to the satisfaction of the competent authority that he was a permanent resident in the seam zone on the effective date of the declarations.
>
> 2. to a person lawfully present in the Area who holds a new resident permit in the seam zone, as provided in section 7 of these directives, and with respect to whom it was proved to the satisfaction of the competent authority that he has been permanently residing in the seam zone for a period exceeding two years.
>
> 3. to a person lawfully present in the Area who was 12 years or older after the effective date of the declaration and who was registered as an accompanying individual in a permanent-resident card which was issued pursuant to subsections (a)(1) and (a)(2) [emphasis added – D.B.].

Section 4 of the directives further provides as follows:

> **Submission of Application**
>
> 4(a) An application for the issuance of a permanent-resident card, pursuant to section 3, will be submitted within a year from the effective date of the declarations.
>
> (b) Notwithstanding the provisions of

subsection (a) with respect to a person who was 16 years old on the date specified in subsection (a), the application for the issuance of a permanent-resident card will be submitted before he turns 16, and not later than one year after he reached said age."

25. Under the seam zone Standing Orders, for the purpose of obtaining a permanent resident permit in the seam zone, the applicant must prove that **his center of life is in the seam zone**. This demand is also relevant for resident card renewal applications. The procedures provide that for the purpose of conducting a center of life examination the competent authority (heads of the relevant coordination and liaison offices) may conduct home visits, check various tax payments, examine the place of residence of the applicant's children etc. It is further indicated that the procedures concern two situations in which a seam zone permanent resident card may be granted – the **first situation** concerns the grant of a resident card to a person who, at the time a population census is conducted in the seam zone shortly after the declaration, will prove that his center of life is in the seam zone, and the **second situation** concerns the grant of a resident card to a person who submits such an application after the population census, according to the conditions specified in section 7 of the above mentioned directives, as will be further discussed below.

26. According to the data presented by the state, at this present time the permanent resident cards in the seam zone are valid for a maximum period of two years (in the past such certificates were granted for shorter periods). In practice, it seems that a considerable percentage of the certificates are granted for shorter periods. These certificates are renewable on the condition that a center of life in the seam zone was proved.

The holders of permanent resident cards in the seam zone are entitled to remain in the seam zone and to leave and enter it through the checkpoints – by foot or by a vehicle in their possession or in the possession of their family (in the past a separate permit was required for this purpose). Entry into Israel or the Israeli settlements requires the receipt of adequate permits according to the relevant procedures for such applications. The travelling arrangements of the permanent residents in the seam zone were entrenched in section 2 of the "Directives Regarding Movement and Traffic in the Seam Zone" (hereinafter: the "**movement and traffic directives**") and in section 6 of the "Directives Regarding Entry Permits into the Seam Zone and the Presence Therein" (hereinafter: the "**entry directives**").

The data provided by the state indicate that along phases A and B of the fence, which consist, to the state's estimate, a population in the scope of about 7,000 inhabitants, about 5,155 permanent resident cards were issued in 2009. Along phases C, D and "surrounding Jerusalem" according to the state's estimate, the population consists of about 390 inhabitants only, and according to its data about 280 permanent resident cards were issued. The state notes that in this area permanent resident cards were issued to all inhabitants over the age of 16.

(B) <u>The arrangements concerning applications of Palestinians who are not permanent residents in the seam zone to enter the zone</u>

27. In addition to the regulation of the status of permanent residents in the seam zone, the entry directives specify a list of causes based on which Palestinians, residents of the Area, may request to

enter the seam zone with what is known as a "personal permit". The provisions concern two main groups – those having a permanent interest and those having an occasional interest. The **group having a permanent interest**, the members of which need, according to the directives, a longer period of time, consists, in general, of farmers, merchants, business owners, international organizations personnel, Palestinian Authority personnel, education personnel, medical team, students and any other group having a permanent interest as will be determined by the competent authority. According to the directives, the members of this group will be issued, as a general rule, permits valid for one year, with the exception of farmers who prove a connection to an agricultural land in the zone, who will be issued, as a general rule, permits valid for two years, and students, who will be issued, as a general rule, permits for the period of their studies. The group having an occasional interest consists of individuals who do not have a permanent interest and whose entry into the zone is required for a short period of time on an occasional basis. The directives stipulate that the members of this group will be issued permits for a duration to be determined based on their individual circumstances. This group consists, *inter alia*, of the family members and employees of those who received a permanent agricultural permit, who do not have a direct connection to the land, and who receive working permits in the seam zone the validity of which is limited for shorter periods of time. This group consists, *inter alia*, of all permit applicants for visitation purposes and other purposes which are not included in the Standing Orders' causes and for whom a permit known as a "special permit" is issued. Proper application forms for the various causes were attached to the directives. The holders of personal permits must receive a separate permit in order to enter the seam zone by car.

The manner by which the arrangements are implemented

28. In addition to the establishment of the arrangements themselves, one should take into consideration the reality in which these arrangements are implemented in practice, commencing from the applications' processing procedures and ending with the prevailing movement and traffic regime, which will also serve as a layer in the comprehensive examination of the proportionality of the injury inflicted on the Palestinian inhabitants, as will be specified below. The state discussed in length, in its response and in its updating notices, these aspects and the measures taken by it to improve the service given to the Palestinian inhabitants in practice – by handling the various permit applications more efficiently and by improving the entry arrangements into the zone itself.

