At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

HCJ 9961/03

In the matter of: **HaMoked: Center for the Defence of the Individual**
founded by Dr. Lotte Salzberger (Reg. Assoc. No. 58-016-3517)

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v.

1. **The Government of Israel**
2. **The Prime Minister of Israel, Mr. Ariel Sharon**
3. **The Minister of Defence, Mr. Shaul Mofaz**
4. **The Seam Zone Directorate in the Ministry of Defence**
5. **The Military Commander in the West Bank Region**

all represented by the Office of the State Attorney,
The Ministry of Justice, Salah-a-Din St., Jerusalem

Petition for Order Nisi and Interlocutory Order

This is a petition for an order nisi, in which the Honorable Court is moved to order the Respondents to explain, should they so desire, why they shall not revoke the decisions specified below, pertaining to the erection of the wall and fence system known as the "separation wall" or the "separation barrier", as follows:

1. To the Respondents 1-3: Why they will not revoke the decision to build the secondary barrier in seven "enclaves" located along Stage A of the separation wall route, marked by a dashed line on the separation wall map attached hereto (as Exhibit A).

2. To the Respondents 1-3: Why they will not revoke the decision to build the segment of the separation wall from Al-Mutilla to Tayasir, in the eastern wing of Stage B of the separation route.

3. To the Respondents 1-3: Why they will not revoke the decision to build the segments of the wall deviating from the Green Line in Stages C and D of the separation route.

4. To the Respondents 4-5: Why they will not refrain from expropriating and seizing lands and from building, paving, excavating and performing any type of other work and all in the segments of the wall and the secondary fence mentioned in Sections 1-3 above.

5. To the Respondents 4-5: Why they will not revoke the Declaration in the Matter of Closing Territory No. S/2/03 (The Seam Zone) (Judea and Samaria), 5764-2003 (hereinafter: the Declaration), and why they will not revoke the orders on security instructions promulgated by virtue thereof with regard to permits to enter the seam zone (hereinafter: the Orders) (the Declaration and the Orders are attached hereto as Exhibits B1-B5).

In addition, this is a petition for an interlocutory order, in which the Honorable Court is moved to order the Respondents to refrain from any act of land expropriation or seizure, construction, digging, paving or installation thereon of any permanent facility and/or changing the land in any way as part of the construction of the secondary separation fences of Stage A, of the main segment of the wall from Al-Mutilla to Tayasir in Stage B, and of the segments deviating from the Green Line in Stages C and D of the route. In addition, the Petitioner seeks an interlocutory order whereby the Declaration and the Orders mentioned in Section 5 above will not come into effect.

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1. Introduction

1. This petition concerns the legality of the decision whereby the route of the separation wall (or "separation barrier") will encroach upon the territories that have been occupied by Israel since the June 1967 war, and whereby the wall being erected by the occupying power will be built on private land and on state land of territories that are subject to belligerent occupation.

2. Already at this point it should be stated that this petition – although it deals with specific and limited segments of the wall that have not yet been built in Stages A-C of the construction project, and which deviate from the Green Line (hereinafter: the Deviating Segments) – raises an issue of principle, the implications of which will affect also the decisions on the route in the next stages of this immense project.

3. The Petitioner's claim, which is an argument of principle, is this: That a colossal construction project such as that of the separation wall, the effects of which on the occupied civilian population, on the economy of the occupied territories and on all aspects of civilian life conducted therein, are far-reaching and long-term, to the extent that one might say that they are permanent – violates the principles of international law and is categorically prohibited by the laws of belligerent occupation, insofar as its route runs inside the occupied territory and materially modifies the fabric of civilian life in the occupied territory, isolating in fact considerable portions of the occupied population, creating hermetic enclaves and constituting a de-facto annexation of parts of the occupied land.

4. There is no dispute that the State of Israel is entitled to defend its territory from material risks emanating from the occupied territories. And if the Government of Israel decides that such defence be effected by the construction of a security wall, this is a reasonable decision within its residual authority. Once, however, the Government decided that the wall would penetrate into the occupied territories, biting off chunks of the territories left, right and center, snaking inside of them and creating isolated enclaves of land and inhabitants, the Government of Israel exceeded its authority and breached the customary international law, which is an inseparable part of the law of the land. Safeguarding the residents of the State of Israel is no cause for expropriating land, building walls, paving roads, uprooting orchards and making permanent and long-term changes in the occupied territories. The separation wall, with its variety of titles, is designed to separate between the territory subject to Israeli law, governance and administration and the occupied territories, which are an entirely different political and legal being. Merging occupied land into the State of Israel by the separation wall is

wrongful – it constitutes a breach of weighty obligations owed by the State of Israel to such territories.

5. We would be divulging no top secret by stating that any deviation of the route of the wall from the Green Line (with the exception of the wall surrounding Jerusalem, which is more complicated legally due to the annexation of Eastern Jerusalem, and therefore this Petition does not deal with that part of the separation wall project), is designed to include Jewish settlements located deep inside the occupied territories in the area fenced in by the separation wall, thus turning them into an inseparable part of the State of Israel. Although the inclusion of the settlements sweeps along also occupied lands and communities into the State, in order to prevent dangers posed by them the wall, twisting like a ring snake, surrounds the living areas of these inhabitants of the territories, isolating them from the State of Israel on the one hand and from the territories on the other hand and, as aforesaid, all in order to spread the wings of the wall on settlements, the mere establishment of which was, from the outset, problematic and difficult from the point of view of international law, to say the least. Thus is created an absurd situation, in which this immense project, at the cost of billions of NIS, leaves on its western side thousands of Palestinians, who were supposed to be separated from the State of Israel by the wall.

