At the Supreme Court Sitting as the High Court of Justice

HCJ 2150/07

Before:	**Honorable President D. Beinisch** **Honorable Justice E. Levy** **Honorable Justice U. Vogelman**
The Petitioners:	1. **'Ali Hussein Mahmoud Abu Safiya, Beit Sira Village Council Head et 24 al.**
	v.
The Respondent:	1. **Minister of Defense** 2. **IDF Commander in the Judea and Samaria Area** 3. **Binyamin Brigade Commander** 4. **Shurat HaDin, Israel Law Center et 119 al.** 5. **Fence for Life**
Objection to Issuance of *Order Nisi*	
Session date:	28 Adar 5768 (5 March 2008)
Representing the Petitioners:	Att. Limor Yehuda; Att. Dan Yakir
Representing Respondents 1-3:	Att. Osnat Mendel; Att. Michal Tzuk
Representing Respondents 4:	Att. Ro'i Cochavi
Representing Respondent 5:	Att. Ilan Zion; Att. Adi Baruch

Judgment

Justice U. Vogelman

The petitioners in the petition at bar are residents of the villages Beit Sira, Saffa, Beit Liqya, Kharbatha al Misbah, Beit 'Ur at Tahta, Beit 'Ur al Fauqa (hereinafter: **the villages**), the council heads of these villages

and the Association for Civil Rights in Israel [ARCI]. In the context of this petition, they seek to instruct respondents 1-3 (hereinafter: **the respondents**) to allow free pedestrian and vehicular movement of Palestinians on Road 443 and on the "Beituniya Road"; the respondents are also requested to remove all permanent roadblocks blocking access from the villages to Road 443.

General Background

1. Road 443 (hereinafter: **Road 443** or **the Road**) connects the area of the Ben Shemen interchange inside Israel to the Ofer camp intersection (near the Givat Zeev settlement). The total length of the Road is 25.5 kilometers. The petition at bar concerns the eastern part of the Road which runs inside the Judea and Samaria Area (hereinafter: **Judea and Samaria** or **the Area**), between the Maccabim-Reut crossing to the west and the Ofer camp intersection to the east. The length of the aforesaid segment of the Road is some 14 kilometers. The road is used, as defined by the respondents, "as the main traffic artery connecting the coast and the Modi'in block to the Jerusalem area. Along with Road No. 1, Road No. 443 is one of the two main traffic arteries leading to the capital". The Road is also used as an access route to Israeli settlers in the Judea and Samaria sector. As relayed by the respondents, some 55,000 residents live in these communities. Of the aforesaid communities, the Road serves as a sole access route only for residents of the Beit Horon settlement.

2. The Road dates back to the British Mandate. It served as a local access road passing through the village centers. Over the years, statutory planning amendments were made and the Road became a "regional road" and as a result, the route was expanded and changed such that it no longer traversed Palestinian villages. Throughout the years, until the outbreak of the second intifada in 2000, the Road was used by both Palestinian and Israeli vehicles. The Road served as a main traffic artery for the Palestinian residents of the Area, among them, residents of the villages. Residents of the villages used the Road in order to travel between the villages and as an artery for Ramallah (access to Ramallah from Road 443 is via the Beituniya Road which will be discussed below). Israeli vehicles travelled on this road between the coast and Jerusalem. The Road was also used as an access road to Israeli settlements in the Area.

3. In 2000, the second intifada broke out. Fierce fighting took place in the Judea and Samaria Area, in which thousands of terrorist attacks targeting residents and citizens of Israel were committed – both in the Area and inside Israel. This court has often addressed the severity and scope of the fighting and has, *inter alia*, stated as follows:

> Since the end of September 2000, fierce fighting has been taking place in Judea, Samaria and the Gaza Strip. This is not police activity. It is an armed conflict, in which approximately 14,000 terrorist attacks have been committed against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than 600 citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in a single month – March 2002 – 120 Israelis were killed in terrorist attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.
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> (HCJ 7015/02 '**Ajuri v. 92IDF Commander in the West Bank**, IsrSC 56(6) 352, 358 (2002) (hereinafter: **'Ajuri**). See also HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel** IsrSC 58(5) 807 814-815 (2004) (hereinafter: **Beit Sourik**); HCJ 7957 **Mara'abe v. The Prime**

Minister of Israel IsrSC 60(2) 477, 484-485 (2005) (hereinafter: **Mara'abe**); HCJ 7052/03 **Adalah – Legal Center for Arab Minority Rights v. Minister of the Interior**, paras. 6-12 of the opinion of Vice President (Emeritus) M. Cheshin (not yet reported, May 14, 2009; hereinafter: **Adalah**)).

Road 443 did not escape this reality. A large number of Israel vehicles travel along this road. This fact, in conjunction with the topographical characteristics of the Road made it, as defined by the respondents "a security weak spot" – an "easy" mark for terrorist attacks. Indeed, over the years many terrorist attacks were perpetrated along the Road, leading to loss of life and limb. The attacks included gunfire and stone and Molotov cocktail throwing and were directed both against persons traveling on Road 443 and security forces. We shall address this below.

4. As a result of the aforesaid security escalation, and in addition to other measures taken in order to provide security for Israeli road users, which we shall address below, the respondents began preventing the entry of Palestinian vehicles to Road 443. The prevention was initially partial, carried out via checkpoints and patrols by security forces who saw to removing Palestinian vehicles from the Road. Beginning in 2002, when the security situation escalated, the ban on Palestinian vehicular movement on the Road became absolute. All access roads connecting the villages to Road 443 were blocked off and the villagers were denied any use of the Road. Currently, as a rule, only Israeli vehicles travel on Road 443. According to information provided by the security establishment, some 40,000 vehicles travel on the Road daily (in both directions).

5. This is the place to briefly relate also to information regarding the Beituniya Road which is also a focal point of the petition at bar. The Beituniya Road connects Road 443 (from the Ofer camp intersection) to the city of Beituniya, which is adjacent to Ramallah. This road was used over the years as an access road to Ramallah for vehicles traveling on Road 443. In the past few years, with the construction of the security fence in the Area, the Road was blocked off to movement by both Palestinian and Israeli vehicles. At the point where the security fence crosses the Beituniya Road, a "back to back" checkpoint was constructed (the Beituniya crossing) which is designed for transporting commercial goods between Israel and the Judea and Samaria Area. The Beituniya crossing is not designed for use by private cars or for pedestrian crossing, as set forth in the Order regarding Transference of Commercial Goods (Amendment No. 2) 5765-2005, the respondents note that other than transporting goods, the Beituniya crossing is used, in a limited capacity, for screening pedestrians who arrive at the nearby courts, located at the Ofer camp.

6. ACRI, petitioner 7, contacted the respondents a number of times on behalf of the petitioners and on behalf of the village council heads, demanding to remove the roadblocks placed on the roads between the villages and Road 443 and allow Palestinian vehicles to travel on the Road. Not only has this demand not been met, but, in a letter dated October 18, 2006, the office of the military legal advisor for the Judea and Samaria Area claimed – **in contradiction to the situation on the ground** – that IDF forces do not prevent Palestinian movement on the Road, but rather restrict exit from the rural area to the Road to a number of exit intersections in which gates are installed for the purpose of security screening (the consequences of this error will be discussed below). The petition was filed following this response.

7. Only after submission of the petition, on August 28, 2007, did the IDF commander in the Judea and Samaria Area (at the time) Major General Gadi Shamni, issue the Provisions regarding Movement and Traffic (Road 443) Judea and Samaria Area 5778-2007 (hereinafter: **the Movement Provisions**), pursuant to his power under the Order regarding Security Provisions (Judea and Samaria Area) (No. 378) 5730-1970 (hereinafter: **the Security Provisions Order**). The Movement

Provisions imposed a prohibition on movement by vehicles which are not Israeli (as defined in the Movement Provisions) on Road 443, unless issued with a permit. The period of validity of the Movement Provisions was limited and they were periodically extended.

Parties' Arguments

8. The petitioners argued that the closure of Road 443 to Palestinian movement expropriates the possibility of using the only major road in the Area from the local population and greatly inconveniences the villages' residents, who are forced to use an alternative road which runs inside communities and along which military checkpoints are often erected (hereinafter: **the rural route**). Travel on the rural route is difficult: the road is narrow, winding and in poor condition and using it significantly increases travel time and costs. The petitioners also argued that the aforesaid travel difficulties result in a general injury to the economy of the villages and the overall fabric of life of their inhabitants, mostly due to the villagers' disconnection from Ramallah, which is their urban center. Thus, for example, the prohibition on travel on the Road has led to many businesses in the villages shutting down and disrupted the arrival of workers at their workplaces in Ramallah. There has been a sharp increase in the unemployment rate in the villages as a result. In addition, the closure of the Road has impeded the villagers' access to medical services, access to the villages by fire and rescue services, access to educational facilities in the villages and in Ramallah, the possibility to visit and maintain social ties. The petitioners also note that the closure of the Road has denied them direct access to their farmlands (although it did not deny access entirely) and has made the transportation of agricultural products difficult. It was also argued that the closure of Road 443 has transferred congestion to the internal roads such that road accidents have greatly increased and with them, the potential for loss of life.

According to the petitioners, the prohibition on Palestinian movement on Road 443 is unlawful. They contend that the prohibition was imposed in order to preserve Road 443 as an "internal" Israeli traffic route connecting the coast to Jerusalem. In so doing, the military commander has exceeded his powers which are vested in him solely for the benefit of the occupied territory itself; breached his duty to maintain the public order and safety of the protected persons residing in the occupied territory and made extraneous considerations. It was further argued that the prohibition is unlawful since it constitutes wrongful discrimination on the basis of national-ethnic origin; is tantamount to a breach of the prohibition on collective punishment; is extremely unreasonable and since it disproportionately infringes on the human rights of the protected Palestinian residents – including the right to freedom of movement, the right to earn a living, the right to live in dignity, the right to education, the right to family life and to connection with family members and the right to health and to receive medical treatment. The petitioners further argue that the respondents' position in the proceeding at hand contradicts arguments the latter made years ago in a petition addressing land expropriation for the purpose of building the Road (HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Masuliya Cooperative Association Legally Registered at the Judea and Samaria Area Headquarters v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785 (1983) (hereinafter: **Jam'iat Iscan**). The petitioners stress that while in the **Jam'iat Iscan** case, the respondents argued that the transportation needs of the Area's residents necessitate the planning of a new road system, now, over twenty years later, the respondents claim that the residents of the villages have an adequate traffic system at their disposal. The petitioners call attention to the fact that although the Road 443 travel prohibition was defined as "temporary" it has been in place for the past seven years and there is no serious intention to consider its revocation in the future. In the written submission, the petitioners also argued that the travel prohibition must be dismissed as it is enforced without a valid legal source, in the absence of a written authority for the prohibition. This argument has been made redundant following issuance of the Movement Provisions, yet the petitioners stress that the

practice of issuing travel bans without written authority is repetitive and, they argue, a clear judicial ruling on this issue is required.

With respect to the Beituniya Road, the petitioners argue that it must be opened in order to reduce the harm caused to villagers who need Road 443, *inter alia*, for the purpose of traveling to Ramallah (as elucidated above, the Beituniya Road connects between Road 443 and Ramllah). In their view, there is no impediment to using the Beituniya crossing for the purpose of traffic by private cars in conjunction with its use for the transportation of commercial goods.

