

**In the Supreme Court
sitting as the High Court of Justice**

HCJ 9961/03

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founded by Dr. Lotte Salzberger**

represented by Attorney Avigdor Feldman *et al.*
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The Petitioner

v.

- 1. Government of Israel**
- 2. Prime Minister of Israel, Mr. Ariel Sharon**
- 3. Minister of Defense, Mr. Shaul Mofaz**
- 4. Military Commander in Judea and Samaria**

represented by the State Attorney's Office,
Ministry of Justice, Jerusalem

The Respondents

Respondents' Response to Application for Temporary Injunction

1. The petition involves the request of the Petitioner to nullify the decisions to build several sections of the barrier, which were constructed a long time ago, and to cancel the proclamation to close territory that relates to the area referred to as "the seam area."
2. In the petition, the Petitioner requests a temporary injunction "to refrain from any action to expropriate land, requisition land, build on it, excavate, pave, or place any permanent structure and/or make any alteration on the land in the framework of the construction of the secondary separation fences of Stage 1, of the main part of the wall from al-Mutilla to Tayasir of Stage 2, and of the sections that protrude across the Green Line along the route of Stages 3 and 4. In addition, a temporary injunction is requested to enjoin implementation of the proclamation and orders" that are set forth in Section 5 of the relief sought by the petition.
3. For the reasons set forth below, the Honorable Court is requested to deny the petition.

The petition should be denied because of its generalness

4. The petition attacks the construction of a barrier dozens of kilometers in length. The petition does not state concrete facts as to specific parts of the barrier, but requests a hearing on the general principles relating to construction of the barrier. Construction of

the barrier in each area results from different considerations, thus it is not practical to conduct a legal hearing on such a broad set of facts.

See HCJ 1901/94 **MK Uzi Landau v. Jerusalem Municipality**, *Piskei Din* 48 (4) 403, Sections 10-11.

The petition should be denied because of the existence of other proper petitions

5. The petition seeks to nullify the requisition of land intended for construction of the barrier. Some of this land belongs to private individuals. The owners or possessors of land routinely receive orders notifying them of the intention to requisition their land, and on the possibility available to them to object to the requisition. Therefore, in those cases in which the route passes across private land, there will be other proper petitioners who have the information regarding the significance of construction of the barrier as regards their land, and are given the opportunity to petition against the requisition order and raise any argument they wish in the matter, including those mentioned in the petition herein. Where another proper petitioner exists, and petitions of this kind are filed with the court from time to time, it is improper to hear the matter in the framework of a public petition.

See HCJ 1759/94 **Srozberg v. Minister of Defense**, *Piskei Din* 55 (1) 625.

The application for a temporary injunction is premature

6. According to the work procedures regarding construction of the barrier, following the government's decision in principle on the location of the barrier's route, intense staff work is performed to implement the decision, following which a land requisition order is issued and delivered to the owners or possessors of the particular lot to which the order applies. Regarding substantial portions of the route that are the subject of the petition (such as the secondary barrier in enclaves in the area of Mevo Dotan and Homesh, Azzun-Atma and more, the section from Har Avner (al-Mutilla) to Tayasir, and sections of the wall in Stages 3 and 4), the land requisition orders have not yet been issued, so the relief requested is premature. In other areas, orders have been issued, but at this stage, decision has not yet been made regarding execution of the work on the ground, and various aspects of the matter are under consideration. Thus, in each and every area a substantive examination is being conducted regarding the various considerations before decision is reached on executing the work to construct the barrier.

The application for a temporary injunction should be denied because the petition entails enormous financial consequences, and no affidavit was attached thereto

7. The copy of the petition served on the undersigned did not contain any affidavit to support the petition. A petitioner who requests to stop construction of a project costing billions of shekels, which is in the course of execution and on which many persons and hundreds of pieces of heavy machinery are engaged by independent contractors, it is proper that, at the least, the petition be supported by an affidavit. If it is not, it is not possible to hear the petition, and certainly not grant a temporary injunction in regard thereto.

The likelihood that the petition will prevent construction of the barrier is minimal

8. The present petition is not the first petition filed with the Honorable Court against construction of the barrier, and is not the only one currently pending before the Honorable Court. Previous petitions dealt with specific sections of the barrier. The Honorable Court rejected these petitions. Nevertheless, the Petitioner has not attempted to contend with the earlier decisions of the Honorable Court. The precious decisions on this subject are:

H CJ 3325/02 **Abd Alrahman Rahid Hassan Hatab v. Military Commander of Judea and Samaria** (unpublished).

