

HCJ 1748/06

**Mayor of Ad-Dhahiriya
and others**
v.
IDF Commander in West Bank

HCJ 1845/06

**Khalil Mahmud Younis
and others**
v.
**1. IDF Commander in West Bank
2. Head of Civilian Administration in West Bank, Bethel**

HCJ 1856/06

**As-Samu Municipality
and others**
v.
**1. IDF Commander in West Bank
2. State of Israel**

Amicus curiae: Council for Peace and Security

The Supreme Court sitting as the High Court of Justice
[14 December 2006]
*Before Emeritus President A. Barak, President D. Beinisch
and Vice-President E. Rivlin*

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

Facts: The petitioners challenged the construction of a concrete barricade, with a height of 81 centimetres, along a section of road in the south of Mount Hebron in the territory of Judaea and Samaria. The respondents argued that the barricade was required for security purposes. The petitioners argued that it impeded the movement of pedestrians and animals.

Held: The concrete barricade was disproportionate, since it was not the least harmful measure that was capable of achieving the security purpose. A metal barricade, which would allow livestock to pass underneath and would make it easier for people to climb over, would achieve the same security purpose, but cause less harm to the local inhabitants.

Petition granted.

Israeli Supreme Court cases cited:

- [1] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
- [2] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
- [3] HCJ 3680/05 *Tana Town Committee v. Prime Minister* (not yet reported).
- [4] HCJ 4938/04 *Shuqba Village Council v. Prime Minister* (not yet reported).
- [5] HCJ 1348/05 *Shatiyeh v. State of Israel* (not yet reported).
- [6] HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* (not yet reported).
- [7] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.
- [8] HCJ 2942/05 *Mansour v. State of Israel* (not yet reported).
- [9] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
- [10] HCJ 399/06 *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* (not yet reported).
- [11] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
- [12] HCJ 258/79 *Amira v. Defence Minister* [1980] IsrSC 34(1) 90.
- [13] HCJ 4825/04 *Alian v. Prime Minister* (not yet reported).
- [14] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

For the petitioners in HCJ 1748/06 — L. Yehuda.

For the petitioners in HCJ 1845/06 — N. Amar.

For the petitioners in HCJ 1856/06 — G. Nassir.

For the respondents — G. Shirman, D. Tirza.

For the Council for Peace and Security — Col. (res.) S. Arieli, Maj-Gen. (ret.) S. Givoli.

JUDGMENT

President Emeritus A. Barak

This petition is directed against the construction of a concrete barricade by the IDF forces in the south of Mount Hebron and against orders to requisition land that were made for the purpose of constructing this barricade.

The background to the petition

1. There are three roads in the south of Mount Hebron in Judaea. Road no. 60 runs from the south-west to the north-east and it passes through the Jewish town of Shima. Road no. 317 is the continuation of road 60, extending east from Shima Junction, and it connects the towns of Susiya, Maon and Carmel. The third road connects road 60 to the town of Tana. The petition concerns three sections of these roads, which jointly create a continuous road that is approximately 41 kilometres long, from the town of Tana in the west to the town of Carmel in the east (hereafter: the roads). North of the roads lie the Palestinian towns of Ad-Dhahiriya, As-Samu and Al-Carmel, and beyond these to the north lies the Palestinian city of Yatta. The Green Line passes to the south of the roads, at a distance of between three and seven kilometres. The route for constructing the separation fence was planned to run close to the Green Line. In the area between the planned separation fence and the roads there are approximately twenty small Palestinian villages in which there live a total of approximately 2,000 inhabitants. This area also contains agricultural land that is cultivated by the local Palestinian inhabitants. The roads are crossed by various paths that connect the Palestinian towns in the north with the Palestinian towns and agricultural land in the south.

