HCJ 2150/07

Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head, and 24 others

v.

1. Minister of Defense

2. IDF Commander in the Judaea and Samaria Area

3. Commander of the Benjamin Brigade

4. Shurat Hadin Israel Law Center and 119 others

5. Fence for Life

The Supreme Court sitting as the High Court of Justice

[5 March 2008]

Before President D. Beinisch and Justices E.E. Levy, U. Vogelman

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

Facts: This is a petition to allow free movement of Palestinian vehicles and pedestrians along Road 443 and on the Beituniya Road. In 2002, Road 443, which served as the main traffic artery for the Palestinian residents of the area between the villages in the area and Ramallah, was closed to all Palestinian traffic. This closure was ordered following the numerous terrorist attacks that were perpetrated along the Road. The arguments related to the question of the authority of the military commander to order the restriction of traffic on the Road in general, and closure of the Road to Palestinians in particular; they also related to the mode of exercise of the military commander's authority and his discretion, based on the relevant Israeli and international law dealing with belligerent occupation.

Held: The High Court of Justice granted the petition (by majority opinion) in relation to Road 443. It held that it is not sufficient to anchor a decision on the closure of the Road in a security order and in travel provisions. The authority of the military commander is derived from the

laws of belligerent occupancy, which pertain in the Area of Judaea and Samaria. Article 43 of the Regulations Respecting the Laws and Customs of War on Land of 1907, appended to the Fourth Hague Convention of obligates the occupying state "to ensure, as far as possible, public security and safety…".

Road 443 was designed to safeguard the needs of the local population. According to the rules of public international law, the military government's authority to expropriate is exercised for the benefit of the local population, i.e. the "protected persons" in terms of the Convention. It was assumed that the Road would also serve Israeli residents, and traffic needs between the Judaea and Samaria and Israel. However, closure of the Road to Palestinian vehicles results in the Road serving primarily for purposes of "internal" vehicular traffic in Israel between the center of the country and Jerusalem: in accordance with the case law of this Court, the military commander would not have been authorized to order construction of the Road from the outset, had this been its main purpose.

The arrangement resulting from the closure of the Road, whereby it no longer serves the interests of the local population, but is rendered a "service road" of the occupying state, exceeds the authority of the military commander and does not comport with the international law dealing with belligerent occupation. Consequently, the travel restrictions imposed by the military commander cannot stand in their present format, and must be set aside.

In exercising his authority, the military commander must balance three considerations: the security-military consideration, including the security of Israelis travelling on the Road; safeguarding the rights of the Palestinian residents, who are 'protected persons'; and preserving the rights of Israelis who live in Israeli settlements in the Area." A main criteria in the framework of this balancing act is proportionality.

The Court held that there is no basis to intervene in the position of the respondents whereby there is a rational connection between the measures that were adopted and between ensuring order and security. The situation prevailing on the Road, in practice, since the security measures were adopted, supports this position.

As required by the limitation clause in Basic Law: Human Dignity and Liberty, the Court examined whether there exists an alternative measure to that adopted, one that is less prejudicial to the rights of the petitioners, that will achieve the security purpose. While acknowledging the impact of the closure of the Road on security, the Court was not convinced that due consideration was given to possible alternative measures for

protection of travelers on the Road which would be less prejudicial to the rights of the local residents.

The constitutional test of proportionality examines the relationship between the measures and the benefit from their adoption. The Court found that the travel restrictions had indeed been substantially detrimental to the fabric of life of the residents of the villages. It held that in the said circumstances, the sweeping prohibition on travel imposed on the Palestinian residents of the Area does not meet the test of proportionality, since due weight was not ascribed to safeguarding their rights as "protected residents". The said prohibition, therefore, cannot stand.

The authority of the military commander to order the closure of a road without a written document should be exercised only where there is an immediate need to close the road due to safety concerns. When the closure is not for a short and limited time, the order should eventually be committed to writing.

The Court held that there is no cause to intervene in the decision of the military commander concerning the operation of the Beituniya crossing.

Israeli Supreme Court cases cited:

[1] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352.

[2] HCJ 2056/04 *Beit Suriq Village Council v. Government of Israel* [2004] IsrSC 58(5) 807.

[3] HCJ 7957/04 *Mara'abeh v. Prime Minister of Israel* [2004] IsrSC 60(2) 477; **[2005] (2) IsrLR 106**.

[4] HCJ 7052/03 *Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* (2006) (not yet reported).

[5] HCJ 393/82 *Jam'iyyat Iskan al-Mu'allimun al-Ta'wuniyya al-Mahduda al-Mas'uliyya, a Cooperative Society Legally Registered at the Judaea and Samaria Area Headquarters v. IDF Commander in the Judaea and Samaria Area* [1983] IsrSC 37(4) 785.

[6] HCJ 4289/05 *Bir Naballah Local Council v. Government of Israel* (2006) (not yet reported).

[7] HCJ 1661/05 *Gaza Beach Local Council v. Knesset of Israel* [2005] IsrSC 59(2) 481.

[8] HCJ 10356/02 Hess v. IDF Commander in West Bank [2004] IsrSC 58 (3) 443.

[9] HCJ 69/81 *Abu 'Ita v. IDF Commander in the Judaea and Samaria Are*a [1983] IsrSC 37(2) 197.

[10] HCJ 591/88 *Taha v. Minister of Defense* [1991] IsrSC 45(2) 52.

[11] CrA 6659/06 *Anon. v. State of Israel* (2008) (not yet reported).

[12] HCJ 7862/04 *Abu Daher v. IDF Commander in Judaea and Samaria Area* [2005] IsrSC 59(5) 368.

[13] HCJ 351/80 *Israel Electric Corporation, Jerusalem Region Ltd. v. Minister of Energy and Infrastructure* [1981] IsrSC 35(2) 673.

[14] HCJ 2612/94 *Sha'ar v. IDF Commander in Judaea and Samaria Area* [1994] IsrSC 48(3) 675.

[15] HCJ 3933/92 *Barakat v. O/C Central Command* [1992] IsrSC 46 (5) 1

[16] HCJ 2942/05 *Mansur v. State of Israel* (2006) (not yet reported).

[17] HCJ 2645/04 *Nasser v. Prime Minister* (2007) (not yet reported).

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

[19] HCJ 4363/02 *Zindah v. IDF Commander in the Gaza Strip* (2002) (unreported).

[20] HCJ 4219/02 *Gusin v. IDF Commander in the Gaza Strip* [2002] IsrSC 56(4) 608.

[21] HCJ 2577/04 *al-Khawaja v. Prime Minister* (2007) (not yet reported).

[22] HCJ 11344/03 *Salim v. IDF Commander in Judaea and Samaria Area* (2009) (not yet reported).

[23] HCJ 9593/04 *Morar, Yanun Village Council Head v. IDF Commander in Judaea and Samaria* (2006) (not yet reported).

[24] HCJ 3680/05 *Committee of the Tene Settlement v. Prime Minister of Israel* (2006) (not yet reported).

[25] HCJ 6027/04 *Raddad, a-Zawiya Village Council Head v. Minister of Defense* (2006) (not yet reported).

[26] HCJ 8414/05 *Bil'in Village Council Head v. Government of Israel* (2007) (not yet reported).

[27] HCJ 401/88 *Abu Rian v. IDF Commander in the Judaea and Samaria Area* [1988] IsrSC 42 (2) 767.

[28] HCJ 202/81 *Tabib v. Prime Minister* [1982] IsrSC 36 (2) 622.

[29] HCJ 6982/02 *Wahidi v. IDF Commander in the Gaza Strip* (2002) (unreported).

[29] HCJ 1890/03 *Municipality of Bethlehem v. State of Israel* [2005] IsrSC 59(4) 736.

[30] HCJ 2717/96 *Wafa v. Minister of Defense* [1996] IsrSC 50(2) 848.

[31] HCJ 5539/05 *Atallah v. Minister of Defense* (2008) (not yet reported).

[32] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel* (2006) (not yet reported).

[33] HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [2004] IsrSC 58(5) 385.

[34] HCJ 5139/05 *Shaib, Beit Lid Village Council Head v. State of Israel* (2007) (not yet reported).

[35] HCJ 1748/06 *Mayor of Dhahiriya v IDF Commander on the West Bank* (2006) (not yet reported).

[36] HCJ 5488/04 *al-Ram Local Council v. Government of Israel* (2006) (not yet reported).

[37] HCJ 1998/06 *Beit Aryeh Local Council v. Minister of Defense* (2006) (not yet reported).

[38] HCJ 3969/06 Dir Samet Village Council Head v. IDF Commander on the West Bank (2009) (not yet reported).

[39] HCJ 6379/07 *Committee of the Dolev Settlement v. IDF Commander in the Judaea and Samaria Area* (2009) (not yet reported).

International Conventions cited

Fourth Hague Convention of 1907

Regulations Respecting the Laws and Customs of War on Land of 1907, appended to the Fourth Hague Convention of 1907

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949

Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977

For the Petitioners – L. Yehuda, D. Yakir

For Respondents nos. 1-3 – O. Mandel, M. Tzuk

For Respondent no. 4 – R. Kochavi

For Respondent no. 5 – I. Tzion, A. Baruch.

JUDGMENT

Justice U. Vogelman

The petitioners in the present petition are residents of the villages of Beit Sira, Safa, Beit Liqiya, Khirbet al-Masbah, Beit Ur a-Tahta, Beit Ur al-Fawqa (hereinafter: "the villages"), the council heads of the villages,

and the Association for Civil Rights in Israel. In the present petition, they are asking the court to order respondents nos. 1 – 3 (hereinafter: "the respondents") to enable Palestinians to travel freely, in vehicles and on foot, on Road no. 443 and on the Beituniya Road; the respondents are further requested to remove all of the fixed roadblocks that prevent access from the villages to Road no. 443.

General background

1. Road no. 443 (hereinafter: "Road 443" or "the Road") connects the area of the Ben Shemen interchange in Israel to the Ofer Camp intersection (near the settlement of Giv'at Zeev). The total length of the Road is approximately 25.5km. The petition before us concerns the eastern section of the Road, which passes through the area of Judaea and Samaria hereinafter: "JSA" or "the Area"), between the Maccabim-Reut bypass at the western end and the Ofer Camp intersection at the eastern end. The length of the aforesaid section of the Road is approximately 14km. The Road, according to the definition provided by the respondents, serves "as a major traffic artery connecting the area of the coastal plain and the Modi'in Bloc to the area of Jerusalem. In addition to Highway no. 1, Road 443 constitutes one of the two major traffic arteries leading to the capital." The Road also serves as an access route for the Israeli settlements in the JSA sector. As stated by the respondents, the settlements are inhabited by 55,000 residents. Of all the settlements in question, the Road constitutes the sole access route only for the residents of the settlement of Beit Horon.

2. The origins of the Road date from the time of the British Mandate. The Road functioned as a local access road which passed through the centers of the villages. Over the years, changes took place in the statutory planning; the Road became a "regional road" and it was widened and its route modified accordingly, such that it no longer passed through Palestinian villages. Throughout all the intervening years and up to the outbreak of the "Second Intifada" in 2000, the Road was used for travel by both Palestinian and Israeli vehicles. The Road served as a major traffic artery for the Palestinian residents of the Area, including the residents of the villages. The residents of the villages customarily used the Road to travel between the villages, and as a traffic artery to the city of Ramallah (access to Ramallah from Road 443 is via the Beituniya Road, which will be discussed below). Israeli vehicles drove along the Road between the coastal plain and Jerusalem. In addition, the Road served as an access road to the Israeli settlements in the Area.

3. In 2000, the "Second Intifada" broke out. Heavy fighting occurred in the area of Judaea and Samaria, including thousands of terrorist attacks

against Israeli citizens and residents in the Area and within the borders of the State of Israel. On more than one occasion, this Court has discussed the scope and severity of the fighting, stating, *inter alia*, as follows:

> 'Since the end of September 2000, heavy fighting has been taking place in the areas of Judaea and Samaria and the Gaza Strip. This is not police activity. This is armed conflict. Within that framework, some 14,000 terrorist attacks have been carried out against the lives, persons and property of innocent Israeli citizens and residents, including the elderly and 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 very gravely. Death and injuries have also been incurred by the Palestinians. Many of them have been killed and wounded since September 2000. Furthermore, in one single month – the month of March 2002 – 120 Israelis were killed and hundreds more wounded in terrorist attacks. Between March 2002 and the writing of this opinion, 318 Israelis have been killed and more than 1,500 have been wounded. We are awash in bereavement and pain' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [1], at p. 358. See also HCJ 2056/04 *Beit Suriq Village Council v. Government of Israel* [2], at pp. 814-815; HCJ 7957/04 *Mara'abeh v. Prime Minister of Israel* [3], at pp. 484-485; HCJ 7052/03 *Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* [4], per Deputy-President (ret.) M. Cheshin at paras. 6-12).

Nor has this reality skipped over Road 443. Large numbers of Israeli vehicles move along the Road. This fact, combined with the topographical characteristics of the Road, has transformed it into what the respondents define as a "security weak point" – a "convenient" target for the perpetration of terrorist attacks. In fact, a large number of terrorist attacks have been perpetrated along the length of the Road over the years, causing injury and loss of life: these have included the use of firearms and the throwing of stones and improvised incendiary devices. All these were aimed both at drivers along Road 443 and at the security forces. We will discuss this point at a later stage.

4. As a result of the aforesaid security escalation, and along with additional measures that were taken in order to safeguard the security of Israeli drivers, which we will discuss below, the respondents began to prevent entry to Road 443 by Palestinian vehicles. Initially, this prevention was partial, and was carried out by means of roadblocks and patrols of the security forces, which ensured that Palestinians were kept away from the Road. Beginning in 2002, during the period of escalation

in the security situation, the prohibition against travel by Palestinian vehicles on the Road became absolute. All the access roads linking the villages to Road 443 were blocked, and the residents of the villages were prevented from making any use of the Road. At the present time, as a general rule, only Israeli vehicles travel along the Road. According to data provided by the security establishment, approximately 40,000 vehicles travel each day on Road 443 (in both directions).