6. In addition and no less importantly, the severe injury dealt by the wall, in its portions that deviate from the Green Line, to the basic rights of protected civilians – who are finding themselves in wall-surrounded enclaves, who require various types of permits to enter and exit the places where they live, who are separated from their lands and sources of livelihood, who lose altogether their freedom of movement and their ties with the towns that provide them with medical, educational and commerce services – turns these deviations from the Green Line into a project which is in fact a collective, illegal and immoral punishment. Also due to this injury to the human rights of those who find themselves between the fence and the Green Line, it is a breach of the branch of international law that deals with belligerent occupation.

7. Another claim, the Petitioner's third, is that in practice, any deviation of the separation wall from the Green Line, in view of the magnitude of the work performed in the project (the digging, the paving, the construction and the posting of permanent facilities) – constitutes a de-facto annexation of the area west of the wall to the territory of the State of Israel. Naturally, and this is a basic principle in the law of war, such occupation when made by force, is illegal and constitutes another breach of international law.

8. Therefore, and on all of these grounds, this petition is aimed at those segments of the separation wall, the construction of which has been approved by the relevant authorities but which have not yet been built, and which deviate from the Green Line border. However, the petition sees on the horizon the intention of approving routes which are even more invasive than those indicated on the map attached hereto (as Exhibit A) for Stages A, B and C, with respect to the next stages of the separation wall. The decision in this petition on the specific segments of the wall addressed by the order sought herein will, no doubt, be binding and serve as a guideline also for those stages not yet approved.

9. And, finally, the physical injury to the inhabitants of the enclaves goes hand in hand with the corruption of the law designed to administer the seam zone and which creates, in practice, inhabitants of two kinds in the zone: "Israelis", who are defined in the Declaration on the closing of the area as citizens of Israel, residents of Israel and those entitled to citizenship by the Law of Return (!), **to whom the Declaration does not apply**, and who are free to move about in the zone, to enter and to exit it; and others (in practice: Palestinians) who are subject to the Declaration and who require all sorts of permits to enter the zone, to work and sleep therein and to exit therefrom.

10. Let us correctly define the legal structure described above by its full name: The web of the Declaration and the Orders has spun, in the seam zone, a legal **apartheid**, which is intolerable, illegal and immoral. In other words, the discriminatory and oppressive topographical structure stands upon a shameful normative infrastructure, unprecedented in Israeli law.

2. Factual Background

a. The parties to the petition

11. The Petitioner, HaMoked: Center for the Defence of the Individual, is an NGO which acts to "offer assistance to persons who fall victim to acts of violence, abuse or denial of basic rights by the state authorities… and to protect basic rights by any other means, including by taking legal action in court, which includes petitions to the Supreme Court sitting as the High Court of Justice, either on behalf of a person claiming a violation of a basic right, or as an independent public petitioner".

12. Respondent 1 is the State of Israel, which in June 2002 decided to erect the separation barrier between Israel and the West Bank, and which authorized the Second and Third Respondents, the Prime Minister and the Minister of Defence, to determine the exact route of the barrier, either themselves or in the Defence Cabinet.

13. The Fourth Respondent, the Seam Zone Directorate, is a professional governmental inter-departmental body, established by the resolution of the Political-Defence Cabinet in its meeting of April 2002 and headed by the Director General of the Ministry of Defence. It is the Fourth Respondent's duty to execute the Government resolution pursuant to the route approved by the Second and Third Respondents or by the Defence Cabinet.

14. The Fifth Respondent is the Military Commander in the West Bank, who is responsible for both security and the fabric of civilian life in the occupied territories.

b. The separation wall (or separation barrier) project

The proceedings for the approval of its construction

15. The background to the decision on the erection of the barrier are various resolutions by the Government of Israel to create an obstacle – with various degrees of effectiveness – which would deny Palestinians uncontrolled passage into the State of Israel. Thus, in March 1996, the Government of Israel decided to establish permanent roadblocks along the seam zone, while blocking off alternative routes of passage. Thus, it was decided in 1997 to deploy Border Guard forces along the seam zone, and so it was resolved in November 2000 to establish a "barrier against vehicles".

16. In June 2001, the Second Respondent ordered the establishment of a Steering Committee, headed by the National Security Council Chair, Maj. Gen. Uzi Dayan, whose function it was to form a new plan to prevent the infiltration of Palestinians over the Green Line via the seam zone.

17. On 18 July 2001, the Steering Committee's recommendations were submitted to the Defence Cabinet, which adopted them. Among the recommendations was the recommendation on the erection of a "barrier" against human beings in certain segments of the seam zone where the level of risk was high (see: The State Comptroller, **Comptroller's Report on the Seam Zone** [in Hebrew], Report No. 2 (Jerusalem, 2002), p. 10-12, attached hereto as **Exhibit C**).

18. On 14 April 2002, the Cabinet reconvened to discuss the recommendation on the erection of a barrier against human beings, for the implementation of which nothing had been done until that time. The cabinet decided on that day to erect a fixed barrier against humans in the seam zone. This resolution also included the establishment of the Seam Zone Directorate – namely, the Fourth Respondent.

19. In June 2002, a detailed proposal was presented to the Government of Israel for the erection of a permanent barrier against human beings from the north-western edge of the Green Line (close to Kafr Salem) to the settlement Elqana in the south (hereinafter: Stage A), as well as a detailed proposal with respect to the route of the barrier in the Jerusalem area (hereinafter: the Jerusalem Envelope).

20. On 23 June 2002, the Government of Israel approved the Seam Zone Directorate's proposal in principle, while authorizing the Second the Third Respondents to determine the exact route. It was further determined in the government resolution that if disagreements arose between these two Respondents, the issue would be referred to the Defence Cabinet (Government Resolution No. 2077, attached hereto as **Exhibit D**).