2. On 14 December 2005 the respondents made three requisition orders: order R/185/05, order R/186/05 and order R/187/05 (hereafter — the new requisition orders). According to what is stated in the orders, they were issued ‘in order to establish a defensive barricade in the south of Mount Hebron.’ They requisition land in a strip adjacent to the roads, which has a length of approximately 41 kilometres and a width of several metres. The strip of land passes through the lands of the villages of Ad-Dhahiriya, Yatta, As-Samu, At-Tuwani, Khirbet Zanuta, Khirbet Ar-Rahwa and A-Tuba. The new requisition orders include a strip that is adjacent to the whole length of the roads, with the exception of several sections, whose total length is approximately three kilometres, which according to the military commander are subject to old requisition orders by virtue of which he is in any case authorized to act as

aforesaid (order R/82/19 of 17 March 1982, order R/82/31 of 28 June 1982, order R/99/2 of 23 March 1999 and order R/96/4 of 2 April 1996). In total the new requisition orders cover an area of approximately 230 dunams of private land. Objections to the requisition orders that the petitioners filed were rejected by the respondents on 12 February 2006.

3. The respondents began to construct a concrete barricade in the strip that was requisitioned along the roads, i.e., from Tana to Carmel. The barricade was built on the north side of the roads at a distance of up to three metres from the road itself. It is approximately 41 kilometres long. It is 82 centimetres high and the width of its base is 60 centimetres. There are 13 openings in the barricade that are intended to allow the traffic of vehicles on the paths that cross the roads. Two of these serve a quarry that is situated in the area and the remainder serve the local inhabitants and farmers. During the hearing of the petition, the respondents decided to make eleven additional openings so that there are a total of 24 openings in the barricade. Six of the openings are situated in close proximity to one another along a four-kilometre section of the road south of the town of Tana, and the remainder are at intervals of between one and three kilometres. Most of the openings are located at intervals of approximately two kilometres.

4. When they filed the petitions, the petitioners requested an interim order that would prevent the performance of the works to construct the concrete barricade until the petition is decided on its merits. We held a hearing of the interim order application on 3 April 2006. The application was denied. We held that in view of the scope of the harm that was anticipated from the works to construct the barricade, which was relatively small, and the fact that the measures were not irreversible, it was not proved that the petitioners' immediate damage from the performance of the works outweighed the risk involved in delaying the construction of the barricade. After the respondents sealed the opening in the concrete barricade that allowed the traffic of vehicles between the city of Yatta and the village of A-Tuwani and other towns, the petitioners filed an additional application for an interim order. We heard the positions of the parties on this matter at a hearing that took place on 27 July 2006. The respondents explained that the sealing of the opening was carried out as an exceptional and temporary step in consequence of the serious deterioration in the security position, and on account of the redeployment of considerable forces from the territory of Judaea and Samaria to the combat areas in Gaza and Lebanon. In such circumstances, we decided (on 31 July 2006) that there was no basis for granting the application. On 6 September 2006 we held a hearing of the petitions themselves. The hearing

President Emeritus A. Barak

was attended by Brigadier (res.) Danny Tirza, who is in charge of the 'Rainbow' administration, which deals with the construction of the separation fence, and Colonel (res.) Shaul Arieli from the Council for Peace and Security, which was joined as a party to the hearing, at its request, as *amicus curiae*. During the hearing the parties agreed to regard the petitions as if an order *nisi* had been made.

The parties to the petition

5. The petitioners in HCJ 1748/06 are the mayor of Ad-Dhahiriya, a part of whose land is included in the requisition orders made by the respondents; the head of the village council of A-Tuwani, which is situated south of the concrete barricade; and Palestinian inhabitants who live in the area or who own agricultural land in the area. The seventh petitioner is the Association for Civil Rights. The petitioners in HCJ 1845/06 are the mayor of Yatta and the mayor of the towns around Yatta, which are all near the area where the barricade is being built, and Palestinian inhabitants who live in the area south of the barricade or who live in towns in the area and have land in the area. Petitioner 30 is a non-profit association, Rabbis for Human Rights. The petitioners in HCJ 1856/06 are the municipality, mayor and inhabitants of As-Samu, a town whose agricultural lands are mostly situated in the area south of the concrete barricade. The respondent in the three petitions is the IDF Commander in Judaea and Samaria.