With respect to the handling of the various applications, it should be firstly noted that the general framework for the handling of the various permit applications was established in the entry directives and the permanent resident directives, and was specified in detail in the Standing Orders. According to these Orders the various permit applications to enter and remain in the seam zone should be submitted to the competent authority – the heads of the Israeli civil coordination and liaison offices, together with all of the required documents according to the type of the requested permit. As to the handling procedures, a certain distinction exists between the two main groups of permit applicants with respect to the authorities conferred upon the competent authority: with respect to permanent residents, the competent authority may approve the application or transfer it for the examination of a special committee to be established for the purpose of examining such applications (hereinafter: the **committee**), which committee may conduct any examination it may need for the purpose of its review of the application, including the summoning of the applicant to appear before it and the issuance of instructions concerning the attachment of different documents. The committee is not authorized to deny applications, unless the applicant was given the opportunity to present his arguments before it. The competent authority is entitled to issue to the applicants temporary permits until a final decision in the application is made by it, at its discretion. On the other hand, with respect to all other permit applicants, the competent authority may approve an application (and issue a permit for the requested term or for a shorter term), deny it or transfer it

for the handling of a committee to be established for the examination of such applications, along with the issuance of a temporary permit until said committee concludes the examination process. In any event, and as indicated by the Standing Orders, a decision to deny the application requires that a denial form be delivered to the applicant, which would state the reason for the denial of the application. In addition, an applicant whose application was denied, is given the opportunity to appear before an appeal committee in the relevant coordination and liaison office. It should be further noted that a perusal of the Standing Orders indicates that the mere existence of a security preclusion for entering Israel, does not prevent the issuance of a permit to enter and remain in the seam zone, and the application will be examined on an individual basis in view of the public interest, on the one hand, and the interest of the inhabitant for whom the permit is requested, on the other. In its updating notice dated May 25, 2009 the state noted that the civil administration engaged a large team which was responsible for the handling of such applications. In addition to the team which handles ongoing applications, professionals having unique expertise handle professional issues pertaining to the seam zone, such as real estate and infrastructure issues. In addition, the state emphasized the existence of a civil administration "public liaison officer" who received requests on different matters, and whose activities were intended, *inter alia*, to increase the availability for applications and requests of the Palestinian inhabitants, also on seam zone issues.

With respect to the entry arrangements into the seam zone, the state specified in its response the various gates which were located along the route of the fence at the entrance to the seam zone, and the measures taken by it, which were intended, as argued, to enable, to the maximum extent possible, an easy entry of the inhabitants to the seam zone areas. Accordingly, the state noted in its response, that in the seam zone which was declared along phases A and B, there were 53 gates, out of which 37 gates were agricultural gates used for the passage of Palestinians to their lands or homes. The state pointed at four types of gates which exited in the seam zone: a fabric of life gate – which is open daily on a continuous basis between 12 to 24 hours a day; a day gate – which opens twice or three times a day, for variable durations of between half-an-hour to two hours, depending on the scope of those who wish to pass through and the agricultural needs; a seasonal gate – which opens in the agricultural seasons with an emphasis on the relevant olive growing periods, and in the other seasons the gate opens subject to coordination in advance; and an operational gate – which serves the operational forces. The state reiterates time and again in its responses that ongoing acts are taken by it to improve the movement and traffic arrangements which were established, including the various types of crossings which form a part thereof. Thus, the state emphasized that extensive effort, financial and other, is invested by it in the construction of high standard crossings, in the improvement of the quality of the services rendered therein and in the installation of advanced security devices which enabled a better security check along the shortening of the waiting periods in the crossing. Similarly, it was noted that significant amounts of money were invested in the improvement of the agricultural gates, that their opening hours were extended and that various arrangements were established for their opening when required. It was noted that various possibilities existed for the opening of the agricultural gates beyond their regular opening hours, including, *inter alia*, by calling the humanitarian center located at the civil administration headquarters in Beit-El. In addition, it was so argued, 22 Arabic speaking officers and non-commissioned officers were assigned to the main pedestrian crossings whose role was to ensure reasonable fabric of life in the crossings and to assist to find solutions for problems which arose therein. In its updating notice, the state elaborated on additional changes which took place in this area, including the upgrade and civilianization of the Reihan crossing – near eastern Barta'a in which most of the seam zone inhabitants lived. It was argued that this step has significantly improved the security check procedures and the passage through said crossing, through which about 2,500 Palestinians pass on a daily basis, and that examinations which were conducted indicated that the average passage time per person amounted to about ten minutes in the average

during busy hours and to five minute in less busy hours. A security check and passage of four vehicles takes about 15-20 minutes in the average.

Is "proper balancing" exercised by the above arrangements?

29. With the above data before us – we shall examine the main question which should be decided in the petitions before us - whether in the seam zone declarations and in the application of the permit regime and the arrangements related thereto, the military commander has properly balanced between the various considerations.

We shall do this, as is customary, by examining whether the measures taken by the military commander satisfy the requirement of proportionality which serves as a central tool in the exercise of judicial review over the acts of the military commander in the Area (and see: **Mara'abe**, pp. 507-509, **Beit Sourik**, pp, 836-841). As is known, the requirement of proportionality in our system is premised on three sub-tests, and the burden to show that his acts satisfy these tests is imposed on the military commander. Firstly, he must show that a rational connection of suitability exists between the measure taken and the objective. Secondly, he must show that of all adequate measures which might have possibly been taken, the measure which was taken injured the individual to the least extent possible. Thirdly, he must show that the damage inflicted on the individual from the measure taken must be of proper proportion to the gain brought about by that measure to the public at large.

We shall analyze the proportionality of the decision of the military commander to close the area on **three** interrelated **levels** – **(a) the mere decision to close the area; (b) the various rules which were established under the "permit regime" which was applied therto; (c) aspects which concern the implementation of such arrangements in practice – from the handling processes of the various applications and through the actualities of life which was referred to by the state as the "movement and traffic regime**". The conduct of such a multi-layered examination is mandated by the logic of things, and is also required in view of the state's position that the proportionality of the injury inflicted on the inhabitants is drawn from a **multi-layered** examination of the unique gamut of arrangements which was established in the seam zone, which forms a comprehensive system consisting of various measures the purpose of which is to minimize the injury caused as a result of the fact that the zone was a closed area – on the level of the procedures which were established as well as on the level of the acts taken by the state to ensure that the lives of the inhabitants were not burdened beyond the extent required by security need. In this context it should be noted that there is no alternative but to reject petitioners' sweeping argument that in view of the injury inflicted on the protected rights, the decision to close the area is unlawful *ab initio* and that the acts taken by the state in the implementation thereof cannot change this aspect. As stated above, and as will be further elaborated below, the acts taken by the state in the implementation of the arrangements which were established in the seam zone directly affect the proportionality of the injury inflicted on the rights of the protected residents, and on the manner by which the rights are realized *de fact*o (and compare: **Morar**, paragraph 21 of the judgment).