9. The respondents object to the petition. They confirm that Road 443 was initially planned for joint travel by Israelis and Palestinians and that was indeed the situation until 2000. However, following the fighting and terrorism, the security reality drastically changed. They contend that the closure of the Road to Palestinian vehicular traffic was implemented in order to secure the safety of Israeli citizens who are present in the Judea and Samaria Area, including those traveling on Road 443. The respondents call attention to severe and murderous terrorist attacks which took place along the Road, in which Israeli civilians were killed and many more were injured. Some of these terrorist attacks, it was argued, were perpetrated by residents of the villages. The military commander bears a responsibility for the safety of the residents of the Area and of the Israelis who are present therein. This is the reason for his decision, which is founded on pure security considerations, to take a number of measures, some temporary, in order to provide security for Israeli travelers on the Road. Among the various measures taken, one can enumerate intensified routine operations, military presence along Road 443 and the Area at large, installation of fencing and observation posts along a number of segments near the Road, temporarily banning Israelis from traveling on a number of roads in the Binyamin area; improved screening at roadside security inspection points along Road 443 and construction of the security fence in the Jerusalem area, including around Road 443. Another measure taken by the military commander, which is the subject matter of the petition at bar, is temporarily blocking the roads connecting Palestinian villages to Road 443 for the purpose of preventing Palestinian vehicles from freely getting on the Road, based on the understanding that these vehicles may be used for terrorist attacks as car bombs, in drive-by shootings and for escaping to a nearby village – modalities that are familiar from other incidents in the Judea and Samaria Area, including the vicinity of Road 443 – abduction of Israeli passengers along the Road and transportation of terrorists and weapons into the State of Israel. Indeed, after these measures were implemented, the number and severity of terrorist incidents along Road 443 significantly decreased, although the threat remains. The Affidavit of Response and the Supplementary Affidavit on behalf of the Respondents presented us with a detailed list of the attempts to harm persons traveling on Road 443 and attempted attacks on security forces. They begin in the period relevant to our matter, on December 21, 2000, with a shooting death of an Israeli civilian, a resident of Modi'in and continue with additional shootings in 2001, in which more Israeli civilians were killed and the explosion of a suicide bomber near the Maccabim checkpoint which caused the injury of one of the police officers staffing the checkpoint. They culminate, at the present time, with events that occurred after the petition was filed. Along with these incidents, there were hundreds of stone throwing incidents and dozens of Molotov cocktail throwing incidents. Thus, for example, between June 4, 2007 and January 1, 2008, 58 incidents of stone and Molotov cocktail throwing at vehicles traveling on the Road were recorded.

The respondents noted in their oral and written pleadings that in the military commander's view, restricting Palestinian vehicles from getting on to Road 443 was, at the time, and continues to be today, an important and necessary security measure, as part of an array of security measures intended for saving the lives of the Israeli civilians traveling on the Road. The respondents stressed that Palestinian pedestrian traffic on the Road was not prohibited. The respondents further argued that the petitioners' allegations of injuries caused due to travel restrictions are exaggerated and

unsubstantiated. According to the argument, the petitioners have access to the rural route which adequately connects between the villages and between them and the city of Ramallah. The respondents noted that no permanent security forces checkpoints are located along the rural route. The respondents further clarified during the hearing of parties' arguments that, as part of the security fence project in the Jerusalem area, a number of "fabric-of-life" routes are being built at a cost of tens of millions of shekels. Fabric-of-life roads are designed to serve the Palestinian residents of the Area and reduce the injury to their daily lives as a result of the roads being blocked (see HCJ 4289/05 **Bir Nabala Local Council v. Government of Israel**, para. 11 (unreported, November 26, 2006) (hereinafter: **Bir Nabala**). The respondents argued that upon completion, the roads would result in a significant reduction of travel time between the villages and Ramallah and would provide an appropriate response and reasonable alternative to travel on Road 443. They further noted that aside from the rural route, the villagers can also use another alternative road which runs on the original route of Road 443. This road now links the villages of Saffa, Beit 'Ur at Tahta and Beit 'Ur al Fauqa and in future will provide access to the Beit 'Ur – Beituniya fabric-of-life road (which was completed after the hearings were concluded and which we shall address below).

According to the respondents, the military commander has a responsibility to strike a balance between the security needs of the administration holding the territory on one hand and securing the needs and rights of the local population on the other hand. In this context, the military commander holds power to implement security measures in order to protect the entire population in the Area, including Israeli civilians, and the fact that the Road was built pursuant to an expropriation order has no bearing on this. The restrictions imposed by the military commander are necessary for security reasons and do not disproportionately harm the local population, or, at least, do not exceed the bounds of proportionality. In this context, the respondents called attention to an arrangement which they formulated whereby **restricted** movement by Palestinian vehicles on the Road would be permitted (we shall address the details of the arrangement below). According to the respondents, of the powers vested in the military commander, the one relevant to the matter at hand is the power to impose various travel restrictions on the local population. This power is anchored in Sections 88 and 90 of the Security Provisions and existed also in the Defense (Emergency) Regulations 1945, which were part of the law of the Area prior to the beginning of the belligerent occupation and continue to apply today. The military commander imposed the travel restrictions on Road 443 pursuant to these powers. The respondents concede that once the travel restrictions along the Road became protracted, there was room to anchor them in a written and signed order. Indeed, as aforesaid, on August 28, 2007, the Movement Provisions were issued and as such, the petitioners' argument on this aspect was made redundant. The imposed restrictions were founded on pertinent reasons and thus do not constitute wrongful discrimination but rather a legitimate distinction. The respondents further argue that the measures at issue are preventative security measures and not collective punishment, as alleged. Indeed, in practice these measures do injure civilians who are not engaged in terrorism, such is the majority of the Palestinian population, but this does not attest to the unlawfulness of the imposed measures. The respondents also addressed their position as presented in the **Jam'iat Iscan** case. They argued that the building of Road 443 and the use made of it through the years until 2000 were consistent with the position they presented in that proceeding. We stress that while in the Affidavit of Response (para. 22), the respondents noted the connection between the segment of the Road under review and that under review in the **Jam'iat Iscan** case, indeed in the supplementary affidavit on their behalf (par. 412), they argued that the road system which was reviewed in the **Jam'iat Iscan** case does not relate to Road 443 or its expansion. Parenthetically, it is noted that we are not addressing the dispute between the petitioners and the respondents on this latter issue as it has no bearing on the normative decisions in the **Jam'iat Iscan** case, which will guide us in this case as well.

With respect to the Beituniya Road, the respondents primarily argue that in this matter no prior communications were made to the authorities and that the petition did not include sufficient legal and factual foundations on this issue. As such, on this aspect, the petition should be dismissed out of hand (it is parenthetically noted that the above detailed petitioners' arguments were first made in a response on their behalf to the Affidavit of Response on behalf of the Respondents). On the merits, the respondents argue that the Beituniya crossing does not have infrastructure suitable for private cars or pedestrians and its preparation for such use would necessitate building a vast infrastructure at a high cost. The respondents also note that in accordance with the security concept underlying the construction of the security fence in the Jerusalem area, the route of the fence was planned such that it separates Judea and Samaria areas and Judea and Samaria residents from the Israeli communities north of Jerusalem and inside Israel. Passage through the fence was limited to a number of permanent crossings which are suitable for passage by private cars and pedestrians. According to the respondents, opening another crossing in the security fence would lead to "some breach" of the security barrier and increase the risk of infiltration by terrorists into the Jerusalem area. It would also create a friction point which would increase the risk to security forces who are in charge of the crossing points. The respondents also noted that the Beituniya crossing is situated in a problematic and vulnerable location in terms of security, such that its expansion and transformation into a crossing designated for private cars also poses a real threat.

10. In their response, respondents 4 (Shurat HaDin et 119 al. (hereinafter: **respondents 4**)), who were added to the petition as per their request, stress the importance of Road 443 as a major traffic artery in Israel which links the city of Jerusalem with metropolitan Tel Aviv. They note that Road 443 is the only practical alternative to Road No. 1. It is also, practically, the only traffic artery available to residents of the Israeli communities located along its route. Respondents 4 also call attention to the terrorist attacks which have been perpetrated on the Road over the years since the outbreak of the second intifada, some – as alleged – by residents of the villages, and the loss of life and limb caused as a result thereof. Respondents 4 argue that the imposed security measures – of which the respondents complain – have merely caused the respondents an inconvenience. They allege that the petition raises the question of the balance between this inconvenience and their own right to life and bodily integrity. Respondents 4 further argue that the decision to close the Road was reasonable, inevitable, based on a military necessity and *intra vires*.

    Respondent 5, "Fence for Life - Public Movement for the Security Fence" was also added, at its request, as a respondent to the petition. Respondent 5 also calls attention to the security threat posed by renewing Palestinian vehicular traffic on Road 443, which may lead to the renewal of deadly terrorist attacks on the Road, and also to the entry of Palestinian vehicles into the Green Line through checkpoints on either side of the Road.

The proposed traffic arrangement and fabric-of-life roads

11. As elucidated, the respondents presented an arrangement they formulated with the purpose of allowing limited movement by Palestinian vehicles on Road 443. In addition, while the petition was being reviewed, the building of some of the fabric-of-life roads progressed and some were completed and opened for traffic. We shall address this hereafter.

12. In the context of the Affidavit of Response submitted by the respondents on September 2, 2007, it was relayed that following a reevaluation of the travel restrictions in the area of Road 443 held within the security establishment and at the central command, a decision was made to allow partial travel by a limited number of Palestinian vehicles on the Road, as a temporary measure. This decision was anchored in a temporary order signed by the GOC Central Command which remained valid until May 31, 2008. According to the arrangement, the intention was to issue permits for travel on the Road to 80 Palestinian vehicles, mostly commercial and public, which would transport

Palestinian passengers on the Road. The identity of the vehicles would be determined in coordination with the petitioning villages. According to the arrangement, the vehicles would get onto the Road at a checkpoint near Kharbatha al Misbah and reach Ramallah via a security fence crossing named the "Al Jib" crossing, which is located near the Givat Zeev settlement. Ramallah is easily and rapidly accessible from the Al Jib crossing via the Bir Nabala – Qalandiya fabric-of-life road. The arrangement would be in effect during daylight hours only. At dark, travel would be possible with prior coordination as a response to humanitarian needs. The respondents noted that this arrangement had been approved with "a heavy heart and after many misgivings" as its implementation carries a significant risk to the safety of Israelis traveling on Road 443 and in the Israeli home front. In an updating notice dated December 17, 2007, the respondents noted that a meeting was held with the village council heads in order to promote cooperation in the implementation of the arrangement. As relayed, in a letter dated November 20, 2007, the council heads notified that they had no intention of cooperating with such an arrangement. As such, the respondents decided to implement the arrangement without the aforesaid cooperation, and contacted residents of the area directly by way of publishing a notice which suggested the residents submit applications for permits to travel on Road 443. In an updating affidavit of February 20, 2008, the respondents notified that no applications for permits had been submitted on the part of the residents. A further updating affidavit, dated September 8, 2008, noted that further attempts had been made to implement the suggested arrangement. However, despite various efforts made by the respondents, no applications for implementation of the arrangement and for travel permits on Road 443 had been made.

The petitioners, in a response on their behalf to the Affidavit of Response, noted that the suggested arrangement was a mockery. They contend that the respondents created a mechanism which transforms a fundamental right into a privilege to be granted or denied at the military commander's wish. In any event, in their view, the suggested arrangement would not decrease the harm caused to the village residents, considering the limited number of vehicles permitted to travel and the arrangement's hours of operation. Additionally, the petitioners noted that according to the proposed arrangement, travel to Ramllah would require passage though two checkpoints and that the distance is double that of traveling along the original road (via Road 443 and on to the Beituniya Road which leads to Ramallah).

Respondents 4-5, on their part, have objected to the proposed arrangement due to the security risks involved in its implementation.

13. As an aside to this matter, we noted that beyond the aforesaid arrangement, the respondents have added in their preliminary response that the military commander routinely allows a limited number of vehicles with Palestinian license plates to travel on the Road, mostly public vehicles which underwent individual inspections. These are vehicles which belong to the village of At Tira (which is not among the villages petitioning us) and which are used for transporting residents of the village in the direction of Ramallah. As relayed, this arrangement, which was achieved in the context of a petition to this court (HCJ 2986/04) will remain in effect until the completion of the fabric-of-life road between the village of At Tira and Beit 'Ur al Fauqa. In a supplementary affidavit submitted by the respondents on September 8, 2008, it was clarified that this road had been completed and opened for traffic.