5. A brief summary of the data with regard to the Beituniya Road, which is also a focal point of the petitions, is in order. The Beituniya Road connects Road 443 (from the Ofer Camp intersection) to the city of Beituniya, near Ramallah. Over the years, this road served as an access artery to Ramallah for vehicles traveling on Road 443. In recent years, with the construction of the security fence in the Area, the Beituniya Road has been blocked to both Palestinian and Israeli vehicles. In the place where the security fence crosses the Beituniya Road, a "back-to-back" crossing known as the "Beituniya Crossing" was set up for the movement of merchandise between Israel and JSA. The Beituniya Crossing is not intended for passage by private vehicles or persons, as specified in the Transfer of Goods Order (Amendment No. 2), 5765-2005. The respondents point out that, in addition to the movement of merchandise, the Beituniya Crossing is used, to a limited degree, for purposes such as security checks of pedestrians coming to the nearby [military] courts which are located in Ofer Camp.

6. The Association for Civil Rights in Israel (petitioner no. 7) has contacted the respondents several times on behalf of the petitioners and on behalf of the council heads of the villages, demanding that they remove the roadblocks that were placed on the roads between the villages and Road 443 and enable travel by Palestinian vehicles on the Road. Not only has this demand not been met; the Office of the Legal Advisor for JSA – in a letter dated 18October 2006 claimed – **contrary to the actual state of affairs** – that IDF soldiers do not prevent Palestinians from traveling along the Road; rather, they limit the exit points from the region of the villages to the Road to a few exit intersections, at which gates are set up for the purpose of security checks (the ramifications of this misstatement will be discussed below). Following receipt of that response, the present petition was filed.

7. Only after the filing of the petition – on 28August 2007 – did the then-Commander of the IDF Forces in the Area of Judaea and Samaria, Major General Gadi Shamni, by virtue of his authority under the Security Provisions Order (Judaea and Samaria) (No. 378), 5730-1970 (hereinafter: "Security Provisions Order"), issue Travel and Traffic Provisions (Road 443) (Judaea and Samaria), 5767-2007 (hereinafter:

"the Travel Provisions"). The Travel Provisions prohibited the travel of non-Israeli vehicles (as this term is defined in the Travel Provisions) on Road 443 without a permit. The validity of the Travel Provisions was limited in time, and they have been extended from time to time.

The arguments of the parties

8. The petitioners argued that the closure of Road 443 to travel by Palestinians deprives the local population of the possibility of using the only main road in the area and makes life extremely difficult for the residents of the villages, who are forced to use an alternative road, which passes through settlements, and along which military roadblocks are set up from time to time (hereinafter: the Village Route). Travel along the Village Route is difficult: the road is narrow, winding and in disrepair; its quality is poor, and using it lengthens travel time significantly and increases travel costs. In addition, the petitioners argued that, as a direct result of the aforesaid difficulties in traveling, both the fabric of life of residents of the villages and the economy of the villages in general are suffering, primarily because the residents are cut off from the city of Ramallah, which is their local urban center. Thus, for example, the prohibition against traveling on the Road has led to the closure of many businesses in the villages and has made it difficult for workers to reach their places of work in Ramallah. As a result of these factors, the number of unemployed persons in the villages has risen sharply. In addition, the closure of the Road has interfered with access by residents of the villages to medical services; with access by fire and rescue services to the villages; with access by residents of the villages to the educational institutions in the villages and in Ramallah; and with the possibility of paying visits and maintaining social relationships. The petitioners further stated that the closure of the Road has prevented their direct access to their agricultural lands (although it does not entirely block such access) and has imposed difficulties on the movement of agricultural produce. It was further argued that the closure of Road 443 has led to the transfer of traffic congestion to the internal roads and that, as a direct result, the number of road accidents has greatly increased, along with the potential for loss of human life.

According to the petitioners, the ban on travel on Road 443 by Palestinian residents is illegal. They state that the prohibition was imposed in order to reserve Road 443 as an "internal" Israeli traffic artery, connecting the coastal plain to Jerusalem. The military commander thereby exceeded his authority, which was granted exclusively for the purposes of the occupied Area itself; he breached his duty of safeguarding public order and the lifestyle of the protected residents within the occupied territory; and he exercised extraneous

considerations. It was further argued that the prohibition is illegal because it constitutes improper discrimination on a national-ethnic basis; because it is tantamount to a breach of the prohibition against collective punishment; because it is tainted with extreme unreasonableness; and because it disproportionately prejudices 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 with dignity, the right to education, the right to family life and contact with family members, and the right to health and medical treatment. The petitioners further argue that the respondents' position in the procedure before us runs counter to arguments which the respondents themselves raised, years ago, in a petition that concerned the expropriation of lands for the purpose of building the Road (HCJ 393/82 *Jam'iyyat Iskan al-Mu'allimun al-Ta'wuniyya al-Mahduda al-Mas'uliyya, a Cooperative Society Legally Registered at the Judaea and Samaria Area Headquarters v. IDF Commander in the Judaea and Samaria Area* [5]). The petitioners emphasize that in that case, the respondents argued that the transportation needs of the Area residents required the planning of a new road system, whereas today – more than 20 years later – the respondents are arguing that the residents of the villages have a reasonable transportation system at their disposal. The petitioners point out that although the ban on travel on Road 443 was defined as "temporary," it has continued throughout the last seven years, and that there is no serious intention of considering its cancellation in the future. The petitioners further argue in their petition that the ban on travel ought to be struck down because it was imposed with no valid legal source, without any written basis for the prohibition. After the Travel Provisions were issued, this argument was obviated; nonetheless, the petitioners emphasize that this phenomenon of imposing a ban on travel with no written authorization, has repeated itself again and again and that, in their view, a clear court ruling is necessary on this issue.

With regard to the Beituniya Road, the petitioners argue that its opening is necessary in order to reduce the harm caused to the residents of the villages, who need Road 443, *inter alia*, to travel to the city of Ramallah (as explained above, the Beituniya Road connects Road 443 to the city of Ramallah). As they see it, there is no impediment to the use of the Beituniya crossing for private vehicular traffic, alongside the use of the crossing for moving merchandise.

9. The respondents are opposed to the petition. They confirm that Road 443 had initially been planned for the purpose of travel by both Israelis and Palestinians, and that this situation prevailed until 2000, but following the outbreak of the fighting and terrorist incidents, the security

situation changed drastically. They argue that the Road was closed to Palestinian vehicles to preserve the security of the Israeli civilians who reside in JSA, including those who use Road 443. The respondents mention brutal and murderous terrorist attacks along the Road, in which Israeli civilians were killed and many others wounded. They argue that some of those terrorist attacks were perpetrated by residents of the villages. The military commander is responsible for the security of the residents of the Area and Israeli citizens within the bounds of the Area, and this is what led to his decision – which was based on purely security-related considerations – to adopt a series of measures, some of which were temporary, in order to safeguard the security of the Israeli travelers on the Road. Among the various measures taken were the increase in ongoing operational activity and the increased military presence along Road 443 and in the Area in general; the construction of fencing and observation posts along a number of sections close to the Road; a temporary ban on travel by Israelis on several roads in the Benjamin area; improvement of the standard of security checks at the roadside security checkpoints adjacent to Road 443; and the construction of the security fence in the areas surrounding Jerusalem, including in the vicinity of Road 443. An additional measure taken by the military commander – the measure that is the object of the petition before us – is the temporary blockage of the roads connecting the Palestinian villages to Road 443, with a view to preventing Palestinian vehicles from entering the Road in an uncontrolled manner. This was based on an understanding that those vehicles might be used for the launching of terrorist attacks, whether as car bombs; or drive-by shootings followed by escape to a nearby village – a scenario that is familiar from other incidents that occurred in JSA, including in the area of Road 443; or kidnapping Israeli travelers along the Road, or transporting terrorist operatives and weapons into the territory of the State of Israel. In fact, after these measures were taken, there was a substantial decline in the number and severity of terrorist attacks along Road 443, although the danger remains. In the respondents' affidavit of response and their supplementary affidavit, we were apprised of the details of attempts to harm travelers along Road 443 and attempts to harm the security forces. These attempts began – in the period relevant to the matter before us – on 21 December 2000, with the fatal shooting of an Israeli civilian, a resident of the city of Modi'in, and continued with additional shooting attacks in 2001, in the course of which additional Israeli civilians were killed and wounded, and a female suicide bomber who blew herself up near the Maccabim roadblock, resulting in the wounding of police officers who were manning the roadblock. The latest of these attempts, as of this point in time, are incidents that occurred after the filing of the petition. Together with these events, there were hundreds

of cases of stone-throwing and dozens of incidents involving improvised incendiary devices. Thus, for example, during the period between 4 June 2007 and 1 January 2008, fifty-eight incidents were recorded in which stones or improvised incendiary devices were thrown at vehicles traveling along the Road.

In their written and oral pleadings, the respondents pointed out that in the military commander's view, restricting access by Palestinian vehicles to Road 443 at the time was, and continues to be to this day, an important and necessary security measure, as part of a series of security measures intended to preserve the lives of the Israeli civilians who travel on the Road. The respondents emphasized that Palestinian pedestrian use of the Road was not prohibited. The respondents further contended that the petitioners' arguments regarding the damage they incurred as a result of the travel restrictions were exaggerated and factually unsubstantiated. They argued that the Village Route is available to the petitioners, providing a reasonable connection among the villages themselves and between the villages and the city of Ramallah. The respondents noted that the security forces have no fixed roadblocks on the Village Route. The respondents further clarified, during the hearing of the arguments by the parties, that as part of the security fence project in the sector surrounding Jerusalem, a number of "fabric of life" routes are being constructed, at a cost of tens of millions of shekels. The "fabric of life" routes are intended to serve the Palestinian residents of the Area and to reduce the harm to their way of life resulting from the blockage of roads (see HCJ 4289/05 *Bir Naballah Local Council v. Government of Israel* [6], at para. 11). The respondents argued that upon their completion, these routes will significantly shorten the duration of travel between the villages and Ramallah, and will provide a proper response and a reasonable alternative to travel on Road 443. They further pointed out that, aside from the Village Route, the residents of the Villages can also use an additional alternative route which runs along the original route of Road 443. Today, this route connects the villages of Safa, Beit Ur a-Tahta and Beit Ur al-Fawqa, and in the future, it will enable access to the Beit Ur-Beituniya "fabric of life" route (the paving of which was completed after the hearing of the arguments; we will discuss this road further in this judgment).

According to the respondents, the military commander is obliged to balance the protection of the security interests of the state authority occupying the territory, on one hand, against ensuring the needs and rights of the local population, on the other hand. Within this framework, the military commander is authorized to initiate security measures with a view to protecting all of the population within the Area, including Israeli

civilians, and the fact that the Road was constructed by virtue of an expropriation order cannot change that. The restrictions imposed by the military commander are necessary for security reasons; they do not cause disproportionate harm to the local population and, at the very least, they do not exceed the bounds of proportionality. In this context, the respondents mentioned an arrangement they had devised whereby restricted travel by Palestinian vehicles on the Road would be permitted (the details of the arrangement will be discussed below). According to the respondents, among the powers vested in the military commander, the one which is important in the case before us is his authority to impose various restrictions of movement upon the local population. This authority is anchored in arts. 88 and 90 of the Security Provisions Order, and has existed as far back as the 1945 Defense (Emergency) Regulations, which were part of the applicable law in the Area even prior to the inception of the belligerent occupation, and which continue to apply to this day. By virtue of these powers, the military commander imposed the restrictions with regard to travel on Road 443. The respondents agree that when the restrictions on travel along the traffic artery remained in place, they ought to have been backed with a signed written order. And indeed, as mentioned, on 28 August 2007, the Travel Provisions were issued, and the petitioners' argument in this regard has therefore become moot. The restrictions that were imposed are based on relevant considerations, and accordingly, they do not constitute prohibited discrimination; rather, they represent a permitted distinction. The respondents further emphasize that the measures in question are preventive security measures and not collective punishment, as was argued. Admittedly, in actual practice, these measures inflict harm on civilians who do not participate in terrorist activities, a category which includes the majority of the Palestinian population. This, however, is not an indication of the illegality of the measures taken. The respondents went on to discuss their position as it was presented in *Jam'iyyat Iskan v. IDF Commander* [5]. It was argued that the building of Road 443 and the way in which the road was utilized throughout the years up to 2000 were compatible with their position as presented in that proceeding. We would emphasize that whereas in the affidavit of response (sec. 22), the respondents pointed to the connection between the section of the Road in question and that which was discussed in the above *Jam'iyyat Iskan* case, in their supplementary affidavit (sec. 412), the respondents argued that the system of roads that was discussed in the *Jam'iyyat Iskan* case had nothing to do with Road 443 or with its expansion. As a parenthetical note, we will comment that we do not need to discuss the dispute between the petitioners and the respondents in this last regard, as it has no impact

on the normative decisions in the *Jam'iyyat Iskan* case, which will guide us in the present matter as well.

With reference to the Beituniya Road, the respondents argue primarily that the authorities were not approached in advance on this matter, and that the factual and legal basis on this matter in the petition statement was insufficient. As such, that aspect of the petition should be denied *in limine* (as a parenthetical note, we note that the petitioners' above arguments were first raised in their reply to the affidavit of response which was filed on behalf of the respondents). On a substantive level, the respondents argue that the Beituniya crossing does not have appropriate infrastructure for the passage of private vehicles or pedestrians, and to prepare it for this purpose would require the construction of extensive infrastructure, at a high cost. The respondents further point out that in accordance with the security concept underlying the construction of the security fence in the areas surrounding Jerusalem, the course of the fence was planned in such a way as to separate the lands and residents of JSA from the Israeli settlements north of Jerusalem and within the boundaries of the State of Israel. Fence crossings were limited to a number of fixed crossing points that are suitable for the passage of private vehicles or pedestrians. In their view, opening an additional crossing point in the security fence would lead to "a certain breach" of the security obstacle, itwould increase the risk of infiltration by terrorist activists into the vicinity of Jerusalem, and it would create a friction point that would increase the danger to the security forces in charge of the crossing points. The respondents further noted that the Beituniya crossing is situated in a problematic location that is subject to security threats; expanding the crossing and allowing the passage of private vehicles as well would therefore constitute a real risk.