The first sub-test – a rational connection between the means and the objective

30. We have already specified in length the state's position on this issue, according to which the decision to declare the seam zone as a closed area and the establishment of unique arrangements which enable the control and supervision of those who enter and leave the zone, constitutes an additional layer in the objective of the security fence – to assist the state of Israel to fight the severe threats of terrorism directed at it from the territories of the Palestinian Authority. Therefore, it seems that the decision to close the zone and facilitate the passage thereto through specifically defined gates, and the establishment of a unique permit regime which enables the respondents to

employ individual supervision over those who enter and leave the zone and the application of a movement and traffic regime for the implementation of all of the above, have a rational connection to the declared security objective. Therefore, under the circumstances at hand, the test of the rational connection between the means and the objective is satisfied **on the three levels of examination specified above** – the decision to close the zone itself, the arrangements which were applied to the area and the acts taken to implement it.

The second sub-test – the least injurious means

31. In the analysis of the second proportionality test, a distinction should be drawn between the three levels mentioned above – the mere decision to close the area, the arrangements applied thereto and the measures taken to implement said arrangements.

With respect to the **mere declaration** of the seam zone as a closed area, the petitioners argue that the declaration of the seam zone as a closed area is not required in view of the fact that the security objective may be realized by less injurious means. Hence, according to the petitioners, there is no need to close the zone and to prohibit the entry of anyone who does not hold a permit since it would be sufficient to conduct a security check by the respondents in the crossings located along the security fence, in a manner which would prevent the entry of armed terrorists and explosives to the zone – from which they have easy access to Israel – and to prevent passage from the closed area to the territory of Israel. In view of the above, the petitioners are of the opinion that the permit regime which was applied is not the least injurious means out of the diverse means which may be used for the realization of the security objective.

On the other hand, the military commander is of the opinion that only a physical check-up at the entrance to the seam zone is not sufficient for the realization of the security objective. In this context it was argued, that the mere conduct of a physical check-up was not sufficient to prevent the entry of terrorists and/or individuals against whom a security preclusion existed to the seam zone, to whom weapons and explosives would be transferred in the seam zone area or in Israel, in various ways. Therefore, the state argued that a physical check-up only could not provide adequate guarantee for the thwarting of the terrorists' plans to carry out a terror attack in Israel or in the Israeli settlements in the seam zone and hence, it could not be said that this means realized the security objective in the same manner.

As was held by us many times, in matters of security expertise the court attributes substantial weight to the professional position of the military commander - who has the knowledge and expertise in these matters – who is in charge, by virtue of his position, of the security of the Area and its inhabitants (see **Beit Sourik**, pp. 842-843; HCJ 8414/05 **Ahmed Issa Abdallah Yassin v. The Government of Israel**, (not published yet, September 4, 2007), paragraph 29 of the judgment). The professional position of the military commander is that under the circumstances at hand, the adoption of petitioners' proposal to revoke the decision to close the zone with the proposed alternative being to conduct a physical check-up in the crossings to the seam zone area, would not realize the security objective. This position seems *prima facie* reasonable, and we did not find any reason to interfere therewith. Indeed, it seems that an individual examination which is conducted prior to the issuance of an entry permit into the seam zone – including an examination *vis-à-vis* the security forces of whether a security preclusion exists against the permit applicant - minimize the potential of the security threat posed, and thus, better realize the security objective underlying the closing of the zone. As is known, only when the least injurious means equally

realizes the objective which the administrative act is intended to achieve, it may be said that it should be adopted. When the least injurious means exists but it fails to realize the objective in a similar manner, it should not be adopted under the second sub-test of proportionality (and see also Aharon Barak **Proportionality in the Law – The Violation of the Constitutional Right and its Limitations** (2010), pp. 395-396).

Therefore, we found that on the first examination level – the mere decision to close the zone for the realization of the security objective - satisfies the second proportionality sub-test.

32. This is also our position concerning the **arrangements** which were adopted under the permit regime, and as will be further elaborated below, we found that as a whole, and subject to a number of specific comments which will be hereinafter specified, the petitioners were unable to point at other arrangements which realized the same security objective in a manner that caused less injury to the rights of the Palestinian population.

We have established our position in view of three major aspects – firstly, on the basis of our presumption that the permit regime imposes a very heavy burden on the Palestinian population and severely injures their rights. This presumption obligates the respondents to establish arrangements that would minimize to the maximum extent possible the encumbrance inflicted on the inhabitants, without undermining the security objective. Secondly, in view of the fact that in this judgment the relevant arrangements are overviewed from a general and wide perspective, without making redundant an individual examination in the future, to the extent required, of an alleged injury as a result of the application of the arrangements, as was done by us in different cases in the past. Thirdly, based on our determination that the mere decision to close the seam zone satisfies the second proportionality sub-test.

We shall specify our position according to the different groups of the population referred to by the arrangements:

With respect to the arrangements concerning **permanent residents** who were living in the zone on the **declaration date** , it seems, *prima facie*, that the population census and the substantiation of the center of life as a basis for the issuance of resident cards are reasonable measures to prove one's entitlement to be issued a permanent resident card, and it seems, based on respondents data, that in practice, permits are indeed issued to the vast majority of the inhabitants living in the area. These permits allow a relatively unrestricted movement between the territories of the Area and the seam zone – even by car – and it seems that the injury caused to the property rights and freedom of movement of the individuals who hold such permits, is relatively limited. Petitioners' arguments, also ostensibly indicate that they do not focus on the aspect concerning the issuance of permanent resident cards, but rather on respondents' policy which concerns the ability of these residents to maintain proper social and family life with Palestinian residents who live outside the seam zone. This aspect – which concerns the issuance of permits to Palestinian residents of the Area who are not permanent residents of the seam zone – will be discussed by us at a later stage.