In addition to these, as aforesaid, the respondents also called attention to another development in the building of the fabric-of-life roads. Among the above roads, three are relevant to the petition at bar: One is the fabric-of-life road linking the villages of Beit Liqya and Kharbatha al Misbah, which is open for traffic. Another is the fabric-of-life road linking the villages of At Tira and Beit 'Ur al Fauqa, which includes an underground pass beneath Road 443. This road was opened for traffic on June 1, 2008. Another road which is important for our matter is the one linking the villages Beit 'Ur

al Fauqa and Beituniya and providing the villagers with access to Ramallah (via Beituniya). As stated in an updating notice dated September 8, 2008, the projected time for completing road works and opening of the road for traffic was December 2008. At that point, the respondents noted that once the road is opened, the villagers' trip to Ramallah is expected to be extremely short and speedy even compared to travel on Road 443. The respondents stressed that fabric-of-life roads were built according to a "high standard" as per criteria accepted by the Israel National Roads Company with respect to ordinary civilian roads, and therefore, at a very high cost. In a further updating notice submitted on April 8, 2009 (after pleadings were completed), the respondents added that in the meantime, a fabric-of-life road which is a two lane road linking the petitioning villages to the local urban center of Ramallah "in a short, speedy and convenient route, even compared to travel on Road 443". After it was opened, the road was closed for a limited time for repair and maintenance work, including ones needed due to weather damage.

The petitioners, on their part, argue that from the local population's perspective, there is no need for fabric-of-life roads, as Road 443 should have been available to them. They further add that lands were expropriated from the local population for the purpose of building the fabric-of-life roads, in addition to lands expropriated in the past for the purpose of building Road 443. They contend that these are unnecessary roads that have extremely harmful effects on the residents of the Area both now and in the future. The building of the Road has dispossessed landowners and many families of their lands and livelihoods; appropriated lands required for the development residents of the Area truly need; devastated local nature and environment and created separate roads for different populations. Additionally, it was argued that in terms of transportation, most fabric-of-life roads link between the villages themselves, are significantly inferior to local major roads and do not amount to main roads allowing speedy and convenient travel.

The framework of the review

14. The area which is the subject matter of the petition is under a regime of "belligerent occupation" (see, e.g.: **Jam'iat Iscan**, p. 792; **Beit Sourik**, p. 827; HCJ 1661/05 **Gaza Beach Regional Council v. Prime Minister**, IsrSC 59(2) 481, 514-516 (2005) (hereinafter: **Gaza Beach**), **Mara'abe**, p. 492). In an area under belligerent occupation the military commander serves as "the long arm of the state" (**Mara'abe**, p. 492). The military commander is not sovereign over this area and his powers derive from the rules of public international law relating to belligerent occupation, from local laws in effect in the Area which comprise of the law prior to the military occupation and new local statutes enacted by the military administration and from the principles of Israeli law (**Mara'abe**, p. 492, HCJ 10356/02 **Hess v. IDF West Bank Military Commander**, IsrSC 58(3) 443, 455 (2004) (hereinafter: **Hess**); see also **Jam'iat Iscan**, p. 792-793). The first question we shall address in the framework of the hearing at hand is whether the military commander's decision to order the closure of Road 443 in the Security Order and the Movement Provisions such that the Palestinian residents of the Area are not authorized to use it was *intra vires*. The question of the manner in which the military commander executed his power and discretion shall be reviewed distinctly from the question of power. The foundational criteria for this review are those which we have outlined above, namely, local law, the rules of Israeli administrative law and the rules of international law pertaining to belligerent occupation (**Jam'iat Iscan**, p. 793; cf. **Beit Sourik**, p. 832), as "every Israeli soldier carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law." (**Jam'iat Iscan**, p. 810; also cf. **'Ajuri**, p. 365; **Mara'abe** pp. 492-493; **Hess**, p. 454; **Beit Sourik**, pp. 827-828). There are, therefore, two question before us – one concerns the military commander's power to order travel restrictions on the Road in general and closing it to Palestinians in particular; the other concerns his discretion to order such. We shall review these questions in order.

The military commander's power

15. The respondents contend that the Road was closed to Palestinian vehicles pursuant to existing legislation in the Area, enacted by the military commander. In their view, the military commander's power to close the Road originates in the provision of Section 88(a)(1) of the Order regarding Security Provisions which reads as follows:

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> |---|---|
> | Movement and Transportation | A military commander, or a person acting under general or specific permission by the military commander, may, by way of order or by way of issuing orders in a different manner:

(1) Prohibit, limit, or regulate the use of certain roads; or determine routes on which vehicles, livestock or people shall travel; whether generally or specifically. |

In addition, the respondents refer to the Movement Provisions issued by the military commander (subsequent to submission of the petition), in which his decision to close Road 443 to Palestinian vehicular movement was put in writing in 2007. Section 2 of the Movement Provisions stipulates that "Whilst these provisions remain valid, no person shall travel on Road 443 using a vehicle which is not Israeli, unless by permit issued to him by me or a person appointed by me for this purpose." "Israeli vehicle" is defined in section 1 of the provisions as "a vehicle registered in Israel or a vehicle bearing identifying marks issued for it in Israel."

16. I do not think that anchoring the decision to order the closure of Road 443 in the Security Order and the Movement Provisions is sufficient. As ruled: "in order to answer the question of the military commander's authority, it is insufficient to determine merely that the Amending Order (or any other order of the commander of the territory) gives the military commander … authority … the authority of the military commander to enact the Amending Order derives from the laws of belligerent occupation. They are the source of his authority and his power will be determined accordingly." (**'Ajuri**, p. 364; also cf. **Jam'iat Iscan**, p. 973; HCJ 69/81 **Abu Aita v. Regional Commander of Judea and Samaria Area**, IsrSC 37(2) 197, 230 (1983) (hereinafter: **Abu Aita**)). The main norms applicable in an area which is under belligerent occupation are the Hague Regulations concerning the Laws and Customs of War on Land, 1907 which are annexed to the Hague Convention (IV), 1907 (hereinafter: the **Hague Regulations**), and which reflect customary international law (**Jam'iat Iscan**, p. 793; **Hess**, p. 455; **'Ajuri**, p. 364; HCJ 591/88 **Taha v.** Minister of Defense, IsrSC 45(2) 52-53 (1991) (hereinafter: **Taha**); **Beit Sourik**, p. 827; **Gaza Beach**, pp. 516-517; **Mara'abe**, p. 492). International laws applicable to armed conflict are also enshrined in the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, (hereinafter: **the 4th Geneva Convention**), the customary provisions of which have become part of Israeli law; and in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1977 (hereinafter: **the First Protocol**), although Israel is not a party thereto, the customary provisions thereof are also part of its law. Additionally, where there is a gap in the aforesaid laws of armed conflict, it may be completed from within international human rights law (see CrimA 6659/06 **A v. State of Israel**, para. 9 of the opinion of President D. Beinisch (unreported, June 11, 2008). See also, **Hess**, p. 517, **Mara'abe**, p. 492; HCJ 7862/04 **Abu Dhaher v. IDF Commander in the Judea and Samaria Area**, IsrSC 59(5) 368, 376 (2005) (hereinafter: **Abu Dhaher**).

17. The following has been said of the balances reflected in the Hague Regulations and of the scope of the powers and discretion of the military commander as a result thereof. The remarks are relevant to the case at hand:

> The Hague Regulations revolve around two central axes: one – ensuring the legitimate security interests of the occupier in a territory which is under belligerent occupation; the other – safeguarding the needs of the civilian population in a territory under belligerent occupation…In both these matters – the "military" necessity and the "civilian" necessity – the basic premise is that the military commander does not inherit the rights and status of the defeated regime. It is not the sovereign in the held area … The powers of the defeated regime are suspended and the military commander is vested with the 'supreme governance and administration authority in the area'… These authorities are, from the legal aspect, temporary by nature as belligerent occupation is temporary by nature… This temporariness may be long term… International law does not set a time limit thereto and it continues as long as the military government effectively controls the area. (**Jam'iat Iscan**, p. 794; see also **Hess**, p. 455; **Beit Sourik**, pp. 833-834; **Gaza Beach**, p. 520; Orna Ben Naftali and Yuval Shani, **International Law: Between War and Peace** 126, pp. 179-180 (2006)).

18. In our matter, the provisions of the third section of the Hague Regulations entitled Military Authority over the Territory of the Hostile State bear relevance. Of the aforesaid provisions, the provision of Article 43 of the Hague Regulations, to which parties referred, applies to our case. It reads as follows:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. (for the "legislative history" of the Article see Yoram Dinstein, **Laws of War**, pp. 215-216 (1983)).

This provision was defined as a "'supreme' general provision" (**Jam'iat Iscan**, p. 797). In the case at hand, the parties focused on the question of the military commander's power to impose travel restrictions pursuant to his duty to maintain public order and safety, as stipulated in the first clause of Article 43 of the Hague Regulations. Parties made no arguments respecting the restrictions imposed in the final clause of the Article on legislation by the military commander and as such, our review will also focus on the first clause of the Article (cf. **Jam'iat Iscan**, p. 797; HCJ 351/80 **Jerusalem District Electrical Company LTD. v. Minister of Energy and Infrastructure**, IsrSC 55(2) 673, 688-689 (1981)).

19. Regulation 43 imposes on the occupying power, via the military commander, the duty to "…ensure, as far as possible, public order and safety." This duty expresses the military commander's control of the area and it derives from "his being in charge of public safety in his area" (HCJ 2612/94 **Sh'ar v. IDF Commander in the Judea and Samaria Area**, IsrSC 48(3) 675, 679 (1994) (hereinafter: **Sh'ar**). The military commander is thus entrusted with enforcing the law in the Area and maintaining public order (HCJ 3933/92 **Barakat v. GOC Central Command**, IsrSC 46(5) 1, 6 (1992) (hereinafter: **Barakat**). For this purpose, customary international law vests him with the right to take action to ensure the preservation of his control of the area, using the appropriate means (**Taha**, p. 64; also cf. **Laws of War**, p. 216).

20. Who is on the receiving end of the military commander's duty to ensure public order and safety in the Area? As we have seen, the population using Road 443 up to 2000 can be divided into three categories: one, residents of the villages who are protected persons under the meaning of the term in the 4th Geneva Convention (Article 4 of the Convention, see **Gaza Beach**, p. 517; HCJ 2492/05 **Mansour v. State of Israel**, para. 22 (unreported, October 26, 2006) (hereinafter: **Mansour**)). The second is residents living in Israeli settlements in the Area (on the status of these settlements see **Gaza Beach**, pp. 524-527). These residents are part of the local population in the Area (see **Hess**, p. 455), albeit not "protected persons" (**Mara'abe**, p. 496, **Gaza Beach**, pp. 517, 524; **Mansour**, para. 21; HCJ 2645/04 **Nassr v. Prime Minister** (unreported, April 25, 2007), para. 26 (hereinafter: **Nassr**)). Aside from these two groups, the Road is also used by residents and citizens of Israel who do not reside in the Area, mainly for the purpose of travel between the coast and Jerusalem. The obligation to ensure "public order and safety" pursuant to Article 43 of the Hague Regulations is broad. It does not apply only to those who constitute "protected persons", but rather to the entire population present in the Area at any given time, including residents of the Israeli settlements and Israeli citizens who do not live in the area under belligerent occupation (**Hess**, p. 455; **Barakat**, p. 6; HCJ 6339/05 **Matar v. IDF Commander in the Gaza Strip**, IsrSC 59(2) 846, 851-852 (2005); HCJ 4363/02 **Zindah v. IDF Commander in the Gaza Strip** (unreported May 28, 2002); HCJ 4219/02 **Ghossin v. IDF Commander in the Gaza Strip**, IsrSC 56(4) 608, 611 (2002); **Mansour**, para. 22; **Mara'abe**, pp. 496-498; **Hess**, pp. 460-461; HCJ 2577/04 **Al Hawaja v. Prime Minister** (unreported, July 19, 2007), para. 31 (hereinafter: **Al Hawaja**); HCJ 11344/03 **Salim v. IDF Commander in the Judea and Samaria Area** (unreported September 9, 2009); **Sh'ar**, p. 679; see also HCJ 9593/04 **Morar, Head of Yanun Village Council v. IDF Commander in Judea and Samaria**, para. 13 (unreported, June 26, 2006) (hereinafter: **Morar**); HCJ 3680/05 **Teneh Community Committee v. Prime Minister of Israel**, para. 8 (unreported, February 1, 2006) (hereinafter: **Teneh**)).