21. On 14 August 2002, the Cabinet approved the final route for Stage A, which included 96 kilometers between Salem and Elqana and another 20 kilometers in the Jerusalem Envelope.

22. In early December 2002, the Cabinet approved the route for Stage B, which stretches east from Salem along the Green Line and then south from Al-Mutilla to Tayasir.

23. In July 2003, work on Stage A of the barrier was completed in most areas, except for the construction of the secondary barriers (marked on the map, Exhibit A, by a dashed line).

24. To the Petitioner's best knowledge, the lands required for the erection of the barrier in the Al-Mutilla-Tayasir segment have not yet been expropriated, and construction work on the secondary barrier of Stage A not yet commenced, other than west of Baqa Ash-Sharqiya and Nazlat 'Isa, where the work has already started.

What the barrier is

25. One may learn of the nature of the barrier from the website of the Seam Line Directorate (the Fourth Respondent), at http://www.seamzone.mod.gov.il/Pages/ENG/operational.htm. According to the drawing posted on the website, the barrier is composed of an electronic fence in its center, wrapped on both sides by patrol roads, smoothed strips of sand, barbed wire fences and ditches. In total, the width of the barrier ranges between 50 and 60 meters. However, in certain places the barrier could reach a width of 100 meters (according to the State's response in HCJ 7784/02, *Sa'el Awani Abd Al Hadi et. al. v. The Commander of the IDF Forces in the West Bank*, paragraph 23).

    A drawing of the barrier from the Fourth Respondent's website is attached hereto as **Exhibit E**.

26. In certain areas, the separation barrier includes a high wall against gunfire (in the areas of Qalqiliya and Tulkarm, for instance).

27. In addition, the separation barrier plan includes secondary barriers which are "depth" barriers that include ditches and barbed wire fences surrounding Palestinian communities (see in Tulkarm and in three communities east of Um El Fahem, for instance), in order to divert human traffic to and from these communities to a controlled checkpoint – **also in the case of eastbound traffic deep into the occupied territories**.

28. On 8 September 2003, the undersigned sent a letter on behalf of the Petitioner to the Second and Third Respondents and to the Attorney General, demanding that no route deviating from the Green Line be approved. Until the filing of the petition, only confirmations were received from the addressees that the letters were received, but no answer on the merits of the matter.

    Copies of the letter and of the confirmations of receipt are attached hereto as **Exhibits F1-F5**.

29. On 1 October 2003 the Government approved the route of Stages C and D.

The implications of the separation barrier project

30. For the State of Israel, the separation barrier project is a colossal enterprise, the cost of which – in difficult economic times – is millions of NIS per kilometer, and billions of NIS in total.

31. In addition to the economic implications, the barrier's Deviating Segments reduce its effectiveness from the security point of view, because they create a situation in which

dozens of Palestinian communities remain west of the barrier. In other words, it is merely a "partial separation barrier".

32. Since the route of the separation barrier, as approved, does not run along the Green Line but invades the occupied territories at many points, the project irreversibly injures the rights of hundreds of thousands of Palestinians, whose lands have been or will be expropriated, who will be separated from their lands by the fence, whose community will become a detention facility which they cannot enter or exit without the army's approval, and whose community is trapped between the wall and the Green Line.

33. According to the assessment of the human rights organization B'tselem, **Stage A alone** injures more than 210,000 Palestinian inhabitants in 67 communities, in the following manner:

- 13 communities (with approximately 11,700 inhabitants) will become enclaves trapped between the barrier and the Green Line (in other words: the fence will run east of their community).
- 19 communities with 128,500 Palestinian inhabitants will be trapped between the barrier and the secondary barrier, and will become isolated enclaves.
- Another 36 communities east of the separation barrier or of the secondary barrier, with 72,200 inhabitants, will be separated from a substantial portion of their agricultural lands, which will remain west of those barriers.

All of this is the result of the construction of the fence in Stage A alone.

B'tselem's report "Behind The Barrier: Human Rights Violations As a Result of Israel's Separation Barrier", April 2003 is attached hereto as **Exhibit G**.

34. Over and above the obvious implications from the points of view of property rights and the injury to the freedom of movement, which will have an immediate effect on the Palestinian population **as a result of the penetration of the barrier into the Green Line, and not of the actual erection of the barrier**, the separation barrier injures all aspects of civilian life, because it separates teachers from the schools where they teach, medical personnel from local clinics, rural inhabitants from the towns that provide them with services, and, frequently, people from members of their own family.

35. The secondary barrier creates de-facto detention camps, between which and the main barrier will crowd the inhabitants of the towns and villages surrounded by such barriers, cut off from the rest of the West Bank.

36. Several reports by international organizations and by Israeli and Palestinian human rights organizations have been written about the civil, economic and other implications of the invasion of the barrier into the West Bank. A small number of these reports are attached to this petition:

- The report of UNRWA (the U.N. Relief and Works Agency for Palestinian Refugees), "Impact of the First Phase of the Security Barrier on the Qalqiliya, Tulkarm and Jenin Districts", is attached hereto as **Exhibit H**.
- The report of OCHA (the U.N. Office for the Coordination of Humanitarian Affairs) on the separation wall of July 2003, is attached hereto as **Exhibit I**.
- An update to OCHA's report of August 2003 is attached hereto as **Exhibit J**.

37. The construction of the barrier requires the seizure of land and the destruction of plantations, orchards and fields at a massive scope. According to the assessment of B'tselem (see Exhibit G, p. 16) and the international human rights organization Amnesty, 11,500 dunam[1] have already been seized and destroyed – see the report entitled "Surviving Under Siege: The Impact of Movement Restrictions on the Right to Work" on the organization's website at http://web.amnesty.org/library/index/engmde150012003.