According to the inspection reports which were attached by the petitioners themselves – which point mainly at the harsh reality with which the Palestinian residents must cope – it also ostensibly seems that with respect to the issuance of permits to permanent residents, changes to the better occurred during the time that passed from the commencement of the permit regime; and see the report of the OCHA organization (United Nations Coordination of Humanitarian Affairs – Office of occupied Palestinian territory) which was attached as Exhibit P/34 to their complementary response:

> "In previous years, permanent resident cards were not issued to a minority of the Palestinian residents of the closed area. This restricted their ability to leave their communities since the passage to all other parts of the West Bank is routed through manned block-roads and gates. **It seems that the above deviations were rectified**: as specified below, the main difficulty which faces Palestinians at this present time involves the attainment of visitor permits, which are required by Palestinians who are not residents of the closed area, especially farmers, for the purpose of entering the closed area which is located in the northern part of the West Bank…" [emphasis added –D.B.].

Under these circumstances, it seems to us that in essence the arrangement which was established for the permanent residents in the zone is *prima facie* reasonable and satisfies the requirements of the second proportionality sub-test. In addition, we did not find any flaw in the arrangements which were established by the state for **the new residents – i.e. those who requested to be recognized as permanent residents after the declaration date**, including by the establishment of a graduated arrangement in which, initially, a resident card is issued for one year, the renewal of which is conditioned on proving a center of life, as is customary in other similar proceedings, all of the above subject to one comment which will be further specified below.

33. The arrangements which were established concerning the issuance of permits to those who have a **permanent** and **occasional** interest, as such were specified, also satisfy, according to us, the second proportionality sub-test. As indicated by us above, we agree that the injury inflicted on this group is severe. Individuals who cultivated their lands in the seam zone, conducted their businesses over there and established family and social relations, are forced at this present time, in order to preserve the ways of their lives, to apply for an entry permit based on several limited causes. The residents of the zone itself are also injured from the regime which was applied thereto, since, against their will, the reality of their lives becomes difficult and complex, as social and business isolation is imposed on them in their place of residence. These injuries require the establishment of arrangements which preserve, to the maximum extent possible, the fabric of life which preceded the declaration, subject to security needs which require same. It seems to us, that as a general rule, the arrangements which were established satisfy this requirement. We shall refer to the arrangements which concern the different interest groups.

With respect to permit applicants for **agricultural purposes,** the state is of the opinion that the arrangements which were established by it give an adequate solution for the famers' needs – from the aspect of accessibility to their lands as well as from the aspect of the assistance provided to them in the cultivation of their lands. The petitioners, who presented a wide array of arguments concerning this group, dispute the state's position, and present data which point at the sharp decline in the issuance of permanent agricultural cards in the seam zone from the commencement of the permit regime, and at the difficulties encountered by the farmers when they enter the seam zone to cultivate their lands. This, in view of the cumbersome permit processing system, the lack of continuity in the agricultural handling which derives from short term permits, gates the opening hours of which are limited and difficulties in the passage of vehicles for the purpose of gaining access to the lands as well as for agricultural cultivation.

It seems that the state is also aware of the fact that a significant decline has occurred in the issuance of agricultural permits from the commencement of the permit regime. It is argued that this has occurred, due to the concern that the liberal policy which was allegedly applied in the past to the issuance of entry permits into the zone would be abused. Therefore, as specified above, it was

decided that *in lieu* of permanent agricultural permits, the family members and the workers would be issued temporary working or agricultural permits, according to the specific needs of the farmer. The data attached by the state supported its above position, even if there is merit in petitioners' position according to which the decline in the number of permanent permits was not fully compensated by the temporary permits. In addition, the state has concisely referred to the gamut of farmer related arrangements, which, according to it, provide a reasonable solution to this section of the population. This applies both to the issuance of the permits themselves – with a distinction drawn between their issuance on a routine basis and their issuance during the olive harvest season, and to the opening of the different gates according to the needs of the population, as balanced against security needs. In this context the state has already pointed out in its response that a directive was issued according to which whenever an agricultural gate located near the relevant agricultural plots of a resident was not open all year round on a daily basis, an additional gate or crossing which was open all year round on a daily basis, would be specified on the permit, through which the resident would be able to enter the zone, provided that the crossing would not necessitate the entry of the resident into Israel. The state has also responded to petitioners' argument concerning the difficulties in proving ownership of land in the Area, as a condition for proving a connection which gives rise to a right to obtain a permanent agricultural permit. According to the state – the requirements raised by it for the purpose of proving a connection to the land are reasonable – in regulated lands a land registration extract, and in unregulated lands other evidence, such as property tax registration extract etc. The state has also raised in its response possible solutions for the entry of vehicles and agricultural machinery into the seam zone as well as for the transfer of the goods to the territories of the Area located outside the seam zone.

34. Notwithstanding all of the arrangements which were specified by us, the picture presented by the petitioners in their pleadings and in the reports which were attached by them is severe (although we have not examined the reliability of the reports). It describes a complex reality in which, ostensibly, the land owners cannot continue to farm their land, in a manner which infringes on their livelihood and families, as a result of the prevailing policy concerning the issuance of permits and the entry options into the zone by foot and by car. This applies both to the entry into the seam zone by the land owners, their family members and additional farmers working with them, and to the entry of vehicles which are required for the agricultural cultivation and for the loading of the agricultural produce and the distribution thereof outside the seam zone.

Nevertheless, in these aspects the generality of the petition works to its detriment. Petitioners' failure to specifically refer to areas along the seam zone in which injury is inflicted on specific farmers, makes it difficult to thoroughly examine the condition on the scene and the specific balance system implemented in the case of each resident. The court did so in the dozens of fence petitions which were filed with it, and which challenged specific segments along the route of the fence; and it will do so in the future to the extent specific claims are raised by residents concerning injury inflicted on them as a result of the application of the various arrangements. However, petitioners' request as drafted in the petitions before us, in which the court is requested to revoke the gamut of arrangements which apply to the seam zone based on a vague and general injury – is not practical, since the only thing that the court can examine within the framework of the petitions as filed, is whether in the arrangements, as a whole, the state acts to minimize the violation of the rights of the protected residents.