The arguments of the parties

6. The petitioners request that we set aside the decision to build the barricade. They emphasize that the barricade does not merely prevent the passage of motor vehicles but also the passage of livestock, whether these are herds or pack animals. The barricade also prevents the passage of pedestrians, including children, the elderly and the disabled. In view of the character of the local population, travel in the area takes place on foot, on horses or donkeys, or by means of agricultural vehicles such as tractors. The use of these forms of transport has increased as a result of the travel restrictions imposed on the Palestinian population. The result is that the concrete barricade seriously disrupts the petitioners' mobility. The situation is even more serious on account of the proximity to the separation fence. The concrete barricade encloses an extensive area of land to the north and west, and the separation fence is being built to the south. This creates an enclave that is surrounded on all sides by a barrier. The ability of the inhabitants of the enclave to leave it and the ability of farmers from nearby towns to enter

the cultivated areas in the enclave is very restricted and is only possible via the openings that remain in the concrete barricade.

7. The petitioners point out that the enclave contains approximately twenty villages, which are inhabited by two thousand people. These villages are very small and most of them are not connected to water and electricity. Therefore the inhabitants of the villages are dependent upon Palestinian towns on the other side of the roads for every sphere of life: the supply of water and fuel, health and education services, and a livelihood. According to the petitioners, the construction of the concrete barricade will result in the demographic and economic decline of the villages in the enclave to the point where their long-term existence is endangered. The petitioners attached to their petition a professional opinion of the non-profit association Bimkom — Planners for Planning Rights, which supports this conclusion. According to the petitioners, the concrete barricade bisects kilometres of agricultural land. It encloses within the enclave agricultural land that belongs to the inhabitants of the nearby towns. According to the records in the petitioners' possession, at least 3,500 families from the towns of Yatta, As-Samu and Ad-Dhahiriya own rights in land in the area of the enclave. It is becoming difficult for these farmers to have access to their land. Shepherding is impeded because the movement of the flocks has become very restricted. These injuries exacerbate the harm to the property rights of the owners of the private land that has been requisitioned for building the barricade. In most places where openings have been left in the barricade, the paths that connect with the road on either side do not meet at the same point. This means that in order for an inhabitant of the area to pass from one side of the road to the other, he needs to reach the road via a path on one side that leads to an opening, enter the road and travel along it until he reaches another opening which connects with the other side. The problem with this, according to the petitioners, is that in recent years the IDF forces prevent Palestinians from travelling on the roads that are the subject of this petition.

8. The petitioners claim that the construction of the barricade is not required at all for security reasons and therefore its construction is improper and falls outside the authority of the respondents. The petition was supported by a professional opinion signed by Brigadier (res.) Yehuda Golan-Ashenfeld and four other reserve IDF officers with the rank of colonel or lieutenant-colonel, who all formerly held senior army positions in Judaea and Samaria or the Gaza Strip. The authors of the opinion say that most of the terrain where the barricade was constructed could not in any case be negotiated by vehicles, and the construction of the barricade in fact increased certain

President Emeritus A. Barak

threats, such as shooting ambushes, and created security problems. Their conclusion is that not only does the concrete barricade provide no benefit, but it is more of a security liability than an asset. According to the authors of the opinion, the IDF protects hundreds of kilometres of other roads in the territory of Judaea and Samaria without using concrete barricades of the type under discussion in this petition. The petitioners conclude their arguments in this regard by saying that the concrete barricade seriously violates the basic rights of the Palestinian inhabitants without there being any military need that can justify this violation. They therefore claim that this is an act that is *ultra vires*, or at the very least a disproportionate act that should be set aside.

