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At the Supreme Court Sitting as the High Court of Justice

HCI 3969/06

Before:

**Honorable President D. Beinisch
Honorable Deputy President A. Rivlin
Honorable Justice A. Procaccia**

The Petitioners:

1. **Head of Deir Samit Village Council, Muhammad ‘Abed Mahmoud al-Harub**
2. **Head of Local Council of the Villages of Dura al-Khalil, ‘Issa Abu Sharar**
3. **E.D. of Beit ‘Awwa municipality, Muhammad Ahmad Isma’il Sweiti**
4. **Badawi Muhammad Walid Muhammad**
5. **The Association for Civil Rights in Israel**

v.

The Respondent:

1. **Commander of the IDF Forces in the West Bank**
2. **Commander of the Hebron Brigade**

Opposition to *Order Nisi*

Session date:

8 Av 5767 (23.07.2007)

Representing the Petitioners:

Att. Limor Yehuda; Att. Dan Yakir

Representing the Respondent:

Att. Gilad Shirman

Judgment

President D. Beinisch

The matter of the petition at bar concerns the travel restrictions placed on Palestinian residents of Judea and Samaria (hereinafter: the Area) in the vicinity of the Beit ‘Awwa intersection. The restrictions prevent Palestinian pedestrian and vehicular traffic on the segment of road 3265 which

connects the Judea and Samaria Area borderline (hereinafter: the Green Line) to the west and the Palestinian village of Fuqeiqis to the east. The road crosses the Beit 'Awwa intersection.

Factual background and chain of events in the petition

1. Petitioners 1- 3 are the head of the Deir Samit village council, the head of the Dura local council and the executive director of the Beit 'Awwa municipality (hereinafter: the petitioners). Petitioner 4 is the father of the Jadallah family, a Palestinian family living some two kilometers east of the Beit 'Awwa intersection. Petitioner 5 is the Association for Civil Rights in Israel. According to the petitioners, some 45,000 residents live in the Palestinian communities under their jurisdiction. Two major roads serve the residents of these villages: road 354 is the major length road (north-south) in this area. It links the Palestinian villages to the north of the Beit 'Awwa intersection with the villages to the south thereof. The Beit 'Awwa intersection is located in the middle of this road, near the town of Beit 'Awwa. Road 3265 is the breadth road (east-west) which crosses the Beit 'Awwa intersection and connects the area's residents to the urban centers: Hebron and Dura which are located to the north-east, Adh Dhahiriya to the south-east and Beit 'Awwa to the west. The Jadallah family, which numbers a few dozen individuals, lives at the eastern edge of the segment of road which is blocked to Palestinian traffic. For the Jadallah family, this is the only access route home. These two roads served the population of the area for many years as major and vital access routes connecting between the smaller communities, most of which lack basic services, and the urban centers which provide them with various civil services such as health, education and religious services.
2. The Israeli community of Negohot is located some four kilometers east of the Beit 'Awwa intersection, on the breadth road. The community was established in 1982 as an outpost and was made civilian in 1998, following a government resolution to build a community in a nearby location. However, building plans which were submitted in regards to the aforesaid settlement location were not approved by the government and the community was established without approved building plans. About a kilometer west of Negohot there is an illegal outpost, "Mitzpeh Lachish" (or, "Negohot West"), which was established in 2002. This outpost was established without approval and lacks legal planning. Residents of the two communities, Negohot and Mitzpeh Lachis together, currently number some 150. As indicated by the state's response, following security threats and various incidents of road bombs, stone throwing, terrorist attacks and attempted terrorist attacks carried out in the Beit 'Awwa area, the military prohibited Palestinian movement at the Beit 'Awwa intersection. On the breadth road, Palestinian movement was prohibited on the segment between the Green Line and the village of Fuqeiqis via the installation of gates on either side of the Beit 'Awwa intersection and an additional gate east of the Negohot community, between it and Fuqeiqis. Palestinian movement was also prohibited on the breadth road in the Beit 'Awwa intersection both to the north and south, with a military observation post being erected in the northern part of the blocked area.
3. In the petition, submitted on May 11, 2006, the petitioners made arguments against both restrictions – the one preventing passage of Palestinians on foot and by car on the length road from the north and the south, and the restriction preventing Palestinian movement on the breadth road from the east and west on the segment between the Green Line and the village of Fuqeiqis. On August 6, 2006, we held the first hearing in the petition, following which the respondents were requested to submit a supplementary response. Following submission of the response, we held a further hearing in the petition, on February 18, 2007. In their written response and in their oral arguments, the respondents noted that the travel restrictions on the length road had been cancelled and that there was currently no restriction on movement of Palestinians in the Beit 'Awwa intersection to the south and north. On the other hand, the petitioners argued that certain restrictions on Palestinian movement on the length road, from the north and south, still existed. A few days later, on February 21, 2007, we ordered the issuance of an *order nisi* in the petition instructing the respondents to appear and show cause why the

military forces should not be prohibited from preventing Palestinian movement on the breadth road at the Beit 'Awwa intersection. On April 22, 2007, an affidavit of response was submitted on behalf of the respondents, in which it was argued, *inter alia*, that the prohibition on Palestinian movement on the length road had been cancelled. As per the affidavit of response, there is currently no general restriction on the movement of Palestinians on the length road. It was also noted that subsequent to the date of the hearing, three inspections of the intersection were held. These revealed that the security forces manning the location allow Palestinian movement through the intersection from the north and the south at all hours. In any case, it was clarified that the clear instruction conveyed by the commander of the IDF forces in this area was to allow passage of Palestinians through the Beit 'Awwa intersection both on foot and by car. In the brief submitted by the petitioners it was argued that the travel restrictions on the length road remained intact even after the respondents' declaration before the court regarding their cancellation. However, it was made clear that there are currently no more travel restrictions on the length road. Therefore, this remedy sought in the petition has been made redundant and there is no longer a need to review the legality of this travel restriction.