Under the circumstances at hand, *prima facie*, it indeed seems that the respondents acknowledge the residents' right to continue to farm their lands and seek to enable those who have a connection to lands in the seam zone to continue to farm them, by enabling family members and other workers to assist them with their work. In addition, special crossings exist the purpose of which is to regulate the entry into the zone – some of which are adapted to agricultural activity according to the

seasonal needs. It seems to us that this arrangement gives reasonable solution which minimizes the violation of the rights of the farmers, and we assume in our said determination that respondents' declarations concerning the importance of giving proper solutions for the needs of the framers in the Area with real substance are filled by them with real substance. However, and as specified above, we cannot deny the possibility that in specific cases severe injury is caused to the human right to livelihood and land of Palestinian residents who cannot adequately farm their lands or who encounter other access difficulties, and the respondents, on their part do not take adequate measures to minimize said injury. As stated above, these cases may be reviewed within the framework of specific petitions, in which the court will be able to examine the gamut of relevant arrangements which apply to a certain area, and the specific balancing which takes place therein between the rights of the residents and other interests, as was previously done in similar petitions.

35. The above is also relevant to the other "interest holders" (either **permanent** or **occasional**) who are issued entry permits into the zone as specified above. *Prima facie* – and with one exception to which we shall refer forthwith – it ostensibly seems that the state has mapped all relevant interest holders whose entry into the seam zone is required in view of the rights granted to the Palestinian residents: merchants, workers, education personnel, international organizations employees, medical teams, etc. These permit applications are examined according to the procedures which were established by the respondents and according to the outline which was established as specified above, and the petitioners were unable to show that in view of the fact that this was a closed area which required a specific examination before a permit to enter it could be issued, other arrangements which cause less injury to the rights of the Palestinian inhabitants could be implemented.

36. Therefore, we came to the conclusion that as a **whole**, the arrangements which were established in connection with the entry and presence in the seam zone for the various groups satisfied the second proportionality sub-test.

However, in a number of aspects we found that it would be appropriate to make a certain change in the arrangements or to clarify the processing guidelines for the issuance of the various permits;

Thus, for instance, we found that in the arrangement which concerns the holders of **permanent resident cards** it would be appropriate to change a certain point. The movement and traffic directives and state procedures ostensibly indicate that a permanent resident may enter the zone only through the checkpoint specifically mentioned in the issued certificate. This issue was not sufficiently clarified before us with respect to permanent residents, but to the extent that the entry of these residents into the seam zone in which they live is restricted to a single crossing only, we did not find any justification for such restriction, and ostensibly it seems that the injury caused to the freedom of movement of the permanent residents into the zone may be reduced by allowing the passage of these residents from the zone into the territories of the Area **through all crossings** located in the relevant part of the zone, all subject to the opening hours of the crossings. This step does not frustrate the security objective – since these are residents whose presence in the seam zone was permitted by the state – but it somewhat eases their accessibility to the zone.

We also found that a **certain difficulty** existed in the arrangements which were established for **new** residents who wish to move into the seam zone **after the declaration**. The permanent resident directives do not define causes based on which a resident of the Area may file an application to move into the seam zone to live there. The Standing Orders define three narrow causes based on which new applications for the receipt of a permanent resident card may be ostensibly filed – A. a single man or woman who wish to change their place of residence for marriage purposes. B. a person who is married with a permanent resident of the seam zone. C. persons who acquired real

property in the seam zone and wish to move and live there on a permanent basis. In its response affidavit the state presented a position which ostensibly broadened the causes as it was stated that "a resident of the Area who wishes to live in the seam zone may submit an application to the district coordination office, which is examined in view of his connection to the zone (marriage relations, acquisition of real property and **such similar causes**) and his intent to permanently settle down therein" [emphasis added – D.B.].

In view of all of the above, we were not presented with a clear picture concerning the causes based on which an application to move to the seam zone may be submitted, but in any event, it seems to us that the closed list which was established in the Standing Orders cannot constitute a list which restricts the various causes based on which new applications for the receipt of permanent residency in the seam zone may be submitted, and that any Palestinian inhabitant who believes to have a good reason to move his place of residence to the seam zone will be entitled to submit an appropriate application which will be examined on its merits. On this issue it should be noted that we are of the opinion that the condition concerning "acquisition of real property" cannot be used as a single condition for the issuance of a permanent resident card for anyone who wishes to move into the seam zone for any reason other than family unification, in view of the complex circumstances of life in which residents of the Area may wish to change their place of residence and move into the seam zone although they have not acquired real property therein, for instance, by rental or transfer into the family house which is located in the zone. These data will be examined on their merits by the civil administration personnel according to the specific circumstances which would be presented to them. The expansion of the causes based on which applications for a new permanent resident card in the zone may be submitted, reduces the injury caused to the Palestinian inhabitants, and on the other hand, does not frustrate the security objective, since it does not prevent the state from thoroughly examining the applicants, according to its own established parameters, before a permit allowing their entrance into the seam zone is issued. Therefore, **we found that on this issue, arrangements which may potentially cause less injury to the rights of the inhabitants can be established**, and so we order.

In addition, we were especially troubled by petitioners' arguments which pointed at an **injury to the life of the individual and community of permanent residents in the seam zone**. In this context it was argued that the application of the permit regime disconnected the residents of the zone from their families and friends who resided in the "outside" world – in the territories of the Area which were not included in the seam zone – and restricted their ability to conduct proper trade, community and social life. It seems to us that this concern is justified. As noted by us above, the reality which was imposed on the residents of the seam zone against their will, exposed them to a forced separation from the world which lies beyond the seam zone. Israel, into which they are not allowed to enter, on the one hand, and on the other, the territories of the Area where their friends and family members reside who may be reached by them, but who cannot enter the zone without a special permit, the receipt of which naturally involves a bureaucratic process *vis-à-vis* the civil administration. Under these circumstances it seems to us that the severe injury inflicted on the residents of the zone is self evident.