9. Finally the petitioners point out that it was originally planned (in a government decision in 2003) to build the separation fence with a route that is close to the route chosen for the concrete barricade. The route of the separation fence was changed (in a government decision in 2005) in order to comply with the principles laid down by this court in H CJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [1]. According to the petitioners, the construction of the concrete barricade along a route that is very similar to the original route of the separation fence is a way of circumventing the requirement of determining a proportionate route for the separation fence. The petitioners express the concern that the barricade constitutes an initial stage on the way to building a barrier like the separation fence, which will be accompanied by the introduction of travel restrictions.

10. According to the respondents, the barricade is intended to protect persons travelling on the roads. These are roads that lead to Israeli towns that are situated on the 'Palestinian' side of the security fence in the area, and therefore there is a special defensive need in this area. The respondents pointed out that 'the security need is based, *inter alia*, on a series of security incidents that have taken place in the area where the barricade is being constructed (including during 2005), namely stone throwing, Molotov cocktails, shooting at vehicles, etc.'. The concrete barricade restricts the possibilities of entering and exiting the road. It directs vehicles travelling along the road to specific exit openings. These openings will admittedly not be fitted with gates and they will allow free passage, but directing the traffic of vehicles in the area to specific openings will allow the IDF to control the traffic that crosses the road more effectively. The concrete barricade is especially useful in contending with the phenomenon of 'drive-by shootings,' because it limits the car's possibilities of escaping. The respondents claim that the harm to the inhabitants as a result of building the concrete barricade

is minimal. The respondents insisted that a barricade that is 82 centimetres high does not create any restriction upon pedestrian traffic. Cars can cross the roads freely at the openings in the barricade. In their statements before us, both in oral argument and in written pleadings, the respondents insisted that there is no general restriction upon the movement of Palestinian cars on the roads themselves. At the last hearing that took place on 6 September 2006 the respondents stated that if the petitioners make specific requests to make additional openings in the concrete barricade, their requests will be considered favourably. On 19 October 2006 the respondents notified the court that they had made a 'detailed re-examination' of the route of the concrete barricade and the openings that were made in it. The petitioners' proposal of making 45 openings in the barricade was examined. The respondents found that the application was not sufficiently detailed and coherent and that it did not 'represent real needs.' Notwithstanding, a decision was made to add eleven openings that would be used for the passage of vehicles, pack animals and pedestrians, so that there would be a total of twenty-four openings in the barricade.

11. The experts of the Council for Security and Peace appeared before us and filed a detailed and coherent security opinion. According to them, the concrete barricade does not provide any protection for persons travelling on the roads. On the contrary, it creates security weaknesses. The barricade provides cover for persons wishing to ambush passing cars. It makes it impossible to carry out an immediate pursuit of terrorists when necessary. According to the representatives of the Council for Security and Peace, no incident of 'shooting from a passing car,' which according to the respondents is the threat that the concrete barricade is supposed to prevent, ever occurred in the area under consideration in the petition, but only in remote parts of Judaea and Samaria. Instead, other security incidents have taken place in the area under consideration in the petition; these are no less serious, but the concrete barricade is of no use in preventing them. In their opinion the representatives of the Council for Security and Peace point out that the concrete barricade was also built along sections of roads that cannot be used by wheeled vehicles because of topographic conditions, natural obstacles and mounds of earth that are in the area. In view of this, the representatives of the Council for Security and Peace wonder why the concrete barricade was built, why in particular it was built on the roads that are under consideration in the petition, and why no such barricade has been built anywhere else in Judaea and Samaria.