H CJ 3771/02 **Kafr a-Tas Local Council v. Military Commander of Judea and Samaria** (unpublished).

H CJ 8172, 8532/02 **Abtasam Muhammad Ibrahim v. Commander of IDF Forces in the West Bank** (unpublished).

In the matter of taking security measures similar to constructing security components to protect Israeli communities, as regards the Gaza Strip, see:

H CJ 4363/02 **Khayder Abd Ahmad Zindah v. Commander of IDF Forces in the Gaza Strip** (unpublished)

H CJ 3761/02 **Hamdi Darwish Ahmad Khadir v. Commander of IDF Forces in the Gaza Strip** (unpublished)

9. Because of the importance of the holding in **Ibrahim**, it is appropriate that we quote its language:

The decision to build the separation fence was adopted on 14 April 2002 by the Ministerial Committee for National Security Matters, with the objective of “improving and strengthening the readiness and operational capability in fighting terror, and to thwart, impede and prevent penetration of terrorist activity from the area of Judea and Samaria into Israel.” This decision was approved following discussions held by the Cabinet on 23 June 2002, in which it was decided to erect a barrier 116 kilometers long, primarily in the sensitive areas through which terrorists seeking to wreak destruction and death penetrated many times to commit terrorist attacks. The final route of the barrier was selected by security and military officials in collaboration with professionals and was approved by the Ministerial Committee for National Security Matters on 14 August 2002.

The seam area is intended to block suicide-terrorists and other terrorists from crossing into areas of the State of Israel.

According to the conception of the security and military officials responsible for the subject, creation of the seam area is a major element in the fight against terror whose source lies in Judea and Samaria. To the extent that there will not be a barricade erected to block completely penetration of terrorists, the purpose of the barrier is to delay penetration into Israel for a period of time that will enable the forces to reach the place of penetration, and thus create a geographic security zone that will enable combat forces to [chase] after terrorists before they enter the state’s territory.

Clearly, construction of the seam area harms the Palestinian residents in the seam area. To construct the barrier, agricultural lands have been and will be requisitioned, and the residents’ ability to use their land may be substantially impaired, as will their access to the land. Such harm is a necessary result of the hostilities that have been taking place in the region for more

that two years, a situation that has taken the lives of many persons.

In its response, the state set forth at length the efforts made to minimize the harm that the barrier will cause to the residents of the area. For example, an effort is made to run the barrier, to the extent possible, along land that is not privately owned and along uncultivated land, and an effort is also made not to make a partition between the land and its owners. Also, the state delineates numerous measures that will be taken to minimize the harm in cases in which harm to the residents cannot be prevented. For example, compensation is paid to persons whose land has been requisitioned, an effort is made to move trees rather than cut them down, and gates are established to allow residents access to their land. Also, the respondents have shown their willingness to solve specific problems in the field after giving the landowners an opportunity to file objections related to the route. In the hearing before us, the state's counsel declared that, even at this stage, it is ready to take into account specific problems that the residents raise to the entities performing the construction and to the military authorities if these problems can be solved without impairing security.

We did not find in the requisition orders that were issued and in the respondents' acts any defect that warrants our intervention. Even though the requisition will result in damage, hardship and inconvenience to residents, we accept that the measures are intended to serve as an important element in the IDF's conception of waging combat, which were decided by the officials charged with security matters, and, as is known, this Court tends not to interfere in operational security considerations.

We have recorded before us the declaration of the state's counsel that, if the petitioners promptly raise contentions that arise during performance of the work that involve problems that

can be resolved in the field without impairing security or other residents, the state is prepared to grant the request.

The petition is denied.

10. The foundation underlying this ruling can be found in the norms set forth in international customary law and other holdings of the Honorable Court.
11. The power to requisition land in territory under belligerent occupation is based on international treaty-based and customary law. In the context of the laws of war, the Hague Regulations Respecting the Laws and Customs of War on Land, of 1907, regulates the conduct of parties to hostilities on land.

As a rule, the military commander in the territory has a duty not to damage the property of local residents (Article 46 of the Hague Regulations). However, this rule is subject to two exceptions that are relevant in the present case, which enable the requisition of private land. These exceptions result first and foremost from the basic principle of international law, whereby a state has a right to protect itself from threats existing outside its borders, a principle enshrined in Article 51 of the UN Charter. These powers also result from military needs in the course of belligerent occupation.