10.Respondents no. 4 (Shurat Hadin and 119 others (hereinafter: respondents no. 4)), who were added to the petition at their request, emphasize in their response the importance of Road 443 as a major traffic artery in Israel, connecting the city of Jerusalem with metropolitan Tel Aviv. They state that Road 443 is the only practical alternative to Highway No. 1, and, in addition, it is the only transportation artery which is open, in practical terms, to the residents of the Israeli settlements along its route. Respondents no. 4 further discuss the terrorist attacks that occurred on the Road during the years since the outbreak of the Second Intifada, some of which, they argue, were perpetrated by residents of the villages, and the deaths and injuries that resulted from them. Respondents no. 4 argue that as a result of the security measures taken – which constitute the object of the petitioners' complaints – the petitioners incurred no more than inconvenience. They argue that the petition raises

the question of the balance between that inconvenience and their right to life and physical safety. In the case at hand, they believe that the right to life and physical safety should be given preference. Respondents no. 4 go on to state that the decision to close the Road [to Palestinians] is a reasonable and unavoidable position, based on a military need, which was made under the proper authority.

Respondent no. 5, "Fence for Life – the Movement for Construction of the Separation Fence", was also joined to the petition as a respondent, at its request. Respondent no. 5 also points out the security risk inherent in the resumption of travel by Palestinian vehicles on Road 443, which is likely to cause a renewed outbreak of bloody terrorist attacks along the Road and even to lead to the crossing of the Green Line by Palestinian vehicles, through checkpoints at both sides of the Road.

The proposed travel arrangement and the "fabric of life" roads

11. As explained above, the respondents presented an arrangement they had devised with a view to enabling restricted travel by Palestinian vehicles on Road 443. In addition, during the hearing of the petition, the laying down of some of the "fabric of life" roads has progressed, and some of them have been completed and opened to traffic. We will discuss this below.

12. The affidavit of response, which was filed by the respondents on 2 September 2007, stated that after the security forces and the Central Command of the IDF had re-examined the restrictions on travel in the area of Road 443, it was decided, as a temporary measure, to permit partial travel by a limited number of Palestinian vehicles along the Road. This decision was backed by a temporary order, signed by the O/C Central Command, which remained in force until 31 May 2008. According to the arrangement, the intention was to issue permits for travel along the Road to approximately 80 Palestinian vehicles, most of them commercial and public vehicles, the identity of which would be determined in coordination with the petitioning villages, and those vehicles would drive Palestinian passengers along the Road. The vehicles would enter the Road at a checkpoint near the village of Khirbet al-Masbah, and would then reach Ramallah through a passage in the security fence, known as the al-Jib crossing, which is located near the settlement of Giv'at Zeev. From the al-Jib crossing there is convenient and rapid access to the city of Ramallah via the Bir Naballah – Qalandiya "fabric of life" road. The arrangement would only operate during the day; at night, travel would be permitted subject to prior coordination, to provide a response to humanitarian needs. The respondents stated that this arrangement was approved "with a heavy heart and with considerable

misgivings", as implementing it involves a considerable risk to the security of Israeli citizens traveling on Road 443 and in the hinterland of the State of Israel. In an update notice of 17 December 2007, the respondents mentioned that for the purpose of implementing the arrangement, a meeting was held with the council heads of the Villages, aimed at promoting cooperation in the implementation of the arrangement. As we were told, in a letter dated 20 November 2007 the council heads announced that they did not intend to cooperate with this arrangement. Nevertheless, the respondents decided to implement the arrangement even without cooperation, and addressed the residents of the Area directly, by publishing a notice to the public in which the residents were offered the opportunity to submit applications for permits to travel on Road 443. In a supplementary affidavit dated 20 February 2008, the respondents announced that no applications for permits had been filed by the residents. Another supplementary affidavit, dated 8 September 2008, stated that additional attempts had been made to implement the proposed arrangement. Nevertheless, despite various efforts on the part of the respondents, no applications have yet been filed for implementation of the arrangement or for permits to travel along Road 443.

The petitioners, in their reply to the verified response, stated that the proposed arrangement is in the nature of "mocking the poor". They believe that the respondents are creating a mechanism which transforms a basic right into a privilege, to be granted or denied at the military commander's whim. In any event, this proposed arrangement, as the petitioners view it, will not lead to a reduction in the harm caused to the residents of the villages, given the small number of vehicles which would be permitted to travel and the hours during which the arrangement would operate. In addition, the petitioners point out that according to the proposed arrangement, travel to Ramallah would require passing through two checkpoints, and that the travel distance is twice as long as it would be on the original road (via Road 443 and from there to the Beituniya Road which leads to Ramallah).

Respondents nos. 4 and 5, for their part, expressed their objection to the proposed arrangement, in light of the security risks it entails.

13. As a marginal note in this regard, we will state that in addition to the aforesaid arrangement, the respondents, in their preliminary response, added that the military commander regularly allows travel on the Road by a limited number of vehicles with Palestinian license plates – mostly public vehicles – which have been individually examined. These are vehicles belonging to the village of a-Tira (which is not among the villages that are petitioners in this case), which are used to transport residents of that village to the city of Ramallah. As we were told, this

arrangement, which was achieved within the framework of a petition to this court (HCJ 2986/04), will remain in force until the completion of the "fabric of life" road between the village of a-Tira and the village of Beit Ur al-Fawqa. A supplementary affidavit filed by the respondents on 8 September 2008 clarified that this road has, in fact, been completed and has been opened to traffic.

In addition to all this, the respondents, as aforesaid, pointed out the further progress that has been made in constructing the "fabric of life" roads. Among those roads are three that pertain to the petition before us. One of them, the "fabric of life" road connecting the villages of Beit Liqiya and Khirbet al-Masbah, is open to traffic. The second is the "fabric of life" road connecting the villages of a-Tira and Beit Ur al-Fawqa, which includes an underground passage beneath Road 443. This road was opened to traffic on 1July 2008. An additional road of importance to the matter before us is the road connecting the villages of Beit Ur al-Fawqa and Beituniya, which gives the residents of the villages access to the city of Ramallah (through Beituniya). As stated in the update notice of 8 September 2008, the planned date for completion of the paving work and opening of the road to traffic was December 2008. Already then, the respondents stated that once the road was open, the trip to Ramallah for residents of the villages was expected to be short and quick, even compared to travel on Road 443. The respondents emphasized that the "fabric of life" roads were built at "a high standard", in accordance with the criteria generally accepted by Israel's Public Works Council for ordinary civilian roads and, accordingly, the building costs were very high. In an additional update notice, delivered on 8 April 2009 (following the completion of arguments), the respondents added that the "fabric of life" road, a dual-carriage road that connects the petitioning villages to the regional city of Ramallah "by means of a short, fast and convenient route, even by comparison to travel on Road 443," had meanwhile been completed. After its opening, the road was closed for a limited period of time for maintenance and repair work, including work that resulted from weather damage.

The petitioners, for their part, argue that from the standpoint of the population of the Area, there is no need for the "fabric of life" roads, because the road available to that population should have been Road 443. In addition, they point out that for the purpose of laying the "fabric of life" roads, lands were expropriated from the local population, in addition to the lands that were previously expropriated for the construction of Road 443. In their view, these are unnecessary roads, the construction of which has harsh ramifications, both present and future, for the residents of the Area. The building of the roads deprives the landowners and many

families of their land and their livelihood; it uses land that is required for the genuine development of the residents of the Area; it causes the destruction of nature and the environment in the Area; and it creates separate road systems for the various populations. Furthermore, it was argued that from the standpoint of transportation, most of the "fabric of life" roads that run between the villages themselves are significantly inferior to the main roads in the Area, and are not in the nature of a main road which enables rapid, convenient travel.

The framework of the deliberations

14. The territory that is the object of the petition is under a regime of "belligerent occupation" (see e.g.: *Jam'iyyat Iskan v. IDF Commander* [5], at p. 792; *Beit Suriq Village Council v. Government of Israel* [2], at p. 827; HCJ 1661/05 *Gaza Beach Local Council v. Knesset of Israel* [7], at p. 514-516; *Mara'abeh v. Prime Minister of Israel* [3], at p. 492). In a territory under belligerent occupation, the military commander serves as "the long arm of the state" (*Mara'abeh v. Prime Minister of Israel* [3], at p. 492). The military commander is not the sovereign entity in that territory, and he draws his authority from the rules of public international law that govern belligerent occupation; from the local law prevailing in the Area, which consists of the law in force prior to the military occupation and new local legislation enacted by the military government; and from the principles of Israeli law (*Mara'abeh v. Prime Minister of Israel* [3], at p. 492; HCJ 10356/02 *Hess v. IDF Commander in West Bank* [8], at p. 455; see also HCJ *Jam'iyyat Iskan v. IDF Commander* [5], at pp. 792-793). The first question that we will address in our deliberations in this case is whether, in deciding to order the closure of Road 443 by means of the Security Order and the Travel Provisions, such that the Palestinian residents of the Area are prohibited from traveling on it, the military commander acted within his authority. Separately from the question of the purview of his authority, the question of the manner in which the military commander exercised his authority and his discretion will also be examined. The criteria on the basis of which this examination will be conducted are those listed above – i.e., the rules of local law, the rules of Israeli administrative law, and the rules of international law that govern belligerent occupation (*Jam'iyyat Iskan v. IDF Commander* [5], at p. 793; cf. *Beit Suriq Village Council v. Government of Israel* [2], at p. 832), as "each Israeli soldier carries with him, in his backpack, the rules of customary international public law that concern the laws of war and the basic rules of Israeli administrative law" (*Jam'iyyat Iskan v. IDF Commander* [5], at p.810; cf. *Ajuri v. IDF Commander in West Bank* [1], at p.365; *Mara'abeh v. Prime Minister of Israel* [3], at pp. 492-493; *Hess v. IDF Commander in West Bank* [8], at p.454; *Beit Suriq Village Council*

v. Government of Israel [2], at pp. 827-828). Accordingly, we have two questions before us, one of which concerns the actual authority of the military commander to order restrictions on travel along the Road in general, and the closure of the Road to Palestinians in particular. The other concerns his discretion in so ruling. We will discuss these questions in the order in which they are listed.

The authority of the military commander

15. The respondents contend that the Road was closed to passage by Palestinian vehicles by virtue of the existing legislation in the Area, which was issued by the military commander. They argue that the authority of the military commander to close the Road is based on the provisions of s. 88 (a) (1) of the Security Provisions Order, which states as follows:

> "Movement and Transport
>
> A military commander, or a person acting under the general or special authorization of a military commander, is entitled, by means of an order or by issuing provisions or in any other manner:
>
> (1) To prohibit, restrict or regulate the use of certain roads or to determine routes along which vehicles or animals or persons will pass, whether generally or specifically."

In addition, the respondents refer to the Travel Provisions issued by the military commander (after the petition was filed), in which, in 2007, his decision to close Road 443 to travel by Palestinian vehicles was put in writing. Section 2 of the Travel Provisions states: "As long as these Provisions remain in force, no person shall travel on Road 443 by means of a vehicle which is not Israeli, other than in accordance with a permit which was issued to him by me, or by a person authorized by me to do so." An "Israeli vehicle" is defined, in s. 1 of the Provisions, as "a vehicle that is registered in Israel or a vehicle that bears identifying marks which were established for it in Israel."

16. I do not believe that the anchoring of the decision to order the closure of Road 443 in the Security Order and the Travel Provisions is sufficient. As has been ruled –

> 'In order to provide a response to the question of the authority of the Area commander, it is not sufficient to determine that the amending order (or any other order by the Area commander) grants authority to the military commander... The authority of the military commander to enact the amending order is derived

> from the laws of belligerent occupation. They are the source of his authority, and his powers will be determined according to them' (*Ajuri v. IDF Commander in West Bank* [1], at p. 364; cf. *Jam'iyyat Iskan v. IDF Commander* [5], at p. 793; HCJ 69/81 *Abu 'Ita v. Commander of the Judaea and Samaria Area* [9], at p. 230).

The principal norms that apply to a territory under belligerent occupation are the Regulations Respecting the Laws and Customs of War on Land of 1907, appended to the Fourth Hague Convention of 1907 (hereinafter: "the Hague Regulations"), which reflect customary international law (*Jam'iyyat Iskan v. IDF Commander* [5], at p. 793; *Hess v. IDF Commander in West Bank* [8], at p. 455; *Ajuri v. IDF Commander in West Bank* [1], at p. 364; HCJ 591/88 *Taha v. Minister of Defense* [10], at p. 53; *Beit Suriq Village Council v. Government of Israel* [2], at p. 827; *Gaza Beach Local Council v. Knesset of Israel* [7], at pp. 516-517; *Mara'abeh v. Prime Minister of Israel* [3], at p. 492). At the same time, the provisions of international law that apply to international armed conflict are also anchored in the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter: "the Fourth Geneva Convention"), the customary provisions of which became part of the legal system of the State of Israel; and in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereinafter: "the First Protocol")); although Israel is not a party to the First Protocol, its customary provisions have also become part of Israel's legal system. In addition, wherever a lacuna exists in the aforesaid laws of armed conflict, it may be filled by provisions of international human rights law (see CrA 6659/06 *Anon. v. State of Israel* [11], per President D. Beinisch, at para. 9. See also *Hess v. IDF Commander in West Bank* [8], at p. 455; *Ajuri v. IDF Commander in West Bank* [1], at p. 364; *Beit Suriq Village Council v. Government of Israel* [2], at p. 827; *Gaza Beach Local Council v. Knesset of Israel* [7], at p.517; *Mara'abeh v. Prime Minister of Israel* [3], at p. 492; HCJ 7862/04 *Abu Daher v. IDF Commander in the Judaea and Samaria Area* [12], at p. 376.