As for the restrictions on movement on the breadth road, the respondents' affidavit of response notes that it had been decided to allow the Jadallah family to travel on this road without restriction and the residents of Fuqeiqs to travel on the road three times a day, at times to be determined by the commander of the IDF forces in this area, subject to the former contacting the Coordination Office for the purpose of obtaining the appropriate permits.

4. After the submission of the affidavit of response on behalf of the respondents we held a hearing in the petition, on July 23, 2007. Upon hearing parties' arguments, we suggested council for the state bring the state's position on this issue to the defense minister for determination. On January 15, 2008, the respondents notified that the defense minister had examined the issue and saw fit to leave the closure of the breadth road to Palestinian movement intact, subject to the arrangement being expanded such that the residents of Fuqeiqs would be permitted to travel on the road, following issuance of appropriate permits, six, rather than three times a day, as determined previously. It was also conveyed that "the status of the Negohot community as an illegal outpost was presented to the defense minister prior to him making the decision", yet it was found that since the communities were not considered high priority for evacuation, this fact was insufficient to alter the respondents' position. In view of these developments, we shall address only the restrictions on Palestinian movement on the breadth road, in accordance to the current arrangement dated January 15, 2008, formulated by the respondents and detailed above.

The petitioner's arguments

5. The petitioner's arguments are divided into a number of levels. On the level of power, the petitioners argue that the decision of the military commander to impose travel restrictions was flawed as these were not anchored in an order and that they were, in fact, imposed without legal power or basis.

On the level of discretion in exercising the power, the petitioners argue that the rules of international humanitarian law impose a duty on the military commander to perform a balance between the benefit of the local population and the legitimate security interests of the occupying power. They argue that these interests do not include protection of settlements which are, it is argued, prohibited under international law; all the more so in our case, where the communities at issue are unapproved outposts which were established in contravention of Israeli domestic law also.

In this context, the petitioners further argue that in fact, it was not security considerations which formed the basis of the decision to close the road to Palestinian movement, but rather extraneous considerations of expanding the Jewish communities and their taking over Palestinian lands adjacent to the breadth road. According to the petitioners, the list of security incidents which posed danger to

passengers on the road which is the subject matter of the petition in recent years, as provided by the respondents, indicates that in the area of the road which is the subject matter of the petition only a few, isolated security incidents occurred, long ago, and that in these circumstances, the road which is the subject matter of this petition poses no special risk compared to other roads in Judea and Samaria. They argue that this state of affairs indicates that the decision to close the road to Palestinian movement was based on extraneous motives, to prevent Palestinian farmers from working their lands adjacent to the road in a manner allowing the Israeli settlers to take over these lands and work them.

It was further argued, on the level of the exercise of power, that the closure of a public road in the Judea and Samaria Area to Palestinian traffic while dedicating it to movement by the Jewish residents of the Israeli communities, expropriates public property from the Palestinian residents of the Area and constitutes wrongful discrimination on the basis of nationality. This, as the travel restriction on the road applies to all Palestinians, regardless of whether they pose an individual security risk, whereas it does not apply to Israelis who may pose a risk to the Palestinian population.

6. Finally, the petitioners argue that the measure of closing the road to Palestinian movement also does not meet the subtests of proportionality and for this reason too, its revocation must be ordered. They argue that in the two Jewish communities together, there are no more than 150 residents, whereas the road closure violates the basic human rights of the Palestinian residents of the area who number tens of thousands, and that for thousands among them, the violation is extremely severe. The petitioners argue in this context, *inter alia*, that according to the security opinion of Brigadier General (reserves) Ilan Paz, which was annexed to their petition, the travel restrictions on the road may actually increase the security risk to those travelling on it, while more effective alternatives which cause less harm to the local population exist. Among these alternatives, the petitioners note the possibility of placing manned posts on the sides of the road, using observation posts and patrols, bullet proofing the cars of the Israeli residents or providing them with military escorts etc. The petitioners stress that for the residents of Fuqeiqis, Khirbet Salama and Khursa, which lack basic services such as health, education and religious services as well as water infrastructure and which are entirely dependent on the large urban communities of the area, the closure of the road constitutes severe and disproportionate harm. This, particularly in view of the fact that water shipping costs have doubled and public transportation to the villages has stopped.

