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

H CJ 9961/03

**In the matter of: HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger (Reg Assoc.)**

represented by attorneys 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 Defence, Mr. Shaul Mofaz**
- 4. Military Commander in Judea and Samaria**

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

The Respondents

Preliminary Response on behalf of the Respondents

1. In its petition, the Petitioner requests the nullification of the decision to build a number of sections of the separation fence (hereinafter – the barrier), and of the declaration closing the area referred to as the “seam area.” The sections of the barrier as to which the Petitioner requests nullification are:
 - A. The secondary barrier in the seven enclaves situated along the length of Stage 1 of the barrier;
 - B. The barrier from al-Mutilla to Tayasir in the eastern portion of Stage 2 of the barrier;
 - C. The barrier's sections that go beyond the Green Line in the route of Stages 3 and 4 of the barrier.
2. The Petitioner's application for a temporary injunction preventing the construction of the said sections of the barriers was denied by the Honorable Court.
3. For the reasons set forth below, the Honorable Court is requested to deny the petition.

Factual background

General – The nature of the current conflict between Israel and the Palestinian side

4. As is known, since 1967 and as a result of the Six Day War, Israel has held the territory of Judea and Samaria (hereinafter – the region) in belligerent occupation. In 1993, Israel began a peace process with the PLO, during which a number of agreements transferred control of some of the region to the Palestinian Authority. Israel and the PLO continued to conduct political negotiations in an attempt to resolve outstanding problems, but the negotiations, which were in their end stages at Camp David, failed in July 2000.
5. Shortly following the failure of the Camp David talks, the Israeli-Palestinian conflict, which had experienced violence in the past, reached new peaks of violence. On September 2000, the Palestinian side decided to switch to a brutal terror offensive against Israel and Israelis. Since then, this aggression has been conducted by the Palestinian terror organizations with the massive support of the Palestinian citizenry, and of external terror organizations such as Hizbullah, and states hostile to Israel. This orientation to armed conflict came, inter alia, from the Palestinian leadership.
6. The terror attacks took place and are taking place in the region and in the State of Israel. They are directed against civilians and soldiers, men and women, the young and the old, ordinary citizens and public officials. The terror attacks are committed in every place and location, including public transportation, shopping centers and markets, cafes and restaurants, and in other places.
7. The terror organizations use many varied means in committing the terror attacks, with the only common denominator being their deadliness and cruelty. These means include gunfire, suicide attacks, mortar fire, rockets, booby-trapped cars, and more. Since September 2000, more than 780 attacks have been committed within the State of Israel. During that same period, more than 8,200 attacks were committed in Judea and Samaria and thousands in the Gaza Strip.
8. The armed conflict has taken the lives of more than 900 citizens and residents of the state, and has injured more than 6,000 others. Many of the injured have become extremely disabled. It is undisputed that the armed conflict has also resulted in many killed and injured on the Palestinian side.
9. In H CJ 7015/02 *Ajuri v. Commander of IDF Forces, Takdin Elyon* 2002 (3) 1021, the Honorable President Barak pointed out the unique characteristics of this conflict, as follows:

Since the end of September 2000, grave hostilities have been taking place in the regions of Judea an Samaria and the Gaza

Strip. This is not a police action. This is an armed conflict. In this conflict, there have been 14,000 attacks against the lives, bodies, and property of innocent Israeli citizens and residents, among them the elderly and children, men and women. More than 600 citizens and residents of the State of Israel have been killed. More than 4,500 have been injured, some extremely seriously. Death and attacks have also struck the Palestinians. Many of them have been killed or wounded since September 2000. Furthermore, in one month alone – March 2002 – 120 Israelis were killed, and hundreds wounded, in attacks. From March 2002 to the day that this opinion is being written, 318 Israelis have been killed and more than 1,500 injured.

Bereavement and pain engulf us.

2. The hostilities in which Israel is engaged is complex. The Palestinian side uses, *inter alia*, human bombs. These suicide bombers make their way to every place where Israelis are found (within the State of Israel and in the Jewish communities in Judea and Samaria and the Gaza Strip). They bring death and gore to the cities and these communities. Indeed, the forces fighting in Israel are terrorists; they are not part of a regular army; they do not wear uniforms; they conceal themselves inside the civilian population in the region, including holy sites; they receive support from part of the civilian population, in general, and also from families and relatives, in particular. A new, harsh reality has been placed before the State of Israel, which is fighting to maintain its security and the security of its citizens. This reality has, more than once, found its way to this court...

The terror attacks committed by the Palestinian side, including by members of the various security bodies of the Palestinian Council, led to a long list of security measures of varying severity. These measures were expressed also in the judgment in HCJ 24612/01 *Kanan v. Commander of IDF Forces in Judea and Samaria*, unpublished:

For several months now in Judea and Samaria and in the Gaza Strip, there have been *substantial hostilities*: live gunfire at Israelis and IDF soldiers, laying of roadside explosives, hurling of petrol bombs and grenades, infiltration into Israel of booby-

trapped vehicles, murder of Israelis, and attacks on Israelis entering Area A.

10. We see from the above that the situation existing between Israel and the Palestinian side is one in which there occur, both in the Territories and in Israel, actual hostilities. This is a situation of “armed conflict.”
11. The nations of the world have recognized the struggle against terror as being comparable to a military struggle against aggressive states; they recognized an attack by a terror organizations as an “armed attack” that endangers international peace and security (see Security Council Resolution 1373, of September 2001); the United States, which was directly harmed by the attack in September 2001 also formally declared the existence of armed conflict between it and the terror organization that harmed it.