17. On the balances reflected by the Hague Regulations and the scope of the powers and discretion of the military commander resulting from them, the following – which also applies to the case before us – was stated:

> 'The Hague Regulations revolve around two main axes: one – ensuring the legitimate security interests of the occupier in territory held under belligerent occupation; the other – ensuring the needs of the civilian population in the territory held under

> belligerent occupation... In both these matters – both the "military" need and the "civilian" need – the initial assumption in principle is that the military commander does not inherit the rights and status of the defeated regime. He is not the sovereign in the occupied territory... The powers of the defeated regime are suspended, and by virtue of the rules of public international law, the military commander is given "the supreme power of government and administration in the area" ... These powers, from a legal standpoint, are temporary by nature, because the belligerent occupation is temporary by nature ... This temporariness may be long-term ... International law does not set a deadline for it, and it continues as long as the military government efficiently controls the area' (*Jam'iyyat Iskan v. IDF Commander* [5], at p. 794; see also *Hess v. IDF Commander in West Bank*, at p. 455; *Beit Suriq Village Council v. Government of Israel* [2], at pp. 833-834; *Gaza Beach Local Council v. Knesset of Israel* [7], at p. 520; O. Ben Naftali and Y. Shani, *International Law Between War and Peace* [Heb.], 126, at pp. 179-180 (2006)).

18. The provisions relevant to the matter at hand are those of Section III of the Hague Regulations, entitled "Military Authority over the Territory of the Hostile State." Of those provisions, our concern is with the provisions of art. 43 of the Hague Regulations – cited by the Parties – which 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 security and safety, while respecting, unless absolutely prevented, the laws in force in the country' (see also, on the "legislative history" of the regulation: Y. Dinstein, *The Laws of War* [Heb.], at pp. 215-216 (1983)).

This provision was defined as "a general 'meta'- provision, which is intended to establish a normative arrangement for an entire set of cases" (*Jam'iyyat Iskan v. IDF Commander* [5], at p. 797). In the case before us, the parties have focused on the question of the military commander's authority to determine travel restrictions, by virtue of his duty to safeguard "public order and safety," as prescribed in the opening passage of art. 43 of the Hague Regulations. The parties did not raise arguments concerning the restrictions imposed by the closing passage of the article on the enactment of legislation by the military commander; accordingly, our discussion, too, will focus on the opening passage of the regulation (cf. *Jam'iyyat Iskan v. IDF Commander* [5], at p.797; HCJ 351/80 *Israel*

Electric Corporation, Jerusalem Region Ltd. v. Minister of Energy and Infrastructure [13], at pp. 688-689).

19. Article 43 imposes upon the occupying state the duty to "ensure, as far as possible, public order and safety". This duty reflects the military commander's control of the territory and results "from his being in charge of the preservation of public welfare in his area" (HCJ 2612/94 *Sha'ar v. IDF Commander in the Judaea and Samaria Area* [14], at p. 679). In other words, the military commander is in charge of enforcing the law in the Area and safeguarding public order (HCJ 3933/92 *Barakat v. O/C Central Command* [15], at p. 6), and for this purpose, customary international law and treaty law confer upon him the right to act in order to ensure that his control of the territory is preserved. This may be done through the use of appropriate means (*Taha v. Minister of Defense* [10], at p. 64; cf. *The Laws of War*, at p. 216).

20. Toward whom is the military commander's duty of safeguarding public order and public life in the Area directed? As we have seen, the population that used Road 443 until 2000 may be divided into three categories. The first consists of residents of the villages, who are considered "protected persons" within the meaning of the Fourth Geneva Convention (art. 4 of the Convention; see *Gaza Beach Local Council v. Knesset of Israel* [7], at p.517; HCJ 2942/05 *Mansur v. State of Israel* [16], at para. 22). The second consists of residents living in the Israeli settlements in the Area (on the status of these settlements, see *Gaza Beach Local Council v. Knesset of Israel* [7], at pp. 524-527). These residents are among the local population of the Area (see *Hess v. IDF Commander in West Bank* [8], at p. 455), although they are not "protected persons" (*Mara'abeh v. Prime Minister of Israel* [3], at p. 496; *Gaza Beach Local Council v. Knesset of Israel* [7], at pp. 517-524; HCJ 2942/05 *Mansur v. State of Israel* [16], at para. 21; HCJ 2645/04 *Nasser v. Prime Minister* [17], at para. 26). Apart from those two groups, residents and citizens of Israel who do not live in the Area also use the Road, primarily for traveling between the coastal plain and Jerusalem. The duty of safeguarding "public order and safety" by virtue of art. 43 of the Hague Regulations is broad. It does not apply only to those individuals who are considered "protected persons", but rather, to the entire population within the bounds of the Area at any given time, including residents of the Israeli settlements and Israeli civilians who do not reside within a territory under belligerent occupation (*Hess v. IDF Commander in West Bank* [8], at p. 455; *Barakat v. O/C Central Command* [15], at p. 6; HCJ 6339/05 *Matar v. IDF Commander in the Gaza Region* [18], at pp. 851-852; HCJ 4363/02 *Zindah v. IDF Commander in the Gaza Strip* [19]; HCJ 4219/02 *Gusin v. IDF*

Commander in the Gaza Strip [20], at p. 611; *Mansur v. State of Israel* [16], at para. 22; *Mara'abeh v. Prime Minister of Israel* [3], at pp. 496-498; *Hess v. IDF Commander in West Bank* [8], at pp. 460-461; HCJ 2577/04 *al-Khawaja v. Prime Minister* [21], at para. 31; HCJ 11344/03 *Salim v. IDF Commander in the Judaea and Samaria Area* [22]; *Sha'ar v. IDF Commander in the Judaea and Samaria Area* [14], at p. 679; see also HCJ 9593/04 *Morar, Head of Yanun Village Council v. IDF Commander in Judaea and Samaria* [23], at para 13; HCJ 3680/05 *Committee of the Tene Settlement v. Prime Minister of Israel* [24], at para. 8).

21. The military commander's duty to protect the lives and the security of Israelis who reside within an area under belligerent occupation derives not only from his duty pursuant to art. 43 of the Hague Regulations, but also, as stated above, from internal Israeli law. As was ruled (in a case relating to the legality of the construction of a section of the security fence):

> 'The authority of the military commander to construct a separation fence includes the authority to construct a fence in order to protect the lives and the security of Israelis who reside in Israeli settlements in the Judaea and Samaria Area. This is true notwithstanding the fact that the Israelis who live in the Area are not considered "protected persons" in the sense of art. 4 of the Fourth Geneva Convention ... This authority is derived from two sources. One is the authority of the military commander, pursuant to art. 43 of the Hague Regulations, to safeguard public order and safety... The other is the duty of the State of Israel, which is anchored in internal Israeli law, to protect the lives, the security and the well-being of the Israeli civilians who reside in the area' (*Nasser v. Prime Minister* [17], at para. 26; see also *Mara'abeh v. Prime Minister of Israel* [3], at p.502; *Tene Settlement v. Prime Minister of Israel* [24], at paras. 8-9; *Bir Naballah Local Council v. Government of Israe*l [6], at para. 32; *al-Khawaja v. Prime Minister* [21], at para. 31).

Moreover, the duty of the military commander to ensure the security of all persons within the bounds of the Area also applies to anyone who is alleged to be present in the Area unlawfully. The following was said in that context:

> 'The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (art. 43 of the Hague Regulations). It is necessarily entailed by the human

> dignity of every individual as a human being. It is designed 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 there for the taking. Even a person who is in the area illegally does not thereby become an outlaw …. Even if the military commander acted contrary to the laws of belligerent occupation when he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the laws of belligerent occupation themselves to protect the lives, safety, and dignity of every one of the Israeli settlers. Ensuring the safety of Israelis present in the area is the responsibility of the military commander (cf. art. 3 of the Fourth Geneva Convention)' (*Mara'abeh v. Prime Minister of Israel* [3], at pp. 498-500; see also HCJ 6027/04 *Raddad, a-Zawiya Village Council Head v. Minister of Defense* [25], at para. 15; HCJ 8414/05 *Bil'in Village Council Head v. Government of Israel* [26], at para. 28).

22. By virtue of his duty to safeguard public order, the military commander is required to ensure, *inter alia*, normal travel on the roads in the Area (HCJ 401/88 *Abu Rian v. IDF Commander in the Judaea and Samaria Area* [27], at p.770). The means of protecting travel are varied. In this case, we will mention that the court has repeatedly confirmed the military commander's authority to build roads for security reasons, including for the purpose of protecting the civilian population which uses them. The words of the court in another case apply here as well:

> 'It may be assumed that the security authorities and the military government, which took upon themselves the task of planning and implementing this network of roads, the cost of which is enormous, did not do so merely for reasons of ecology and alleviating civilian traffic, and that their prime consideration was the military aspect. ... Another extremely important military consideration is the situation in times of tranquility. It often happens that a hostile population harasses military traffic (as well as that of civilians, whom it deems undesirable) that passes through or close to residential areas. Diverting the traffic to other places, far from the "homes" of potential assailants, will reduce the number of incidents of harassment, the loss of human lives and the damage done. This consideration is mixed: it is a military consideration, insofar as it is capable of preventing losses among the military; and a security consideration, insofar as it keeps peaceable civilians from incurring harm and damage

> as a result of operations involving chases, searches, curfews and the like – operations that are unavoidable after a hostile strike against military forces or peaceable civilians' (HCJ 202/81 *Tabib v. Prime Minister* [28], at pp. 634, 635).

In yet another case, which dealt with an access road to the settlement of Netzarim, the Court ruled as follows:

> 'The need to build a new access road to the settlement of Netzarim arose as a result of the many brutal terrorist attacks against the army and against Jewish civilians who used the existing access road. The new road is slated to be built at a greater distance from the built-up area, and it is designed to provide its users with better protection against terrorist attacks. This consideration – the existence of which was not disputed, even by the petitioners' counsel – is one which the military commander is entitled to take into account, within the framework of his duty to protect his soldiers and the population within the territory. The petitioners' argument, that the military commander must renounce this duty because this is ostensibly what is required by the rules of international law, is unacceptable; moreover, from the legal standpoint, it is incorrect. The question of the legality of the Netzarim settlement is not for the military commander to decide' (HCJ 6982/02 *Wahidi v. IDF Commander in the Gaza Strip* [29]).

Similarly, this Court did not see fit to intervene in the decision by the military commander to seize land for the purpose of constructing walls to shield a bypass road being built for Jewish worshipers who wished to travel from Jerusalem to Rachel's Tomb – although, in that case, the petitioners did not dispute the military commander's authority to do so (HCJ 1890/03 *Municipality of Bethlehem v. State of Israel* [29], at p.747). It was also ruled that there was no cause to intervene in the military commander's decision to seize land for the purpose of building a bypass road in the Hebron area, which was required in order "to reduce the constant friction between Israeli vehiculr traffic, both military and civilian, and the Palestinian population" (HCJ 2717/96 *Wafa v. Minister of Defense* [30], at 856). At the same time, it should be recalled that the concept of building bypass roads, which the court discussed in that case, was intended to circumvent large Palestinian population centers, to enable "effective preservation of the well-being, security and lives of the users of the road, who are residents of the Area, Jews and Arabs alike" (*ibid*., at p.856). In another case, this Court decided not to intervene in the military commander's decision to seize land in order to protect the road which afforded Jewish worshipers access to the Machpelah Cave (*Hess v.*

IDF Commander in West Bank [8]). In addition, this Court did not find cause to intervene in the decision to construct the security fence in order to protect, *inter alia*, the well-being of Israelis who travel along the Trans-Samaria Highway from Israel to the city of Ariel and the Jordan Valley (*Raddad, a-Zawiya Village Council Head v. Minister of Defense* [25], at para. 18).

23. In addition to the considerations of preserving order and security in the Area and ensuring secure travel, the military commander is entitled to take into account considerations related to the security of the State of Israel and protection against a security threat that originates in the Area and is directed against targets within the territory of Israel (HCJ 5539/05, *Atallah v. Minister of Defense* [31], at para. 8; *Abu Daher v. IDF Commander in the Judaea and Samaria Area* [12], at p.376). Accordingly, the military commander was entitled to include in his considerations his assessment that terrorist assailants might infiltrate Israel as a result of travel by Palestinian vehicles on the Road. However, the military commander is not entitled to include other interests of the State in his considerations:

> '... The military commander's considerations involve safeguarding his security interests in the area, on the one hand, and securing the interests of the civilian population on the other. **Both of these interests are directed at the Area**. The military commander is not entitled to consider the national, economic, or social interests of his state, insofar as said interests have no implications for his security interests in the area or the interests of the local population. Even the needs of the Army constitute military needs, and not the needs of national security in the broader sense... An area which is held under belligerent occupation is not an open field for economic or other exploitation' (*Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* [5], at pp. 794-795 [emphasis added]; see also *Beit Suriq Village Council v. Government of Israel* [2], at p.829; *Hess v. IDF Commander in West Bank* [8], at p.456).

From the general to the specific

24. The principles that we discussed above are the source from which the military commander's duty to ensure safe travel along the roads in the Area is derived. This duty applies with regard to every vehicle travelling in the Area, irrespective of its owner's identity. Against this background, the military commander is authorized – for the purpose of fulfilling his aforesaid duty – to impose restrictions on vehicular travel in general, and on travel by Palestinian vehicles in particular. It has

already been ruled that "subject to specific provisions, which are laid down in the Hague Regulations, and according to the general provision, which is laid down in art. 43, the military government has been given all of the ancillary powers reasonably required for the purpose of fulfilling the authority" (*Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* [5], at p. 807). In addition, as explained above, the military commander is empowered to impose restrictions as abovesaid in order to ensure that no security risks are posed to the State of Israel. Another question – and this brings us to the dispute awaiting resolution – is whether, under the concrete circumstances before us, the military commander was entitled to totally prohibit (rather than merely restrict) travel on the Road by residents of the villages.