The respondents' arguments

7. In regards to petitioners' arguments that the imposition of the travel restrictions was made *ultra vires*, as it was not properly anchored in an order, the respondents argue that Section 88 of the Order regarding Defense Regulations (Judea and Samaria) (No. 378) 5730-1970 (hereinafter: the Order regarding Defense Regulations) allows the imposition of travel restrictions without a written order but rather by "other" publication. In our case, they maintain that the placing of the roadblocks on the ground and their enforcement by the military forces suffices. In any event, the respondents notified that on February 13, 2007, the military commander signed an order anchoring the travel restrictions on the road which is the subject matter of the petition, such that this argument is no longer relevant.
8. In regards to the level of discretion, the respondents argue that the decision on the travel restrictions on the breadth road was made based on clearly security related considerations and on the security discretion of the military commander. They argue that this is a relatively isolated area without significant military presence and that dozens of security incidents occurred there in the past. Thus, the respondents noted that on December 14, 2000, shots were fired at an Israeli vehicle at the Beit 'Awwa intersection resulting in the killing of the vehicle's driver; on February 4, 2002 a wire explosive device was operated against an Israeli vehicle moving on the road as a result of which two civilians were injured and on September 28, 2005, an explosive device was operated but fortunately there were no casualties. Additionally, the respondents' arguments listed that on September 26, 2003, the

Negohot community was breached and during the incident two of the community's residents were killed and two others injured. As a result of these security risks, it was argued, security officials decided on a separation between Palestinian and Israeli movement on the breadth road such that Palestinian movement was prohibited on the breadth road between the Negohot community (and the adjacent Palestinian village of Fuqeiqis) and Israel, while Palestinian traffic is directed to alternative roads. They argue that this travel restriction mainly harms residents of Fuqeiqis wishing to travel west toward Beit 'Awwa and the Jadallah family, and that therefore, it was decided to allow the residents of Fuqeiqis to use the breadth road six times a day, subject to the issuance of permits, as detailed above, whereas the Jadallah family are permitted to use the road at all times.

9. In regards to the petitioners' claim that closing the road to Palestinian movement and allowing movement to Israelis only constitutes wrongful discrimination on the basis of nationality and ethnicity, the respondents argue that the distinction between the population groups relevant to movement on the road stems from security reasons alone. On this issue, the state argues that it is not wrongful discrimination, but rather a legitimate distinction based on a relevant difference between the two population groups. This difference arises from the existence of a security threat against the Israelis who use the road as a result of attempts by Palestinian terrorists to carry out attacks against them. In support of this argument, the petitioners note that there are roads in the Judea and Samaria Area which were closed to Israeli movement whereas Palestinian movement on them was permitted.

In regards to petitioners' argument that the decision on the closure of the road to Palestinian traffic does not meet the subtests of proportionality owing to its harm to fundamental rights of the local population, the respondents claim that there are alternative roads which the Palestinian residents may use. These do extend the trip by about twenty minutes, but the harm caused as a result of this delay is not great. It was also argued that the residents of Fuqeiqis and the Jadallah family, who suffer greater harm, are entitled to permits to use the road – the Jadallah family may freely travel on it, while the movement of residents of Fuqeiqis is permitted, subject to the issuance of appropriate permits, six times a day. Additionally, the respondents note that Palestinian movement on the road is made possible for humanitarian reasons subject to prior coordination and that movement of farmers wishing to reach their plots is also made possible. Thus, the respondents claim, in the case at hand, the balance that has been struck is appropriate, reasonable and proportional.

Review

The normative foundation

10. The premise is that Israel holds the Judea and Samaria Area under belligerent occupation (see for example: [HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel](#), IsrSC 58(5), 807 (hereinafter: the Beit Sourik case); [HCJ 393/82 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in the Area of Judea and Samaria](#) - Judgment (hereinafter: the Iscan case)). This Area, in which the area which is the subject matter of this petition is included, is under a military administration headed by a military commander. The powers of the military commander imbibe from the principles of international public law which apply to belligerent occupation.

These principles are mostly anchored in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereinafter: the Hague Convention) and its Regulations, the provisions of which have the status of international customary law; the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, the customary provisions of which form part of the laws of the State of Israel and this court has, in the past, addressed the interpretation of various of its provisions in its judgments ([HCJ 7015/02 'Ajuri v. IDF Commander in the West Bank](#), IsrSC 56(6) 352 (2002, hereinafter: the 'Ajuri case), p. 364; [HCJ 7957/04 Mara'abe v. The Prime Minister of Israel](#), IsrSC 60(2) (2005, hereinafter: the Mara'abe case), p.

492); and in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1977 (hereinafter: the First Protocol) to which Israel is not a party, yet the customary provisions of which also form part of the law of Israel (see [HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel](#) (not yet published, December 14, 2006, hereinafter: the targeted killings case), §20; [CrimA 6659/06, Iyad v. State of Israel](#), (not yet published, June 11, 2008, hereinafter: the Incarceration of Unlawful Combatants case), §9; HCJ 201/09 **Physicians for Human Rights v. Prime Minister of Israel** (not yet published, January 19, 2009, §15). It has already been found in our rulings that it is possible, at times, to supplement the humanitarian provisions from within international human rights law (see for example, the targeted killings case, §18; the Incarceration of Unlawful Combatants Law case, §9; [HCJ 1890/03 Bethlehem Municipality v. State of Israel](#), 59(4) 736 (2005, hereinafter: the Bethlehem case), pp. 754-755; [HCJ 3239/02 Marab v. IDF Commander in the West Bank](#), 57(2) 349 (2003, hereinafter: the Marab case, pp. 369-371).