38. The seizing of land was made by seizure orders **for military purposes** effective until December 2005 (with the declared intention of extending them).

39. In addition to the severe effects on the lives and rights of Palestinian inhabitants, the barrier creates a de-facto annexation of the areas to its west, between the barrier and the Green Line, to the State of Israel.

40. In practice, the barrier creates a border. The barrier re-divides the State of Israel and the occupied territories into two separate regions, each of which has a contiguous internal space – from the Jordan valley and the northern Dead Sea to the east to the barrier, and from the barrier to the Mediterranean Sea.

41. The fence therefore creates areas of land and population that will huddle in detention camps surrounded by the fence, while watching their neighbors in the settlements enjoy an unlimited freedom of movement and civil and legal rights that are entirely equal to those of a resident and citizen of the State of Israel. The ideological significance of the creation of these enclaves is grave – it is the creation of a discriminatory regime of the worst kind, in which one community is a detention camp for powerless inhabitants,

[1] Translator's note: The dunam is a common measurement of land in Israel. One dunam is equal to 1,000 m^2, and four dunam equal one acre.

adjacent to a settlement inhabited by free and independent people. Nor is it difficult to guess that within a short period of time, the inhabitants of the enclaves will become the hewers of wood and the drawers of water for their neighbors the settlers.

3. Legal Argumentation

a. The argument in short

42. The starting point for an examination of the legality of the barrier in its segments that deviate from the Green Line, is that there is no dispute on the right of a state to erect a border fence, and that it is entitled to surround itself with a variety of means to prevent vehicles and people from illegally crossing and infiltrating into it.

43. However, a legitimate and desirable separation fence has turned into an unruly fence penetrating deep into the occupied territories, expropriating, isolating, dispossessing and injuring the rights of the inhabitants there, while creating a legal regime of segregation on the basis of national origin.

44. It is the Petitioner's claim that since the stated purpose of the fence, in the areas in which it invades the occupied territories, is to address the fear of hostile elements infiltrating **Jewish settlements which are also located in the occupied territories**, to which end it spreads its wings on them and incorporates them in practice in the territory of the State of Israel – it is therefore illegal, violates the most basic principles of international law and specifically the law of belligerent occupation, and constitutes, in addition, de-facto annexation which is categorically prohibited.

45. In addition and alternatively, the Petitioner will claim that even without the prohibition on the construction of the barrier stemming directly from the laws of occupation and war, as a deviation from the occupying power's authority to administer an occupied territory, the project is illegal and breaches the laws of belligerent occupation due to its destructive impact on the rights of protected civilians.

46. Finally, but no less importantly, we will argue against the legal regime which accompanies the erection of the wall, which seeks to segregate on the basis of national origin and creates an illegal and immoral apartheid which the Honorable Court is moved to definitively strike down.

47. Following is a legal analysis of the authorities by virtue of which the Respondents can claim that they are acting, and our response to such claims.

48. Our argumentation will be based, as aforesaid, on the provisions of international law relating to belligerent occupation. In the event that the Court will so deem necessary, we undertake to produce a detailed argumentation on the status of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, and of extensive parts of its protocols that were signed in 1977, as enforceable customary international law. We have not included this argumentation in this petition,

because to our understanding, there is no dispute on the applicability of the provisions relevant to this petition of the aforementioned documents.

49. Let us therefore turn to the legal argumentation based on the assumption that the Convention and the Protocols are indeed customary law.

b. The illegality of constructing the barrier within the occupied territories - Lack of authority

General

50. The invasion of the separation wall into the occupied territories is illegal due to three independent reasons, which concern the lack of authority and the exceeding of authority:

- First, the project concerns a permanent (or at least long-term) change of the arrangements prevailing in an occupied territory, in violation of the administrative authorities vested in the occupying power;
- Second, the project requires the expropriation of thousands of dunams of private land, the use of thousands of dunam more of state lands, the demolition of buildings and the uprooting of fields, plantations and orchards, and all not for the security of the occupying forces or the occupying power, but for the security of the settlers, contrary to the causes which permit expropriation and demolition;
- Third, the project, in its said Deviating Segments, creates, in practice, a prohibited annexation of an occupied territory, and for this reason too it is illegal.

51. These three arguments are based on the general principles of the relevant branches of international law, and on the concrete provisions set forth in the rules appended to The Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, the Geneva Convention (IV) and the protocols appended thereto.

52. We will mention only that the general principles of international law are a highly important legal source of international law (see Section 38 of the Statute of the International Court of Justice (ICJ), which explicitly states that general principles are a legal source of international law).

53. The Petitioner shall further claim as aforesaid that the legal regime that was imposed in the area between the wall and the Green Line – the closure of the area by the Declaration and the creation of a regime of permits which only Palestinians require – is a wrongful apartheid regime.

General principles: The occupying power as an administrative and managerial entity and <u>not</u> as a sovereign

54. International law, in the branch thereof which deals with the law of belligerent occupation, is founded upon two basic principles, which balance each other and constitute supreme principles, charting the image of occupiers and occupied and setting forth the set of obligations and rights that is applicable between them: **The first principle** determines that the occupying power is responsible for order and security (without delving into the argument born of the expression 'vie public' in the French version of Rule 43 of the Hague Rules, which expands the occupying power's responsibility to other areas of civilian life, we will assume that this is the case); **The second principle** determines that belligerent occupation does not render the occupying power sovereign of the occupied territory, since legal rights to land are not acquired by way of military occupation. See, in this context, the scholar Oppenheim's well-known saying whereby belligerent occupation has in it "not a single atom of sovereignty" ("The Legal Relations Between an Occupying Power and the Inhabitant", **L.Q.R.** 33 (1917), 363, 364)

55. The international law of belligerent occupation has, therefore, created a unique legal institution, the underlying rationales of which seek to address reality and the situation of occupied populations that have no rights, by granting security and administration authorities to the occupying power on the one hand, and preventing a crawling annexation by drawing a sharp and clear distinction between the status of an occupier and the status of a sovereign, on the other hand.