25. Before handing down the judgment itself, two preliminary comments are in order. The first is that our decision does not refer to cases in which the prohibition on use of the Road by the protected population results from immediate security needs, such as the situation at the end of 2000, following the outbreak of the Second Intifada, or when the prohibition is in force for a limited period of time. Categories such as these require separate deliberation, and we may leave them for future consideration. By contrast, the prohibition in the case before us has continued for almost a decade, and its termination is not in sight at this time. A second clarification concerns the arrangement proposed by the respondents in the verified response, whereby, under specified conditions, they expressed willingness to permit restricted travel on the Road by approximately 80 vehicles from the villages. We note that according to the data provided by the respondents, the number of residents of the villages in 2007 was 26,280, and that approximately 40,000 Israeli vehicles travel on the Road each day. Given the extremely limited scope of the proposed arrangement and the additional restrictions involved therein, it cannot be said that this arrangement transforms the prohibition into something less than a complete prohibition, or that it is capable of changing the situation that is the object of the petition.

26. We will now discuss the actual merits of the case. According to the regulations of the plan for its construction (RE/35), Road 443 – or the relevant section of it – was intended "to improve the transport connections between villages on the Beit Sira-Beituniya route and to increase the level of traffic safety." The Road, which was constructed on land expropriated from residents of the Area, was thus intended – by definition – to secure the needs of the local population. In conformity with the rules of public international law, the power of expropriation by the military government was exercised under the local law and, within that framework, for the benefit of the local population, i.e., the protected

persons (cf. *Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* [5], at para. 37). However, the presumption in the planning of Road 443 for the benefit of the local population was that the Road would also serve residents of Israel and the traffic needs between the Area and Israel (cf. *Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* [5], at p. 790). As explained, this was the situation until 2000. The petitioners, in fact, are not complaining about the way the Road was used up to that time. The problem arises with the situation that began in 2000, when the use of the Road was restricted only to Israeli vehicles, in the format that we have discussed. The closure of the Road to Palestinian vehicles gave rise to a situation whereby Road 443 is used primarily for the "internal" travel of vehicles in Israel – between the center of the country and Jerusalem. As mentioned, the Road was defined by the respondents as "a major traffic artery connecting the area of the coastal plain and the Modi'in bloc to the area of Jerusalem. In addition to Highway No. 1, Road 443 constitutes one of the two major traffic arteries leading to the capital." Respondents no. 4 also define the Road as an important traffic artery from the center of the country to Jerusalem, as does respondent No. 5. At the same time, the Road is used for travel by residents of the Israeli settlements in the Area. According to the decisions of this Court, the military commander would not have been authorized to order the building of the Road in the first place, had this been the underlying purpose for which it was built:

> 'The military government is not entitled to plan and execute a system of roads in an area that is held under belligerent occupation, if the purpose of such planning and the purpose of its execution is solely and exclusively to constitute a "service road" to its own state. The planning and execution of a road system in an occupied territory may be carried out for military reasons... A road system may be planned and executed to benefit the local population. Such planning and execution may not be carried out merely in order to serve the occupying state' (*Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* [5], at p. 795; see also *Beit Suriq Village Council v. Government of Israel* [2], at p. 829).

These statements also apply, *mutatis mutandis*, to the use of the road. The military commander is authorized to impose travel restrictions by virtue of his duty to safeguard public order and security on the traffic routes in the Area; this includes ensuring the well-being of the Israeli settlers and of the Israelis who are present in the Area and use the Road. However, the military commander's authority does not extend to the permanent, absolute restriction of travel along the Road by Palestinian

vehicles. The reason is that upon the imposition of those restrictions, Road 443 – in practical terms – becomes a road which is intended for travel by Israeli vehicles only, whereby the great majority of those vehicles travel from the coastal plain to Jerusalem and back – i.e., for the purposes of "internal" Israeli travel (as respondents no. 4 define it: "a major traffic artery in Israel, connecting the city of Jerusalem with metropolitan Tel Aviv"). We emphasize that we have no reason to doubt the military commander's position, which is that the exercise of his authority is founded on considerations of security, which, in turn, are founded on his duty to preserve order and security. However, the military commander's authority in the said context must be examined in view of the consequences of the restrictions, and must not focus merely on examining the motives for imposing them (compare, in another context, HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel* [32], per President A. Barak, at para. 18).

The state of affairs resulting from the total ban on travel by residents of the villages is that the Road no longer benefits the local population; rather, it is a "service road" of the occupying state. Any arrangement with such an outcome exceeds the military commander's authority and cannot be reconciled with the rules of international law concerning belligerent occupation. The direct result of what we have said thus far is that **the travel restrictions which were imposed by the military commander cannot stand in their present format and should be set aside**.

Beyond what is strictly necessary, we would add that we would have arrived at a similar outcome had we assumed that the military commander possessed the requisite authority, on the basis of the rules of public international law in general and the Hague Regulations in particular. Even in that state of affairs, in the framework of which – assuming that the authority existed – we would have been required to examine the discretion of the military commander, we would have concluded that he is not entitled to exercise his authority as he did and to restrict travel in a manner which transforms the road into one whose entire purpose is to constitute a "service road" for Israeli vehicles. We will now explain this conclusion.

Examination of the military commander's discretion

27. The military commander's discretion will be examined in accordance with the principles set out in the case law of this Court. Even when acting within his authority, the military commander, like any administrative entity, must exercise his discretion, *inter alia*, according to the principles of reasonableness and proportionality, and his discretion will be subject to the review of this court (*Municipality of Bethlehem v.*

State of Israel [29], at p. 747; cf. *Abu Daher v. IDF Commander in the Judaea and Samaria Area* [12], at p. 378; *Mara'abeh v. Prime Minister of Israel* [3], at p. 507-509; *Bil'in Village Council Head v. Government of Israel* [26], at para. 29). Indeed, "the argument that the infringement of human rights is due to security considerations does not rule out judicial review. 'Security considerations' or 'military necessity' are not magic words" (*Mara'abeh v. Prime Minister of Israel* [3], at p. 508). However, as emphasized on more than one occasion, this Court does not serve as a "supreme military commander", and does not substitute its own discretion for that of the military commander; it merely examines the legality of his actions. The responsibility and the authority were conferred upon the military commander, and the court does not set itself up as an expert on matters of security in his stead:

> 'The Supreme Court, sitting as the High Court of Justice, carries out judicial review over the legality of the discretion exercised by the military commander. ... In carrying out this judicial review, 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 limit the discretion of the military commander are upheld' (*Ajuri v. IDF Commander in West Bank* [1], at p. 375; see also *Hess v. IDF Commander in West Bank* [8], at p. 458).

Another judgment stated:

> 'There are often several ways of realizing the purpose, all of them proportionate and reasonable. The military commander is given 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 discretion' (*Municipality of Bethlehem v. State of Israel* [29], at p. 765).

At the same time, it should be emphasized that although the Court attributes special weight to the military expertise of the commander of the Area, with whom the responsibility for the security of the Area lies, when his decision involves violation of human rights, the proportionality of the violation must be examined in accordance with the well-known tests that have been delineated in case law in this regard (*Mara'abeh v. Prime Minister of Israel*[2], at p. 508). 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 military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law. That is our expertise' (HCJ 4764/04 *Physicians for Human Rights v. Commander of the IDF Forces in Gaza* [33], at p. 393).

28. In exercising his authority, the military commander must balance three different considerations. These are "the security-military consideration; preserving the rights of the Palestinian residents, who are 'protected persons'; and preserving the rights of the Israelis who live in the Israeli settlements in the Area" (HCJ 5139/05 *Shaib, Beit Lid Village Council Head v. State of Israel* [34], at para. 10; see also HCJ 1748/06 *Mayor of Dhahiriya v IDF Commander on the West Bank* [35], at para. 13; HCJ 5488/04 *al-Ram Local Council v. Government of Israel* [36], per President A. Barak, at para. 42; HCJ 1998/06 *Beit Aryeh Local Council v. Minister of Defense* [37], at para. 8; HCJ 3969/06 *Dir Samet Village Council Head v. IDF Commander on the West Bank* [38], at para. 14). In the present case, as explained, from the security-military consideration is derived the additional consideration of protecting the well-being and security of Israelis who travel on Road 443. A major criterion utilized in this balance is that of proportionality, including the three sub-tests which are examined within its framework (HCJ 6027/04 *Raddad v. Minister of Defense* [25], at para. 17). We will now address that criterion.

Proportionality

29. According to the principle of proportionality, the freedom of an individual may be restricted in order to achieve proper purposes, provided that the restriction is proportional (*Beit Suriq Village Council v. Government of Israel* [2], at p. 837). The principle of proportionality draws its force from international law as well as from the basic principles of Israeli public law (*Mara'abeh v. Prime Minister of Israel*[3], at p. 507). To meet the requirement of proportionality, the military commander bears the burden of showing that the measures he has taken comport with the purpose (the first sub-test of proportionality); that of all possible alternatives, the measures he has taken result in the least harm to individuals, (the second sub-test); and that the adverse effect on individual liberties resulting from adoption of the measures in question is proportionate to the benefit to be derived from them (the third sub-test,

also known as the "test of proportionality in the narrow sense") (*Morar v. IDF Commander in the Judaea and Samaria* [23], paragraph 18; see also *Beit Suriq Village Council v. Government of Israel* [2], at p. 840). We will discuss each of these tests individually.

30. In relation to the first sub-test, we will examine, as stated above, whether there is a rational connection between the measure adopted, i.e., closure of the Road to travel by Palestinian vehicles, resulting in the restricted freedom of movement of the residents of the Area, who are subject to belligerent occupation, and the purpose, i.e., preserving the security of the state and its citizens and the security of the Area, both on Road 443 and within Israel. The petitioners claim that the prohibitions against travel do not contribute to the protection of the State of Israel or its residents, nor to ensuring safe travel along the Road, because other measures that are being taken by the respondents provide an adequate response. The petitioners further point out that in other places in JSA, the Army secures hundreds of kilometers of roads, on which both Palestinians and Israelis travel. They argue that the respondents have not clarified how "preventing tens of thousands of persons who are not suspected of anything and do not endanger anyone's security from traveling" serves to reduce the risks and threats. The petitioners emphasize, on the basis of the ruling of this Court in *Morar v. IDF Commander in the Judaea and Samaria* [23], that the existence of "a purely technical causal relationship between the means and the purpose" is not enough; rather, what is required is "for there to be a rational connection between the measures and the purpose, and for the measures to be appropriate to the attainment of the purpose." According to their argument, "[t]he meaning of this is, *inter alia*, that an arbitrary, unfair or illogical measure must not be taken." The petitioners also referred to an expert opinion on security, which was submitted in the framework of a petition involving travel arrangements on the Sheqef – Negohot road (*Dir Samet v. IDF Commander on the West Bank* [38]) by Brigadier General (res.) Ilan Paz. According to the expert opinion, reserving the Road for travel by Israeli vehicles merely provides "a solution which is not bad" to the threat of shooting attacks from passing vehicles. Nonetheless, because this policy leads to a situation whereby only Israeli vehicles travel on the Road, it enables terrorist attacks to be carried out by other methods – such as firing on passing vehicles from the roadside, or laying explosive charges – more easily.

The respondents, on the other hand, argue that there is a rational connection between the purpose of preserving the lives and the safety of Israeli travelers on Road 443, and the measures restricting travel on the Road by Palestinian vehicles. They assert that permitting free travel by

Palestinian vehicles along the Road would significantly increase the risk of terrorist attacks, for example, in the form of car bombs, drive-by shootings, or smuggling terrorists and weapons into Israeli territory.

We have found no basis for intervening in the position taken by the respondents, whereby there is a rational connection between the measures taken and the preservation of order and security. The situation that has prevailed on Road 443, in practical terms, since the security measures were introduced, confirms this position. The measures taken provide a response to the concern about shooting attacks being carried out from cars traveling along the route, Israelis being kidnapped and terrorists gaining entry into Israeli territory through the crossing points at the sides of the Road. Nor is the expert opinion, on which the petitioners relied, capable of changing my conclusion. I am prepared to assume, similar to the position taken by the author of the expert opinion, that alongside the advantages inherent in the ban on travel imposed by the military commander, there are certain disadvantages, which the author pointed out. However, it is the military commander who is responsible for the final decision, as well as for weighing the advantages against the disadvantages, and considerable weight must be attributed to his opinion. This is in keeping with the concept discussed above, whereby the expert opinion of the military entity in charge of security must bear special weight (*Beit Suriq Village Council v. Government of Israel* [2], at p. 844; see also *Mara'abeh v. Prime Minister of Israel* [3], at pp. 508-509; *Bir Naballah Local Council v. Government of Israe*l [6], at paras. 33, 36; *al-Ram Local Council v. Government of Israel* [36], at para. 42; *Dir Samet v. IDF Commander on the West Bank* [38], at para. 23). In view of the aforementioned, we have found that the measures taken by the military commander comply with the first sub-test of proportionality.

31. According to the second sub-test, the measures adopted must result in the least harm to individuals, relative to all appropriate alternative measures. The petitioners claim that the respondents have alternative means at their disposal for achieving the purpose sought (such as security fences, checkpoints at the entrance to Israel, and means of observation), and that, should these not suffice, the respondents can take additional measures that do not involve harm to the local population. The petitioners emphasize that the measures adopted by the respondents may not be capable of achieving the entire purpose sought in its entirety – the complete protection of the Israelis traveling on Road 443. Reality, however, reveals that there is no such thing as complete security, and a well-reasoned and balanced decision is necessary with regard to the risks to be taken for the purpose of protecting human rights. The petitioners further emphasize that, should the military commander reach the

conclusion that it is not possible to allow travel along the Road by Israeli civilians who do not reside in the Area without simultaneously revoking the right of protected persons to use it, it is possible to prevent the former from entering the Area. In this context, the petitioners emphasize that Israeli civilians have no "right" to benefit from public resources in the occupied territory, and that their entry into the Area is enabled by a general permit issued by the military commander. The petitioners further claim that no other alternatives available to the respondents, such as taking additional security measures, increasing the stringency of the examination at entry points to Israel, or partial restrictions on travel along the Road by Israelis, were even examined.