Deliberations

President Emeritus A. Barak

12. According to the laws relating to a belligerent occupation, the military commander is competent to order the construction of a concrete barricade and to requisition land belonging to Palestinian inhabitants for this purpose. This power only exists when the reason that gave rise to the decision is a military or security one. According to art. 52 of the regulations appended to the Hague Convention Respecting the Laws and Customs of War on Land, 1907, the requisition of the land should be for the ‘needs of the army of occupation.’ According to art. 53 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, a requisition should be ‘rendered absolutely necessary by military operations.’ The military commander is also competent to requisition land and to build a concrete barricade on it in order to protect the lives and security of Israelis who live in Israeli towns in the territory of Judaea and Samaria, even though the Israelis who live in the territories are not ‘protected persons’ within the meaning of this term in art. 4 of the Fourth Geneva Convention. This was what we held with regard to the separation fence in HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [2], at paras. 18-22; see also HCJ 3680/05 *Tana Town Committee v. Prime Minister* [3], at paras. 8-10). It is also the position in the petition before us. Indeed, the normative position for deciding the matter before us is identical to the normative position that was determined for considering the petitions concerning the separation fence in *Beit Sourik Village Council v. Government of Israel* [1] and in *Marabeh v. Prime Minister of Israel* [2] (see also HCJ 4938/04 *Shuqba Village Council v. Prime Minister* [4]; HCJ 1348/05 *Shatiyeh v. State of Israel* [5]; HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* [6]). The principles guiding the military commander when constructing the separation fence also apply when he decides to requisition land for other defensive activity, such as the construction of the concrete barricade under discussion in this petition.

13. When he considered the decision whether to construct the barricade, the military commander was required to take several considerations into account. The *first* consideration is the security or military consideration, which concerns the protection of the security of the state and the security of the army. The *second* consideration concerns the welfare of the inhabitants who live in the area. The military commander is obliged to protect the human dignity, life and security of every one of them. The *third* consideration is that the military commander is obliged to protect the human dignity, life and security of Israelis who live in Israeli towns in the territories. These considerations conflict with one another. The military commander should balance the conflicting considerations. Indeed —

‘The laws of belligerent occupation recognize the authority of the military commander to maintain security in the area and thereby to protect the security of his country and its citizens, but it makes the exercising of this authority conditional upon a proper balance between it and the rights, needs, and interests of the local population’ (*Beit Sourik Village Council v. Government of Israel* [1], at p. 833 {290}; see also *Marabeh v. Prime Minister of Israel* [2], at para. 29; *Tana Town Committee v. Prime Minister* [3], at para. 10).

14. The balance between security needs and the interests of Palestinian inhabitants and Israeli citizens is not simple. The military commander is responsible for striking a balance between them. A main criterion in this balance is ‘proportionality,’ with its three subtests. *First*, there should be a rational connection between the measure chosen and the purpose that it is supposed to realize. *Second*, the measure chosen should be the one that is least harmful to the violated rights. The question is whether, of all the various measures that are capable of realizing the security purpose, the least harmful one was chosen.

‘The obligation to choose the least harmful measure does not amount to the obligation to choose the measure that is absolutely the least harmful. The obligation is to choose, of the reasonable options that are available, the least harmful. One must therefore compare the rational possibilities, and choose the possibility that, in the concrete circumstances, is capable of achieving the proper purposes with a minimal violation of human rights’ (H CJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [7], at para. 68 of my opinion).

Third, the measure chosen should strike a proper balance between the purpose underlying its realization and the violated rights (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [7], at paras. 64-75 of my opinion; *Beit Sourik Village Council v. Government of Israel* [1], at p. 841 {297}; *Shatiyeh v. State of Israel* [5], at para. 22; H CJ 2942/05 *Mansour v. State of Israel* [8], at para. 23). When determining the proportional balance, the military commander’s discretion is not absolute. His decision should be one that a reasonable military commander could make (see *Marabeh v. Prime Minister of Israel* [2], at para. 32, and the references cited there). His decision is subject to judicial scrutiny. Notwithstanding, the Supreme Court sitting as the High Court of Justice does not replace the

President Emeritus A. Barak

military commander's discretion with its own discretion. This court exercises judicial scrutiny of the legality of the military commander's exercise of discretion. In this scrutiny —

'... we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted... Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld...' (H CJ 7015/02 *Ajuri v. IDF Commander in West Bank* [9], at p. 375 {109-110}, and see: *Tana Town Committee v. Prime Minister* [3], at para. 11; *Bet Aryeh Local Council v. Minister of Defence* [6], at para. 8; *Shatiyeh v. State of Israel* [5], at para. 22).