56. On the basis of these supreme principles, the Geneva Convention, the Hague Rules and the laws of occupation in general have created a delicate fabric of a military administration which is obligated to see to the needs of the occupied population in all civilian aspects on the one hand, and has the security authority to judge and penalize civilians who jeopardize security and operate against the soldiers and citizens of the occupying state, on the other hand.

57. In accordance with the outlines of these two supreme principles, the Hague Convention Regulations revolve around two axes for the exercise of authority: Realizing the security interests of the occupying power and realizing the civilian interests of the population in the occupied territory (see HCJ 393/82 *Jamait Ascan Almaalamon v. The Commander of the IDF Forces*, PDI 37 (4) 794) or, as Prof. Dinstein put it, "two magnetic poles of military necessity on the one hand and humanitarian considerations on the other hand" (Y. Dinstein, "Legislative Authority in the Occupied Territories",

Iyunei Mishpat (5732-33) 505, p. 509). These two axes or poles are expressed in the general "supreme" norm of the Hague Regulations, as referred to by the Hon. Justice Barak (as was his title then) in the said HCJ 393/82 (p. 797 opposite the letter A), namely Article 43, which provides that:

> **The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety[2], while respecting, unless absolutely prevented, the laws in force in the country.**

(The Hebrew version by Prof. Dinstein in his said article, p. 506, was accepted and adopted in HCJ 202/81 *Tabib et. al. v. The Minister of Defence et al.*, PDI 36 (2) 622, p. 629).

58. According to the interpretation given to this Article in case law, the authority to ensure "public order and safety"[3] encompasses both the security needs of the military administration and the needs of the local civilian population (the said HCJ 393/82, p. 797).

59. In HCJ 393/82, which discusses the highway paving plan approved by the Supreme Planning Committee, the Hon. Justice Barak summarized the case law on the considerations which a military administration is required to consider when executing acts of government in the territory occupied thereby. *Inter alia*, the Hon. Justice Barak ruled that:

> **The military commander is not entitled to weigh the national economic and social interests of his own country, insofar as they do not bear on his own security interest in the region or on the interests of the local population… a region held by belligerent occupation is not an open field for economic or other exploitation… such planning and execution cannot be carried out only to serve the occupying country.** (p. 794-795)

60. Although the quoted passage was stated in the context of a plan that was supposed to apply to private land, Article 55 of the Hague Regulations, which is also in the third chapter of the Regulations entitled "Military Authority Over the Territory of the Hostile State" – which opens with the foregoing Article 43 which is, as aforesaid, a general

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[2] Translator's note: Prof. Dinstein's Hebrew version literally reads "public order and life".
[3] See note 2 above.

"supreme" norm, adds real estate to the list of assets which are to be managed by the military administration subject to the said restrictions.

61. The judgments of this Honorable Court have emphasized, without exception, that alongside the Respondents' authority to administer public life in the occupied territories, security alone is grounds for allowing the exercise of the Respondents' authorities of the type which is the subject matter of this petition. It was the failure of the security grounds that resulted in the reversal of a decision to establish the settlement Eilon Moreh. (See HCJ 390/79 *Dwikat v. The Government of Israel* (PDI 34 (1) 1).

The Petitioner will claim that the Respondents' decisions certainly cannot rely on the second authority axis outlined by the Hon. Justice Barak in the said HCJ 393/82, namely the general authority to administer public order and safety in the region, because the project for the erection of the wall is designed to serve the occupying power and not the protected civilians of the occupied land, for the sake of whom the authority to operate on the aspect regulating civilian life was created.

Furthermore, and in the same context, it shall be stated that the Hague Convention (IV) and its Regulations sought to anchor the military administration's authority over the occupied population and to defend the latter from the arbitrariness of the former's acts. Therefore, one should view with relative restriction the power with which such administration is allowed to serve the interests of elements that are foreign to the occupied land, such as the citizens of the administration's flag country. Naturally, this does not mean that it should abandon this latter population to its fate, but it certainly must not give it absolute preference over the original population of the occupied territory and take measures which extremely injure the local population with the pretext of protecting the population of the occupying state. Such an excuse gives rise to a serious suspicion of wrongful discrimination and of oppression of the local population for the benefit of newcomers settling in the region with the occupier's blessing. In this case, the Respondents have not been able to dispel this serious suspicion. On the contrary, all the indications imply that what we have before us is the creation of a regime of segregation and preference, a regime of apartheid disguising itself with security pretexts.

Concrete provisions - The prohibition of harming property, movement and livelihood

62. Against the background of the basic principles regarding the authorities of an occupying power over land occupied thereby by belligerent occupation and specified above, the laws of occupation include several concrete provisions which limit the occupying power's ability to violate the rights of protected civilians.

63. In our case, as stated in the previous chapter, the Deviating Segments of the separation barrier violate the rights of hundreds of thousands of protected civilians in all areas, including the rights of property, movement and the ability to earn a living.