12. The first normative source is Article 23 of the Hague Regulations, which appears in the chapter regulating the conduct of combat forces **in time of war**. Article 23(g) provides an exception to the prohibition on the destruction or requisition of enemy property, provided that the action is demanded by the necessities of war. The article states:

23. In addition to the prohibitions provided by special conventions, it is especially forbidden –

(Seven) to destroy or seize the enemy's property, **unless such destruction be imperatively demanded by the necessities of war...**

The Honorable Court has held that this article enables the requisition of land during hostilities, and also “to forestall an existing, actual danger,” because of the vital military need. On this point, see:

H CJ 606/78 **Ayub v. Minister of Defense**, *Piskei Din* 33 (2) 113, 129, 133.

See, also, in this context, *inter alia*:

H CJ 401/88 **Abu Rian v. Commander of IDF Forces**, *Piskei Din* 42 (2) 767.

HCJ 24/91 **Timraz v. Commander of IDF Forces in the Gaza Strip**, *Piskei Din* 45 (2) 325.

HCJ 4112/90 **The Association for Civil Rights in Israel v. OC Southern Command**, *Piskei Din* 44 (4) 626.

13. Since September 2000, Israel has been engaged in armed conflict. In this conflict, powers are exercised pursuant to the laws of war. Such exercise of power has been stated to the Honorable Court a number of times in the past, and the Court did not find it proper to interfere with the Respondents' position and decisions.

On this point, see:

HCJ 8286/00 **The Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria** (not yet published).

HCJ 9252/00 **Al Saqa v. State of Israel** (not yet published).

HCJ 4219/02 **Gusin v. Commander of IDF Forces in the Gaza Strip** (not yet published).

14. Furthermore, even when an actual combat action is not involved, but the situation is one of "belligerent occupation," a state has the authority, pursuant to Article 52 of the Hague Regulations, to requisition property for military needs or military actions. The article states:

Requisitions in kind and services shall not be demanded from local authorities or inhabitants except **for the needs of the army of occupation**.

They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in obligation of taking part in the military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given for the payment of the amount due shall be made as soon as possible.

15. The article is construed to relate also to the requisition of land. One of the conditions set forth in the article is that the requisition be for the military needs of the occupying state. The decisions of the Honorable Court interpreted this article based on its purpose. It was held that seizure is allowed also to meet needs to ensure “public order and safety” in accordance with the authority given the military commander in Article 43 of the Hague Regulations. On this point, see:

H CJ 606/78 **Ayub v. Minister of Defense**, *Piskei Din* 33 (2) 113, 130.

H CJ 401/88 **Abu Rian v. Commander of IDF Forces in Judea and Samaria**, *Piskei Din* 42 (2) 767, 770.

16. It was also held that “military needs,” which allow the requisition of private land, include army posts and encampments (H CJ 24/91 **Timraz v. Commander of IDF Forces in the Gaza Strip**, *Piskei Din* 45 (2) 325); soldiers’ quarters (H CJ 290/89 **Jukha v. Military Commander in Judea and Samaria**, *Piskei Din* 43 (2) 116); representation of the Civil Administration (H CJ 1987/90 **Shadid v. Commander of IDF Forces in Judea and Samaria**, *Takdin Elyon* 90 (2) 34); paving of bypass roads to protect Israeli civilians living in the region, and to reduce the friction between the Palestinian and Israeli vehicles (H CJ 2717/96 **Wafa Ali v. Minister of Defense et al.**, *Piskei Din* 40 (2) 848, 856).

17. As mentioned above, on the basis of its right to self-defense, Israel has engaged in special combat operations in the region since the beginning of the armed conflict. Pursuant to this right, Israel and the military commander have the right to requisition land in the region, where the purpose of the seizure is to protect the State of Israel. Action taken in self-defense is certainly a “military need.”

Indeed, the rule given by this Honorable Court is that the military commander is empowered to requisition land in the region, which requisition is also allowed pursuant to Article 52, in cases in which the purpose is to protect the State of Israel and its citizens.