The court does not take the place of the responsible military authority. Judicial scrutiny examines whether the actions and decisions of the military commander comply with the law.

From general principles to the specific case

15. In *Tana Town Committee v. Prime Minister* [3] and H CJ 399/06 *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* [10] we denied petitions of Jewish inhabitants of the towns of Tana and Susiya, which are situated in the area under discussion in this petition; they requested, contrary to the position of the army, that the separation fence should pass to the north of their towns so that they would be included on the 'Israeli' side. We held that the decisions of the military commander were made after he considered all the relevant factors and struck a proper balance between them. These factors included the protection of the Jewish inhabitants, the protection of the military forces and the protection of the human rights and needs of the protected inhabitants in the territory. Within the framework of the hearings of each of the petitions, the respondents told us that they believed that they could discharge their responsibility to provide the petitioners with security to a sufficient degree even if the town was on the northern side of the fence. The military commander gave details of security measures that would make it possible to provide security for the Jewish towns in the area. The position of the respondents was described in the judgment in *Tana Town Committee v. Prime Minister* [3] as follows:

'The military commander is of the opinion that he can discharge his responsibility to provide the inhabitants with security to a

sufficient degree even if the town of Tana is left on the northern side of the fence. The town of Tana itself will receive perimeter protection by means of a special security zone, which is a security system that includes a security fence and a series of security measures whose purpose is to prevent any infiltration into the town and to allow advance warning of any attempt to infiltrate the town. The security fence itself will be constructed at a distance of approximately 400 metres from the most outlying houses of the town. A patrol route and lighting will be set up between the security fence and the fence that surrounds the town. The approach route to the town will be protected in the same way in which main traffic arteries are protected in the territories, by means of two long-range observation towers and by means of fences (which are not uninterrupted) along the road, to prevent the throwing of stones and other short-range terrorist measures. Apart from the physical protection measures, rapid response forces will operate in the area at all times' (*Tana Town Committee v. Prime Minister* [3], at para. 4; see also *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* [10], at para. 5).

Indeed, it should be taken into account that this area contains Jewish towns whose protection requires proper military deployment. The protection of persons travelling on the access routes to these towns also requires proper military deployment. The respondents have the authority to employ military measures in order to guarantee this essential protection. The construction of the concrete barricade is therefore an act that derives from the authority of the military commander.

16. Have the respondents exercised their power proportionately? Does the harm arising from the concrete barricade strike a proper balance between the rights of the petitioners on the one hand and security needs on the other? The respondents insist that the concrete barricade is similar in nature 'to the safety barricades on Israeli roads,' such as those that have been constructed along inter-city roads in order to separate the traffic going in different directions. According to them, this implies that the measure is a commonplace one that does not unduly harm the petitioners. We do not accept this argument. The extent of the harm should be examined against the background of the characteristics of the injured population. The principle of proportionality is a concrete test. It is 'a criterion that balances the authority of the military commander in the occupied area against the needs of the local population'

President Emeritus A. Barak

(Beit Sourik Village Council v. Government of Israel [1], at p. 838 {295}). Proportionality focuses therefore on the harm caused by the administrative action to a certain group. The harm depends upon the circumstances. The harm caused by an administrative action varies from person to person and from one population group to another. The harm caused to an urban population by a barricade built along a paved and developed road that is used by motor vehicles cannot be compared to the harm caused by such a barricade to a rural population. The conditions and character of the petitioners' lives are such that the nature of the harm caused by the barricade to them is serious. Many of the Palestinian inhabitants of the area make use of donkeys and other animals as means of transport, and many of them travel by foot. Many of the inhabitants of the area earn their livelihood from herding sheep. The barricade impedes the passage of pack animals and flocks of sheep and goats. The barricade impedes the passage of pedestrians. Not every person is capable of climbing over a concrete barricade with a height of 82 centimetres. The barricade denies passage to the disabled. The barricade prevents the passage of the elderly and other persons who have limited movement. The barricade makes the passage of women with small children difficult.