In the 20th century, a new term was formulated and made its imprint in international law. The term – “armed conflict.” – was intended to cover every situation of violent conflict (declared or undeclared) in which at least one state was involved. Following this development, the term currently used to describe hostilities of different kinds is “armed conflict,” which now includes armed disputes of different, additional, kinds, which are less than war.

For the sake of convenience, hereinafter we shall relate to this situation in Hebrew as עימות מזויין [armed conflict].

The decisions on building the barrier

12. Until March 2001, most of the terrorist attacks were committed in Israel’s population centers. As a result, in April 2001, the head of the National Security Council was directed to coordinate a staff to build a barrier that would assist the security forces in stopping the attacks. The staff’s work continued for about one year. During 2002, particularly following the growing wave of suicide bombings in March-April of that year, it became clear that, if a physical partition means of protection – i.e., a continuous barrier – was not erected between most of the Palestinian residents in the region and Israel and the Israelis living in the region, it would be impossible to provide protection against suicide bombers and other attacks.
13. In April 2002, a plan for building a barrier was presented to the government. In June 2002, the government decided to build Stage 1 of the barrier in three sections between Israel and the region – from Salem south to Elqana – approximately 120 kilometers, and two sections in North Jerusalem and south of the city, about 22 kilometers in length. Most of Stage 1 was completed in July 2003.

14. A description of the decision regarding construction of the barrier is set forth in the judgment of the Honorable Court in HCJ 8172, 8532/02 *Abtasam Muhammad Ibrahim v. Commander of IDF Forces in the West Bank* (unpublished), as follows:

The decision to erect the separation fence was made on 14 April 2002 by the Ministerial Committee for National Security Matters, with the purpose of “improving and strengthening operational readiness and capability in the battle against terror, and to thwart, impair, and prevent the infiltration of terrorist activity from the areas of Judea and Samaria into Israeli.” This decision was approved, following Cabinet discussion, on 23 June 2002, in which it was decided to build a barrier 116 kilometers long, which would run primarily in the sensitive areas through which terrorists seeking to reek blood and destruction infiltrated many times to commit terror attacks. The final route of the barrier was selected by security and army officials, together with professionals, and was approved, on 14 August 2002, by the Ministerial Committee for National Security Matters.

The seam area is intended to block the crossing of suicide bombers and other terrorists into the State of Israel. As conceived by the security and army officials in charge, the creation of a seam area is a major element in the battle against terror that originates in the region of Judea and Samaria. To the extent that the barricade erected does not completely block the infiltration of terrorists, the objective of the barrier is to delay infiltration into Israel for a period of time that will enable security forces to reach the site of the penetration, and thus create a geographic security space that enables the combat forces to pursue the terrorists before they enter the state.

Unquestionably, the construction of the seam area harms the Palestinian residents in that area. To construct the barrier, it is necessary to seize, and there has been seizure of, farmland, and it is liable to significantly impair the residents’ ability to use their lands, and is also liable to impede access to the land. This harm is forced by the emergency situation, and results from the fighting to which the region has been subject for more than two years – a situation that has resulted in the loss of many lives.

15. In December 2002, the prime minister and the minister of defence approved Stage 2 of the barrier from Salem east to the Jordan River, a distance of about 60 kilometers, and also the extension from Mount Avner (near al-Mutilla) , in the South Gilboa, to Tayasir. It should be mentioned that construction of Stage 2 from Salem to the Jordan is scheduled for completion in March 2004.

The extension from Mount Avner (al-Mutilla) to Tayasir was approved by the Cabinet on 1 October 2003, but is still under review, and orders to seize land have not been issued.

16. On 5 September 2003, the Ministerial Committee for Security Matters decided to construct Stage 3 of the barrier in the Jerusalem Envelope area (except in the area of Ma'ale Adumim), covering a total length of 64 kilometers. Regarding the route of these parts, in the 14-kilometer stretch running from Mazmura to Az-Za'ayem, orders for the seizure of land were issued to the landowners, and objections were filed, as well as a number of petitions to the High Court of Justice. Regarding other parts of the route, the planning is still under way, so orders for the seizure of land have not yet been issued.
17. On 1 October 2003, the Cabinet reached a decision on Stages 3 and 4 of the barrier, as follows:

A. The government repeats its decision regarding the supreme importance of building a "seam area," and emphasizes the security need entailed in the continued construction of the barrier in the "seam area" and Jerusalem Envelope.

B. In continuation of the above:

1) to approve the continuation of construction of the barrier to prevent terror attacks in accord with the stages and the route presented to the government today by the defence establishment (the map in which the route of the fence and the stages as presented to the government is on file in the office of Cabinet Secretariat).

2) The barrier that is built in accordance with this decision, like the other sections in the "seam area," is a security measure to prevent terror attacks, and does not reflect a political, or other kind of, border.

3) Local changes in the route of the barrier or in its execution that are required by the overall planning of the route,

will be brought to the minister of defence and the prime minister for approval.

4) The prime minister, minister of defence, and minister of finance will determine the magnitude of the multi-year budget needed to implement the decision and arrange the financing necessitated by it. The amount will be brought to the government for approval.

5) In this framework, determination will be made as regards other immediate security components to protect the Israeli communities in Judea and Samaria against threats that exist during the period of construction of the barrier in the “seam area.”