11. Alongside the principles of international public law, the fundamental principles of Israeli public law also apply to the actions of the military commander (see the Iscan case, p. 810; the 'Ajuri case, p. 365, the Mara'abe case, p. 492, the targeted killings case, §18). According to the principles of Israeli public law, the military commander must act, *inter alia*, fairly, reasonably and proportionately, with a proper balance between individual liberty and the public interest, all whilst taking security needs into account ([HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza](#), IsrSC 55(5) 385 (2004, hereinafter: the Rafah case, p. 393).

The power to impose travel restrictions

12. As stipulated in Regulation 43 of the Hague Regulations, the military commander is empowered to take various measures in order to protect the residents of the area under belligerent occupation and ensure public order and safety. In accordance thereto, Section 88 of the Order regarding Defense Regulations stipulates:

(A) A military commander, or a person acting under general or specific permission by the military commander, may, by way of order or by way of issuing orders in a different manner:

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

This power has previously been used by the military commander on various occasions. Thus, for example, certain villages were encircled (HCJ 2847/03 '**Alawuneh v. IDF Commander in Judea and Samaria**' (unpublished, July 14, 2003); HCJ 2410/03 **Lamia al 'Arja v. IDF Commander in Judea and Samaria** (unpublished, July 8, 2003), and in other cases, a curfew was imposed on various areas (HCJ 854/03 **Al-Rahman v. IDF Commander** (unpublished, July 9, 2003). In our case, the respondents were indeed initially remiss in not publishing the travel restrictions in an order (see: [HCJ 9593/04 Murar v. IDF Commander in Judea and Samaria](#), (not yet published, June 26 2006, hereinafter: the Murar case). However, in view of the correction of the defect and the publication of the travel restrictions in an order dated February 13, 2007, this flaw has been corrected.

13. As stated above, the petitioners' arguments mainly address the manner in which the military commander's power to impose travel restrictions in the Area was exercised. Indeed, even when the military commander acts within the scope of his powers, he must exercise his powers, *inter alia*, reasonably and proportionately and his discretion is subject to judicial review by this court (see for example: the Bethlehem case, p. 747). We turn, therefore, to address the question of whether the military commander did indeed lawfully exercise his authority with respect to the imposition of the

travel restrictions which are the subject matter of this petition. In order to respond to this question, we shall first address the purpose for which the military commander's power to impose travel restrictions was exercised. We shall also examine the various considerations the military commander must weigh when instructing the imposition of travel restrictions. At the second stage, and assuming that the seizure order was issued for an appropriate purpose and out of pertinent security considerations, we shall examine the balance struck among the various considerations and whether the decision of the military commander satisfies the conditions for proportionality.

Pertinent considerations when exercising the power to impose travel restrictions

14. As aforesaid, the laws of belligerent occupation recognize the military commander's power and obligation to maintain security in the Area, thus protecting the security of his state and its citizen. However, they subject the exercise of this power to an appropriate and proportionate balance between the latter and the rights, needs, and interests of the local population (HCJ 1748/06 **Mayor of Adh Dhahiriya v. IDF Commander in the West Bank** (not yet published, December 14, 2006, hereinafter: the Adh Dhahiriya case); the Iscan case, p. 794; HCJ 72/86 **Zaloum v. HCJ 72/86 Zlum v. The Military Commander of the Judea and Samaria Area**, IsrSC 41(1), 528 (1987, hereinafter: the Zlum case), p. 532; the Marab case, p. 365). Therefore, when exercising the power to impose travel restrictions in the Area, the military commander must strike a balance between the principle of security and maintaining public order on the one hand and the human rights of the local population which are harmed by this decision on the other.
15. As for the security interest – the military commander's considerations include the need to protect the State of Israel and its residents, the need to protect the military within the territory held under belligerent occupation and the need to protect the civilian population in this territory (see the Mara'abe case, pp. 496-498, 506). It has already been found in our judgments that this protection applies to anyone in the area under belligerent occupation – both Palestinian and Israeli (see for example, the Zlum case, p. 532).
16. In our case, the petitioners argue that the fact that these are Israeli communities which were established also in contravention of Israeli domestic law bears significance. They maintain that the community of Negohot was indeed established in accordance to a government resolution, but without approved building plans and whilst trespassing on private lands; and that the community of Mitzpeh Lachish (Negohot West) was established without any government approval or legal planning. It should be stated at the outset that this argument does nothing to change our consistent finding that the duty to protect the life of any person – where life is at risk – is not subject to the legality of his dwelling in any specific place. In the Mara'abe case, we stressed in this context that:

The authority to construct a separation fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (Regulation 43 of The Hague Regulations). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God's image. **The life of a person who is in the Area illegally is not up for the taking. Even if a person is located in the Area illegally, he is not outlawed.** (the Mara'abe case, p. 498, emphasis added – D.B.; see also HCJ 4219/02 **Gusin v. The Commander of IDF Forces in the Gaza Strip**, IsrSC 56(4) 608 (2002), (pp. 610-611).