21. The military commander's obligation to ensure the lives and safety of Israelis living in the area under belligerent occupation stems not only from his duty pursuant to Article 43 of the Hague Regulations, but also, as stated, from domestic Israeli law. As has been ruled (in that case with respect to the legality of constructing a section of the security fence):

> The military commander's power to construct a separation fence includes the power to construct a fence for the protection of the lives and safety of Israelis living in Israeli communities in the Judea and Samaria Area, despite the fact that the Israelis living in the Area do not constitute protected persons in the meaning of the term in Article 4 of the 4th Geneva Convention… This power originates in two sources. One is the military commander's power under Article 43 of the Hague Regulations to ensure public order and safety. … The second is Israel's obligation to protect the lives and safety of the Israeli civilians who reside in the Area, as enshrined in domestic Israeli law. (**Nassr**, para. 26; see also **Mara'abe**, p. 502; **Teneh**, paras. 8-9; **Bir Nabala**, para. 32; **Al Hawaja**, para. 31).

We further clarify that the military commander's duty to ensure the safety of those present in the Area applies also to those who are alleged to be present therein unlawfully. Of this the following remarks have been made:

> The authority to construct a security fence for the purpose of protecting the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (Article 43 of the Hague Regulations). It is called for, in light of the human dignity inherent in every individual. It is intended

> to preserve the life of every person created in God's image. The life of a person who is in the Area illegally is not up for the taking. Even if a person is present in the Area illegally, he is not outside the law… Even if the military commander acted against the laws of belligerent occupation at the time he consented to the establishment of this or that settlement – and this matter is not before us, nor shall we express any opinion on it – this does not release him from his duty under the laws of belligerent occupation themselves, to protect the life and dignity of every single Israeli settler. Ensuring the safety of Israelis present in the Area is cast upon the shoulders of the military commander. (**Mara'abe**, pp. 498-500; see also HCJ 6027/04 **Radad, Al Zawiya Village Council Head v. Defense Minister** (unreported, August 17, 2006) para. 15 (hereinafter: **Radad**); HCJ 8414/05 **Head of Bil'in Village Council v. Government of Israel** (unreported, September 4, 2007) para. 28 (hereinafter: **Bil'in**).

22. Pursuant to his duty to maintain public order, the military commander is under obligation to ensure, *inter alia*, orderly movement on the Area's roads (HCJ 401/88 **Abu Rian v. IDF Commander in the Judea and Samaria Area**, IsrSC 42(2) 767, 770 (1988)). There are various ways to protect movement. In our case, we note that the court has repeatedly addressed the military commander's power to build roads for security reasons, including for protecting the civilian population which uses them. Remarks made in one of the cases are relevant:

> Presumably, the security and military authorities who have undertaken the task of planning and implementing this road system, the cost of which is enormous, have not done so for reasons of simply facilitating civilian transportation and ecology, and the primary consideration in respect thereof was the military aspect… a further military consideration which is also highly important is the situation during times of calm. Hostile populations often attack military personnel traffic (as well as traffic by civilians it considers unwanted), which passes through or near communities. Transferring traffic elsewhere, to locations which are distant from the 'home' of potential assailants would reduce the number of attacks, loss of life and damages. This consideration is mixed. It is military inasmuch as it prevents casualties among the military. It is a security consideration inasmuch as it prevents harm and damages to peaceful civilians which would be caused as the result of operations such as chases, searches, curfews and the like, that are necessary after hostile attacks on military personnel or peaceful civilians." (HCJ 202/81 **Tabib v. Minister of Defense**, IsrSC 36(2) 622, 634, 635 (1982).

In a different case, in which an access road to the Netzarim settlement was reviewed, the following ruling was made:

> The need to build a new access road to the community of Netzarim arose following the many and severe terrorist attacks against the military and against the Jewish civilians using the existing access road. The new road is to be built at a greater distance from the built up area and should provide its users better protection against terror attacks. This consideration, which was undisputed even by counsel for the petitioners, is one the military commander may weigh in the framework of his duty to protect his soldiers as well as the population present in the area. The petitioners' argument that

> the military commander must shun this duty since the same is mandated by the principles of international law cannot be accepted and is legally incorrect. The question of the legality of the Netzarim settlement is not one for the military commander to decide." (HCJ 6982/02 **Wahidi v. IDF Commander in the Gaza Strip** (unreported, August 16, 2002).

Similarly, this court did not see cause to intervene in the military commander's decision to seize lands for the purpose of building a bypass road for Jews wishing to arrive from Jerusalem to pray at Rachel's Tomb [and] for building walls to secure the Road, although, in that case, the petitioners did not dispute the military commander's power to do so (HCJ 1890/03 **City of Bethlehem v. State of Israel**, IsrSC 59(4) 736, 747 (2005) (hereinafter: **Bethlehem**)). It has also been held that there is no place to intervene in the military commander's decision to seize land for the purpose of building a bypass road in the Hebron area, needed in order to "reduce the constant friction between movement of Israeli military and civilian vehicles and the Palestinian population" (HCJ 2717/96 **Wafa v. Minister of Defense**, IsrSC 50(2) 848, 856 (1996)). It is worth recalling, in addition to the aforesaid, that the seizure for building bypass roads which the court addressed in that case, was intended for bypassing large concentrations of Palestinian population in order to "effectively ensure the safety and lives of those using the road, including residents of the Area, both Jewish and Arab"(*Supra*, p. 856). In another case, this court did not see cause to intervene in the military commander's decision to seize land in order to protect the access road used by Jews wishing to pray at the Tomb of the Patriarchs (**Hess**). Additionally, the court did not see cause to intervene in the decision to build the security fence in order to protect, *inter alia*, the safety of Israelis traveling along the Trans Samaria road from Israel to Ariel and the Jordan Valley (**Radad**, para. 18).

23. Alongside considerations relating to order and safety in the Area and ensure safe travel, the military commander may weigh considerations relating to the security of the State of Israel and defending it from a security threat originating in the Area and directed at targets inside Israel (HCJ 5539/05 **'Atallah v. Minister of Defense** (unreported, January 3, 2008), para. 8; **Abu Dhaher**, p. 376). Therefore, the military commander was entitled to consider the concern that terrorists might enter Israel as a result of Palestinian vehicular traffic on the Road among his considerations. However, the military commander may not take other interests of the state into consideration:

> [T]he considerations of the military commander are ensuring his security interests in the Area on one hand and safeguarding the interests of the civilian population in the Area on the other. **Both are directed toward the Area**. The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population. Military necessities are his military needs and not the needs of national security in the broader sense… A territory held under belligerent occupation is not an open field for economic or other exploitation. (**Jam'iat Iscan**, pp. 794-795 (emphases added); see also **Beit Sourik**, p. 829; **Hess**, p. 456).

From the general to the specific

24. The general principles we addressed give rise to the military commander's duty to secure safe travel on the Area's roads. This obligation relates to all vehicles traveling in the Area, regardless of the their owners' identity. In this context, in order to fulfill his aforesaid obligation the military commander is empowered to impose restrictions on vehicular traffic in general, and on Palestinian vehicular traffic in particular. As ruled, "subject to specific provisions set forth in the Hague Regulations and according to the general provision in Regulation 43, a military government is

vested with all the by-powers which are reasonably needed for exercising the power." (**Jam'iat Iscan**, p. 807). Additionally, and as clarified above, the military commander is empowered to impose such restrictions in order to ensure that Israel comes under no security threats. The question, and here we arrive at a dispute which requires a ruling, whether in the concrete circumstances at hand, the military commander was empowered to impose a full ban – as opposed to imposing restrictions – on movement by the residents of the villages on the Road, is a different question.

25. Prior to ruling, two preliminary remarks must be made. First, our ruling does not relate to cases in which banning the protected population from using a road stems from immediate security necessities such as the situation at the end of 2000 when the "second intifada" broke out, or when the ban is time-limited. Such categories require separate scrutiny and we may leave them for future review. In contrast, the ban in our case has continued for almost a decade with no end in sight at this time. The second clarification focuses on the arrangement proposed by the respondents in their affidavit of response expressing a willingness to allow limited movement by some 80 vehicles from the villages on the Road, under specified conditions. Parenthetically, we note that according to the respondents' figures, in 2007, the villages numbered 26,280 residents whereas the daily traffic volume on the Road is about 40,000 Israeli vehicles. In view of the very limited scope of the proposed arrangement and the additional restrictions involved therein, it cannot be held that it stops the ban from being a flat ban or alters the situation which is the subject matter of the petition.

26. We now turn to the particulars. Road 443, in the relevant segment, was designed, according to the protocol of the plan by which it was built (R/35) "to improve the traffic connection between the villages on the Beit Sira – Beituniya line and increase traffic safety". The road, for the purpose of which lands were expropriated from residents of the Area was thus meant, according to its definition, to meet the needs of the local population. According to the rules of public international law, the seizure power of the military administration was exercised, in accordance with and within the scope of local law, for the benefit of the local population, namely, the protected persons (cf. **Jam'iat Iscan**, p. 790). As clarified, this was the situation until 2000. Indeed, the petitioners are not complaining about the use of the Road until that time. The difficulty arises with respect to the state of affairs beginning in 2000, when the Road was designated for use by Israeli vehicles only, in the form which we addressed. The closure of the Road to Palestinian vehicles leads to a situation whereby Road 443 is mainly used for "internal" Israeli traffic between the country's center and Jerusalem. As recalled, the Road was defined by the respondents "as the main traffic artery connecting the coast and the Modi'in block to the Jerusalem area. Along with Road No. 1, Road No. 443 is one of the two main traffic arteries leading to the capital". Respondents 4 also define the Road as an important traffic artery from the country's center to Jerusalem, as does respondent 5. In addition to this, the Road is used for travel by residents of the Israeli settlements located in the area. According to the ruling of this court, the military commander would not have been empowered to build the Road in the first place if this were the purpose for building it:

> [T]he military government may not plan and implement a road system in an Area held under belligerent occupation if the purpose of this planning and implementation are simply to constitute a "service road" for its own state. The planning and implementation of a road plan in a held territory may be carried out for military reasons … As we shall see, the planning and implementation of a road system may be carried out for reasons relating to the best interest of the local population. This planning and implementation may not be carried out simply to serve the holding state. (**Jam'iat Iscan**, p. 795; see also **Beit Sourik**, p. 829).

These remarks are relevant, mutatis mutandis, also with respect to **using** the Road. The military commander is indeed empowered to impose travel restrictions pursuant to his obligation to ensure public order and safety on the roads in the Area, including ensuring the safety of Israeli settlers and Israelis present in the Area and using the Road. However, the military commander's power does not extend to the point of imposing a permanent and complete ban on Palestinian vehicular traffic on the Road. The reason thereto is that in imposing such restrictions, Road 443 becomes, for all practical purposes, a road designated for Israeli vehicles only, the majority of which travel from the coast to Jerusalem and back, i.e. **for the purpose of "internal" Israeli traffic** (as defined by respondents 4: "a major traffic artery in Israel which links the city of Jerusalem with metropolitan Tel Aviv"). We stress that we have no reason to doubt the military commander's position that the exercise of power was founded on security considerations stemming from his duty to ensure order and safety. However, the review of the military commander's power in the current context is carried out noting the result of the imposition of restrictions, rather than merely focusing on the motives for imposing the same (cf. in a different context, HCJ 11163/03 **Supreme Committee for Monitoring Arab Affairs in Israel v. Prime Minister of Israel**, para. 18 of President **A. Barak**'s opinion (unreported, February 27, 2006)).