6) During the detailed planning, every effort will be made to reduce, to the extent possible, disturbances that the construction of the barrier are liable to cause to the Palestinian’s way of life.

(The text of the decision is attached as Appendix 4 of the petition,)

18. The last Cabinet decision relates to the route going from Elqana in the direction of North Jerusalem, a distance of 180 kilometers (and also about 30 kilometers of depth barriers). The decision also applied to Stage 4, from Gilo southwards to South Mt. Hebron, a length of about 180 kilometers.

It should be mentioned that, as regards construction of the barrier in Stage 3, orders have been issued seizing land in all the sections near the Green Line and in the area of Kiryat Sefer and in the area of Har Adar and Givat Ze’ev.

As regards construction of the barrier in Stage 4, orders to seize land have not yet been issued.

19. In parts of the route, the plan is for a barrier and also for a secondary barrier to be constructed, generally, east of the barrier. Most of these secondary barriers have not been built, and orders to seize land have not yet been issued to the land owners. This is true as regards the secondary barrier near Salem, the secondary barrier near the communities of Mevo Dotan and Hermesh, the secondary barrier in the area of Tulkarm, the secondary barrier in the area of Budrus Rantis, and the secondary barrier north of Route 443. Two depth barriers have been constructed so far, one in the area of Baqa As-Sharqiya and the other in the Qalqiliya area.

20. Since the decision to construct the barrier was made, some 180 kilometers of the barrier have been built, and work is now taking place on the construction of 75 kilometers of the barrier. It should be mentioned that the results generated by construction of the barrier are evident, and led to a reduction in terror attacks in the areas where it was erected. The barrier makes it difficult for suicide terrorists to cross into Israel, and facilitates protection of civilian lives.

Below are examples of cases in which the barrier made it difficult for terror organizations to commit attacks:

- A. On 3 December 2003, two terrorists left the Jenin area on their way to commit a suicide attack at a school in Yokne'am. Were it not for the barrier, the distance they would have traveled would have been relatively short; however, because of the barrier, they had to try to bypass it from the east. Because they had to go a longer distance, IDF forces, which had warning, were able to organize and capture the terrorists before they reached Israeli soil.
- B. On 3 November 2003, a terror attack took place near Azzun. A suicide bomber who left Nablus wanted to commit an attack inside Israel and tried to infiltrate through the barrier, but IDF forces were efficiently deployed in the area, and the terrorist was compelled to blow himself up near an army jeep, injuring one soldier.
- C. On 9 October 2003, a suicide bomber left Nablus on his way to commit a suicide attack inside Israel. He decided to go from the area of Tulkarm, but failed, so he decided to perpetrate the attack at the permits window of the District Coordinating Office in Tulkarm.

In general, it can be said that, we know from the interrogation of terrorists from the area of Samaria that the barrier in that area indeed constitutes a significant obstacle that affects the ability of the terror infrastructures in Samaria to infiltrate suicide bombers into the State of Israel. Information obtained from the interrogations further indicates that, because of the barrier, terror organizations are forced to find other ways to get terrorists into Israel, through areas in which the barrier has not yet been built, such as in Judea.

The procedures for building the barrier

21. The procedures for building the barrier include a number of stages:
- A. Preparation by the competent officials of plans for the route along which the barrier will be built;
- B. Government approval in principle of the route;
- C. Examination of the route in detail by professionals and legal advisors;

- D. Approval of alterations in the route by the minister of defence and the prime minister;
 - E. Issuance of orders to seize land for the purpose of building the barrier;
 - F. Serving the orders on the occupants of the land on which the route is scheduled to run, and giving them an opportunity to object to the route;
 - G. Examination of the objections by military officials, and delivery of the decisions to the objectors;
 - H. Providing an opportunity to petition the High Court of Justice against the decision rejecting the objections;
 - I. Building the route after completing the legal proceedings;
 - J. Making changes in the route in response to needs arising on the ground.
22. The above outline shows that the barrier entails a multi-stage process, and, because of the length of the barrier, its physical location results from a variety of considerations and procedures that exist regarding each and every part of the route. Thus, also regarding the parts of the route that are the subject of the petition, implementation of the decisions on the ground are still subject to change in certain cases.

Declaration of closed area

23. The declaration of closed area, of 2 October 2003, attached to the petition as Appendix 2, applies to certain areas situated near and to the west of Stage 1 of the barrier. Some 5,000 Palestinians live in this area. Upon completion of construction of the barrier, this declaration will apply to a total of about 10,000 Palestinians who will be living west of the barrier. The declaration places restrictions on crossing the barrier from east to west, for the reason that in the westerly direction no barrier exists to prevent entry into Israel. It should be mentioned that the Civil Administration currently is handling requests of Palestinians to receive permits to enter the closed area, and thousands of permits have already been given to the applicants, both to permanent residents in the closed area and to Palestinians who have some need to enter the “seam area.”
- Also, an appeals committee was established in the framework of the declaration. This committee is empowered to hear the cases of persons whose requests for a permit were rejected.
24. It should be mentioned that the declaration does not apply to all the other Palestinian villages that the Petitioner thought would find themselves between the barrier and the secondary barriers described above. As regards all these villages, crossing from the region to areas located within the territory located between the two barriers will be open along paths intended for this purpose, without need for a permit.