17. As for the human rights of the local population, there is no dispute that the military commander must respect, protect and facilitate the realization of the spectrum of human rights vested in the local residents, subject to imperative security necessities (see for example, Article 27 of the Fourth Geneva Convention; Regulation 46 of the Hague Regulations; see also the principles guiding our judgments according to the International Convention on Civil and Political Rights, 1966; hereinafter: the

ICCPR)).

In our matter, as a result of the decision to close the road which is the subject matter of this petition to Palestinian movement, a number of the rights of the local population are harmed. Primarily, as a result of the closure of the breadth road to Palestinian movement, the right to freedom of movement is harmed directly. Freedom of movement is recognized as a highly important fundamental right both in Israeli law and in international law. It has already been stated in our judgments that this right is “in the first rank of human rights” and that it is “on the very highest level of the scale of rights in Israel” (the Bethlehem case, p. 754). This right must be respected also in the Area, subject to the conditions which are intrinsic to holding under the laws of belligerent occupation, which, of their essence, sometimes justify restrictions on freedom of movement. We have made this finding in many cases (see for example: the Murar case, §14; the Bethlehem case, p. 755; the Mara’abe case, p. 504; HCJ 10356/02 [Haas v. IDF Commander in the West Bank](#), IsrSC 58(3) 443 (200), p. 461; HCJ 5488/04 **Al-Ram Local Council v. Government of Israel** (not yet published, December 13, 2006, hereinafter: the Al-Ram case). In the case at hand, there is no dispute that the decision to close the road which is the subject matter of this petition to movement by Palestinians compromises their freedom of movement. The bulk of the dispute between the parties on this aspect is in regards to the extent of the harm *vis-à-vis* security necessities, as detailed below.

18. Alongside the right to freedom of movement, the petitioners argue that their right to equality is also violated as the travel restriction is imposed on Palestinians only. The respondents, on their part, do not deny their obligation to act equitably. However, they argue that the case at hand involves a legitimate distinction which is based on clear security reasons. The respondents emphasize the military commander’s duty to protect the lives of all passengers on the road, Israeli and Palestinian, in accordance to the concrete risks in the area. The measures taken for the security of the population must correspond to the threats from which they are designed to protect. Therefore, there may be a security justification for applying this measures to a certain group and not another, with security forming the basis for the distinction between the groups. Thus, for instance, the affidavit of response on behalf of the respondents notes that there are other roads in the Judea and Samaria Area regarding which military commander orders were issued to the effect of prohibiting movement thereon for Israelis only. This, as regarding these roads, no alternative security solution was found which meets the concrete risks and security threats. Among others, it was noted that the Adam-Qalandiya road (road 45) was closed by order to Israeli movement as of December 31, 2006, whilst Palestinian movement is permitted. The “Beituniya bypass road”, which connected the residents of the Talmonim block with Givat Zeev and Jerusalem, was also closed to Israeli movement as of 2001.
19. We are in agreement that the right to freedom of movement is vested both in the Palestinian and the Israeli residents of the Judea and Samaria Area, subject to security restrictions. Unfortunately, the security situation in this Area has led the military commander to reach the conclusion, with respect to some roads, that in order to protect human life, travel restrictions must be put in place – both on the Palestinian and the Israeli residents – in accordance with the conditions and the risks which apply in every specific case. In the circumstances of the matter before us, security considerations indeed justify measures to protect the Israelis using the road. However, the question which must be decided is whether there is justification to take such an extreme measure as completely closing the breadth road to a large population that depends on freedom of movement in the area in order to maintain the basic necessities of life. We turn therefore, to examine the legality of the balance the military commander has struck between the conflicting rights and interests in this case.

Appropriate purpose and extraneous considerations

20. The petitioners argued before us that it was not the security considerations claimed by the respondents which lay at the basis of the latter’s decision to impose the travel restrictions which are the subject

matter of the petition, but rather an extraneous consideration – succumbing to the demands of the residents of Negohot with the purpose of allowing them to take over lands and expand the community. This far reaching claim had no basis in evidence, and the petitioners did not present a sufficient foundation to substantiate their claim that the respondents acted out of extraneous considerations in issuing the order. The military commander denied the existence of ulterior motives to the issuance of the order and insisted that the imposition of travel restrictions is vital for security needs and for protecting the safety of Israelis traveling on the road. His statements are credible in our view.

In their response to the petition, the respondents noted the risks in the area which is the subject matter of the petition, detailed the security incidents which occurred in that area, as detailed above, and insisted that a specific security response is required in order to address these risks. Accordingly, the argument was made that the purpose of imposing the travel restrictions in this case was to protect the lives and safety of the Israelis who live in Negohot and Mitzpeh Lachish with the breadth road being the only route connecting between their homes and Israeli territory.