17. The concrete barricade causes serious harm. It is more than forty kilometres long. It restricts the movement of more than five thousand inhabitants who live or own agricultural plots to the south. The petitioners filed affidavits of dozens of inhabitants of the villages that are situated in the enclave, which is enclosed by the concrete barricade on one side and the separation fence on the other. The concrete barricade restricts the movement of the inhabitants of these villages in a way that will make it difficult for them to lead normal lives. It seriously impedes access to basic and essential services that are located in nearby urban centres. It makes it difficult for the inhabitants of these villages to earn a livelihood, since they need to reach the nearby urban centres in order to market their crops, and it substantially increases the costs of essential products such as water, food, fuel and animal fodder. Thus the concrete barricade violates property rights, the freedom of movement and the right to education, health, family life and dignity. Indeed, the effect of constructing the concrete barricade, which is more than forty kilometres long, is to isolate a large area and separate it from the other parts of Judaea and Samaria. The lifestyles of the inhabitants will be deeply affected by this isolation. It constitutes a major change for the local inhabitants and imposes a real burden on their ability to continue to live in this area. We are not speaking of self-sufficient towns. These are small

villages that depend extensively on their contact with nearby towns. Moreover, the barricade separates the farmers who live north of the road from their crops and grazing land to the south of it. Thus it separates the town of Ad-Dhahiriya from approximately half of its inhabitants' agricultural land. More than 950 inhabitants of Ad-Dhahiriya own rights in agricultural land in the enclave. The barricade separates the city of as-Samu from 80 per cent of its agricultural land, an area of approximately 22,000 dunams. Admittedly we are not speaking of a complete isolation, since the concrete barricade does have openings, which can be used by the inhabitants to cross the roads. But we are speaking of a significant impediment to the mobility of farmers in the area, especially in view of the extensive use that they make of pack animals and the considerable amount of sheep herding.

18. Does this harm satisfy the *first* test of proportionality? Is there a rational connection between the measure that was adopted and the purpose that the respondents are seeking to achieve? The petitioners claim that there is no rational connection between the declared security purpose and the construction of the concrete barricade. The representatives of the Council for Security and Peace also claimed before us that constructing the barricade not only makes no contribution to security, but does more harm than good, since it increases the security risks to persons travelling on the roads. By contrast, the professional opinion of the respondents is that restricting the movement of vehicles in the area is important from a security viewpoint and will make it possible to contend with threats presented to those travelling on the roads. We have before us two conflicting viewpoints. When there is a professional dispute between the military commander and other security experts, serious weight should be attached to the professional approach of the military commander in the area. '... we must attribute special weight to the military opinion of the party who has the responsibility for security' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 844 {302}, and see H CJ 390/79 *Dawikat v. Government of Israel* [11], at p. 25; H CJ 258/79 *Amira v. Defence Minister* [12], at p. 92; H CJ 4825/04 *Alian v. Prime Minister* [13], at para. 15; *Marabeh v. Prime Minister of Israel* [2], at para. 32 of my opinion; H CJ 1661/05 *Gaza Coast Local Council v. Knesset* [14], at pp. 574-576). Therefore, anyone who asks the court to prefer a professional opinion of another expert to the position of the military commander needs to discharge a heavy burden. The petitioners did not discharge this burden. We have not been persuaded that we should prefer the professional opinion of the members of the Council for Peace and Security or the professional opinion of the security experts representing the petitioners to the position of the military

President Emeritus A. Barak

commander. In such circumstances we should base our judgment on the security opinion of the military commander. We therefore accept the respondents' position with regard to the military solution to the security needs in the area. We rely upon their position that the concrete barricade is an effective means of protecting whoever travels on the roads. The result is therefore that the construction of the concrete barricade satisfies the first subtest of proportionality.