Prior petitions to the High Court of Justice

25. The present petition is not the first petition filed with the Honorable Court against the building of the barrier, and is not the only file currently pending before the Honorable Court. Previous petitions dealt with specific sections of the barrier. The Honorable Court rejected them. Prior judgments dealing with this subject are:

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

H CJ 3771/02 Local Council of a-Ras Village v. Military Commander of Judea and Samaria (unpublished);

H CJ 8172, 8532/02 Abtasam Muhammad Ibrahim v. Commander of IDF Forces in Judea and Samaria (unpublished).

26. In the course of the handling of petitions to the High Court, changes were made in the barrier's route in some of the cases:

H CJ 6600/02 Armenian Patriarch v. IDF commander in Judea and Samaria (unpublished);

H CJ 1890/03 Bethlehem Municipality v. the State of Israel (pending);

H CJ 9156/03 Jabbur Da'ud v. Seam Area Administration (unpublished);

H CJ 9674/03 Hamidan v. Minister of Defence (pending).

Nevertheless, the Petitioner did not think it proper to confront the earlier judgments of the Honorable Court.

Compensation and usage fees

27. In building the barrier, every effort is made to use land that is government property and not private property. In cases in which there is no alternative to using private land, the landholders are offered usage fees and compensation for the damage caused to them by erection of the barrier. To date, some 55 claims have been filed, for a total amount of approximately NIS 25 million, and in a number of cases, compensation was paid to the holders of the rights in the land.

The barrier is a subject for political contacts

28. Despite the existence of the armed conflict, there have been contacts between the Israeli side and the Palestinian side, brokered by international entities, in an attempt to commence political negotiations to resolve the ongoing dispute that has resulted in such a large number of victims. The barrier is a security measure, which the Palestinians oppose for various reasons, and, therefore, it is natural that this subject, too, is one of the issues on the current agenda of these political contacts.

At a time in which political contacts between Israel and the Palestinian side are affected by the security situation prevailing on the ground, and are almost non-existent, the subject of the barrier is raised also in political contacts with other entities, such as the United States and various European countries.

The Respondents' position

29. The decision to build the barrier was made only following the unprecedented wave of cruel terror attacks that were initiated and carried out by Palestinian terror organizations. Testimony to this is the fact that, over the decades that have passed since 1967, and despite the grave security situation from time to time, Israeli did not erect such a barrier.
30. The terror of unprecedented magnitude, and particularly the phenomenon of suicide bombers in Israeli civilian population centers, which rose greatly at the end of 2001 and reached its peak in the bloody month of March 2002, in which 132 Israelis were killed in terror attacks, required the security forces and the government to re-examine the way to fight this frightful phenomenon.
31. On the one hand, aggressive measures were taken, as seen particularly in Operation Defensive Shield, in which army troops entered areas that were under the control of the Palestinian Authority. As is known, the fighting led to casualties among our forces and among the Palestinians. Actions were also taken to enable the taking of measures to protect against suicide bombers, the foremost measure being the construction of a barrier to physically separate the terrorists from their potential victims.
32. The use of a physical barrier to separate the terrorists from the Israeli civilian population worked successfully in the Gaza Strip, and has been used since the middle of the 1990s. The Gaza Strip is surrounded by a fence, and over the years that the fence has been operational, suicide terrorists have not made their way from the Gaza Strip to Israel by going through the fence.
33. The idea underlying the fence is to make it hard for the terrorist to reach Israeli population centers, and to reduce the friction between the populations. In the harsh security reality that has prevailed over the past three years, it seems that this is a natural and necessary measure taken in the spirit of the saying that "high fences make good neighbors."
34. Moreover, the thought is that completion of the barrier and the anticipated reduction in the level of terror aimed against the Israeli population will reduce the need for offensive military operations, with its lethal results, and also to a lessening and reduction of the restrictions on movement currently imposed on the Palestinian population in the area, and in areas deep inside the Territories.

35. As mentioned above, the terrorists aim their attacks against any and all of the Israeli population, in the region, in the Gaza Strip, and in Israel. To protect the Israeli civilians in the region, who found themselves targets of attempted attacks on a daily basis, both within their communities or on the roads leading to and from their community, it was decided that, in places where it was possible, the route would be set in a way that also protects these communities, so that they, too, will benefit from the protection provided by the barrier. The concern was that leaving them on the other side of the barrier would turn them into the main target of the terrorists, as occurred to some degree to the Israeli communities in the Gaza Strip.
36. It should be emphasized that there is not now, nor was there ever, any intention to change the legal status of the area situated on the other side of the barrier. This fact is clearly seen also in the government's decision set forth above.
37. Construction of the barrier, of which more than a small part of it is located on private land, harms the said landowners. The Respondents have attempted, and continue to attempt, to reduce this harm as much as possible by giving preference to the use of state lands, where possible, by giving preference to uncultivated private land over land that is under cultivation, where possible, and by reducing the width of the route to a great extent. The procedure for the seizure of the land includes a dialogue with the land owners, to enable the authorities to hear their position and objections. Furthermore, compensation is offered to all owners of land that is seized. The legal framework for seizing the land is described below, but it should be mentioned now that it is the right, and even duty, of the occupier of land by belligerent occupation to provide security against threats originating in the region, even if such protection requires the taking of private property. If we look at the subject from the perspective of the rights involved, it is a case of balancing between the right to property, on the one hand, and the right to life, on the other hand – and the latter prevails.
38. The barrier also leads to the imposition of restrictions on the freedom of movement of Palestinians in area that is part of the region. This is a harsh result, and the Respondents are doing everything to reduce these restrictions and to provide a way to meet the population's needs. However, it should be recalled that the closing of land for security purposes is lawful and accepted in territory subject to belligerent occupation, as are restrictions on movement, particularly during an armed conflict with terrorists operating among the civilian population. The area situated on the other side of the barrier contains large concentrations of Israelis. Everyone who crosses the barrier can move about freely into the territory of the State of Israel. If there is no control and monitoring of the entry of Palestinians into this area, the idea underlying the barrier cannot possibly be realized.