The respondents emphasized that in their view, there is no other measure that would result in less harm and would achieve the purpose of preserving the safety of the thousands of Israelis who travel on Road 443. The only conceivable means – checking each individual Palestinian vehicle that attempts to enter the Road – is not necessarily less harmful; moreover, in any case it cannot achieve the required security purpose. Checking procedures cannot locate every terrorist attacker and every weapon; nor can they entirely prevent attempts at infiltration and perpetration of terrorist attacks. Checking every vehicle would increase the duration of travel and would require putting up a number of additional roadside checkpoints, at additional cost and increased risk to Israeli troops. The respondents point out that permitting Palestinian vehicles to access the Road would enable terrorists to pick up passengers and weapons en route, even if the vehicle had been examined at a checkpoint before entering the Road.

The question that we must examine is whether there is an alternative measure that will entail less violation of the petitioners' rights and will achieve the security purpose that the military commander sought to achieve (cf. *Mayor of Dhahiriya v IDF Commander on the West Bank* [35], at para. 20). In the case before us, introducing measures such as those suggested by the petitioners will indeed reduce the severity of the harm caused to them. At the same time, the military commander's position is that such measures do not achieve the security purpose. I am not convinced that other possible alternatives for the protection of travelers along the Road, which are less harmful to the local residents' rights, were taken into consideration. We will return to this point below, as part of our discussion of the third sub-test.

32. Under the third sub-test, it must be shown that adopting the measures in question is suitably proportional to the benefit that will result from doing so. In the words of Supreme Court President A. Barak:

> ‘This sub-test weighs the costs against the benefits... According to this sub-test, a decision of an administrative authority must reach a reasonable balance between general 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 determination is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves “family honor and rights”... All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Fourth Geneva Convention’ (*Beit Suriq Village Council v. Government of Israel* [2], at p. 850).

And as ruled in *Adalah v. Minister of the Interior* [4]:

> ‘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 of such gravity that they cannot be allowed by law, 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 that right is made against a background of all the values of the legal system.’ (at para. 75).

In the present case, the harm, as stated above, is to the petitioners’ freedom of movement. We will begin with an examination of the nature of that harm.

33. This Court, per [then] Justice D. Beinisch, discussed the normative implications of the freedom of movement in the Area, against the background of the status of this basic right in Israel:

> ‘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 that is derived from the right to liberty .... Furthermore, there are those who believe that this freedom is also derived from human dignity.... Freedom of movement is also recognized as a basic right in international law. Freedom of movement within the state is established in a long string of international conventions and declarations concerning human

> rights ... and it would appear that it is also established in customary international law' (*Municipality of Bethlehem v. State of Israel* [29], at pp. 754-755).

In that case, the Court saw no call to rule on the question of whether and to what extent the principles of Israeli constitutional law and the international conventions on human rights apply to the Judaea and Samaria Area. The Court stated as follows:

> 'It is sufficient for us to say that within the framework of the military commander's duty to exercise his discretion reasonably, he must also take into account, amongst his considerations, the interests and rights of the local population, including the need to minimize the violation of its freedom of movement' (*id.* at pp. 755-756; see also *Dir Samet v. IDF Commander on the West Bank* [38], at para. 17).

The travel restrictions imposed by the military commander reduce the freedom of movement of the residents of the villages. The dispute between the parties concerns the severity of the violation of the petitioners' freedom of movement and, as a result, of other rights. A number of sub-tests have been established by case law for the purpose of examining the severity of the restriction of the freedom of movement of individuals, including the scope of the territory within which the restriction is imposed; the level of intensity of the restriction; the period of time throughout which the restriction is in force; and the nature of the interests that require travel for their attainment (*Municipality of Bethlehem v. State of Israel* [29], at p. 757). With regard to the intensity of the travel restriction, the Court said as follows:

> 'It is clear that the violation involved in a total negation of the freedom of movement is more serious than a violation caused by a partial restriction on the freedom of movement, and the lesser the extent of the restriction, the weaker the intensity of the violation. Thus, for example, it was held with regard to the intensity of the violation of freedom of movement, in the context of the closure of roads, that the closure of a road that is the only means of access cannot be compare to the closure of a road where there are alternative access routes nearby; the closure of a main traffic artery cannot be compared to the closure of a road inside a neighborhood; and the closure of a road that is tantamount to totally blocking access cannot be compared to a closure that results merely in a longer route and an inconvenience for the persons using the road; and the smaller the increase in time and convenience caused by the alternative

> route are, the lesser the magnitude of the violation of freedom of movement… Indeed, absolute preclusion of travel is, after all, not the same as delaying travel and subjecting it to inconvenience, and the lesser the extent of the inconvenience, the lesser the severity of the violation of the freedom of movement' (*id.*, at pp. 758-759).

What, then, is the violation of the freedom of movement that the petitioners are experiencing? The petitioners are absolutely barred from using Road 443. This prohibition has been in force for a number of years, and at the present time – as it seems from the respondents' response – there is no concrete intention of lifting it. By contrast, the respondents have repeatedly declared that movement along the Road by pedestrians is permitted. In light of these facts, the dispute between the parties focuses on the question of whether the alternative road system available to the Arab residents of the villages provides an adequate response to the closure of Road 443. According to the position adopted by the petitioners, being prevented from traveling on Road 443 is extremely prejudicial to their quality of life, from many aspects, as described above. As the petitioners argued, the closure of the Road has led to the villages being cut off from the city of Ramallah, and has caused residents of the villages to be cut off from their agricultural lands. As a result, they argued, additional rights are being violated, including the right to earn a living and to live with dignity, the right to education and to maintain contact with family members, and the right to health and to receive medical treatment.

The respondents did not dispute the fact that the travel restrictions have impinged upon the daily routine of the residents of the villages. According to the respondents, however, the alternative road system – together with the "fabric of life" roads and the arrangement for restricted travel – creates a reasonable alternative to travel along the Road. This being so, the harm done to the petitioners prior to the opening of the Beit Ur – Beituniya "fabric of life" road was negligible according to the respondents, and manifested itself in some delay in travel times. The respondents point out that comparing the situation that prevailed at that stage to the previous situation showed that the travel time to Ramallah for most residents of the villages did not increase very significantly (and that for residents of Beit Sira, it even decreased). They say that even at that stage, an economic and factual analysis showed that the petitioners' arguments concerning the harm caused by the closure of Road 443 were unsubstantiated. From the standpoint of the number of employment permits issued to residents of the villages, it was apparent that a considerable part of the population of the villages was employed in Israel

and within the bounds of the Israeli settlements in JSA. As opposed to the [petitioners'] arguments, the respondents believe that although Ramallah is the regional city for the residents of the villages, most of them are not employed there, and that the central locations for the livelihoods and occupations of residents of the villages have not changed significantly as a result of the changes in the travel arrangements on Road 443. They assert that economic damage sustained by the residents of the villages was identifiable, but it was not specific to them: deterioration in the economic situation, particularly with regard to the unemployment rate, has occurred throughout the whole JSA due to the security situation since 2000. In particular, the respondents note that not only can no trend of emigration by residents from the villages to Ramallah be identified, but a trend toward positive immigration to the villages from other areas within JSA has in fact been observed. They assert that the analysis of data on the number of schools, public transportation and its cost, the number of traffic accidents and the state of medical services, does not indicate significant differences between the petitioners' villages and other areas within JSA. It was further argued that there is no difficulty in accessing agricultural lands and that, in any event, because of the nature of Road 443, it can be crossed in the relevant sections by means of underground passageways only (except at its extremities, in the area of the Maccabim checkpoint or in the Beit Horon area). They claim that this will apply *a fortiori* after the opening of the Beit Ur – Beituniya "fabric of life" road.

34. To sum up the positions of the parties with regard to the third sub-test, we find that, according to the petitioners' position, the damage they sustain as a result of the travel restrictions is not acceptably proportional to the security benefit derived from them. They contend that it is not possible to justify the travel restrictions that were imposed, and the harm they cause, by the argument that this is the balance required to achieve security. In the petitioners' view, the ban on travel has led to continuous harm over a long period to a population of tens of thousands of people, causing severe disruptions to all aspects of their lives. They assert that even if the ban on travel enhances security relative to what could be achieved by alternative means, it is not in any way reasonable or proportional to the violation of human rights that it entails. The respondents, on the other hand, argue that the benefit derived from restricting the travel of Palestinian vehicles on Road 443 immeasurably exceeds the harm it has caused. The harm to the Palestinian residents resulting from the restriction on travel is extremely minor and consists primarily of a certain delay in travel times; on the other hand, the security benefit is extremely great. At the same time, once the Beit Ur – Beituniya "fabric of life" road is open, travel to Ramallah will be brief and rapid,

even compared to travel along Road 443 – a fact that must be taken into account.

In view of the extensive factual base provided by the parties, we find that at the time of filing of the petition, the travel restrictions have indeed significantly impaired the fabric of the villagers' lives. The closure of the Road – a major interurban road enabling rapid travel – to the residents of the villages, thereby requiring them to use the Village Route in order to reach Ramallah, has made their travel more difficult. The Village Route is narrow, parts of it are in disrepair, it passes through the villages, and there can be no dispute that its quality is significantly poorer than that of Road 443. However, as we have seen, the opening of the Beit Ur – Beituniya "fabric of life" road, which was subsequently announced by the respondents, has led to a real reduction of the damage to the quality of the Palestinian residents' lives. Indisputably, it is not a fast highway like Road 443, but a two-lane road of lower quality; from this point of view, it cannot be compared to Road 443. At the same time, it appears to be capable of providing the residents of the villages with direct access to the regional city.

35. In light of this conclusion, we will examine whether the universal ban on travel that was imposed on the Palestinian residents of the Area meets the third sub-test of proportionality. This court recently heard a petition by residents of the Israeli settlements in the Dolev-Talmonim bloc within the Area, located to the north of Road 443, for the building of access routes that would shorten the distance between those settlements and Jerusalem (HCJ 6379/07 *Committee of the Dolev Settlement v. IDF Commander in the Judaea and Samaria Area* [39]). The petitioners claimed that due to restrictions based on security reasons, they are forced to travel to Jerusalem via a longer route than before, which inconveniences their lives, imposes difficulties on their travel, and causes a disproportional violation to their basic rights. The response by the court (Justice A. Grunis) was as follows:

> 'First of all, we should recall that the security and political situation in recent years has required the introduction of various measures to restore order to life in the territories of Judaea and Samaria. These arrangements impose inconveniences on the day-to-day routine of all residents of the area. Thus, in recent years, the respondents have frequently imposed various restrictions on the travel of area residents, for reasons of security.... As I see it, the inconvenience caused to the petitioners by the travel restrictions applying to them represents an indirect and limited infringement of their rights. Thus, for example, the petitioners have at their disposal various travel

> alternatives which enable them to reach the city of Jerusalem. Even if these alternatives lengthen their journey, it cannot be said that the petitioners' have been denied their freedom of movement... Finally, even if I were to assume that the petitioners' basic rights have indeed been violated, examination of the considerations that underlie the decision indicates that their rights were violated for the sake of a worthy purpose and in a proportional manner' (*id*., para. 9).

Can this statement be applied, *mutatis mutandis*, to the matter before us as well, in light of the additional alternative now available to the petitioners? The answer to this question is derived from the exceptional circumstances before us: complete exclusion of the residents of the Area from a road that was intended to serve them, in favor of Israeli traffic that runs primarily between the coastal plain and Jerusalem. **Under these special circumstances**, the existence of an additional access alternative to Ramallah, by means of the "fabric of life" road that has now been laid, is not the be-all and end-all. As I see it, under those circumstances, the indiscriminate ban on travel that was imposed upon the Palestinian residents of the Area does not fulfill the third sub-test of proportionality. This is because sufficient weight was not ascribed to preserving the rights of those residents as "protected persons." We have already pointed out that the relevant segment of Road 443 was intended, according to the protocol of the plan under which it was built, to improve the vehicular connections between the villages and to increase the level of traffic safety; that the Road was intended, by definition, to safeguard the needs of the local population; and that lands were expropriated from residents of the Area for the purpose of widening the Road. We have also mentioned that under the rules of public international law, the power of expropriation by the military government can be exercised under domestic law and, within that framework, only if it is done for the benefit of the local population. The point is that in actual fact, as already explained, the Road is used for travel only by Israeli vehicles, primarily for the "internal" travel of vehicles in Israel between the center of the country and Jerusalem. We have stated that, under these circumstances, the military commander is not authorized to impose an absolute ban on travel by local residents. In any event, even if we assume, for the sake of discussion and in the respondents' favor, that the military commander was indeed authorized to impose such a ban, there is no escaping the conclusion that at the level of discretion, the all-embracing restriction of the freedom of movement of the Area residents and their absolute exclusion from Road 443 cannot be allowed to stand. Indeed, the consideration relating to the needs of the local population and assuring its

freedom of movement does not exist in a vacuum, and it must be balanced against the security needs. Freedom of movement may be restricted, as already mentioned, because of the security-military consideration and the need to preserve the personal security of the Israelis who use the Road. For this last purpose, it is possible to impose travel restrictions which also entail a security benefit. Nonetheless, an absolute ban on travel by Protected Persons is not the only way to achieve the security purpose. As customary on other roads throughout the Area, it is possible to impose travel restrictions that do not amount to an absolute prohibition (cf. *Dir Samet v. IDF Commander on the West Bank* [38], para. 27; we will discuss this below). It should be added that, as mentioned, aside from imposing travel restrictions, the respondents are adopting a series of measures that help considerably in maintaining order and security, and they have the ability to undertake additional measures that will further reduce the potential risk involved in travel by residents of the Area. An appropriate balance, as set forth above, means the attribution of suitable weight to all the considerations that the Area commander is required to take into account. I am not convinced that an all-embracing revocation of the protected persons' right to use the Road, under the concrete circumstances that we have discussed above, and especially when the Road is used primarily for "internal" travel within Israel, represents a proper balance between the security needs and the violation of individuals' rights. The additional security achieved by the comprehensive prohibition cannot offset the absolute negation of the protected persons' right to travel on the Road, which was planned to meet their needs and which was built on lands that were partially expropriated from them. President D. Beinisch's words in *Dir Samet v. IDF Commander on the West Bank* [38] apply, *mutatis mutandis*, to this matter as well:

> 'The security advantage that is obtained from closing the road in the particular manner is not reasonably proportional to the harm suffered by the local residents. Furthermore – and no less importantly – as we pointed out above, we are not convinced that other security measures, which would be capable of significantly reducing this harm, even if this might involve a certain degree of harm to the security component, have been sufficiently examined. In accordance with the approach that has been consistently adopted by this court, even if the security needs require adopting measures which are likely to harm the local population, every possible effort should be made so that the harm will be proportional' (*id.*, para. 34).