19. Does the harm satisfy the *second* subtest of proportionality? Have the respondents discharged their duty to choose the least harmful of all possible measures in order to realize the purpose? In their updated statement to the court, the respondents said that following a re-examination that they made, they made additional openings in the concrete barricade to allow the passage of pedestrians and livestock. The petitioners for their part replied to this statement by claiming that the vast majority of these openings do not allow anyone to cross the roads. Some of the openings are situated in impassable areas from a topographical viewpoint; some are not situated in places where the local inhabitants wish to cross the road; others are not even openings, but merely narrow slits that do not allow people and animals to pass through. In their most recent statements, the respondents even undertook that requests to make additional openings in the concrete barricade will be considered favourably. Indeed, this is capable of reducing the degree of harm caused by the barricade. We have taken the most recent statements of the respondents into account, but they are insufficient. The question that is considered by the second subtest of proportionality is whether in comparison to the measure chosen by the respondents — which we are considering in the light of their most recent statements — a less harmful alternative exists. The answer to this is that a less harmful alternative does indeed exist.

20. The alternative measure that is less harmful is a barricade as constructed by the respondents, with one difference: instead of concrete it should be a metal barricade, like the safety barricades that have been constructed at the sides of many roads in Israel and in various parts of the territories. This measure was proposed by the petitioners. It is a less harmful measure. Flocks of sheep will be able to pass under the metal bar of the fence. It will be easier for pedestrians to climb over the fence. The respondents themselves do not deny that a metal barricade is capable of achieving the same security benefit as the concrete barricade, but they argued before us that there is a concern that parts of the barricade will be dismantled by metal thieves. In view of this assessment, the respondents' position is this

measure should not be adopted. Counsel for the respondents did not present any figures with regard to the scope of the phenomenon of the theft of metal in the area under discussion in the petition or in the territories in general. In any case, proportionality demands the construction of a metal barricade and protecting it against theft, rather than a serious injury to the lifestyle of the local inhabitants. It should also be noted that the material before us shows that in addition to the alternative of the metal barricade there are other options. The representatives of the Council for Peace and Security said in their opinion that in order to achieve the respondents' declared security purpose, it is also possible to construct a lower barricade, which will prevent the passage of wheeled vehicles. A lower barricade is easier for pedestrians and livestock to cross. It is a less harmful measure. Additional options were raised during the petitions, such as the replacement of the barricade with metal posts or stone blocks that can be placed at distances in such a way that they will prevent the passage of cars but allow the free passage of pedestrians and animals. We are not considering the choice of the most suitable option from among these or other options. This matter lies within the respondents' authority. Our task is to examine whether there is an alternative measure to the one chosen by the respondents — a measure that achieves the same benefit but is less harmful. Such a measure exists. It can realize the security benefit that the barricade seeks to realize, while harming the lifestyle and human rights of the local population to a lesser degree.

21. In view of this finding, the conclusion is that the concrete barricade does not satisfy the requirement of the second subtest of proportionality. Since several rational options were available to the respondents for realizing the same security purpose, they should have chosen the one that is the least harmful to human rights. The respondents did not discharge this duty. In view of our finding with regard to the second condition of proportionality, we do not need to go on to examine whether the *third* subtest is satisfied.

22. The result is that we are making the order *nisi* absolute in respect of the construction of the concrete barricade. Within six months the respondents shall dismantle the concrete barricade that they built between the town of Carmel and the town of Tana, along road 60, road 317 and the road leading to the town of Tana. The respondents may construct an alternative barrier that is consistent with this judgment.

The respondents shall be liable for the petitioners' costs in a sum of NIS 25,000 in each of the petitions.

President D. Beinisch

I agree.

Vice-President E. Rivlin

I agree.

Petition granted.

23 Kislev 5767.

14 December 2006.