39. When Stage 1 of the barrier became operational and the land on the other side of it was closed, difficulties arose regarding preservation of the fabric of life of the population in this area. These problems resulted, in part, from the closing of the area in a shorter period of time than had been planned, the early closing resulting from the bombing attack on the Maxim restaurant, in Haifa. Furthermore, there were problems and difficulties some of which could not be anticipated beforehand, including the lack of work force to enable the orderly operation of the agricultural gates that had been planned for the barrier.
40. The Respondents are aware of the need to find a solution in these matters. Discussions have been held at senior levels in the attempt to solve the problems that arose. Since then, there have been a number of changes in the arrangements applying in the seam area and more changes are planned for the near future. These changes include the paving of roads to facilitate travel by Palestinians from one Palestinian community to another, and also to make it easier for Palestinian farmers to reach their farmland under cultivation. In addition, in light of the difficulties that arose regarding the crossing of students situated on one side of the fence to reach schools located on the other side of the fence, it was decided to fund a transportation service for students to enable them to get to school and return to their homes in an orderly and centralized manner.
41. As mentioned in the government's decision that is the subject of the petition – the barrier is a security measure, and if an arrangement is reached that guarantees quiet and security, it is not inconceivable that the barrier will be dismantled or relocated. It all depends on the Palestinian side, i.e., if it continues with the attacks and the terror, it will be necessary to keep the barrier; if the Palestinian side chooses to cease the acts of terror and to dismantle the terror infrastructure, it will be possible to consider other solutions to safeguarding the security of Israel's citizens.
42. In balancing between the right to life of Israeli residents and protecting the rights of the Palestinian residents, judicial review by this Honorable Court is available in each case in which a Palestinian resident contends that his rights have been infringed, whether the claim relates to infringement of the right to property or the right to freedom of movement. In making this examination, it is necessary to examine the facts of each case and the balancing of the interest that was made regarding the individual claiming injury.

It should be emphasized that the Respondents themselves examine, on an ongoing basis, the barrier's effects on the Palestinian population, and, where possible, act to change the route, pave and build access roads for the Palestinian side, and do other

things to ease restrictions which are intended to minimize the effects that construction of the barrier causes to the way of life of the innocent Palestinian population.

43. However, such judicial review cannot be performed properly when the petition is general, lacking a specific factual basis, when it relates in part to sections of the route as to which seizure orders have not been issued, in which cases the petition is premature, and when the dominant nature of the petition is political. In these circumstances, the Respondents do not believe there is reason to litigate each and every section of the fence's route, because there is no genuine legal dispute between the Petitioner and them.

Legal framework regarding the erection of the barrier

44. The legal framework relating to the building of the barrier was set forth by the Respondents in their response in prior petitions on the subject. The previous petitions filed with the Honorable Court dealt with specific sections of the barrier they were either rejected by the Honorable Court or ended with an agreement between the parties. Despite this, the Petitioners did not deem it proper to confront the previous judgments of the Honorable Court. Previous judgments on the subject under discussion are:

HCI 3325/02 *Abd Alrahman Rashid Hassan Hatab v. Military Commander of Judea and Samaria* (unpublished);

HCI 3771/02 *Local Council of Ra-Ras Village v. Military Commander of Judea and Samaria* (unpublished);

HCI 8172, 8532/02 *Abtasam Muhammad Ibrahim v. Commander of IDF Forces in Judea and Samaria* (unpublished).

45. Because of the importance of the principle of law set forth in **Ibrahim**, it is appropriate to bring, in addition to the above, the following comments:

In its response, the state stated in great detail the efforts made to minimize the damage that the barrier will cause to residents of the area. For example, an effort will be made to run the barrier, to the extent possible, along land that is not privately owned and land that is not under cultivation, also not to partition an owner's land. Also, the state sets forth a list of measures that will be taken to minimize the harm in cases in which harm to residents cannot be avoided.

For example, compensating owners of land that is taken, making an effort to move trees rather than uproot them, and to establish entry gates that will enable the residents to attain access to their land.

Also, the Respondents indicated their readiness to solve concrete

problems on the ground after giving the land owners an opportunity to file objections to the seizure route. During the course of the hearing before us, counsel for the state declared that in this stage, too, it will be willing to consider specific problems that the residents raise with the persons performing the work and with the military authorities, if these problems can be resolved on the ground without harming security.

We have not found any defect in the seizure orders that have been issued, or the actions that the Respondents have taken, that justifies our interference. Even though the seizure will cause damage, hardship, and discomfort to residents, we are of the opinion that the measures taken are intended as an important component of the IDF's conception of combat, which was decided by the officials in charge of security; as is known, where operational security considerations are involved, this court tends not to interfere.

We have recorded before us the declaration of counsel for the state that, if Petitioners raise soon contentions that arise during execution of the work that relate to problems that can be resolved on the ground without harming security or other residents, it will be willing to grant the request.

The petition is denied.