64. The classic liberal basic rights did not skip over the laws of belligerent occupation, and have therefore not been stripped of civilians in occupied territories. The modern international laws of occupation have entirely changed the set of rights and obligations in the relationship between an occupier and the occupied population, as being until the 19th century and the drafting of the Hague Rules (which, according to the common opinion, reduced to writing existing customary international law). They were designed, first and foremost, to protect the occupied civilians, while conferring many rights deriving from the philosophy of human rights, which developed at the same time:

> **The international law of belligerent occupation lays down the rights and obligations of the belligerent power in occupation of foreign territory. The law of belligerent occupation has undergone major development over the past two centuries: while the population of such territories originally had virtually no rights at all, their status and rights have now been greatly improved and are securely anchored in international law.**
>
> **…**
>
> **Belligerent occupation is a form of foreign domination. Its effects on the population are mitigated by the provisions of international law on belligerent occupation. Hence, Geneva 4th Convention appears as a bill of rights with a catalogue of fundamental rights which, immediately upon occupation and without any further actions… becomes applicable to the occupied territory and limits the authority of the occupying power.** (D. Fleck (Editor), The Handbook of Humanitarian Law in Armed Conflicts, (OUP, 1995), p. 240)

65. The "bill of rights" of protected civilians includes, therefore, many rights, the main one of which is the right to life and **honor**, mentioned in Articles 27 of the Geneva Convention (IV) and 75 of the First Protocol.

66. Also the international law of human rights protects the rights of persons finding themselves under foreign occupation (see below on the applicability of this branch to our case).

67. First, let us focus on the property right. Article 46 of the Rules annexed to the Hague Convention prohibits the expropriation of private land in occupied territories (emphases added):

> **Family honor and rights, the lives of persons *and private property,* as well as religious convictions and practice, *must be respected.***
>
> ***Private property cannot be confiscated*.**

To emphasize: Confiscation is prohibited without any exception, not even security necessity.

68. Article 23(g) of the Hague Regulations forbids the destruction or seizure of enemy property, unless "imperatively demanded by the necessities of war".

69. Article 53 of the Geneva Convention, which also deals with the destruction of and injury to private and public property, sets forth a more restrictive legal formula for the circumstances in which an injury is allowed (emphases added):

> **Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operation*.**

70. As we can see, military necessity is the *sine qua non* of any injury to the property rights of the inhabitants of an occupied territory, and even where it is present, confiscation is absolutely and without exception forbidden.

71. The obligation of tending to the livelihood and welfare of the inhabitants of an occupied territory also derives from the laws of belligerent occupation. The said obligation is part of a full fabric of obligations which an occupying power has to protected civilians: the occupying power is responsible for facilitating the proper working of an education system (Article 50 of the Convention – and note further down the article how specific is the duty to arrange for the registration of children, and to supervise institutions taking care of orphans, etc.); it is also responsible for the supply of basic necessities of life to the inhabitants of the occupied territory (Article 55); for the proper functioning of a health and hospital system (Articles 56-57); and for the activity of religious authorities (Article 58). The occupying power is responsible for the supply of food (the said Article 55) and for humanitarian relief programs (Article 59 –

which does not relieve it of the responsibility to supply basic necessities of life – Article 60).

72. The freedom of movement and the right to earn a dignified living are therefore derived, simultaneously, both from the duty of restoring order and security and the duty of arranging for the inhabitants' basic needs, and from the right to honor – which, in both Israeli constitutional law and the laws of belligerent occupation – is the primary right, from which many other basic rights emanate.

The absence of military necessity

73. The Petitioner shall claim that the "military necessity" (or "security necessity") interest, recognized in humanitarian law and in occupation law as permitting a proportionate injury to the rights of civilians, extends to the security interests of the occupying power and of the occupying force, but not of citizens of the occupying power who decide to immigrate to and settle in the occupied territory. The interests of these people are expressed in the authorities of administration and the restoration of order and security only, which in themselves cannot serve as a source of authority to violate so many of the inhabitants' rights.

74. Without discussing the very important issue of the legality of settlements by citizens of the occupying power in the occupied territory (and it is our unequivocal position that this is a blatant breach of customary international law – see Article 49 of the Geneva Convention (IV)), knowing that this Honorable Court has been and is still of the opinion that this issue is unjusticiable (see: HCJ 4481/91 *Bragil et. al. v. The Government of Israel et al.*, PDI 47 (4) 210; HCJ 3125/98 *Abd Elaziz Mouhammad E'ad et al. v. The Commander of the IDF Forces in Judea and Samaria et al.*, PDI 55 (1) 913), the legal position of this Honorable Court has always been that the only justification for the seizure of land is "military necessity", which makes the seizure lawful also if accompanied by another, illegitimate, purpose:

> **The main point is that from the pure consideration of security, there is no doubt that the presence in an occupied territory of settlements – even "civilian" ones – of citizens of the occupying power, makes a considerable contribution to the security situation in the region and facilitates the army's duties.** (HCJ 606/78 *Suliman Toufik Uyav and 11 others v. The Minister of Defence and 2 others*, PDI 33 (2) 113).

75. How different is the situation now. Since those words were written, there is not a single person who believes that the presence of Jewish settlements "makes a considerable

contribution to the security situation", and certainly does not "facilitate the army's duties". It is common knowledge that the situation is quite the contrary – the settlements are an intolerable security burden, the protection of the settlements imposes a very heavy burden on the defence forces, and the separation wall is the climax of this burden, as the location of the settlements requires a wholly unreasonable extension of the wall, to the detriment and distress of the inhabitants of the territories.