21. We have found no reason to doubt the respondents' assessment regarding the existence of a security risk to the lives of the Israelis using the road. There is no doubt that the community of Negohot has been a target for terrorist attacks in the past and it is the military commander's duty to protect the security of its residents. In this context, we have seen fit to reject the claim that extraneous consideration lay in the foundation of the decision to close the road which is the subject matter of the petition to movement by Palestinians and have found that the purpose of the closure of the breadth road to movement by Palestinians is a legitimate security purpose – protecting the safety of the Israeli passengers on the road and preventing harm to them. This purpose is an appropriate purpose which conforms with the duty to maintain public order and safety, as anchored in Regulation 43 of the Hague Regulations (compare: [HCJ 7052/03 Adalah v. Minister of Interior](#) (not yet published, May 14, 2006); the Incarceration of Unlawful Combatants case, §30)). In these circumstances, it remains for us to examine whether the decision to close the breadth road to Palestinian movement satisfies the subtests of proportionality and we now turn to this task.

The subtests of proportionality

22. As stated above, the laws of belligerent occupation recognize the military commander's power and obligation to take various measures in order to maintain security in the territory held under belligerent occupation as well as protect the security of his own state and its citizens. However, they subject the exercise of this power to an appropriate and proportionate balance between the latter and the rights, needs, and interests of the local population (the Beit Sourik case, pp. 832-833). Therefore, when exercising the power to impose travel restrictions in the Area, the military commander must strike a balance between the principle of security and maintaining public order on the one hand and the human rights of the local population which are harmed by this decision on the other. A central criterion of this balance is proportionality with its three subtests. First, there must be a rational connection between the measure chosen and the purpose for which it is intended; second, the measure chosen must be the least injurious to the rights that are being curtailed; third, the measure chosen must strike a proper balance between the purpose underlying it and the injured rights (see for example, the Beit Sourik case, p. 841). Striking the balance of proportionality is at the military commander's discretion which is subject to our judicial review. However, the court does not replace the military commander's discretion with its own, but rather examines the lawfulness of the implementation of the military commander's discretion.
23. In regards to the first subtest of proportionality, the rational connection test, we accept the respondents' position that closing the road to Palestinian movement is a measure which is related to protecting against the relevant security risk – the risk to the lives of Israelis travelling on the road.

The respondents detailed, as aforesaid, a number of security incidents that had taken place in the area which is the subject matter of the petition, including stone and Molotov cocktail throwing at Israeli vehicles travelling on the road, as well as incidents of explosive devices being placed. These security risks are directed by Palestinian elements against the Israeli residents who use the road. According to the respondents, closing the road to Palestinian movement and dedicating it to Israeli movement allows the security forces to protect the passengers on the road from the aforementioned risks. The petitioners disagree, and in the security opinion which was annexed to their petition, it was claimed that creating roads exclusive to Israeli movement increases the overall risk rather than decreases it. However, the question of the proportionality of the chosen security measure cannot be decided by presenting an alternative security position or a security approach which differs from that of the military commander, who has the power and duty with regards to the security of the residents of the Area. The military commander is the professional body with expertise in the area of security and those wishing to refute the security position of the military commander bear a great burden (see for example H CJ 2577/04 **Taha al-Khawaja v. Prime Minister of Israel** (not yet published, July 19, 2007), §32, the Beit Sourik case, p. 858). In the circumstances of the matter, we accept the respondents' position that the security measure chosen by the military commander – closing the breadth road to Palestinian movement – is a security measure which fits the purpose of protecting the residents of Negohot who use the breadth road, and therefore, it is found that there is a rational connection between the measure of closing the road to Palestinian movement and the purpose of protecting the Israeli passengers on the road from the concrete threats that exist in our case.

24. However, the existence of a rational connection between the measure and the goal is insufficient. The second subtest of proportionality requires the respondents to choose, among the selection of measures at their disposal, the one which is least injurious to the human rights of the local residents, if the same can achieve the proper purpose. According to the petitioners, the measure of closing the road to all Palestinian movement is drastic and extremely injurious to the rights of the local residents, whereas, other measures which are less injurious and can guarantee the safety of passengers on the road are available. In the security opinion annexed to their petition, Brigadier General Ilan Paz, formerly the head of the Civil Administration in the Judea and Samaria Area and commander of the Binyamin and Menasheh Brigades, details other security measures which can guarantee the safety of the passengers on the road. Thus, for example, it is noted that manned posts can be placed on the sides of the road, observations and patrols can be used, the vehicles of the passengers from the Israeli communities could be bullet proofed or they could be escorted by security forces while travelling on the road. Another option is to place roadblocks at the entrances to the road and individually examine the vehicles using it. Considering the overall conditions and circumstances on the breadth road, Brigadier General Ilan Paz recommends constructing an operational system which incorporates a number of modes of operation: a bullet proof post at the Beit 'Awwa intersection; proactive, mobile action along the route during the day and night; the erection of an observation post in the western part of Negohot from which a large part of the route is visible and fire controlled; when there is a specific security alert, enhanced security measures may be added, such as travelling in bullet proof vehicles, military escort and placing a roadblock at the eastern entry point into the road.
25. The respondents themselves note that the military commander routinely uses a variety of security measures in order to protect the passengers on many routes in the Area. Despite this, in their view, since Negohot is a secluded community with the breadth road serving as the only access route from it to Israel and in view of the security threats to the residents of Negohot travelling on the breadth road, the most appropriate measure for protecting them is closing it off to Palestinian movement. As for the possibility that individual screening be held at the entry points to the road, the respondents claim that this alternative is less effective in terms of security than a complete shut off of the road to Palestinian movement and that in any event, selecting this alternative would not mitigate the injury to the local

population, as placing roadblocks at the entry points to the road would delay travel on it to an extent similar to the delay caused by using alternative roads.