46. This holding of law is based on norms of international customary law and other decisions of the Honorable Court.
47. The power to seize land in territory under belligerent occupation is found in international treaty-based and customary law. In the laws of war, the Hague Regulations Respecting the Laws and Customs of War on Land, of 1907, regulates the conduct of parties engaged in warfare on land.

As a rule, the military commander in the field is obligated not to harm the property of the local inhabitants (Article 46 of the Hague Regulations). However, there are two exceptions to this rule that are relevant to our matter, which enable the seizure of private land. These exceptions result, first and foremost, from a fundamental principle of international law, whereby a state has an inherent right to defend itself against external threats, which right is enshrined in Article 51 of the UN Charter. Also, these powers result from military needs in a situation of belligerent occupation.
48. The first norm is Article 23 of the Hague Regulations, which is found in the section that regulates the conduct of belligerents **during hostilities**. *Inter alia*, Article 23(g)

sets forth an exception to the prohibition on the destruction or seizure of enemy property, if imperatively demanded by the necessities of war. The article states that:

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

...

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

The article is recognized by this Honorable Court as enabling the seizure of land during hostilities, but also “to meet an existing actual danger,” and for vital military needs. See, on this matter:

HCJ 606/78 *Ayub v. Minister of Defence, Piskei Din* 33 (2) 113, 129, 133.

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

HCJ 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) 323;

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

49. As stated above, beginning in September 2000, the State of Israel has been engaged in armed conflict, in which powers are exercised pursuant to the laws of war. This situation has been stated to the Honorable Court a number of times in the past, and no reason was found to interfere with the position and decisions of the Respondents.

See, on this matter:

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. the State of Israel* (not yet published);

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

50. Furthermore, even in a case where an actual combat action is not taking place, but in a situation of “belligerent occupation,” the seizure of land is allowed for military needs or military operations. These powers are based on Article 52 of the Hague Regulations, which 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 given and the payment of the amount due shall be made as soon as possible.

51. The article is construed as relating also to the seizure of land. One of the conditions set forth in the article is that the seizure be for the needs of the army of occupation. In its decisions, this Honorable Court has construed this article based on its purpose. It was held that requisition is also allowed for the purpose of ensuring “public order and safety” pursuant to the powers given to the military commander in Article 43 of the Hague Regulations. See, in this matter:

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

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

52. It was also held that “military necessity,” which enables the seizure of private land, includes army posts and outposts (H CJ 24/91 *Timraz v. Commander of IDF Forces in the Gaza Strip, Piskei Din* 45 (2) 323); soldiers’ quarters (H CJ 290/89 *Jukha v. Military Commander in Judea and Samaria, Piskei Din* 43 (2) 116); offices of the Civil Administration (H CJ 1987/90 *Shadid v. Commander of IDF Forces in Judea and Samaria, Takdin Elyon* 1990 (2) 34); paving of bypass roads to protect Israeli citizens living in the region, and to reduce the friction between the Palestinian residents and Israeli vehicles (H CJ 2717/96 *Wafa Ali v. Minister of Defence, Piskei Din* 50 (2) 848, 856).

53. As stated, pursuant to Israel’s right to self-defence, Israel has conducted 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 seize land in the region, when the purpose of the seizure is to protect the State of Israel. Action taken for the purpose of self-defence is certainly “military necessity.”

Indeed, t this Honorable Court has held that the military commander is empowered to seize hand in the region, which he may do also pursuant to Article 52, in cases in which the purpose is to defend the State of Israel and its citizens.

54. The legal principle began in H CJ 302/72 *Hilu v. Government of Israel, Piskei Din* 27 (2) 169. This petition dealt with the legality of the decision to isolate the Gaza Strip

from the Sinai region, by severing the access roads between the areas, land seizure, and declaring the Sinai region a closed military area. The case involved the establishment of a partition zone, the purpose of which was to prevent terrorists from infiltrating into the Gaza Strip and the State of Israel to commit terror acts. After surveying the Respondents' position, the Court held that:

In any event, we shall not interfere in the judgment of military commanders who believe that the transfer was necessary, to ensure quiet within the Gaza Strip and *beyond it*, by creating the said partition zone that constitutes an important means in preventing the infiltration of terrorists (emphasis added) (page 178).

55. A similar rationale lay at the base of the judgment in H CJ 606/78 *Ayub et al. v. Minister of Defence et al.*, *Piskei Din* 33 (2) 113, which dealt with the seizure of land to establish a civilian community. The judgment states, in the words of the Honorable Justice Vitkon, that:

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 Ben Porat explicitly refers to the right of self-defence as a basis for exercising the power of the military commander, holding 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-defence 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).

56. **Based on these guidelines, the petition against seizure of land in the region was denied, where the purpose of the seizure was defence of the security interests of the State of Israel** – safeguarding Ben-Gurion Airport and preventing disruption of movement on roads within the territory of the State of Israel. At the hearing, an opinion opposing that of the military commanders was presented. That opinion contended that there was no such military and security need. The judgment rejected an opinion that stated there was no security justification to seize land for the purpose of establishing a community on the land. The Honorable Court rejected the opposing opinion and held that:

This approach, which takes a static view, only in line with the present cease-fire line between Jordan and the territory under Israeli administration, ignores what is liable to happen one day in the future, either as a result of hostile actions from outside or inside the occupied territory, or as a result of a new political arrangement. **Military planning must take into account not only existing dangers but also dangers that are liable to be created as a result of dynamic development in the territory... One recalls the steadfastness of the Gush Etzion communities during the War of Independence, which made a decisive contribution in blocking the advance of the enemy toward Jerusalem. They did that while facing regular forces**, and even more so when the preparations are made to prevent the acts of terrorists or irregular forces. (emphases added)

HCI 258/79 *Amira v. Minister of Defence*, Piskei Din 34 (1) 90, 93.