76. However, as stated above, we are not moving the Court in this petition to rule on the legality or illegality of the settlements. What we ask is for a ruling that the acts of the seizure of lands, the building of structures and the destruction of property, all of which are designed to move the effective border of the State of Israel so that the settlements will become, from every aspect, an inseparable part of the State of Israel, dragging behind them chunks of land and local populations, reluctantly following and stripped of any rights, to live beside them in detention camps, are illegal and realize all that is prohibited, legally as well as morally, in the transfer of inhabitants of the occupying state to the occupied territory. They are an extremely grave illustration of the corrupting impact of establishing concentrations of the occupying population in the heart of the occupied population. The rights and means of protection of the occupiers are being paid for by the occupied inhabitants, by a loss of rights, closure, severe restrictions on movement and total economic annihilation. Everything that is bad about the settlements, from the legal point of view, the law of war and the law of human rights, is aggravated dozens of times over by the invasive wall.

77. The twisting, invasive and dispossessing wall serves no military necessity. International law interprets the term "military necessity" while adopting the legitimate purpose of the use of force determined in the UN Charter:

> **The changes in the jus ad bellum brought about by the UN Charter have added a new dimension to this principle of *military necessity.* Prior to 1945, once a state was justified in going to war it was invariably entitled to seek the complete submission of its adversary and to employ all force, subject only to constraints of humanitarian law, to achieve that goal. That is no longer permissible. Under the UN Charter, a state which is entitled to exercise the right of self-defence is *justified only in seeking to achieve the goals of defending itself and guaranteeing its future security.*** (D. Fleck (Editor), The Handbook of Humanitarian Law in Armed Conflicts, (OUP, 1999) paragraph 130 (2), our emphasis)

78. In other words, "military necessity" is derived from the right of states to self-defence, which extends to the defence of the state and, obviously, the defence of the fighting force itself. Military necessity cannot extend to the defence of inhabitants living in the occupied territory, because with respect to them there is only the authority to administer "order" and "public life". Nor can military necessity be used, and certainly not with the same degree of force, to defend elements that are foreign to the occupied territory, such as settlers, who most certainly do not have an inherent right under international law to settle in the occupied territory.

c. The illegality of the construction of the barrier - The creation of a regime which exercises methodical and legal discrimination

79. Another reason for striking down the Government resolutions on the Deviating Segments and the Declaration on the closure of an area and the Orders related thereto, issued by the Fifth Respondent (Exhibits B1-B4) – is that the legal regime that was chosen to maintain the seam zone is a regime that is defined from the outset as one which extends differential treatment to Jews and Palestinians, and creates, in fact, a regime of **apartheid**, unprecedented in Israeli law in all of its manifestations and extent of reach in Israel and in the territories.

80. The Declaration on the military area determines that it is not applicable to "**Israelis**". An "Israeli" is defined as a person who is a citizen of Israel, a resident of Israel, and a person entitled to citizenship pursuant to the Law of Return.

81. The Declaration prohibits non-"Israelis" to be in the seam zone without a staying permit, and requires Palestinian zone inhabitants to file an application for an inhabitant's staying permit; workers in the zone to file an application for a staying permit for a teacher / farmer / medical worker / international organization worker, etc. Palestinians holding the various staying permits are allowed to enter and exit the seam zone only through the gates identified in the Declaration.

82. The significance of the Declaration and the Orders is that the zone becomes a closed military area for Palestinians who have been living there for hundreds of years, and an open area without any restriction on the freedom of movement for any Jew, including those of the Diaspora. This intolerable situation also means, for instance, that Palestinian inhabitants of the zone cannot hold family events at home (since guests and relatives from outside the zone will not be able to come in), and turns the Palestinian inhabitants of the zone into prisoners in the web of requirements and the need for permits for every single move, while the Jewish inhabitants of the zone are free to move about into and out of the zone as they please, without any restriction.

83. Thus, the State of Israel joins the family of regimes loathed by the international community, which segregate and distinguish among inhabitants on the basis of national origin, and we shall say only that such a regime is entirely unlawful and constitutes an international crime in itself.

84. See how the author of the Orders and the Declaration has lost any sense of shame: On the date of issuance of the Declaration and the Orders compelling the inhabitants of the "seam zone" (the area between the wall and the Green Line) to file an application for a staying permit, the Fifth Respondent also signed an "Order on Security Instructions (Judea and Samaria) (No. 378), 5730-1970, General Permit to Enter and Stay in the Seam Zone". According to this general permit, three types of persons (other than those defined as "Israelis") are entitled to enter into and stay in the zone as they please, without applying for a permit: Tourists, Palestinians who work in seam zone settlements, and Palestinians who hold a permit to enter Israel.

85. Thus, Palestinians who have been living for generations on their land, which has become the "seam zone", who till the soil by the sweat of their brow, who had children and raised them there –have to go to the offices of the Civil Administration and fill out a form and ask for a permit to stay on their land and in their homes, and there is the fear that if one of them is found to have a security history, he will be denied the possibility of continuing to live on his land, and here we have the beginning of a process of a crawling transfer with security pretexts. Tourists, on the other hand, arriving from around the world, possibly setting foot on Middle Eastern soil for the first time, get an automatic permit, are not required to stand in line during the opening hours of the Civil Administration, their right to stay on the inhabitants' land is clear to the Fifth Respondent. And finally there are the hewers of wood and the drawers of water of the settlers, those Palestinians who are exploited by the robbers of their land for a pittance, who, according to the best tradition of racially segregating regimes which enable the servants to reach their masters, are also not barred from entering, lest the settlers be left without anyone to clean their toilets.

86. Anyone who builds a system of walls and ditches that are designed to block one type of people and be transparent to another type is destined, as has happened here, to spin a criminal and despicable web of orders and declarations which distinguish between people on the basis of origin and nationality, and create a world of servants and masters, of those who have rights and those who have not, and, in order to complete the feudal structure, it chooses for itself, from among those with no rights, some to do its unpleasant manual labor. This is precisely what the Fifth Respondent has done, not

stopping for one moment to look at the documents submitted to him by his legal advisers, not noticing the monstrosity embedded in them.