For this reason as well, I have found that the decision by the military commander to restrict entirely travel by Palestinian vehicles on Road 443 – which is anchored in the Travel Provisions – cannot stand.

36. In addition to the aforementioned, it should be noted that, as we explained, the consideration concerning the needs of the local population and assuring its freedom of movement does not exist in a vacuum, and that freedom of movement may be restricted, as mentioned, in view of the security-military consideration and the need to preserve the well-being of the Israelis living in the Israeli settlements in the Area and other Israelis who use the Road. On the basis of these last reasons, it is permissible to impose travel restrictions that entail a security advantage (along with the additional measures that the respondents are taking, as stated, in order to maintain order and security). In any event, nothing that we have said thus far constitutes a ruling to the effect that the military commander must enable the residents of the villages to have free and undisturbed access to Road 443. The military commander has provided us with a detailed and convincing record, based on data accumulated over a long period of time, that indicates a real risk posed by uncontrolled travel as stated. The military commander is entitled to take the measures necessary to maintain order and security, based on an updated factual report to be presented to him, provided that said measures fulfill the criteria laid down in the case law of this Court. Without establishing any hard and fast rules on the question of other travel arrangements that the military commander will be entitled to devise, we cannot rule out an arrangement whereby access to the Road by vehicles belonging to residents of the Area would be limited to a point or points to be determined by the military commander on the basis of security considerations, and would even be made contingent upon an appropriate security check. In this way, the risk of a shooting attack from within the vehicles would be reduced, since the vehicle would be carefully checked before entering the Road, to ensure that it contained no weapons. In the same way, the risk that the vehicles would continue into the territory of the State of Israel would also be prevented, because checkpoints staffed by the security forces exist on both sides of the road and prevent entry by unauthorized vehicles. The fate of the roadblocks that have been set up on the access roads to the villages would also be settled as part of the traffic arrangements to be determined. Aside from the aforementioned, I am not taking a position at this stage with regard to the future arrangement or its details.

Exercise of authority without written directives

37. As explained above, the closure of Road 443 to travel by Palestinian vehicles was implemented without any written authorizing document, but rather, by virtue of the general authorization in sec. 88 of

the Security Provisions Order. Only after the petition was filed was the existing situation anchored in the Travel Provisions. The respondents agree that after the travel restrictions along the Road had continued for some time, it was appropriate to anchor them in a signed, written order.

In view of the fact that the Travel Provisions were issued, and because the petition before us is a forward-looking petition, it has become superfluous to issue a ruling on the petitioners' argument that the military commander was not authorized to order the closure of the Road without a suitable written document. However, it should be stated, with an eye on the future, that this state of affairs gives rise to a real problem. The provisions of sec. 88 of the Security Provisions Order, which were cited above, authorize the military commander to order the closure of a road "by means of an order or by issuing directives or in any other manner." This indicates that the military commander has the authority to order the closure of a road even if no written authorizing document exists. However, this authority should properly be exercised only in cases where a need arises for the immediate closure of a road, when it is feared that security will otherwise be jeopardized. Even in such a case, if the closure is not for a brief and limited period of time, the directive should subsequently be anchored in a written order. In the case before us, this was not the situation. The Road has been closed to travel by Palestinian vehicles (albeit only partially) since 2000, but the Travel Provisions were issued only in 2007, a number of years later, and after the petition was filed. A similar question was brought before this Court in the context of the military commander's authority to order the closure of a land area, which is anchored in sec. 90 of the Security Order. The ruling in that case was as follows:

> 'The closure of the areas should be executed 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 detracts from the authority of the commander in the field to issue oral instructions for a closure of any area on a specific basis for a short and limited period in the event of unexpected circumstances which give rise to a concern of an immediate danger to security that cannot be dealt with by any other measures. But we should take care to ensure that the authority 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 in which it is required immediately. In principle, the closure of areas should be effected by means of an order, notice of which is given to whoever is affected by it,

> and the residents whose lands are closed to them should be given an opportunity to challenge its validity' (per [then] Justice D. Beinisch in *Morar v. IDF Commander in the Judaea and Samaria* [23], para. 21).

The logic of the statement above is also applicable, *mutatis mutandis*, to the matter before us. A course of action of this type is reconcilable with both the interests of the injured party and those of the respondents. In the absence of a signed order, a lack of clarity is liable to ensue, even among government bodies, with regard to the actual state of affairs. This is what happened in the case before us as well. As we have seen, even several years after travel on the Road was restricted, the representative of the legal advisor for the Judaea and Samaria Area was not aware of it. Accordingly, his reply to the petitioners, who challenged the closure of the Road, was incorrect. This is a serious mishap and, presumably, the responsible authorities have reached the required conclusions.

The Beituniya crossing

38. As explained both in the affidavits of the respondents and in the statement made before us in the courtroom by the then-commander of the JS&A Division, Brigadier General Noam Tibbon, the Beituniya crossing, which presently operates as a "back-to-back" crossing for the transfer of goods between Israel and JSA, is located at a point that is dominated by the houses of the nearby town and threatened from a security standpoint. This location makes it a preferred target for attempted attacks by terrorists. The shooting incidents, as well as other events such as the throwing of stones and improvised incendiary devices and the burning of tires within and adjacent to the crossing, were specified in the affidavit of the respondents. Expanding the crossing in such a way as to enable large-scale security checks and the passage of Palestinian vehicles and pedestrians on a permanent basis would lead to a significant increase in the land area of the crossing and the personnel required to staff it. This would create an additional point of friction, which would be vulnerable to attacks by terrorists. This determination is in the nature of a clear security interest, which falls within the discretion of the military commander. According to the criteria for judicial review in this context, which we discussed above, we were not shown cause for intervening in this decision by the military commander and for ruling that a change be made in the manner of operation of the Beituniya crossing. Moreover, opening the Beituniya crossing, as requested, would mean opening another crossing point in the security fence in the areas surrounding Jerusalem. In another petition, which argued that an additional crossing point should be opened in the security fence, the Court ruled as follows:

> ‘The petitioners argue that there is a means that will do less harm to the quality of life and which is capable of achieving the security purpose, provided that the respondents leave the Bir Naballah – a-Ram Road open to travel and set up security checkpoints along it. This would enable residents of the region to travel quickly to a-Ram and Jerusalem, and would greatly reduce the harm to the lives of residents of the Area. At the same time, it would not compromise the security interests, because passage would only be possible through the security checkpoints. We cannot accept this argument. The respondents’ position is that there is a security interest in concentrating the passage to Israel at the Qalandiya crossing. Each additional crossing point increases the risk involved in the infiltration of terrorists into Israel and constitutes a point of friction that increases the risk to the security forces controlling the crossing point. This position by the military commander, who is experienced in security considerations, is acceptable to us. Under these circumstances, it cannot be said that there is a means that will do less harm while achieving the security purpose’ (*Bir Naballah Local Council v. Government of Israe*l [6], at para. 44).

These words are also applicable, *mutatis mutandis*, to the matter before us.

Conclusion

39. We have reached the conclusion that the travel restrictions currently imposed by the respondents, which amount to an absolute ban on travel on the Road by protected persons, cannot stand in their present format, due to both lack of authority and disproportionality. Accordingly, we are transforming the order *nisi* into an absolute order, in the sense that we rule that the Travel Provisions, as well as the decision by the military commander to totally prohibit travel by the residents of the villages on Road 443, must be set aside. We have not found cause to intervene in the decision by the military commander and to require the respondents to change the manner of operation of the Beituniya crossing, nor to intervene in his determination with regard to the risk posed by uncontrolled travel on the Road. Needless to say, we do not intend to delineate the future security arrangements to be taken by the respondents. This decision is within the military commander’s authority, and in any event, we were not presented with a sufficient base regarding the question of the legality of other alternate arrangements. The military commander is entitled to adopt the requisite measures for maintaining order and security, provided that they comply with the criteria established in our

case law. In order to enable the military commander to formulate an alternative security solution capable of providing protection to the Israeli residents who use the Road (cf. *Dir Samet v. IDF Commander on the West Bank* [38], at para. 35), we rule that our judgment will enter into force five months from today.

In light of the conclusion that we have reached, we see no need to address additional arguments that were raised in the petition.

Respondents nos. 1 – 3 will bear the cost of the petitioners' legal fees, in the total amount of NIS 20,000.

President D. Beinisch:

1. I concur with my colleague, Justice U. Vogelman, and with the reasoning in his judgment with regard to the military commander's lack of authority for total closure of Road 443 to travel by Palestinians under the existing circumstances. Furthermore, I accept the conclusion that the closure of the Road to the Palestinian residents, in the manner in which it is implemented, is not proportional. Like my colleague, I accept the fact that the military commander's considerations with regard to the closure of the Road were clearly security-related, to ensure the security of travelers on the Road. In light of the situation that was created, however, it is the gravity of the outcome, and not the sincerity of the considerations, that must tip the scales. Justice Vogelman's judgment is comprehensive and elucidates all the considerations that led to his conclusion. Nonetheless, I would like to comment briefly on the argument raised by the petitioners in the petition before us, and in additional petitions as well – to the effect that in situations in which segregation of travel between Israeli civilians and Palestinian residents is in force on the roads in the Area, that segregation constitutes grave discrimination on racist and nationalist grounds – and I will comment on the petitioners' use of the word "apartheid" in this context.

2. In the unstable security situation prevailing on the roads in the Area, especially since the outbreak of the Second Intifada in 2000, the military commander bears the extremely heavy responsibility of safeguarding the security of travelers on the roads, in the face of the massive recourse by Palestinian terrorist organizations to various means of terrorism, including shooting at cars traveling on the roads, throwing improvised incendiary devices, and even car bombs. Unfortunately, to date, many have lost their lives while seeking to make their way on the roads in the Area as a result of such terrorist incidents. The methods of armed struggle used by the terrorist organizations have resulted in the need to adopt effective security measures in order to prevent harm to

passers-by who are not involved in the terrorist activity or the belligerency, but are merely seeking to use the roads.

3. We have already ruled, on many occasions, that freedom of movement is one of our basic freedoms, and that all possible efforts must be made to uphold it, even in the territories under belligerent occupation by the State of Israel (see e.g. *Dir Samet v. IDF Commander on the West Bank* [38]; *Municipality of Bethlehem v. State of Israel* [29]). This point was discussed at length by my colleague, Justice Vogelman. However, protecting the freedom of movement of various population groups at times requires certain restrictions, the purpose of which is to contend with threats to freedom of movement and terrorist attacks against travelers on the roads. Against this background, the military commander saw fit to adopt solutions that involve a certain separation between Israelis and Palestinians, for the purpose of protecting travelers along the roads and to enable the various population groups to exercise their freedom of movement safely. As a general rule, these measures were adopted within the framework of the military commander's authority and duty of safeguarding security and public order in the Area; moreover, they are part of the security concept adopted by the military commander, under circumstances in which he believed that shared travel on the Road entailed a potential for clashes and real risk to human lives. There is no unequivocal answer to the question of whether a security measure involving the segregation of travel on certain roads, for security reasons, is legal. This is a question that must be examined on an individual basis in each case, considering the entire set of circumstances of the case, in accordance with the individual purpose and the degree of harm caused by the travel restrictions.

4. A number of petitions have already been brought before us, some of them filed by Palestinian residents and others by Israeli citizens, in which the petitioners claimed discrimination, due to the blockage of certain roads from use and, as a result, the inconvenience of lengthening their journey to their destinations. In *Dir Samet v. IDF Commander on the West Bank* [38], we heard a petition filed by residents of Palestinian villages, who, for security reasons, were barred from using one of the roads in the Area which runs near their place of residence, leaving it open for travel to Israeli citizens only. We granted the petition and instructed the military commander to find a different security solution that would cause less harm to the Palestinian residents' freedom of movement and the quality of their lives. We found that closing the road had led to significant violation of the human rights of the local Palestinian residents and their ability to maintain a normal daily routine. On the other hand, in *Committee of the Dolev Settlement v. IDF Commander in the Judaea and*

Samaria Area [39], this Court upheld the decision by the military commander to enable use of the Beit Ur – Beituniya Road, which connects the Palestinian villages in the Area and the city of Ramallah, by the Palestinian population alone. It did so after determining that the road in question had been built as a "fabric of life" route and as part of the set of arrangements for the security fence, to enable free travel for the Palestinian population in the Area and to reduce the harm caused to that group as a result of the security arrangements on the roads in the Area.

5. Despite our understanding of the security needs, the use of security measures of this type, which create a total segregation between different population groups in the use of roads and prevent an entire population group from using the Road, gives rise to a sense of inequality and even the association of improper motives. The result of the exclusion of a certain population group from the use of a public resource is extremely grave. Accordingly, the military commander must do everything possible to minimize situations of this type and to prevent the severe harm and the sense of discrimination that accompanies it.