The state of affairs which stems from the flat ban on movement by residents of the villages is that it is no longer a road serving the benefit of the local population, but a "service road" for the holding country. An arrangement which yields this result exceeds the power of the military commander and is inconsistent with the principles of international law pertaining to belligerent occupation. The outcome of our remarks thus far is that **the travel restrictions imposed by the military commander cannot remain in their current form and must be revoked**.

Beyond necessity, we add that we would have reached a similar result even if we presumed the military commander was did possess power under the principles of public international law in general and the Hague Regulations in particular. Even in such a situation, where power exists, we would have reviewed the military commander's discretion, we would have reached the conclusion that he was not permitted to exercise it as he had and impose travel restrictions in a manner which turns this road into one the sole purpose of which is to be a "service road" for Israeli vehicles. We shall clarify this conclusion.

Review of the military commander's discretion

27. The review of the military commander's discretion will be carried out in accordance with the principles set out in the case law of this court. Even when acting within his power, the military commander, as any administrative agency, must use his power, *inter alia* according to the principles of reasonableness and proportionality, and his discretion is subject to review by this court (**Bethlehem**, p. 747; cf. **Abu Dhaher**, p. 378; **Mara'abe**, p. 507-509; **Bil'in**, para. 29). Indeed, "[t]he argument that the impingement upon human rights is due to security considerations does not rule out judicial review. 'Security considerations' or 'military necessity' are not magic words." (**Mara'abe**, p. 508). The aforesaid notwithstanding, as stressed on more than one occasion, this court does not sit as a "supreme military commander" and does not replace the military commander's discretion with its own, but rather examines the legality of his actions. The power and responsibility are at the hands of the military commander and this court does not purport to be an expert on security matters in his place:

> The Supreme Court, when sitting as the High Court of Justice exercises judicial review over the legality of the discretion exercised by the military commander … In exercising this judicial review, we do not appoint ourselves as experts on security matters. We do not replace the security considerations of the military commander with our own security

> considerations. We do not adopt any position with regard to the manner in which security matters are conducted… Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld." (**'Ajuri**, p. 375; see also **Hess**, p. 458).

It has also been said

> [T]here are often several ways of realizing the purpose, which are all proportionate and reasonable. The military commander has the authority to choose between these methods, and as long as the military commander does not depart from the 'margin of proportionality' and the 'margin of reasonableness', the court will not intervene in his decision. (**Bethlehem**, p. 765).

The aforesaid notwithstanding, it is stressed that although the court gives special weight to the expertise of the commander of the Area who is responsible for the security of the Area; indeed, when his decision impinges on human rights, the proportionality of the impingement will be examined in accordance with the accepted tests which were set out in the case law with respect to this matter (**Mara'abe**, p. 508), and in the words of president **A. Barak**:

> The question before us is whether these military operations satisfy the national and international criteria that determine the legality of these operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander insofar as the military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law. That is our expertise." (HCJ 4767/04 **Physicians for Human Rights v. Commander of the IDF Forces in Gaza**, IsrSC 58(5) 385, 393 (2004)).

28. In exercising his power, the military commander must strike a balance among three considerations which are "the security-military consideration; safeguarding the rights of the Palestinian residents who are 'protected persons'; and safeguarding the rights of the Israelis living in the Israeli communities in the Area" (HCJ 5139/05 **Shaib, Beit Lead Village Council Head v. State of Israel**, para. 10 (unreported, February 22, 2007); see also HCJ 1748/06 **Mayor of Adh Dhahiriya v. Commander of the IDF in the West Bank**, para. 13 (unreported, December 14, 2006) (hereinafter: **Adh Dhahiriya**); HCJ 5488/04 **Al-Ram Local Council v. Government of Israel**, para. 42 of President **Barak**'s opinion (unreported, December 13, 2006) (hereinafter: **Al-Ram**); HCJ 1998/06 **Beit Aryeh Local Council v. Minister of Defense**, para. 8 (unreported, May 21, 2006); HCJ 3969/06 **Head of Deir Samit Village Council v. Commander of the IDF Forces in the West Bank**, para. 14 (unreported, October 22, 2009) (hereinafter: **Deir Samit**)). In the case at bar, as clarified, the consideration of protecting the safety and well being of Israelis traveling on Road 443 was added as a derivative of the security-military consideration. The central criterion used for striking this balance was proportionality, with the three subtests included therein (**Radad**, para. 17). We now turn to this.

Proportionality

29. According to the principal of proportionality, it is possible to restrict the individual's liberty in order to achieve appropriate objectives, provided that the restriction is proportionate (**Beit Sourik**, p. 837). The principle of proportionality imbibes its force from international law as well as the

principles of Israeli public law (**Mara'abe**, p. 507). In order to meet the conditions of proportionality, the military commander bears the onus of demonstrating that there is a correlation between the measure he takes and the objective (the first subtest of proportionality); that the measure taken is the one which is least injurious to the individual of the possible alternatives (the second subtest) and that there is an appropriate relationship between the injury to individual liberty caused by use of the measure and the benefit gained thereby (the third subtest, also known as "the test of proportionality in the narrow sense") (**Morar**, para. 18; see also **Beit Sourik**, para. 840). We shall review each of these tests.

30. In the scope of the first subtest we test, as stated, whether there is a rational connection between the measure taken – closing the Road to Palestinian vehicular traffic and as a result restricting the freedom of movement of the residents of the Area who are under belligerent occupation, and the objective – safeguarding the security of the state and its citizens and the security of the Area both on Road 443 and in Israel. The petitioners argue that travel restrictions do not contribute to the protection of the State of Israel or its residents or to secure travel along the Road, as the other measures taken by the respondents provide a sufficient response. The petitioners also note that in other places in the Judea and Samaria Area, the military secures hundreds of kilometers of road on which both Palestinians and Israelis travel. It was claimed that the respondents have not clarified how "preventing travel by tens of thousands who are not suspect and do not pose a risk to anyone's security" serves the purpose of reducing risks and threats. The petitioners stress, based on this court's ruling in the **Morar** case, that the existence of a "purely technical causal relationship between the measure and the objective" is insufficient but that there must be "a rational connection between the measure and the objective and the measure must be appropriate for achieving the objective". They argue that "this means, *inter alia*, that one must not use arbitrary, unfair or illogical measures". The petitioners also referred to a security opinion which was submitted in a petition concerning travel arrangements on the Shekef-Negohot road (the **Deir Samit** case) by Brigadier General (reserves) Ilan Paz. According to the opinion, dedicating the road to travel by Israeli vehicles only provides a "not bad" solution for threats of drive-by shooting terrorist attacks. However, since this policy leads to a situation where only Israelis travel on the Road, it allows for terrorist attacks using other methods, such as shooting at moving vehicles from the sides of the road or placing roadside bombs more easily.

On the other hand, the respondents argue that there is a rational connection between the objective – safeguarding the lives and security of Israelis traveling on Road 443 and the measure used – restricting movement by Palestinian vehicles on the Road. Their position is that allowing free movement by Palestinian vehicles on the Road would significantly increase the risk of terrorist attacks on it, for example car bombs, drive-by shootings or smuggling terrorists and weapons into Israel's home front.

We have not found grounds for intervening in the respondents' position according to which there is a rational connection between the measures taken and maintaining order and safety. The actual situation on Road 443 since the security measures were implemented supports this position. The measures that have been implemented address the concern regarding shooting terrorist attacks from cars traveling on the Road, abductions and smuggling terrorists into Israel through the roadside crossings. The opinion on which the petitioners relied does not change my conclusion. I am prepared to assume, as the opinion writer maintains, that alongside the advantages of the travel bans imposed by the military commander, there are certain disadvantages, which he pointed out. However, the final decision, as well as the task of weighing the advantages and disadvantages, is at the hands of the military commander and his opinion must be given substantial weight. This, in view of the concept which we addressed whereby the military opinion of the official in charge of security has special weight (**Beit Sourik**, p. 844; see also, **Mara'abe**, p. 508-509; **Bir Nabala**,

para. 33, 36; **Al-Ram**, para. 42; **Deir Samit**, para. 23). In view of the latter, we have found that the measures taken by the military commander meet the first subtest of proportionality.

31. The second subtest requires that the measure employed is the least injurious to the individual of the variety of possible appropriate measures. The petitioners argue that the respondents have alternative measures at their disposal to achieve the sought objective (such as security fences, checkpoints at the entrances to Israel and surveillance) and that inasmuch as the latter are insufficient, the respondents can take other measures which do not involve injury to the local population. The petitioners stress that the measures taken by the respondents cannot achieve the full objective sought – full protection of Israelis traveling on Road 443. However, the reality of life is that full security cannot be obtained and an educated and balanced decision regarding the risks that have to be taken in order to protect human rights must be made. They also stress that inasmuch as the military commander reaches the conclusion that it is impossible to allow movement by Israeli civilians who do not live in the area of the Road without a parallel denial of the right of protected residents to use it, one can prevent the former from entering the Area. In this context, the petitioners stress that Israeli civilians do not have a "right" to enjoy the public resources of the occupied territory and that their entry into the Area is possible by virtue of the general permit granted by the military commander. The petitioners also argue that other alternatives available to the respondents were not considered at all, including employing additional security measures, increasing screening at the entry points into Israel or partially restricting Israeli movement on the Road.

    The respondents stress that their position is that there is no other, less injurious measure that would fulfill the purpose of providing security for the thousands of Israelis traveling on Road 443. The only possible measure – individual screening of each Palestinian vehicle seeking to get on the Road is not necessarily less injurious and in any case, does not suffice to fulfill the required security objective. Screening processes cannot locate each terrorist and every weapon and cannot sweepingly prevent infiltration and terrorist attempts. Security screening all vehicles would increase travel time and require setting up a number of additional checkpoints on the roadsides at an extra cost and while increasing the risk to IDF soldiers. The respondents note that allowing Palestinian vehicles onto the Road would allow terrorists to take passengers and weapons onboard the car while on the Road even if the vehicle was checked at a checkpoint before getting onto the Road.

    The question we must examine is whether there is an alternative measure which is less injurious to the petitioners' rights and which would achieve the security objective the military commander sought to achieve (cf. **Adh Dhahiriya**, para. 20). In the case at bar, taking measures as per the petitioners' suggestion would indeed reduce the severity of the harm done to them. This notwithstanding, the military commander's position is that these measures do not achieve the security objective. I have not been convinced that possible alternatives for the protection of passengers on the Road which are less injurious to the local residents have been duly considered. We address this below whilst referring to the third subtest.

32. In the third subtest, one must demonstrate that the employment of the measure under review appropriately correlates to the benefit gained thereby. In the words of President **A. Barak**:

> This subtest weights the costs against the benefits…According to this subtest, a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognized human rights and the necessity of ensuring the provision of the needs and

> welfare of the local inhabitants, and which preserves 'family honour and rights'… All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. (**Beit Sourik**, p. 850).

And held in **Adalah**:

> This subtest therefore provides a value test that is based on a balance between conflicting values and interests... It reflects the approach that there are violations of human rights that are so serious that a law cannot be allowed to commit them, even if the purpose of the law is a proper one, its provisions are rational and there is no reasonable alternative that violates them to a lesser degree. The assessment of the balance between the extent of the violation of the human right and the strength of the public interest that violates the right is made against a background of all the values of the legal system. (*Supra*, Para. 75).

In the present case, the injury, as aforesaid, is to the petitioners' freedom of movement. We shall first examine the essence of this injury.

33. This court has addressed the normative repercussions of freedom of movement in the Area vis-à-vis this right in Israel. In the words of Justice (as was her title then) **D. Beinisch**:

> Freedom of movement is one of the basic human rights and it has been recognized in our law both as an independent basic right… and as a right derived from the right to liberty… there are some authorities who believe that this freedom is derived from human dignity… freedom of movement is recognized as a basic right also in international law. Freedom of movement within the state is enshrined in a host of international conventions and declarations on human rights… it would appear that it is also enshrined in customary international law." (**Bethlehem**, pp. 754-755).