87. It is hard not to mention, in this context, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, which defines, in Article II(c) and (d) thereof, as a crime of apartheid, the imposition of various legislative measures on different racial groups while injuring the rights of one.

88. We shall quote from the Rome Convention, which is the Statute of the International Criminal Court, a convention signed but not ratified by the State of Israel. This convention determines, in Article 7(1)(h) thereof, that the infringement of human rights based on an ethnic criterion is a crime against humanity:

> **Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court**

And 'Persecution' is defined in Article 7(2)(g) as follows:

> **Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.**

89. As we can see, the deprivation of fundamental rights by reason of identity (including ethnic or national) is defined as persecution, and such persecution is a crime against humanity. There is no doubt that the web of the Orders and the Declaration, indeed, severely deprive of basic rights (the rights to the freedom of movement, to property, to livelihood, to education, to health and mainly to dignity), and there is no dispute that they are directed against and apply only to those who are neither Jews nor tourists – i.e., Palestinians.

90. The Court is therefore moved, on this matter, to step into the breach and block the steep deterioration in the legal and moral standards of the security legislation and the arrangements we, as an occupying power, are imposing upon the inhabitants of the occupied territory.

91. Also the Geneva Convention, **by virtue of which the military commander is authorized to pass legislation in the occupied territories in the first place**, prohibits discrimination between civilians in the occupied territory:

> **Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the party to the conflict in whose power they are, *without any adverse distinction based, in particular, on race, religion or political opinion.*** (Article 27, third paragraph. It should be emphasized that the Article refers to wrongful discrimination between protected persons, and there is great doubt whether the settlers are entitled to that status. Either way, the prohibition on any discrimination between the inhabitants of the occupied territory and the citizens of the occupying power who settle therein derives from this article *a fortiori*).

92. The Court is therefore moved to declare that the Orders and the Declaration are tainted by wrongful discrimination and are therefore invalid.

d. The illegality of the construction of the barrier within the occupied territory – Infringement of inherent rights

93. The Petitioner believes that the erection of the separation wall within the occupied territories, in the format in which it is constructed, inflicts a critical injury on the freedom of movement, the right to a livelihood and the other systems of life, in such a manner that renders the entire project illegal, as it constitutes:

a) Collective punishment, which is prohibited by the law of belligerent occupation;

b) An unnecessary violation of basic rights that are anchored in the international law of belligerent occupation, in the international law of human rights, and finally, in Israeli administrative law.

94. The principles of the prohibition of collective punishment, which is no doubt part of the basic principles of every human legal method and every moral code, are upheld also by the laws of war:

> *Art. 33*
>
> **No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.** (From the Geneva Convention.)

Art. 50

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible. (From the Rules appended to the Hague Convention.)

95. In addition, the injury which the wall in its Deviating Segments deals to the inhabitants' rights, does not stand up to the tests determined in the international law of human rights for a legitimate injury to rights. The reason for this is that no lawful injury to basic rights is possible without meeting the requirement that such injury be the only possible means, having no substitute, and that the injury not be disproportionate (these criteria are acceptable not only in international law but also in the constitutional law of nations, and of course in Section 8 of our own Basic Law: Human Dignity and Liberty). In the case before us, the deviation of the fence from the Green Line creates an excessive injury, because the legitimate goal of defending the State of Israel can be achieved without injuring the inhabitants of the occupied territory (or by doing so to a far lesser extent) by, as aforesaid, having the fence run along the Green Line, possibly with merely technical changes deriving from the topography of the land, and not necessarily into the occupied territory but by retreating the fence at times into the territory of the State of Israel.

e. The illegality of constructing the barrier within the occupied territory – De-facto annexation

96. As mentioned above, the Deviating Segments, in practice, re-divide the area between the sea and the Jordan River in a manner that maintains a contiguous space, lacking any barrier / wall / fence, from the Jordan to the barrier, and another contiguous space from the barrier to the sea.

97. The erection of the barrier has far-reaching economic, cultural, social and other implications. The severance of contact between the inhabitants west of the fence and those east of it, creates a new political entity.

98. Hence, the barrier creates a permanent (or at least long-term) modification which translates into a practical annexation of the land located between the barrier and the Green Line, to the realm of absolute control of the State of Israel. The law of the enclaves already applying to the Jewish areas of those lands will become a lodestone of

Israeli legislation which will apply therein, and we will find ourselves annexing land that was seized by the use of force.

99. Above, we quoted the scholar Oppenheim's statement whereby there is not a single "atom of sovereignty" in belligerent occupation, and we see no need to quote further on this principle, which is a solid foundation of the modern law of war.

100. On these grounds too, the barrier project, in its Deviating Segments, violates the principles of international law and should be abolished.

The grounds for the petition for an interlocutory order are as follows:

101. The barrier erection project is, in major part, irreversible. An uprooted olive tree will not be re-planted, and an uprooted orchard will no longer bear fruit if the petition turns out to be justified. The project requires demolition, expropriation, paving and digging, and all of these unrecognizably transform the land which is the subject matter of the petition.

102. This petition should be heard quickly, so that policymakers too will know what is allowed and what is prohibited in this project, and until this happens it would be correct to freeze the status quo and not enable any injury to land and property. The Honorable Court is therefore moved to issue an interlocutory order as requested at the outset of the petition, and to schedule the case for hearing as early as possible.

The Honorable Court is therefore moved to issue an order nisi as requested at the beginning of the petition, and, after discussion, to make it absolute.

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