57. In addition, the common law is that the powers to maintain public order and safety may also be exercised to defend and safeguard the safety of Israelis living in the region, some of them for many years. In this matter, it was held more than thirty years ago that the military administration is empowered to provide public services to Israelis living in the region, for they, too, are residents of the region:

The provision of electricity, needed by the local population, undoubtedly belongs to the functions imposed on the military government, in order to ensure the proper living conditions of the population. We saw above that the current provision of electricity to the city of Hebron is poor and requires rapid improvement, and that there is no dispute that this improvement can only come by connecting the city to one of the power grids outside the area. This need exists now and must be met. Mr. Shomron says that construction of the high-current line necessary for that purpose establishes facts that will last into the future, and that the military government is not allowed to take measures that exceed that which is necessary for the duration of that government. But there is no reasonable way to supply existing needs today without basic investment, which includes construction of a high-current line. In any event, it is not currently known how long the existing situation in this area will last, and which final arrangements will come at the end of the military government. If necessary, such arrangements can include agreed-upon conditions to conform the facts now created to the situation that will prevail at the end, whether by acquisition in exchange for compensation or in another manner. Thus, the military government's action regarding the subject of this petition does not breach Article 43 of the Hague Regulations. Quite the opposite. This action is intended to meet the government's obligation to ensure the economic welfare of the population in the area. **In this matter, the residents of Kiryat Arba are to be seen as having joined the local population, and they, too, are entitled to receive electricity in an orderly manner.** (emphasis added)

HCJ 256/72 Electric Company for the Jerusalem District Ltd. v. Minister of Defence, Piskei Din 27 (1) 124, 138-139.

Also, in **Zalum**, the Court held that the military commander is empowered to take security measures to protect Israeli civilians in the region:

Are the means taken proper? Clearly, because the formal authority to take measures necessary to protect the lives of the settlers of Beit Hadassah is in the hands of the respondents. Certainly, this

authority is given as regards those settlers who are part of IDF forces.

This authority is broader, and covers everyone who is in the region, whether a permanent resident of the region or one of its new residents (compare H CJ 256/82, Piskei Din 27 (1) 124).

H CJ 72/86 *Jalab Judi Hassan Zahum v. Regional Military Commander*, Piskei Din 41 (1) 528, 531-532.

Also, in **Gusen**, the question involved the authority to demolish structures in the Gaza Strip, from the direction of which there was wide-scale shooting at persons using the nearby road. The Court held:

It is argued that the purpose of the order is to enable movement between the two settlements, and that this purpose is improper, because the settlements are illegal. Political, and not security considerations underlie the order. The status of the settlements will be determined in the peace agreement. Until then, the Respondent has the duty to protect the populations (Arab and Jewish) in territory that is under military control (see H CJ 4363/02 *Khader Abd Ahmad Zindah et al. V. Commander of IDF Forces in the Gaza Strip* (not yet published)).

H CJ 4219/02 *Yusuf Muhammad Gusen v. Commander of IDF Forces*, Piskei Din 56 (4) 608, 610-611.

- 58. To summarize this part, the laws of war give the military commander power to seize land. In addition, such authority also exists in the laws of belligerent occupation, which may be exercised also for the purpose of protecting the State of Israel and Israelis, and this authority is in addition to the power to so act in order to maintain order and public life in the region.**

The petition should be denied because it is basically political in nature

59. It is known that the authority of this Honorable Court is discretionary, and the common law provides that the Honorable Court will not hear a petition that is dominantly political in nature. On this point, it was held in a petition that sought to examine the legality of establishing Israeli settlements in the region that:

3. I believe this petition should be denied because it is defective in that it relates to political issues that are reserved for other branches of democratic government, and raises issues in which the political characteristics dominate and clearly

outweigh its legal sections. The controlling nature of the subject raised in the petition is purely political.

The non-conformity of the subject of the petition to legal disposition in the High Court of Justice arises in the present case from the combination of three characteristics that deny adjudication of the subject:

Interference in political issues lies within the domain of another branch of government, the lack of an actual dispute, and the controlling political nature of the issue.

H CJ 4481/91 Bargil v. commander of IDF Forces in Judea and Samaria, Piskei Din 25 (1) 913.

See, also: *H CJ 3125/98 Iyad v. Commander of IDF Forces in Judea and Samaria, Piskei Din 55 (1) 913.*

60. In the petition before us, too, the political nature of the petition prevails over the nature of the legal dispute in it –
- A. the lack of any petitioner with ties to land that is harmed;
 - B. lack of a petitioner whose freedom of movement was restricted;
 - C. it relates to a barrier route that exceeds 100 kilometers in length;
 - D. it attacks an issue that is on the political agenda of the government and its international contacts.
61. It should be emphasized that the Respondents do not contend that the subject is absolutely non-justiciable. They believe that the petition does contain legal aspects, but that is when the petition is filed by a person who contends that he is harmed by implementation of the decision on erecting the barrier. As mentioned above, a number of petitions have been filed with the Honorable Court regarding erection of the barrier. These petitions were filed by persons holding rights in the land on which it was decided to build the barrier, and were, indeed, suitable for judicial review.