In that case, the court did not find cause to rule on the question if and to what extend the principles of Israeli constitutional law and international human rights conventions apply to the Judea and Samaria Area, finding that: "it is sufficient for us to state that in the scope of the military commander's duty to exercise his discretion reasonably, he must taken into consideration the interest of the local population as well, including the need to minimize the degree of infringement on its freedom of movement (*Supra*, p. 755-756, see also **Deir Samit**, para. 17).

The travel restrictions imposed by the military commander infringe on the freedom of movement of residents of the villages. The parties are in dispute over the degree of the injury to the petitioners' freedom of movement and as a result – other rights. Case law has set out a number of subtests for examining the degree of harm to the individual's freedom of movement, which include the size of the area in which the restriction is imposed; its intensity, the period of time the restriction has been in place and the nature of the interests for the purpose of which movement is required (**Bethlehem**, p. 757). As for the intensity of the travel restriction, the following has been remarked:

> It is clear that the violation involved in a complete denial of freedom of movement is more serious than a violation caused by a partial restriction of freedom of movement, and the lesser the extent of the restriction, the lesser the extent of the violation. Thus, for example, with regard to the intensity of

> the violation of freedom of movement in the context of road closures, it was held that closing a road which is the only access road is not comparable to closing a road where nearby alternative access roads remain open; closing a major traffic artery is not comparable to closing an internal, neighborhood road; a road closure which is tantamount to blocking access completely is not comparable to a road closure which results in a longer route and an inconvenience for the persons using the road; the smaller the increase in time and inconvenience caused by the alternative route, the lesser the intensity of the violation of freedom of movement… Indeed, an absolute denial of movement is not comparable to traffic delays or inconvenience, and the lesser the degree of the inconvenience, the lesser the intensity of the violation of freedom of movement. (*Supra,* p. 758-759).

What is, then, the violation of freedom of movement caused to the petitioners? The petitioners are entirely prevented from using Road 443. This preclusion has been in force for a number of years, and for the time being – as indicated by the respondents' response – there is no concrete intention to remove it. On the other hand, the respondents repeatedly declared that **pedestrian movement on the Road is permitted**. With these facts in the background, the dispute between the parties focuses on the question whether the alternative road system which is available to the residents of the villages provides a sufficient response to the closure of Road 443. It is the petitioners' position that preventing travel on Road 443 leads to very severe harm to their fabric of life, including all aspects thereof as detailed. As claimed, the closure of the Road resulted in the villages' being cut off from the city of Ramallah and the villages' residents from their farmlands. The outcome – it is claimed – is that other rights to which the petitioners are entitled are also violated, including the right to a livelihood and living in dignity; the right to education and connection with relatives and the right to health and to receive medical care.

The respondents did not dispute that the travel restrictions have caused harm to the routine lives of the residents of the villages. Yet, they maintain that the alternative road system – in conjunction with the "fabric-of-life" roads and the restricted movement arrangement – create a reasonable alternative for travel on the Road. As such, the injury caused to the petitioners prior to the opening of the Beit 'Ur-Beituniya fabric-of-life road, was, in their view, negligible and manifested itself in some delays in travel times. The respondents noted that the comparison between the situation that existed at that point and the previous situation indicates that for most of the villages' residents, the road to Ramallah was not made substantially longer (and the route for residents of Beit Sira was made shorter). They maintain that even at that point, an economic and factual analysis indicated that the petitioners' allegations with respect to the injuries suffered as result of the closure of Road 443 were unsubstantiated. In terms of the number of work permits issued for residents of the villages, the latter indicates that a large number of the villages' residents were employed in Israel and in the Israeli settlements in the Judea and Samaria Area. Contrary to the allegations, the respondents believe that although Ramallah is the major urban centre for the residents of the villages, most are not employed therein and the locales of the villagers' employment and occupation did not significantly change due to changes to travel arrangements on Road 443. They maintain that economic harm to the villagers was detected, but that such was not unique to them, as the economy, and in particular unemployment rates, in the entire Judea and Samaria Area had taken a downturn due to the security situation since 2000. They particularly note that not only was there no trace of a trend of relocation by the villages' residents to Ramallah, but rather positive migration into the villages from other parts of the Judea and Samaria Area was detected. They maintain that an analysis of figures regarding the number of schools, public transportation and its cost, the number of road accidents and the state of medical services does not indicate that there are significant differences between the petitioners' villages and other parts of the Judea and Samaria

Area. It was also argued that there is no difficulty to access farmlands and that, in view of the nature of Road 443, it can only be traversed in the relevant section using underground passages (with the exception of its ends in the Maccabim checkpoint or the Beit Horon area). They believe that the aforesaid is all the more valid subsequent to the opening of the Beit 'Ur – Beituniya fabric-of-life road.

34. Summarizing parties' positions with respect to the third subtest, we find that it is the petitioners' position that the damage they sustained as a result of the imposition of travel restrictions is not appropriately proportional to the security benefit gained thereby. They maintain that it is not possible to justify the imposed travel restrictions, with their inherent injuries, on the claim that this is the required balance in order to achieve security. According to the petitioners, the travel ban has led to prolonged injuries over a protracted period of time, affecting a population of tens of thousands, whilst severely disrupting all aspects of their fabric of life. They maintain that even if the travel restriction does increase security compared to the level achievable by other means, indeed, it has no reasonable or proportionate relation to the human rights violations caused thereby. The respondents, on the other hand, claim that the benefit gained by restricting Palestinian vehicular movement on Road 443 greatly surmounts the damage caused. The injury to Palestinian residents caused as a result of restricting movement is minute and primarily confined to some delay in travel time; whereas the security benefit is very substantial. In addition to this, one must also consider that following the opening of the Beit 'Ur – Beituniya fabric-of-life road, travel to Ramallah is short and speedy, even compared to travel along Road 443.

    In view of the broad factual infrastructure presented to us by the parties, we find that at the time the petition was filed, the travel restrictions indeed substantively harmed the fabric of life of the residents of the villages. The closure of the Road – which is a major inter-city road that allows speedy travel – to the residents of the villages, who were required to use the rural route to get to Ramallah, impeded their movement. The rural route is narrow, faulty in some parts, it runs through the villages and there is no dispute that it is significantly inferior in quality to Road 443. However, as we have seen, the opening of the Beit 'Ur – Beituniya fabric-of-life road, of which the respondents notified subsequently, has substantially mitigated the intensity of the disruption of the fabric of life of the Palestinian residents. It cannot be disputed that it is not a multi-lane, fast road like Road 443, but a double-lane road which is of a much lower standard and in that respect, is not comparable to Road 443. The aforesaid notwithstanding, it does appear to allow direct access by residents of the village to the local urban center.

35. With this conclusion as the background, we seek to examine whether the sweeping travel ban imposed on the Palestinian residents of the Area meets the third subtest of proportionality. This court has recently reviewed a petition by residents of Israeli communities in the Dolev-Talmonim block which is in the Area and located north of Road 443 for building roads which would shorten travel between these communities and Jerusalem (HCJ 6379/07 **Dolev Community Committee v. IDF Commander in the Judea and Samaria Area** (unreported, August 29, 2009)). The petitioners argued that due to security related restrictions, they are forced to travel to Jerusalem on a longer road than in the past in a manner which interferes with their daily routine, inconveniences them and disproportionately injures their basic rights. To this the court replied as follows (remarks by Justice A. Grunis):

> First, one must recall that the political-security situation in recent years necessitates the employment of various measures for regulating life in the Judea and Samaria Area. These measures have interfered with the daily routines of all residents of the Area. Thus, in recent years, the respondents have routinely placed various restrictions on the movement of residents of the Area for security reasons… In my view, the inconvenience caused to the

> petitioners as a result of the travel restrictions imposed on them constitutes an indirect and limited infringement of their rights. Thus, for example, the petitioners have alternative routes at their disposal for reaching Jerusalem. Even if these alternatives extend their route, one cannot say that the petitioners' freedom of movement is denied... Finally, even if I presume that the petitioners' basic rights were violated, indeed, an examination of the considerations at the basis of the decision indicates that this harm is caused for an appropriate purpose and in a proportionate manner" (*Supra*, para. 9).

Can these remarks be applied, mutatis mutandis, to the matter at hand with attention to the alternative currently available to the petitioners? The answer to this question is derived from the exceptional circumstances in this case: complete exclusion of residents of the Area from a road that was designed to serve them, for the benefit of movement by Israelis mainly serving the connection between the coast and Jerusalem. **In these special circumstances**, the existence of an alternative for accessing Ramallah by way of the fabric-of-life road is not the be all and end all. In my view, in the aforesaid circumstances the complete travel ban imposed on the Palestinian residents of the Area does not meet the third subtest of proportionality, as not enough weight was given to safeguarding the rights of the latter as "protected persons". We have noted that Road 443 – in the relevant segment – was designed, *ab initio*, according to the plan by which it was built, to improve the traffic connection between the villages and increase the level of travel safety; and that the Road, for the expansion of which land was expropriated from residents of the Area, was designed – by definition – to meet the needs of the local population. We have also noted that according to the principles of public international law, the military administration's power to expropriate is valid under local law and within its framework, only if it is implemented for the benefit of the local population. Yet in this case, the Road is used in practice, as explained, for movement by Israeli vehicles only, and for the most part for "internal" vehicular movement inside Israel, between the center of the country and Jerusalem. We have commented that in these circumstances, the military commander is not empowered to impose a complete travel ban on the local residents. In any event, even if we assume – for the purpose of the review and in the respondents' favor – that the military commander is empowered to impose the aforesaid ban, one cannot avoid the conclusion that from the aspect of discretion, a complete denial of the freedom of movement of residents of the Area and their total exclusion from Road 443 cannot be accepted. Indeed, the consideration relating to the needs of the local population and securing their freedom of movement does not stand alone and must be balanced with security needs. One may restrict freedom of movement, as mentioned, due to a military-security consideration and the need to provide personal security for the Israelis using the Road. For the latter need, it is possible to impose travel restrictions which provide a security benefit. However, a complete travel ban on protected persons is not the only measure for achieving the security objective. As accepted on other roads in the Area, it is possible to impose travel restrictions which do not amount to a complete ban (cf. **Deir Samit**, para. 27, first clause. We address this below). One must add to this that as we have mentioned, the respondents employ a number of measures which greatly assist in maintaining order and security in addition to the travel ban, and they can employ other measures which would further decrease the potential risk posed by movement by residents of the Area. A proper balance means, as stated, giving the appropriate weight to all the considerations that are incumbent on the military commander. I have not been convinced that a sweeping denial of the protected persons' right to use the Road, in the concrete circumstances of which we spoke, particularly when the Road is primarily used for "internal" movement inside Israel, properly balances between harming individual rights and security needs. The additional security achieved by the flat ban does not equal a complete denial of the right of protected persons to travel on a road which was designed for their needs and built on lands some of which were expropriated from them. The remarks of President D. Beinisch in the **Deir Samit** case are relevant here, mutatis mutandis.

> The security advantage gained by closing the Road to a lesser degree is not reasonably proportionate to the harm to local residents. Further still, and no less important, as we noted above, we were not convinced that adequate consideration was given to alternative security measures which would significantly decrease these injuries even if this involves compromising the security component to a degree. In accordance with the consistent approach of this court, even if security requirements necessitate measures which might injure the local population, indeed, every effort should be made to make this injury proportionate. (*Supra*, para. 34)

For this reason also, I have found that the military commander's decision to entirely restrict Palestinian vehicular traffic on Road 443 – which was enshrined in the Movement Provisions – cannot be accepted.