26. Having examined parties' arguments regarding this aspect, we were not convinced that the respondents had examined all the reasonable alternative measures for protecting the residents of Negohot and persons travelling on the breadth road. The respondents' response notes that security forces provide various solutions to the security threats which exist on various travel routes in the Area, including "patrols, electronic devices, observation posts and other protection measures" (§40 of the Affidavit of Response of the state dated April 22, 2007). Despite this, the affidavit includes no specific reference to these alternatives relative to their application to the breadth road other than a general statement that:

In the rare cases in which the military commander decides to close one route or another to Israeli movement or Palestinian movement, such action is taken only after it has been clarified that the same is imperative for security reasons and only on condition that the harm caused to Israelis or Palestinians as a result of this restriction is proportional." (§39 of the Supplementary Response on behalf of the Respondents of February 4, 2007).

There is no explanation in the respondents' arguments as to why the possible security measures – which they themselves detail in their response – do not provide a solution to the existing risks. Additionally, even if we were to accept the position that the existing threats justify the measure of separation and prevention of friction between the Israeli population and the Palestinian population, they do not necessarily justify taking the sweeping measure of closing a road to Palestinian movement almost completely, save for specific permits, and permitting movement to Israelis. In view of the fact that the gravest harm to the Palestinian residents is a result of the cancellation of public transportation on the road, including taxis, buses, water tankers, various service vehicles and trucks transporting vital goods to the villages, rather than as a result of the extended journey time (as detailed below), indeed, less injurious alternatives may be found. For example, as the respondents do in other areas, screening measures on the road itself could be increased, particularly considering that security screening posts are already in place both in the Beit 'Awwa intersection and near Negohot. Other alternatives have been cited, as stated, in the respondents' response without providing a satisfactory explanation in regards to their security benefit. All this, when the list of security incidents which occurred on the breadth road reveals that most took place after the measure of closing the road to Palestinian movement was implemented.

27. Moreover, the respondents' arguments do not point to a substantive distinction between the breadth road and other roads in Judea and Samaria which may justify taking such a drastic measure as closing the road to Palestinian movement for an extended period of time. On this aspect, it shall be noted that despite the fact that in the respondents' supplementary response it was stressed that this is a measure which the military commander was forced to take "at the present time and considering current needs" (section 29 of the respondents' supplementary response of February 4, 2007), it is a measure that has been in place for many years, with the respondents not pointing to a time or change of circumstances that may lead to its revocation. Additionally, there is no reference to a reevaluation of the justification for this measure in the respondents' response. In these circumstances, we have found that the decision to close the breadth road to Palestinian movement does not satisfy the second subtest of proportionality, as we have not been convinced that other possible alternatives for protecting passengers on the road which are less injurious to the local residents had been considered.
28. In view of our finding regarding the second subtest, we could leave the question of whether the respondents' decision satisfies the third subtest of proportionality, proportionality in the "narrow sense", for further review. However, we have seen fit to note that in view of the totality of information and considerations we detailed above, the respondents' decision to order the closure of

the breadth road to Palestinian movement does not satisfy the third subtest of proportionality either. This test examines the question whether the severity of the injury to the local residents as a result of the closure of the road is appropriately proportionate to the security benefit which results (see the Beit Sourik case, p. 850).

As for the security benefit, the respondents claim that since this is the only road connecting the Israeli residents who live in Negohot and Mitzpeh Lachish to the territory of the State of Israel and in view of the number of threats and security incidents in that area, indeed the security benefit which results from its closure to Palestinian movement is quite significant. They maintain that the significant security benefit gained by closing the road to Palestinian movement is balanced against a very minor injury to the local population, as there are alternative roads which the Palestinian residents can use and which do not significantly extend their travel time. As for the distress of the Jadallah family and the residents of Fuqeiqis, who are severely harmed by the closure of the road even according to the respondents, the respondents offer a solution in the shape of permits to travel on the road – for the Jadallah family at all times and for Fuqeiqis residents six times a day at set times. According to the respondents, this solution negates the harm to local residents and brings it to the minimum necessitated by security considerations.