The petition should be denied because it is general in nature

62. The petition attacks the building of sections of the barrier that extend over a distance of many, many kilometers. The petition does not set forth concrete facts regarding specific sections of the barrier, i.e., to concrete plots of land, but seeks a hearing on general principles that relate to erection of the barrier. In that the erection of the barrier in each area results from different considerations, it is not practical to hold a legal hearing on such a wide scope of facts.

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

The petition should be denied because other proper petitioners exist

63. The petition seeks to nullify the seizure of land intended for the construction of the barrier. Some of these lands are privately owned. The owners or holders of the land routinely receive orders that inform them of the intention to seize their land, and of their entitlement to file their objection. Therefore, in those cases in which the route crosses private land, other proper petitioners, who know the repercussions of the barrier on their land, are given the opportunity to petition against the order of seizure and to raise any argument they wish, including arguments raised in the petition. In such circumstances, in which another proper petitioner exists, and petitions of this kind are filed with the Court from time to time, it is not proper to hear the case as a public petition.

The same is true regarding the persons whose request for a permit to enter the “seam area” is rejected. These persons can turn to the appeals committee established in the framework of the declaration on the “seam area.”

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

The petitioner is premature regarding parts of the barrier’s route

64. As described above, according to the work procedures for erecting the barrier, following adoption of the government’s decision in principle as to the route of the barrier, intensive staff work is done to implement the decision, following which land seizure orders are issued, which are delivered to owners or possessors of the particular parcel to which it applies.

As stated above, in substantial portions of the route that are the subject of the petition (such as the secondary barrier in the enclaves in the area of Mevo Dotan and Homesh and others, the section from Mount Avner (al-Mutilla) to Tayasir, land seizure orders have not been issued, so the petition is premature as to those sections. In certain places, land-seizure orders have been issued and delivered to the owners or possessors of the land, and they can file objections if they wish.

In such circumstances, there is no basis to hold a hearing before the Honorable Court, already at this stage, on a petition that is so broad in scope and is filed by a public petitioner.

The contentions set forth in the petition

65. As regards the Petitioner’s contention that the occupying power does not have the authority to erect a barrier in the occupied territory. In Section 61 of the petition, it is

argued that the barrier “is designed to serve the occupying power and not the protected civilians of the occupied land...”. This contention ignores the common law mentioned above, which deals with various situations in which security powers were exercised to protect the lives of Israelis. There can be no dispute that, where people decide to commit acts of terror, either by shooting or by suicide attacks, the state occupying the territory will be empowered to take the measures necessary, in a reasonable manner, to save the lives of innocent persons. Human life, whether that of soldiers or of civilians, is a protected value according to every law. Thus, erection of the barrier, which is intended to improve the protection of human life in times of armed conflict, is a legitimate means to be applied in the framework of the powers of the military commander in the territory under belligerent occupation.

66. As regards the contention that the “military necessity” that grants the military commander powers in the region is construed such that the protection can only be provided to the state and IDF soldiers, and not to other residents living in the territory, it should be said that the Petitioner ignored the consistent decisions of this Honorable Court in *Hilu*, *Zalum*, and *Wafa Ali*, and the other petitions described above.

This disregard for the previous decision is particularly grating, because the right to life is the most basic human right. Nobody loses the right to life just because of the place in which he chooses to live. Nobody has the right to take the life of another person, except in the exceptional case of self-defence or lawful war. Thus, every government, including a military administration, must protect the life of every civilian. Anyone who holds otherwise commits a grave breach of the most basic human rights.

67. In Sections 79 to 92 of the petition, it is contended that the declaration on closing area and the accompanying orders constitute systematic discrimination and create, in practice, an apartheid regime. This contention ignores the fact that the said declaration and orders were issued after Palestinian residents from the region carried out dozens and hundreds of deadly terrorist attacks on a purely racist bias against Israel and Israelis; thus, substantive security reasons required a distinction be made between Palestinians and other persons who move about in the territory. It should be recalled that, until the last wave of terror, no restrictions were placed on the movement of Palestinians in the region under discussion. The continuation of the wave of terror dictated that a partition zone be established that would protect Israel and Israelis from the atrocities of the terror.

Therefore, the situation is not one of persecution, of the desire for domination, or discrimination of the Palestinian population. The barrier is not intended to preserve the supremacy of one racial group over another racial group. The barrier is not

intended to prevent a particular racist group from taking part in the country's fabric of life. The barrier is a defensive measure, which the Respondent were compelled to take to protect Israelis, Jews and Arabs alike, only after it became clear that the other means in the war against Palestinian terror organizations were insufficient.

The time chosen to erect the barrier and the fact that this measure was taken only after hundreds of innocent Israelis lost their lives is equivalent to the testimony of hundreds of people in showing that discrimination, persecution, and a policy of apartheid were not the objectives sought by the Respondents; rather, the Respondents acted to exercise the fundamental right to self-defence and the protection of human life.

68. In light of the above, the Honorable Court is requested to deny the petition.
69. This response is supported by the affidavit of Mr. Dan Tirza, head of *Qeshet Zeva'im*, in the central Command, who is in charge in the IDF for the planning of the barrier.

Today, 7 Tevet 5764 (1 January 2004)

[signed]

Malchiel Blass

Head of HCJ Matters, State
Attorney's Office