36. The aforesaid notwithstanding, it must be noted, as we have clarified, that the consideration relating to the needs of the local population and securing its freedom of movement does not stand alone and may be restricted, as mentioned, in view of the security-military consideration and the need to provide security for the Israelis living in the Israeli communities in the Area and other Israelis using the Road. For these considerations, one may impose travel restrictions which yield a security benefit (along with the other measures the respondents employ, as aforesaid, for the purpose of maintaining order and safety). In any event, our remarks thus far do not amount to a finding that the military commander must allow residents of the villages unlimited and unhindered access to Road 443. The military commander has presented us with a detailed and persuasive infrastructure, based on information accumulated over time, which points to substantive dangers posed by such unchecked movement. The military commander may employ the necessary measures for maintaining order and safety, according to a current factual infrastructure presented to him, provided they meet the criteria determined in this court's rulings. Without making any findings with respect to other travel arrangements that the military commander would be permitted to employ, one cannot rule out an outline of an arrangement whereby entry of vehicles of the Area's residents to the Road would be restricted to a location, or locations, determined by the military commander for security reasons and would also be subject to appropriate security checks. In this manner, the risk of a drive-by shootings from the vehicle would be reduced, as prior to entering the Road, it would undergo strict screening which would ensure that there are no weapons on board. The risk of the vehicle entering Israel would be equally prevented, as there are security forces checkpoints on both sides of the Road, which prevent the entry of prohibited vehicles. The fate of the roadblocks placed at the villages' access routes would be decided in the framework of these travel procedures. With the exception of the aforesaid, I make no judgment with respect to the future arrangement or its particulars.

Exercising power without written authority

37. As illustrated above, the blockage of Road 443 to Palestinian vehicular traffic was implemented without written authority, but rather pursuant to the general powers in Section 88 of the Security Provisions Order. The existing situation was enshrined in the Movement Provisions only after the petition was filed. The respondents agree that as the travel restrictions on the route continued, there was room to enshrine them in a written and signed order.

Once the Movement Provisions were issued, and as the petition at hand is anticipatory, the need to rule on the petitioners' claim that the military commander was not empowered to order the closure of the Road without proper written authority has become redundant. However, it shall be said, with a view to the future, that this state of affairs raises a real difficulty. The provision of Section 88 of the Security Provisions Order quoted above, empowers the military commander to order the closure

of a road "by way of order or by way of issuing orders in a different manner". This points to the military commander's power to order a road closure even in the absence of a written authority. However, this power should only be used when there is a need to close a road immediately due to concerns of a security breach. Even in this case, when the closure is not for a limited and short period of time, the order must be subsequently enshrined in a written order. In the case at hand, this was not the reality. The road has been closed to Palestinian vehicular traffic (even if only partially) ever since 2000, whereas the Movement Provisions were issued only in 2007, a number of years later and after the petition was filed. This court faced a similar question in the context of the military commander's power to order the closure of an area stipulated in Article 90 of the Security Order. The following was ruled in that case:

> It should also be noted that closing the areas should be done by means of written orders that are issued by the military commander, and in the absence of closure orders the Palestinian residents should not be denied access to their land. Nothing in the aforesaid prejudices the commander's power in the field to give oral instructions for a closure of any area on a specific basis for a short and limited period when unexpected circumstances present themselves and give rise to concern of an immediate danger to security that cannot be dealt with by any other measures. But we should take care to ensure that the power to order the closure of a specific piece of land without a lawful order, as a response to unexpected incidents, should be limited solely to the time and place where it is immediately required. In principle, the closure of areas should be done by means of an order of which notice is given to whoever is harmed by it, and the residents whose lands are closed to them should be given an opportunity to challenge its validity. (Remarks by Justice, as was her title then, **D. Beinisch** in the **Morar** case, para. 21).

This logic is relevant, mutatis mutandis, to our matter as well. Such a mode of operation is consistent both with the interests of the injured individual and the interest of the respondents. In the absence of a signed order, misunderstandings may arise even among administration officials, with respect to the actual situation. This transpired in our case as well. As we have seen, even after several years during which travel on the Road had been restricted, the representative of the military legal advisor to the Judea and Samaria Area was unaware thereof. Therefore, he provided the petitioners who complained to him of the road closure, with an incorrect response. This is a grievous failure. My presumption is that the officials in charge have drawn the necessary conclusions.

The Beituniya crossing

38. As clarified both in the respondents' affidavits and in the remarks made by then Commander of the Judea and Samaria Area Division, Brigadier General Noam Tibon, the Beituniya crossing which primarily operates as a "back to back" crossing designed for transferring commercial goods between Israel and the Judea and Samaria Area is situated in a location over which the houses of the nearby town have a commanding view and which is vulnerable in terms of security. This location has made it a preferred target for attacks by terrorists. Shootings, as well as other breach-of-peace incidents such as stone throwing, Molotov cocktail throwing and tire burning carried out at or near the crossing were detailed in the respondents' affidavit. Expanding the crossing in a manner allowing routine screening of Palestinian vehicles and pedestrians on a large scale would substantially increase the area of the crossing and the manpower needed to staff it. This would create an additional area of friction prone to attacks by terrorists. This finding constitutes a clear security issue over which the military commander has discretion. Under the criteria for judicial review in this context, which we noted above, we have not been presented with any cause to

intervene in the military commander's decision on this issue and instruct a change to the operation of the Beituniya crossing. Furthermore, opening the Beituniya crossing as sought means opening another crossing in the security fence in the Jerusalem area. In another petition, in which it was argued that an additional crossing should be opened in the security fence, the following was held:

> According to petitioners' arguments, there is a means which causes a lesser injury to the fabric of life and is sufficient for achieving the security objective. This, if the respondents keep the Bir Nabala Al-Ram road open and install a checkpoint therein. In so doing, residents of the area could travel to Al-Ram and Jerusalem quickly and the injury to the fabric of life of the Area's residents would be greatly diminished without compromising the security interest, as travel would be carried out through the checkpoint. We cannot accept this argument. The respondents' position is that there is a security interest in consolidating passage to Israel at the Qalandiya crossing. Any additional crossing increases the risk involving terrorist infiltration into Israel and constitutes a point of friction which increases the threat to the security forces in charge of the crossing. We accept this position of the military commander, who is entrusted with security considerations. In these circumstances, it cannot be said that there is a means which is less injurious and achieves the security objective. (**Bir Nabala**, para. 44)

These remarks, mutatis mutandis, are relevant in our case too.

Conclusion

39. We have reached the conclusion that the travel restrictions currently imposed by the respondents which mean a complete ban on movement by protected persons on the Road cannot remain in their present form; both due to **lack of authority** and **the absence of proportionality**. Therefore, we make the order nisi absolute in the sense that we find that **the Movement Provisions and the military commander's decision to completely prohibit travel by residents of the villages on Road 443 must be revoked**. We have seen no cause to intervene in the military commander's decision and compel the respondents to change the manner in which the Beituniya crossing is operated; nor in his determination with respect to the threat posed by unchecked travel on the Road. It is superfluous to stress that we do not purport to outline future security arrangements to be taken by the respondents. This decision is under the authority of the military commander and in any case, we have not been presented with sufficient infrastructure with respect to the legality of alternative arrangements. The military commander may take the necessary measures to maintain order and safety, provided that they meet the criteria established in our rulings. In order to allow the military commander to formulate a different security solution which would provide protection for the Israeli residents who use the Road (cf. **Deir Samit**, para. 35), we rule that our judgment enter into force five months hence.

In view of the result we have reached, we have not seen fit to address the additional arguments made in the petition.

Respondents 1-3 will pay legal fees in the total amount of 20,000 NIS.

Justice

President D. Beinisch

1. I concur with my colleague Justice **U. Vogelman** and with the reasons provided in his judgment with respect to the military commander's lack of authority to close Road 443 to Palestinian traffic entirely in the current circumstances. I also accept the conclusion that closing the Road to Palestinian residents, in the manner carried out, is disproportionate. I, as my colleagues, accept that the military commander's considerations with respect to the closure of the Road were purely security related for the purpose of the safety of those traveling on the Road. However, in view of the situation that ensued – the grave result, rather than the sincerity of the considerations – tips the balance. Justice **Vogelman**'s opinion is thorough and gives expression to all the considerations which led to the conclusion he reached. Despite this, I saw fit to briefly comment on the argument presented by the petitioners in this petition, as in other petitions, that where there is a separation between Israeli citizens and Palestinian residents in terms of travel on the Area's roads, such separation constitutes grievous discrimination on the basis of race and national origin and on the use made by the petitioners of the term Apartheid for this issue.

2. In the unstable security circumstances on the roads of the Area, particularly since the outbreak of the second intifada in 2000, the military commander has a most serious responsibility to provide security for those using the roads. This in view of the massive use made by Palestinian terrorist organizations of various terrorism means including shooting at cars traveling on the roads, throwing Molotov cocktails and using car bombs. Unfortunately, many have lost their lives due to such terrorist attacks as they sought to travel on the roads in the Area. The battle tactics used by terrorist organizations necessitated the implementation of security measures for protecting human lives and preventing harm to persons traveling on the Road. For this reason, it is impossible to avoid taking effective measures to prevent terrorism on the roads as well as harm to passers-by who are not involved in terrorism and fighting and who wish to use the roads.

3. We have often held that freedom of movement is one of the basic human liberties and that there is a duty to make every effort to maintain it also in the areas Israel holds under belligerent occupation (see, for example, HCJ 3969/06 **Head of Deir Samit Village Council v. Commander of the IDF Forces in the West Bank**, (unreported, October 22, 2009) (hereinafter: **Deir Samit**); HCJ 1890/03 **City of Bethlehem v. State of Israel**, IsrSC 59(4) 736, (2005)). My colleague, Justice **Vogelman** elaborated on this. However, at times, protecting the freedom of movement of different populations requires certain restrictions designed to confront threats to freedom of movement and terrorism aimed at travelers on the roads. With this as the background, the military commander saw fit to employ solutions which involve a certain separation between Israelis and Palestinians, in order to protect travelers on the roads and allow the safe fulfillment of the freedom of movement of the different populations. As a rule, these measures were taken within the scope of the military commander's duty and power to maintain public order and safety in the Area; and they are a part of the military commander's security perception where he believed there was potential for conflict and real threats to human lives due to joint movement on the Road. The answer to the question whether a security measure such as separation of movement on certain roads for security reasons is legal is not clear cut. This question must be examined in each case individually as per the entire circumstances of the case and in accordance with the individual objective and the degree of harm created by the travel restrictions.

4. A number of petitions have come before us – some filed by Palestinian residents and some by Israeli citizens – in which the petitioners alleged discrimination against them due to their being blocked from using certain roads and a resulting inconvenience caused by having to take longer roads to their destinations. In the **Deir Samit** case, we reviewed a petition by residents of Palestinian villages in an area where one of the roads near their homes was closed to their use and travel was permitted only to Israeli citizens, for security reasons. In our judgment, we accepted the petition and instructed the military commander to find another security solution which would injure

the freedom of movement and fabric of life of the Palestinian residents to a lesser extent. This, having found that the closure of the Road led to a significant injury to the human rights of the local Palestinian residents and their ability to have a normal routine. However, in HCJ 6379/07 **Dolev Community Committee v. IDF Commander in the Judea and Samaria Area** (unreported, August 29, 2009), this court upheld the military commander's decision to allow use of the Beit 'Ur – Beituniya road, which connects the Palestinian villages of the area to Ramallah, exclusively for the Palestinian population. This after it was held that the aforesaid road was built as a "fabric-of-life" road and as part of the overall arrangements of the security fence, in order to allow the Palestinian population free movement in the Area and reduce the harm caused to this population by the security arrangements on the Area's roads.

5. Despite the understanding for the security need, the use of such security measures, which cause complete separation between different populations in terms of using the roads and deny an entire population use of a road do give rise to a sense of inequality and even an association with unacceptable motives. The result of excluding a certain population group from using a public resource is very grave. Therefore, the military commander must do everything possible to minimize situations such as these and prevent the grave harm and the feelings of discrimination that accompany it.

6. Even as we consider that complete separation between populations traveling on the roads is an extreme and undesirable result, we must remain cautious and reserved when it comes to defining security measures taken to protect travelers on the road as separation based on unacceptable foundations of racial and national considerations. The comparison made by the petitioners between the use of separate roads for security reasons and the Apartheid policy implemented in South Africa in the past and the actions associated therewith, is inappropriate. Apartheid is a grievous crime. It contradicts the fundamental tenets of the Israeli legal system, international human rights laws and the provisions of international criminal law. It is a policy of racial separation and discrimination on the basis of race and national origin. It is based on a number of discriminatory practices designed to engender supremacy by members of one race and oppression of members of another. The great distance between the security measures taken by the State of Israel in defending against terrorism and the unacceptable practices of the Apartheid policy oblige refraining from any comparison or use of the dire phrase. Not every instance of distinguishing between people under any circumstances necessarily constitutes wrongful discrimination, and not every instance of wrongful discrimination constitutes Apartheid. It seems that the very 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, comparing the prevention of movement by Palestinian residents along Road 443 to the crime of Apartheid is so extreme and exaggerated that there was no room to raise it at all.