29. It is difficult to accept the description which makes light of the injury caused to the local residents. The petition indicates that substantive harm is caused to the local population as a result of the closure of the road which is the subject matter of the petition to Palestinian movement. The major harm, it appears, is not reduced to extending the time it takes the residents to travel westward, but rather the collateral injuries which interfere with their daily lives to a significant and severely harmful extent. Thus for example, the petitioners note that the closing of the breadth road to Palestinian movement severely harms the fabric of life of the residents of the villages of Fuqeiqis, Khirbet Salama and Wadi 'Abid Khursa – population over 4,000. These villages, which are located along and near the breadth road, lack basic infrastructure and their residents depend on the large urban communities nearby. Most of the residents of these villages do not own cars and require public transportation in order to leave their villages to get to the nearby towns; the absence of water infrastructure in the villages requires water be transported in water tankers to the residents' homes; according to data provided by the respondents themselves (regarding Fuqeiqis only), there is no high school in Fuqeiqis, such that high school students must travel every morning to their schools which are located in other towns.
30. The entire routine of thousands of residents has been based, therefore, on the breadth road being a traffic artery on which public buses, taxis, water tankers and commercial trucks with various goods travelled every day. The closure of the road to Palestinian movement has led to the cancellation of the public transportation which served the residents of the villages – both westbound and eastbound. The closure of the road has also led to an increase in water shipping prices and the seclusion of the residents as friends and relatives who do not own cars can no longer reach those who live in the villages and houses along the road. Thus, it is argued, these villages have been transformed from lively communities located on a major traffic artery to isolated and forgotten locales.
31. An even greater injury is suffered by the Jadallah family – some thirty individuals – who live halfway on the segment of road which is closed off to Palestinian movement. The closure of the road cut off the Jadallah family from nearby villages and large towns, effectively eliminating the only traffic artery leading to their homes. Even if the respondents' claim that the Jadallah family members are allowed to use the road at any time and without restriction is true, still the injury they suffer by the closure of the road to other Palestinian vehicles – public transportation, water tankers, friends and relatives, remains. Moreover, since, as claimed (and unchallenged by the respondents), the Jadallah family does not own a car, indeed, they cannot effectively leave the area of their home as Palestinian taxis are no longer allowed to travel on the road nor are relatives and friends permitted to use their

cars to reach the homes of the Jadallah family or take them in their cars. In these circumstances, the closure of the breadth road to Palestinian movement in the segment between the Beit 'Awwa intersection and their dwelling place has led to the isolation of the Jadallah family and caused severe harm to their daily lives and their lives in general.

32. In the context of the aforementioned information, one must examine the harm *vis-à-vis* the benefit. We have not been convinced that the special reason which requires an almost complete closure of the breadth road exists in our case. The closure of the road was designed to provide protection for some 150 Israeli residents who live in the area and use the road, yet it injures the fabric of life of thousands of protected residents. On this aspect, a distinction must be made between making travel more difficult and extending the road, which, in difficult security conditions, is sometimes unavoidable, and a complete stoppage of vehicular traffic in an inhabited area, including public transportation, which disrupts the daily lives of some communities and hinders the transportation of basic life necessities to them. Indeed, the closure of the breadth road to Palestinian movement such that there is no access from the Beit 'Awwa intersection to Fuqeqis has directly impacted the residents of the villages in the area – their routine has been disrupted, simple every day tasks have become complicated missions. Thus, as stated, thousands of residents of the villages close to the road which is the subject matter of the petition have been cut off from public transportation services; water shipping costs to their houses have increased; every foray out of their homes has become so difficult such that a reasonable daily life is not possible. This state of affairs severely injures the local population, particularly residents of the village of Fuqeqis which is close to Negohot and the Jadallah family for whom, the respondents themselves admit, this road is the only access route connecting their homes to the services vital for their lives.
33. The respondents' proposition to create a permit regime in the area whereby the Jadallah family would be permitted to use the road and Fuqeqis residents – only – would be allowed to travel on the road six times daily does not negate these severe injuries. It is subject to the restrictions which follow from the very existence of a permit regime. The residents must file applications to receive a permit to travel on the road, where only a small number among the local residents – the Jadallah family and residents of Fuqeqis – would be eligible to receive a permit. Among these, most do not own cars in any case and make use of public transportation which was stopped with the closure of the road. Taxis, buses, water and fuel tankers, relatives, family members and friends are not eligible for permits to use the road. This severe restriction is not time limited.
34. It has thus been found that the closure of the road to Palestinian vehicles in the manner described above severely infringes upon the rights of the local residents in a disproportionate manner. This state of affairs contravenes the military commander's duty to see to the welfare of the local population and allow it to have a normal life. Even considering security needs, of which we are aware, it does not satisfy the test of proportionality in the narrow sense. The security advantage gained by closing the road to a lesser degree is not reasonably proportionate to the harm to local residents. Further still, and no less important, as we noted above, we were not convinced that adequate consideration was given to alternative security measures which would significantly decrease these injuries even if this involves a degree of damage to the security component. In accordance with the consistent approach of this court, even if security requirements necessitate measures which might injure the local population, indeed, every effort should be made to make this injury proportionate.
35. Therefore, we render the *order nisi* absolute in the sense that we find that the order issued by the military commander pursuant to which the breadth road was closed off to Palestinian movement in the segment between Fuqeqis and the Beit 'Awwa intersection is disproportionate in its current form. However, we have seen fit to suspend our judgment for three months in order to allow the military commander to formulate a different security solution which would provide protection for the Israeli residents who use the breadth road.

The respondents shall bear the petitioners' costs in this petition to the amount of 10,000 ILS.

President

Vice President A. Rivlin

I concur.

Vice President

Justice A. Procaccia

I concur.

Justice

Given today, 4 Cheshvan 5770 (22.10.2009).

President

Vice President

Justice

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