The main solution offered by the state for this violation is embedded in the possibility, which exists under the rules, to submit an application for an entry permit into the seam zone for a "person having an occasional interest", who receives a permit for personal needs for a duration to be determined by the competent authority. According to the Standing Orders, these permits are issued for visitation and other purposes which are not detailed in the Standing Orders and which are referred to as a "special permit". According to the data provided by the state, in 2007 for instance, about 11,015 permits for personal needs were issued, about 7,200 in 2008 and about 5,203 in 2009. Hence, *prima facie*, there was a significant decline in the issuance of such permits over the years.

We do not know why this decline has occurred – is it a coincidental datum or whether it stems, as the petitioners argue, from the difficulties encountered by visitors who wish to enter the seam zone – but in any event it seems to us that the civil administration **must show flexibility in its willingness to issue such permits**, which constitute, so it seems, a central layer in the ability of the residents of the zone to maintain community and social relations with their families and friends who live in the Area. Access which enables entry not only to family members but rather to all residents who maintain social and business relations with the residents of the zone, is vital for maintaining the fabric of life. This approach will not interfere with the rules which apply in the zone since, in any event, it will obligate the applicants to submit their applications according to the procedures which were established by the respondents themselves, and on the other hand, will minimize the injury inflicted on the permanent residents and the Palestinian residents who wish to enter the seam zone. As stated above, in any event, applications for such permits may be currently submitted according to the existing rules, therefore, our comments are mainly directed at the prevailing policy of their issuance.

37. Therefore, and subject to our above comments which refer to different aspects of the existing arrangements, and in view of the fact that we are concerned with a closed area, we did not find that other arrangements were presented to us which realize, in a similar manner, the security objective, and which cause less injury to the rights of the residents. Therefore, we came to the conclusion that the arrangements which were applied to the seam zone satisfied the second proportionality sub-test.

38. However, the examination of the arrangements alone is not sufficient. As noted by the state, the proportionality of the injury inflicted on the rights of the inhabitants should be examined not only against the backdrop of the written arrangements and procedures which were established, but also against the backdrop of the reality in which such arrangements are implemented in practice, commencing from the processing procedure of the applications and ending with the current movement and traffic regime. These practical aspects enable the court to establish its position on the proportionality of the injury from a wide perspective, and hence, their importance.

And indeed, many of the arguments which were raised in the petitions, concern, in practice, the aspects which pertain to the manner by which the permit regime is implemented, *de facto*. Accordingly, the petitioners go up against the cumbersome handling processes of the applications which, according to them, were designed to burden the local population; they claim that this is not a due process as required by administrative law and point at the practical difficulties in maintaining proper life routine under the permit regime and the limitations imposed on the opening of the various gates. According to the petitioners, the reality on the scene is "a reality of destruction of the fabric of life of the inhabitants and a continuous deprivation of individuals from their sources of livelihood and lands; from their ways of life and occupations. Above all, the above mentioned regime deprives the inhabitants of the seam zone and the farmers who wish to obtain access to their lands of their humanity and dignity." The petitioners presented on this issue various data which were designed to support their position in these contexts. Among other things, the petitioners sought to prove to us in their updating notices that the state introduced a strict policy as a result of which the number of permits which were issued in the seam zone declined.

The state, on its part, attached great importance to these aspects and dedicated extensive portions of its response and updating notices to the measures taken by it to improve the service rendered to the Palestinian inhabitants in practice – by handling the various permit applications more efficiently and by improving the entry arrangements into the zone itself.

39. The gamut of the data presented to us by the state creates, *prima facie*, the impression that the respondents are aware of the difficulties created by the permit regime and that they act in different ways to minimize the injury caused as a result of its application, by improving the handling

processes of the various applications and by maintaining an ongoing way of life between the territories of the Area and the seam zone. On the other hand, we did not find that the petitioners managed to point at material flaws in the handling processes adopted by the state within the framework of the application of the permit regime. As specified above, according to the material presented to us, detailed rules were established for the processing of the different permit applications, including the relevant forms which specify, *inter alia*, the various documents which should be provided with each application depending on its nature and essence. In addition, an orderly system was established for the handling of such applications as specified above, which provides for an appeal and a hearing process there-under. According to the data presented to us, tens of thousands of permit applications submitted by Palestinian residents for different needs are approved each year, which also points at the reasonable operation of the system which was established to handle the matter. Thus, according to the data attached to the complementary notice, about 30,000 permits were approved in 2007, about 29,000 in 2008 and about 17,000 permits in 2009 (until the submission date of the state's updating notice). In addition, we got the impression that the state continued to act for the establishment of specific arrangements which would make it easier for the inhabitants to enter into and exit the seam zone – taking into consideration the different needs of the inhabitants – by improving the crossings between the seam zone and the territories of the Area and by upgrading the various access roads between them. Under these circumstances, we did not find that the petitioners managed to establish a cause which would justify our interference neither with the handling system which was established nor with the general access arrangements to the seam zone, and we got the impression that the measures taken to improve the crossings and access roads assisted, to a certain degree, to minimize the violation of the rights of the Palestinian residents arising from the decision to close the zone. It should also be noted, that on this aspect too, the petitions as filed, do not enable to conduct a specific examination of the current situation on the scene due to the fact that the court was not presented with a specific case which pointed at a flaw in the system established by the state for the implementation of the unique regime which was applied to the seam zone, against which all other considerations which obligated the respondents to act in this manner or another may be examined (and compare: **Mara'abe**, page 534). Therefore, under the above circumstances we are unable to examine whether there is a gap between the state's statements and the situation on the scene.

In view of all of the above, we did not find reason to intervene with the handling system established by the respondents as a whole and in the manner by which the movement and traffic regime is implemented, in practice, in the seam zone area.