6. Even if we take into account the fact that absolute segregation of the population groups traveling on the roads is an extreme and undesirable outcome, we must be careful to refrain from definitions that ascribe a connotation of segregation, based on the improper foundations of racist and ethnic discrimination, to the security means enacted for the purpose of protecting travelers on the roads. The comparison drawn by the petitioners between the use of separate roads for security reasons and the apartheid policy and accompanying actions formerly implemented in South Africa, is not a worthy one. The policy of apartheid constituted an especially grave crime and runs counter to the basic principles of Israeli law, international human rights law, and the provisions of international criminal law. It was a policy of racist segregation and discrimination on the basis of race and ethnic origin, founded on a series of discriminatory practices, the purpose of which was to establish the superiority of members of a certain race and to oppress members of other races. The great distance between the security measures practiced by the State of Israel for the purpose of protection against terrorist offensives and the reprehensible practices of the apartheid policy makes it essential to refrain from any comparison with, or use of, the latter grave expression. Not every distinction between persons, under all circumstances, necessarily constitutes improper discrimination, and not every improper discrimination is apartheid. It seems that the very use of the expression "apartheid" actually detracts from the extreme severity of the crime in question – a crime that the entire international community joined forces to extirpate, and which all of us condemn. Accordingly, the comparison

between preventing Palestinian residents from traveling along Road 443 and the crime of apartheid is so extreme and disproportionate that it should never have been made.

7. As stated above, the ban on travel by Palestinians on Road 443, in the manner in which it has existed for many years, is improper due to lack of authority, as discussed extensively by my colleague, Justice Vogelman. Road 443 is used as a road that connects two major areas of the State of Israel, and this has become its principal purpose today. The outcome is that a road located in an area under "belligerent occupation" is used exclusively for the purposes of the occupying state, whereas the protected persons residing in that area are unable to use the very same road. This outcome is incompatible with the laws of belligerent occupation that apply to the Area, and the creation of a "service road" of this type – a road intended for the purposes of the occupying state – is not within the authority of the military commander. Accordingly, even if the decision is based on relevant motives, it is tainted by the fact that the military commander exceeded his authority and, for that reason, it must be set aside. In any event, as described in my colleague's opinion, the across-the-board closure of the Road to Palestinian travel is not proportional, and, for this reason too, it cannot stand.

8. In conclusion, I would like to emphasize that wherever possible, all efforts should be made to ensure the protection of travelers on the roads in the Area, while at the same time finding means of protection that cause less harm to the local population, which is a protected population. The military commander must refrain, insofar as possible, from adopting a measure as extreme as absolute exclusion of the protected persons from a specific road, which severely affects an entire population group and disrupts the order and the quality of their lives. From this aspect, as we have said, the legality of the security measures adopted will always be examined in accordance with the extent to which they harm the protected persons and the balance of all of the relevant rights and interests. Therefore, I concur my colleague in the conclusion that the travel restrictions which are currently imposed on Road 443 by the respondents cannot remain in their present format and must be set aside.

9. After having presented my position above, I read the opinion of my colleague, Justice E. Levy. It appears that the discrepancy between our positions is not great. My colleague is of the opinion that the military commander's decision to close the Road to travel by Palestinians was within his authority *ab initio*, and that the authority of the military commander has not diminished to this day. I, on the other hand, concur with the opinion of Justice Vogelman, whereby the authority in question can no longer stand at this time, considering the circumstances that have

arisen, the present purpose for which the Road is used, the duration of time over which the decision on across-the-board closure has remained in force, and that the decision has metamorphosed from a temporary and limited security measure into a permanent measure. In any event, even Justice Levy agrees that the measure that was adopted – the across-the-board closure of the Road to travel by Palestinians – is not proportional today. In this regard, all the members of the bench agree that the total closure of the Road to travel by Palestinians cannot be allowed to continue, and that an alternative solution for ensuring the security of the travelers on the Road must be found.

As for the relief that is required by this conclusion, as stated above, there is no dispute between us regarding the fact that the across-the-board closure of the Road to travel by Palestinians cannot be allowed to continue, and that the Respondents must formulate another, alternative solution. Nonetheless, like my colleague, Justice Vogelman, I accept the position that the examination of the proper and proportional measures for ensuring the freedom of movement along the Road and the security of travelers should not be left to the discretion of the respondents, without issuing an absolute order. Accordingly, I concur in the outcome reached by Justice Vogelman, whereby an absolute order will be issued pursuant to this judgment.

Justice E.E. Levy

1. I am compelled to disagree with some of the conclusions drawn by my colleague, Justice U. Vogelman and, accordingly, with the outcome at which he arrived. I believe that we are not required to issue an absolute order in this petition, because the respondents themselves are of the opinion that it is necessary to implement a more proportional solution than that which prevails on the Road today. The only question, as I see it, is the form that this solution should take and, in this regard, there is reason to conclude that the parties are capable of achieving agreement on its components. Five months, in any event, do not constitute a reasonable period of time for making the preparations required for implementing what is required according to my colleague's judgment, and the outcome might be fraught with danger.

2. Among his considerations, my colleague states that as he sees it, the military commander exceeded his authority by issuing instructions that transformed the road in question, for more than a limited period of time and not as a result of special security circumstances, into an "internal Israeli road," intended solely to create an alternative for access by Israelis from the coastal plain to Jerusalem. As such, as my colleague sees it, the Road serves Israeli interests, which it is not the military

commander's duty to promote. It seems that in my colleague's view – and this is the way I read his conclusions – a "great degree" of disproportionality is tantamount to exceeding of authority. I have difficulty accepting this legal construction. I believe that before we can discuss the question of proportionality, our starting point must be that the administrative action was not "caught in the net" of the fundamental cause of exceeding authority. This, as I see it, is the state of affairs in the case before us.

3. The principal importance of Road 443 lies in it being a major access road to the large cities around it – Jerusalem and Modi'in, al-Bireh and Ramallah. Its characteristics today are suited to an interurban road, and over the years, the traffic network that accompanies it has been planned in such a way as to allow the Road to provide convenient access to major traffic arteries in the heart of those cities. In the past, the advantages of using the Road were shared by Israelis and Palestinians. Palestinian vehicles traveled on the Road for many years. The Oslo Agreements defined Road 443 as a major part of the northern "safe passage" for Palestinians between the West Bank and the Gaza Strip. The Beituniya crossing, the closure of which the Petitioners protest in this petition, was established as a central liaison point between the Israelis and the Palestinians. The users of the Road did not experience either "apartheid" or segregation, but rather, cooperation.

4. Admittedly, in recent years, the importance of the Road as an alternative access route to Jerusalem has increased continually. Resources were invested in transforming it into a dual-carriage highway. Many Israelis preferred it to other roads when traveling to the capital. Recently, an experiment was announced, in which the Road would be used to relieve the congestion caused by heavy vehicles on Highway No. 1. This, of course, is significant from a variety of standpoints – economic, planning-related, and political as well. Nonetheless, it was not the military commander who sought to promote objectives of this type. Those who decided on the development of the Road and the routes connecting to it were the government, planning entities and traffic policymakers. Those (as stated above) who preferred travel on the Road, rather than its alternatives, were the drivers. The task of regulating traffic on the Road was assigned to the military commander, who had but a single mission – to safeguard public order and the security of those using the Road. This purpose of his actions (and it is this purpose that delimits his authority) did not essentially change even when the task in question became especially arduous, when Palestinians found the Road to be useful from another standpoint as well – as an appropriate arena for the perpetration of extreme terrorist attacks against Israelis.

Although not many are aware of stone-throwing and the use of improvised incendiary devices, actions that continue on the Road on a routine basis to this day, the shootings and other terrorist attacks that have already cost many lives cannot be ignored. In a series of grave incidents, innocent civilians met their deaths on the Road and the routes connecting to it, merely because, in traveling on those routes, they made convenient targets for Palestinian terrorists. This was the fate of the late Eliyahu Cohen, a resident of Modi'in, who was murdered in a shooting attack near the settlement of Giv'at Zeev on 21 December 2000; the late Ronen Landau, a youth who was shot to death on 26 July 2001 near Old Giv'on; the three members of the Ben Shalom-Sueri families, who were shot along with the family's two toddlers at the gas station near Beit Horon on 25 August 2001; the late Yoela Chen, an Israeli woman who was shot and killed in the Giv'at Zeev gas station on 15 January 2002; and the late Marwan Shweiki, a Palestinian resident of Jerusalem, who was killed on 11 June 2006 when terrorists fired, from a stakeout, at his car, which had Israeli license plates. And because, as a rule, we insist on absolute integrity from those who lay their supplications before this court, it is not superfluous to mention that Palestinian villages scattered along the Road and the routes connecting to it – including those whose residents are now expressing their objection to the barrier that stands between them and the Road – have on more than one occasion served as a point of departure or a place of refuge for Palestinian terrorists, as is well known.

In response to this real threat, the security forces have had to adopt various protective measures: constructing barriers and observation towers, patrolling the Area on horseback, removing piles of earth that provided hiding places for terrorist attackers, and installing street lights to facilitate travel during the hours of darkness. At a certain stage, not many years ago, the military commander was even forced to deploy tanks along the shoulders of the Road, as if it ran through an actual combat zone. And there may be those who remember that the reason why the Road no longer runs through the Palestinian villages dates back to the first Intifada, which also did not spare the users of the Road, leading to the decision to change its course in 1988.

In his efforts to ensure the well-being of the travelers on the Road, in light of the terrorist attacks occurring along it, the characteristics of which were discussed above, and in view of the rampant wave of terrorism throughout the West Bank early in this decade, the military commander saw no other way than to close the Road to Palestinian residents of the surrounding villages. In so doing, as I see it, he acted within his authority, and as he was required to do by his position at the time. That authority, which has been recognized by this court as a basis

for the closure of routes to travel by Israelis only (*Committee of the Dolev Settlement v. IDF Commander in the Judaea and Samaria Area* [39]), served the military commander in his decision.

5. A different question, and one that is shaped by the circumstances prevailing at the time when we must rule on it, is whether this measure – which was taken, as stated, within the military commander's authority – is compatible with the principle of proportionality, which is invoked to examine all administrative actions. Proportionality, as we know, comprises many and varied strata, and calls for a broad-based examination of the administrative action in light of the entire set of interests, principles and values involved. Its implementation always depends on circumstances, and the conclusion derived from them cannot stand as a frozen monolith against changing times. A security measure that is perceived as proportional at times when terrorism runs rampant and unrestrained is likely to be considered overly stringent when relative calm prevails. Something that was intended as a holding action, and that is accordingly likely to justify a forceful, though temporary, operation, may be perceived as exaggerated when it transpires that it has become an established, permanent arrangement. And although it is never possible, before examining the entire set of circumstances, to know what outcome will be reached through the application of the tests of proportionality, it may be said that as a rule, the adoption of an across-the-board measure is "suspect" from the constitutional standpoint. Absolute measures require even more than the usual degree of well-founded substantiation, which is capable of persuading [the court] of the justification for taking them. This is because of the inherent contradiction between an across-the-board action and the protection of rights (*Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* [4], per Justice A. Procaccia, at para. 21).

6. The first matter requiring examination in the case before us is the argument that the measure taken is not capable of achieving the worthy objective of safeguarding security and public order. How can it safeguard security? After all, the dissatisfaction felt by Palestinians, following their deprivation of the freedom to travel on the Road, will almost certainly be translated into additional hostile actions. And how can it safeguard public order? After all, public order also includes freedom of movement for the residents of the Area and their right to conduct their lives without hindrance. A response to these arguments already appears in my statements above, where I mentioned the origin of the terrorist attacks along the Road. True, we must not put the cart before the horse: the terrorist attacks came first, and the closure of the Road came later. And if the closure of the Road entails inconvenience to daily life, that

inconvenience is utterly dwarfed by the lives lost. The measures that were taken therefore maintain a rational connection with the purpose sought.

I also accept the position taken by my colleague, Justice Vogelman, with regard to the outcome of the examination in the next stage – the stage that seeks a less harmful measure than that which was actually taken. I believe that the conclusion reached by my colleague, who found that such a measure exists – with which I agree – must constitute the conclusion of the examination process. The principal focus of the case before us lies in the second test of proportionality, and there is no advantage to be gained by addressing ourselves to the question of proportionality in the narrow sense, with the controversial ethical decisions that it entails.

As times change, the range of measures relevant to achieving the purpose of the administrative action under examination also changes. The total blockage of a traffic artery may be proportional when the security risk reflected for travelers thereon or for the security forces that protect them is extremely high. Such was the risk involved in traveling on Road 443 until recent years. It is doubtful whether anyone disputes the fact that the measure in question is less proportional today. Accordingly, a proper balance between security needs and the needs of the Palestinian population, which depends upon the Road, necessitates the adoption of less harmful alternatives. Admittedly, "insofar as a change occurs in the situation on the ground, it may be assumed that the respondents will reconsider the possibility of allowing the petitioners to make use of the road in question" (Justice A. Grunis in the above-cited *Committee of the Dolev Settlement v. IDF Commander in the Judaea and Samaria Area* [39], at para. 11).

7. It is clear, from the response of the respondents that they themselves do not dispute the justification for taking a measure at this time that does not amount to total closure of the Road to Palestinians. This is illustrated by the arrangement they proposed, which involved the issuance of permits for travel along the Road to approximately 80 Palestinian vehicles. In its existing format, this arrangement obviously cannot stand, because its parameters are so limited that it does not materially change the status quo. However, the formulation of this arrangement constitutes an expression in principle of the military commander's recognition of his duty toward the Palestinian residents in the area under his control. This being so, we do not need to issue an absolute order. What concerns us are the details of the arrangement, and it would be better for us to leave them to the respondents to formulate, while allotting a period of time which will enable both the formulation of

an appropriate solution and its implementation on the ground. This is how I would rule in this petition.

Held as per the opinion of Justice U. Vogelman.

12 Tevet 5770
29 December 2009

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