18. The rule was first established in H CJ 302/72 **Hilu v. Government of Israel**, *Piskei Din* 27 (2) 169. This petition involved the legality of the decision to isolate the Gaza Strip from the Sinai region by severing access roads between the regions, requisition of land, and declaration of an area in Sinai as a closed military area. The action involved construction of a partition zone intended to prevent the penetration of terrorists into the Gaza Strip and the State of Israel to commit terrorist acts. After reviewing the position of the respondents, the Court ruled that:

In any case, we shall not interfere in the judgment of the military commanders who believe that removal was necessary, to ensure quiet inside **and outside** the Gaza Strip, by creating that partition zone which constitutes an important means to prevent the penetration of terrorists. (emphasis added) (p. 178)

19. A similar rationale underlies the judgment in HCJ 606/78 **Ayub et al. v. Minister of Defense et al.**, *Piskei Din* 33 (2) 113., which dealt with the requisition of land to build a civilian community. In his opinion, Justice Vitkon held, as follows:

In this context, Mr. Khoury sought to distinguish between military needs, within their categorical meaning, that is, needs of the army in the occupied territory and its logistic needs, and security needs in general, and he contended that only needs of the first kind come within the power on which the orders under discussion are given. In our opinion, this distinction is meaningless. As I have just said, the existing situation is one of hostilities, and the occupying power has responsibility to ensure order and safety in the occupied territory. **It must also meet the danger posed from such territory to the occupied territory itself and to the state itself. The current hostilities take the form of acts of sabotage, and even one who deems these acts (which injure innocent civilians) a form of guerilla warfare, will admit that the occupying power is empowered, and even obligated, to take the necessary means to prevent them. The military aspect and the security aspect are only, therefore, one aspect.** (emphasis added) (page 118).

In the same judgment, the Honorable Justice M. Ben Porat expressly relates to the right of self-defense as a basis for the military commander to exercise his authority. She held that:

If I went to the end of the written sources to which we were referred by learned counsel, at the foundation of the international principles lies the idea that the occupier is not to use **arbitrary** force. In other words, it should not be allowed to use its control for the sake of **dispossession and annexation**. The border separating arbitrary use and self-defense and the

taking of imperative security means is, then, one of the tests that determine whether the action is proper or prohibited. (emphasis in original, underline added) (page 133).

20. **Using these rulings as a guideline, the Court denied a petition against the requisition of land in the region, where the purpose was to protect the security interests of the State of Israel** – securing Ben-Gurion Airport and preventing obstruction to movement on roads within the State of Israel. At the hearing, an opinion was submitted that contradicted the opinion of the military commanders, contending that military and security needs did not exist. The Court rejected the opinion that there was no security justification for the requisition to establish a community on the land. This Honorable Court rejected the opposing opinion and held that:

The approach that sees things from a static perspective, only taking into account the present cease-fire line between Jordan and the area under Israeli administration, ignores what is liable to happen some time in the future, whether as a result of hostile acts that come from outside or from within the occupied territory, or as a result of a new political arrangement. Proper military planning must take into account not only existing dangers but also dangers that are liable to result from dynamic developments in the territory ... One recalls the perseverance of the Gush Ezyon communities during the War of Independence, which played a decisive role in halting the enemy's advance to Jerusalem. That involved withstanding the actions of regular forces, **and is true eve more so when action is taken to prevent the acts of terrorists or irregular forces.** (emphases added)

21. **To summarize this part, the laws of war empower the military commander to requisition land. Also, authority to requisition land is also found in the laws of belligerent occupation, including for the purpose of protecting the State of Israel, which is in addition to the authority to so act with the objective of ensuring order and public life in the region.**
22. In light of these common law principles of law, with which the petition has failed to contend, it appears that the Petitioner's chances in the petition are minimal, and in such

circumstances, there is no basis for issuing a temporary injunction as a preliminary proceeding in the petition.

23. As regards the application for a temporary injunction enjoining the declaration of closed area from taking effect, which was attached as Appendix B to the petition, it should be stated that the declaration and the directives pursuant thereto were signed and took effect in early October 2003, and pursuant thereto thousands of permits to stay in the closed area and to enter it have been issued. In these circumstances, the temporary injunction does not seek to freeze the current situation, but to change the situation now in place with a situation that was in place a number of weeks before the petition was filed. It is not proper to issue a temporary injunction based on such a pretext.
24. This response is supported by the affidavit of Mr. Dan Tirza, head of the *Qeshet Zeva'im* administration in the IDF, who is in charge of the planning of the barrier.
25. The Respondents will augment and expand their response to the petition in a substantive response thereto.

Today, 6 Kislev, 5764 (1 December 2003)

[signed]

Malchiel Blass
Head of HCJ Matters, State Attorney's Office