However, it should be noted that we did not find that within the different handling processes, the civil administration assumed upon itself an obligation concerning the **required duration** for the handling of the various applications submitted to it, despite the importance embedded in the quick and efficient handling of such applications, which are intended to enable, to the maximum extent possible, an uninterrupted ongoing and dynamic fabric of life for the residents of the seam zone and Palestinian residents who live outside the zone and wish to enter it. Naturally, the period of time required for the processing of each one of the applications is different, and so is the reasonable period of time which is required for the handling thereof, in view of the urgency of the matter and the scope of injury inflicted on the inhabitant. Under these circumstances, we are of the opinion that the respondents should establish a reasonable time frame for the handling of the different applications in view of their unique characteristics, so that the inhabitants would be able to make the necessary preparations for the submission of appropriate applications according to the different needs. In addition, a reasonable time frame would enable to maintain a proper and consistent continuity of the lives of the inhabitants, as required.

Summary – the second proportionality sub-test

40. As specified above, we have examined – on three inter-related levels – whether the decision to close the zone along the application of unique arrangements and the taking of various actions for the implementation thereof, satisfied the requirements of the second proportionality sub-test. Following said multi-layered examination, **and subject to all our above comments**, we did not find any reason to intervene with the arrangements established by the state, as we got the impression that in the establishment thereof, the respondents took into consideration the rights of the protected residents and acted for the establishment of arrangements which would minimize the injury inflicted on them, realizing, at the same time, the security objective of such arrangements, and we did not find that there were better alternatives which could realize this objective. Our said determination is based not only on the arrangements themselves, but rather, also on the measures taken by the state to implement the arrangements, *de facto*, and on the movement and traffic regime carried out by it. Therefore, we came to the conclusion that subject to our comments, respondents' actions satisfied the second proportionality sub-test as well.

The third proportionality sub-test – proportionality in the narrow sense

41. Does the injury inflicted on the inhabitants as a result of the closing of the zone and the application of the permit regime stand in proper proportion to the security benefit which arises from the closing of the zone? As specified above, the zone was closed for a clear security objective, which is inherently connected with the objective underlying the erection of the security fence. The purpose of the fence, and the seam zone as its derivative, is to enable the state of Israel to fight the murderous Palestinian terror which has injured and wishes to injure the state and its inhabitants. This benefit, which is premised on the recognition of the importance attributed to the need to safeguard the sanctity of life principle, is of a substantial importance and is therefore a proper objective. There is no doubt that against this benefit and as broadly discussed above, the arrangements which were applied to the seam zone and which infringe on the rights of the Palestinian inhabitants, were established. However, as noted above, subject to some changes in the arrangements themselves, it seems that the system as a whole – the decision to close the zone along the establishment of entry and presence arrangements and the taking of different measures to improve the handling of permit applications and to ease the passage into the seam zone – minimizes the injury inflicted on the Palestinian population. Hence, we came to the conclusion that the injury inflicted on the inhabitants – although it should not be taken lightly – is not of the kind which may be regarded as over-rides the security benefit which arises from the closing of the zone. Therefore, it seems to us that the decision to close the zone and the various arrangements which were applied thereafter also satisfy the third proportionality sub-test.

Summary – the proportionality tests

42. In conclusion, and in view of all aspects discussed above, we came to the conclusion that subject to a number of changes which should be made in the arrangements themselves as specified above in detail, the decision to make an order to close the zone and the arrangements which were established thereafter, satisfy the proportionality tests. Therefore, it may be said that in his decision to close the seam zone area for the realization of the security objective, the military commander has lawfully exercised his authority.

    Ostensibly, once we reached the above conclusion, we could have ended our discussion. However, and as noted above, the petitions raised several additional arguments which belong to the first group of arguments – which seeks to challenge the mere declaration of a seam zone – and which, according to the petitioners, point at the illegality of the permit regime, and we shall shortly refer to these arguments below.

Additional arguments raised by the petitioners

Discrimination and collective punishment

43. Another main argument which was raised by the petitioners in their arguments (mainly in HaMoked's petition) was that the permit regime violated the right of the protected residents to equality, since, according to the argument, the prohibition which was imposed on the Palestinian inhabitants who did not have in their possession an entry permit into the seam zone constituted prohibited discrimination based on ethnic-group affiliation as compared to foreign residents and Israelis – including Israeli residents who lived in the Area – whose entry into the seam zone was not prevented.

44. Petitioners' argument as presented to us should be rejected. As broadly discussed above, in view of the fact that we recognize the security need upon which the erection of the security fence was founded, there is no escape from prohibiting an unsupervised entry of Palestinians into the seam zone. We are only hopeful that this need is temporary in nature, due to the fact that as a result of the need to fight terror, unfortunately, innocent civilian population is also injured, but from here to accepting petitioners' argument there is still a long way to go.

In addition, I would also like to say a few words about the manner in which petitioners' argument on this matter was presented in HaMoked's petition. As specified above, the petitioners in this petition have discussed in length the argument according to which the permit regime was infected by severe discrimination on national and ethnic basis, which, according to them, amounted to Apartheid. Recently, I have already felt the need to dedicate a few words to the careless manner by which this term was used in another petition. And I have so stated in HCJ 2150/07 '**Ali Hussein Mahmoud Abu Safia v. Minister of Defense** (not published yet, December 29, 2009), paragraph 5 of the judgment:

> "5. Despite the understanding of the security need, the use of such security measures, which cause complete separation between different populations in the ability to use the roads and which prevent an entire population from using the road, gives rise to a sense of inequality and even an association of unacceptable motives. The prevention of a certain sector of the population from using a public resource has very grave results. Therefore, the military commander must take all possible measures to minimize situations such as these, and to prevent the grave harm and the feeling of discrimination deriving there from.
>
> 6. Even as we consider that complete separation between populations traveling on the roads is an extreme and undesirable result, we must be cautious and stay away from definitions which give security measures taken to protect travelers on the road the meaning of separation based on unacceptable foundations of race and nationality. The comparison made by the petitioners between the use of separate roads for security reasons and the Apartheid regime which was applied in South Africa in the past and the actions associated therewith - is inappropriate. The Apartheid regime is a grievous crime which

> contravenes the fundamental tenets of the Israeli legal system, international human rights laws and the provisions of international criminal law. It is a regime of racial separation and discrimination on the basis of race and national origin, which is based on a number of discriminatory practices designed to engender supremacy of the members of one race and to oppress members of other races. The great distance between the security measures taken by the state of Israel in defending against terrorism and the unacceptable practices of the Apartheid regime, require to refrain from any comparison or use of the dire phrase. Not every distinction between people under any circumstances necessarily constitutes a wrongful discrimination, and not every wrongful discrimination constitutes Apartheid. It seems that the mere use of the term 'Apartheid' diminishes the grievous nature of this crime, which the entire international community has joined forces to eradicate, and which we all deplore. Therefore, the comparison drawn between the prevention of movement by Palestinian residents along Road 443 and the crime of Apartheid is so extreme and far reaching that there was no room to raise it at all."