7. As aforesaid, preventing Palestinian movement on Road 43 in the manner in which it has been done for many years is unacceptable due to lack of authority, a reason on which my colleague Justice **Vogelman** elaborated. Road 443 is used as a road connecting two major areas in the State of Israel and this has become its primary designation at present. The outcome is that a road which is located in an area under "belligerent occupation" is used exclusively for the needs of the occupying power with the protected persons in the Area unable to use the very road. This outcome contravenes the laws of belligerent occupation applicable to the Area and the creation of such a "service road" – designed for the needs of the occupying power – is outside the scope of the military commander's power. Therefore, even if the motive for the decision is pertinent, it is in excess of the military commander's power and must be revoked for this reason. In any event, as described in my colleague's opinion, the complete closure of the Road to Palestinian traffic is disproportionate and cannot remain for this reason also.

8. In conclusion, I wish to emphasize that where possible, every effort must be made to provide protection for travelers on the roads whilst finding measures that cause less harm to the local population which is a protected population. The military commander must avoid, to the extent possible, using a measure which is so extreme as to entirely exclude the protected residents from using a certain road, which causes a grave injury to an entire population and which disrupts its life. On this aspect, as aforesaid, the legality of the measures employed will always be reviewed vis-à-vis the degree of harm they cause to protected residents and the balance among all the relevant rights and interests. Therefore, I join the conclusion that the travel restrictions currently imposed by the respondents on Road 443 cannot remain in their present form and must be revoked.

9. Having presented my position as described, I reviewed the opinion of my colleague, Justice **E. Levy**. It seems that the gap between our positions is not great. My colleague is indeed of the opinion that the military commander's decision to close the Road to Palestinian movement was initially *intra vires* and that the military commander's power has not been diminished at present. However, I join the opinion of Justice **Vogelman** that this power cannot remain at the present time considering the circumstances, the purpose for which the Road is used today and the duration of the time in which the full closure decision has been valid which transformed it from a temporary and limited security measure to a permanent measure. In any event, Justice **Levy** also agrees that the measure that has been employed – full closure of the Road to Palestinian movement is currently not proportionate. On this issue, all members of the bench agree that the complete closure of the Road to Palestinian traffic is not to remain as it is and that an alternative solution for the safety of travelers on the Road must be found.

   As for the remedy required by this conclusion, as stated, there is no dispute among us that the complete closure of the Road to Palestinian traffic cannot remain as it is and that the respondents must formulate an alternative solution. However, as my colleague Justice **Vogelman**, I agree with the position that the review of the appropriate and proportionate measures for securing freedom of movement on the Road and road user safety must not be left to the respondents' discretion without issuing a decree absolute. Therefore, I concur with the result reached by Justice **Vogelman** whereby a decree absolute will be issued following this judgment.

President

Justice E E Levy

1. I must disagree with some of my colleague **Justice U. Vogelman**'s conclusions, and hence also with the result he reached. I believe that we need not issue a decree absolute in this petition as the respondents are themselves of the opinion that a solution which is more proportionate than the one currently implemented on the Road should be put in place. The only question in my view is what form this solution should take and in this matter, there are grounds for concluding that the parties may be able to reach an agreement with respect to its components. In any event, five months is not a reasonable timeframe for making the preparations required for implementing the recommendations in my colleague's judgment and the result may be fraught with danger.

2. Among his reasons, my colleague includes what seems to him as the military commander's exceeding his power once his directives transformed the road in question to an "internal Israeli road" designed merely for offering an alternative for access by Israelis from the coast to Jerusalem, for an unlimited time and not as a result of special circumstances. As such, in my colleague's view, the Road serves Israeli interests which are not for the military to promote. It seems that in my colleague's view, and thus I understand his above conclusions, a "great deal" of disproportion amounts to excess of power. I find it difficult to accept this legal construct. I believe that before being able to speak to the question of proportionality; the premise must be that the executive act

was not caught in the net of the foundation cause with respect to excess of power. This, in my view, is the situation in the case at bar.

3. The main importance of Road 443 is in being a major access route to the large cities around it – Jerusalem and Modi'in, Al-Bireh and Ramallah. Its current characteristics are in concert with an inter-city road and over the years the accompanying traffic system was planned such that the Road allows convenient access to major routes inside these cities. In the past, Israelis and Palestinians shared the advantages of using the Road. Palestinian traffic was maintained on the Road for years. Road 443 was designated as a major segment of the northern Palestinian "safe passage" between the West Bank and Gaza Strip in the Oslo Accords. The Beituniya crossing, the closure of which is decried by the petitioners in this petition, was established as a major coordination point between Israelis and Palestinians. Neither "Apartheid" nor separation was the fate of those using the Road, but rather cooperation.

4. True, in recent years the importance of the Road as an alternative road to Jerusalem has increased. Resources were allocated in order to turn it into a double-lane road. Many Israelis preferred it to other roads for reaching the capital. Recently a trial was reported in which the Road was used to mitigate congestion caused by heavy vehicles on Road No. 1. This is significant on many levels – economic, planning and political. However, it was not the military commander who sought to promote these objectives. It was the government, planning officials and traffic policy makers who decided on the development of the Road and the roads leading thereto. It was the driving public which preferred, as stated, travel on the Road to its alternatives. The military commander was entrusted with regulating travel on the Road, with a sole mission – to ensure public order and safety for the Road's users. The essence of this purpose of his actions, which defines the limits of his power, remained unchanged even after the mission became particularly difficult when Palestinians found the Road useful on another aspect – a suitable location for launching severe terrorist attacks against Israelis.

   While few are aware of the Molotov and stone throwing incidents routinely taking place on the Road today, indeed, the information regarding terrorism and shooting attacks which have caused severe casualties cannot be ignored. Innocent civilians were killed on this road and the roads leading thereto in a series of grievous incidents, only because in traveling on these roads they made convenient targets for Palestinian terrorists. This was the fate of Eliyahu Cohen, peace be upon him, a resident of Modi'in who was murdered in a shooting terrorist attack near the Givat Zeev settlement on December 12, 2000; the youth Ronen Landau, peace be upon him, who was shot and killed on July 26, 2001 near Givon HaYeshana; three members of the Ben Shalom Swiri family, peace be upon them, who were hit along with two toddlers from the family by terrorist bullets at the gas station near Beit Horon on August 25, 2001; Israeli Yoela Chen who was killed by bullets at the gas station in Givat Zeev on January 1, 2002 and Palestinian Marwan Shweiki who was shot to death from an ambush while in his car which bore Israeli license plates on June 11, 2006. And, as we generally insist on good faith on the part of those who bring their cases to this court, it would not be superfluous to recall that Palestinian villages along the Road and the roads leading thereto – among them those whose residents now decry the wedge placed between them and the Road, were often used as a launching pad and a refuge for Palestinian terrorists, and these matters are known.

   In response to this real threat, security forces employed a variety of defense measures, installed checkpoints and observation towers, used car patrols, removed dirt mounds used for shelter by terrorists and installed light posts to make travel after dark safer. At a certain point, and this was not many years ago, the military commander was forced to deploy tanks on the sides of the Road as if crossing a veritable battleground. Possibly, there are those who remember that the route of the Road was removed from the Palestinian villages due to the first intifada which did not skip over road users and lead to the 1988 decision to change its route.

In his efforts to secure the safety of those traveling on this road in view of the terrorist attacks carried out along its route, with their aforementioned characteristics and in view of the wave of terrorism raging throughout the West Bank in the early part of the decade, the military commander saw no choice but to close the Road to Palestinian residents of the Area. In so doing, he acted, in my view, within the scope of his authority, and as required by his role at the time. The power acknowledged by this court as the basis for closing roads to Israelis only (HCJ 6379/07 **Dolev Community Committee v. IDF Commander in the Judea and Samaria Area** (unreported, August 29, 2009)) served the military commander in his said decision.

5. The question whether this measure which was, as stated, *intra vires*, is consistent with the principle of proportionality used for reviewing executive acts as such, is a different question altogether. Proportionality, as known, has many different strata, and calls for an overview of the executive act vis-à-vis all the interests, principles and values involved. Its use always depends on the circumstances and the conclusion drawn from it does not remain monolithically frozen in the face of changing times. A security measure which is perceived as proportionate in times of raging, unruly terrorism may be considered too harsh in times of relative calm. Endeavors which are essentially a curbing effort and may therefore justify severe, if temporary actions may be perceived as having exaggerated application once it becomes clear that they have become entrenched and permanent. Though one can never know in advance, prior to reviewing all the circumstances, what the application of the proportionality tests would yield, it is possible to say that as a rule, a sweeping measure is constitutionally "suspect". Absolute measures require, even more so than usual, substantiated reasoning powerful enough to persuade that they are justified. This due to the inherent contradiction between blanket measures and the protection of human rights (HCJ 7052/03 **Adalah – Legal Center for Arab Minority Rights v. Minister of the Interior**, para. 21 of the opinion of **Justice A. Procaccia** (not yet reported, May 14, 2009).

6. First, a review of the case at bar must address the allegation that the measure employed cannot achieve the appropriate objective of maintaining public order and safety. How is one to maintain security, seeing as Palestinian displeasure at the denial of their freedom to travel on the Road would, in all likelihood, lead to further terrorist attacks? How is one to maintain public order, when such includes freedom of movement for residents of the Area and their right to conduct their lives without impediment? I have already responded to this allegation in noting, as I did above, the origin of the terrorist attacks that took place on the Road. True, one should not confuse the order of things: first there were terrorist attacks and the road closure followed and if the road closure caused an inconvenience to daily life, indeed it is negligible compared to the lives lost. Hence, the measure employed does have a rational connection to the sought objective.

   I accept the position of my colleague **Justice Vogelman** also with respect to the result of the next step in the review, that which seeks out a less injurious measure than the one employed. I believe that my colleague's conclusion that such a measure exists, with which I concur, must end the review process. The crux of the case lies in the second test of proportionality and nothing is gained by addressing the narrow question of proportionality and the controversial moral determinations it unfolds.

   With the passage of time, the gamut of relevant measure for achieving the objective of the executive act under review has also changed. A complete sealing off of the traffic route might be proportionate when the security threat to the travelers thereon or to the security forces providing for their safety is very high. This was the threat involved in traveling on Road 443 until recent years. It is doubtful that anyone disputes that the level of threat at this time is lower. Hence, a proper balance between security needs and the needs of the Palestinian population which requires use of the Road, means employing less injurious alternatives. Indeed, "inasmuch as the situation on the ground changes, the respondents would presumably reconsider the possibility of allowing the petitioners to

use this road" (remarks of **Jusitce A. Grunis** in the aforesaid HCJ 6379/07 **Dolev Community Committee**, para. 11).

7. The respondents' response clearly indicates that they themselves do not dispute the justification for employing a measure which does not amount to full closure of the Road to Palestinians at the present time. The arrangement they proposed of allowing 80 Palestinian vehicles to travel on the Road attests to this fact. In its current form, this arrangement cannot be accepted as its scope is so limited that it does not substantively alter the existing situation. However, its formulation gives expression to the military commander's acknowledgment of his duty toward the Palestinian residents of the area under his control. We therefore need not issue a decree absolute. We do have an interest in the details of the arrangement and these are better left for the respondents to formulate whilst issuing a timeframe allowing both the formulation of a suitable solution and its implementation on the ground. This is how I would have ruled in this petition.

Justice

Held as stated in the opinion of Justice E. Vogelman.

Given today, 12 Tevet, 5770 (29 December 2009)

President Justice Justice