And the above is also relevant under the circumstance of the case at hand.

As specified above in length, the decision to erect the security fence caused injury, sometimes grave injury, to the Palestinian population. In many judgments, this court has recognized the authority of the military commander to erect the fence, in view of the pressing security need to find solutions for the severe terror attack which was launched against Israel, while directing the military commander, at the same time, to use his best efforts to minimize the severe injury inflicted on the Palestinian inhabitants as a result of its erection. The seam zone and the permit regime which was applied therein are derivatives of the security fence. They indeed injure, by their nature, many of the Palestinian inhabitants who have nothing to do with terrorism and wish to continue with their lives and daily routine as they used to do in past days, but this situation derives from a security need which would hopefully pass. Under these circumstances, we are still a long way from holding that the distinction made in the policy which was applied to the seam zone relies on unacceptable reasons of religion and nationality. Here too, it should be noted that the comparison drawn by the petitioners between the policy which was applied in the seam zone, which is founded on security reasons, and the Apartheid regime which was applied in South Africa, is inappropriate, extreme, and far reaching. This comparison disregards material aspects which concern the unique situation in the seam zone and it seems that it would have been better had it not been raised.

45. Petitioners' arguments concerning collective punishment are also not new with us and reiterate arguments which were raised in the various petitions which were filed against the security fence (and see, for instance, **Beit Sourik**, page 821). The court did not find that these arguments pointed at a flaw in the authority of the military commander to erect the security fence, in view of the security objective on which it was founded. And indeed, under the severe security circumstances which were created in the Area, it seems that there was no alternative but to take measures against the Palestinian terrorists, which inflict injury on all Palestinian inhabitants, even if they themselves do not pose a security threat. Under these circumstances, and in view of the close connection between the route of the fence and the decision to close the seam zone, it seems that under the circumstances of the case at hand petitioners' arguments on this level should also be rejected. Indeed, and as was already broadly noted, the decision to close the seam zone injures the entire

Palestinian population, even if most of its members are not involved with terror at all. However, this outcome is an inevitable ancillary product of the actions taken by the state to protect the safety of its inhabitants – in the Area and in Israel – from the Palestinian terrorist organizations, and therefore, it should not be regarded as collective punishment which is directed at the Palestinian population as such (and compare: HCJ 2847/03 **Hassan Ma'aruf Ratab Al'auna v. Commander of IDF Forces in Judea and Samaria** (not published yet, July 14, 2003)).

Summary

46. In our judgment we have widely discussed the complex security situation which lead to the erection of the security fence. This step severely injured the daily lives of many of the Palestinian inhabitants of the Area. In its judgments, this court ruled many times that such injury was inevitable taking into consideration the clear security need upon which the erection of the security fence was founded. However, this court examined and re-examined, time and again, whether the injury caused by the route of the fence satisfied the proportionality requirement and whether the military commander acted according to the duties imposed on him to minimize the violation of the basic rights of the Palestinian inhabitants. As aforesaid, the permit regime which was applied to the seam zone is a derivative product of the route of the fence. It also severely violates the rights of the Palestinian inhabitants – those who live within and those who live without its boundaries. The restrictions imposed by this regime encumber the ability of the residents of the seam zone and their brothers who live in the other parts of the Area to conduct normal daily lives. The petitioners in the petitions before us presented a harsh picture of the complex reality of life with which these inhabitants cope from the commencement of the permit regime. We did not dispute the fact that such hardships existed, and it seems that the state is also very well aware of them. However, this time again, we could not ignore the essential security objective underlying the decision to close the seam zone, and therefore we examined, with the legal tools available to us, whether the military commander used his best efforts to minimize the injury inflicted on the inhabitants under the permit regime. Under the circumstances of the matter, and given the factual infrastructure which was presented to us, we came to the conclusion that subject to a number of changes which were widely discussed above, the decision to close the seam zone and apply the permit regime thereto satisfied the tests of legality and hence, there was no cause which justified our intervention therewith. Our above determination is based, as aforesaid, not only on the arrangements themselves, but also on the statements of the state concerning measures continuously taken by it, which are designed to improve the handling processes of the different applications and to ease the accessibility to the seam zone, and by so doing, to minimize the injury inflicted on the daily lives of the Palestinian inhabitants.

At the same time, we wish to express a wish and a hope that this state of affairs in which a fence separates between parts of the population that wish to share their lives with its other parts, is a temporary situation, the existence of which is dependent on a severe temporary reality.

47. Therefore, and in view of all of the above, we came to the conclusion that subject to our comments in paragraph 36 and paragraph 39 concerning the required changes to ease the passage of the permanent residents into the zone; the adoption of an approach which would expand the causes based on which a person may be recognized as a permanent resident and concerning the issuance of permits to an "occasional interest holder" in cases which do not fall within the categories which were set forth in the rules, and concerning the establishment of a clear time schedule for the handling of the different applications submitted to the civil administration; the petitions are denied, without an order for costs.

The President

Vice President E. Rivlin:

I concur.

Vice President

Justice A. Procaccia:

I concur.

Justice

Held as stated in the opinion of the President D. Beinisch.

Given today, 1 Nisan 5771 (April 5, 2011).

The President Vice President Justice