At the Supreme Court **HCJ 9961/03**
Sitting as the High Court of Justice

HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
(Registered Association No. 58-016-3517)

Represented Att. Avigdor Feldman and/or Michael Sfrad and/or Aviyam Yariv and/or Miri Hart, all of 6 Beit Hashoeva Lane, Tel Aviv 65814, Tel. 03-5608833, Fax 03-5607176

v.

1. **Government of Israel**
2. **Prime Minister of Israel**
3. **Minister of Defense – Mr. Shaul Mofaz**
4. **Seam Zone Administration at the Ministry of Defense**
5. **Military Commander of the West Bank Area**

Represented by the State Attorney's Office, Ministry of Justice, Salah-a-Din St., Jerusalem

6. **Fence for Life, Public Movement for the Security Fence**
Represented by Att. Ilan Zion

7. **Shurat HaDin, Israel Law Center**
Repsrented by Att. Nitzana Darshan Leitner

Amended Petition for Order Nisi

In accordance with the decision of the honorable court dated 9 November 2005, the petitioner hereby respectfully submits an amended petition.

This is a petition for an order nisi in which the honorable court is requested to instruct the respondents to appear and show cause, should they so desire, 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 regarding security instructions promulgated pursuant thereto and relating to entry permits into the seam zone (hereinafter: the orders) (the declaration and the orders are attached and marked B1-B8).

Contents

1. Introduction

A. The Permit Regime – Unprecedented Legal Discrimination in Israel

1. This petition concerns the lawfulness of the legal regime which was enacted by respondent 5 with the support of the Government of Israel and its defense minister, over vast areas in the West Bank, which cannot be described as other than a regime of separation on the basis of nationality and citizenship.

2. The issue is the declaration of areas west of the route of the separation fence (and east of the Green Line, where the legislative powers of petitioner 4 terminate – hereinafter: the seam zone) as a **closed military zone** which requires those present therein to leave and those wishing to enter to obtain an entry permit. **This regime, as stated in the declaration, does not apply to persons who are not Palestinian residents of the West Bank or the Gaza Strip** (hereinafter: the permit regime).

3. The permit regime is, in effect, the second and complementary aspect of the separation fence project. While the fence and the walls included therein serve as a **physical** barrier which prevents protected civilians from reaching their lands, relatives and friends, the permit regime erects a **legal** barrier and imposes punishments on those breaching its provisions.

4. The petitioner will argue that this regime constitutes a corruption of the law by effectively creating two kinds of inhabitants in this area: Israelis and tourists, **to whom the declaration does not apply**, and who are free to move inside the zone, out of it and into it; and others (in practice: Palestinians) to whom the declaration does apply and who require various types of permits in order to enter, work in, sleep in and leave the zone.

5. Let us correctly define the legal structure described above by its full name: the web of the declaration and the orders applicable to the seam zone constitutes an intolerable, illegal, immoral legal **apartheid**. Thus, the discriminatory and burdensome topographic construct stands upon a shameful normative infrastructure, unparalleled in Israeli law.

6. In this petition, the honorable court will be asked to declare the permit regime null and void both since this regime constitutes a grave violation of international humanitarian law and international human rights law and since it is a flagrant violation of the fundamental principles of Israeli administrative and constitutional law.

B. South Africa's Pass Laws – A Foreign and Frightening Precedent

7. One cannot avoid comparing the permit regime which is the subject matter of this petition to the pass laws instituted in South Africa during apartheid.

8. These laws, which varied from province to province, restricted the movement of black working men through the use of passes. The laws were gradually tightened and whereas they initially

affected only working men (Native Labour Regulation Act of 1911), they later included the entire black population.

9. In 1952, a law was enacted –

Natives (Abolition of Passes and Co-ordination of Documents) Act, Act No. 67 of 1952.

This law cancelled all pervious pass laws. The law demanded that the entire black population over the age of 16, in all provinces, carry a reference book which it will be obliged to present as per the demand of a police officer or administration official. The pass included a photo, details regarding the holder's original birthplace, registration of occupation, tax payments and (prior) dealings with the police.

10. A special court system was planned in order to enforce the pass laws. Between the 1960s and the 1980s, more than half a million black individuals were arrested and brought before these courts which sentenced them to prison terms and fine payments. From a certain point onwards, convicted persons were deported to the Bantustans which had been erected earlier in order to separate between the black and white populations.

11. The permit regime implemented by Israel in the seam zone is a further step designed to regulate the separation of the Palestinian population from the Israeli population, following the erection of the separation wall and preceding further steps which will, no doubt, follow in the future. Like the Bantustans which also separated blacks from other blacks on the basis of their tribal origin, the permit regime separates Palestinians from other Palestinians according to their places of residence in the West Bank, whilst the criteria is determined at Israel's convenience alone.

12. **One must stress and warn that the racial hatred which characterized the apartheid regime in South Africa, was not particular to that area alone. However, the fact that an entire legal system which regulated and enforced the racial separation was enacted in South Africa is what created its monstrous apartheid regime**.

13. Indeed, Israel's permit regime which is implemented in the seam zone does not derive from racial hatred and as such, it is inherently different from the pass law regime of South Africa. However, the permit regime creates restrictions on movement according to collective distinctions between ruler and ruled and this is the source of the similarity between the two.

14. 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 patently unlawful and constitutes an international crime in itself.

15. Observe 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 permit to remain, respondent 5 also signed the "Order on Security Instructions (Judea and Samaria) (No. 378), 5730-1970, General Permit to Enter and Remain in the Seam Zone" (Appendix B2). According to this general permit, three types of persons (other than those defined as "Israelis") are permitted to enter and remain in the zone as they please, without applying for a permit: tourists, Palestinians who work in settlements inside the seam zone, and Palestinians who hold a permit to enter Israel.

16. 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 born and raised children there –

they, according to the original order, must go to the offices of the civil administration, fill out forms and ask for a permit to stay on their land and in their homes, and there is concern 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. 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, receive 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 respondent 5. We have already mentioned that the exemption from applying for a permit in the amendment to the orders regarding persons who are not residents of the area does not change the situation, but the required permit: instead of a permit to enter and remain, they are required to obtain a resident's certificate. Here too, the concern that various considerations, including security ones and those masked as security ones will seep into the discretion of those granting the resident's certificates.

17. Finally there are the hewers of wood and the drawers of water of the settlements, those Palestinians who are exploited by the robbers of their land for a pittance, who, according to the best tradition of racial segregation 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 latrines.

18. 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 respondent 5 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.

2. Factual Background

A. The Parties to the Petition

19. The petitioner, HaMoked: Center for the Defence of the Individual, is a non-governmental organization 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".

20. Respondent 1 is the Government of Israel which, in June 2002, decided to erect a separation barrier between Israel and the West Bank and empowered respondents 2 and 3,the prime minister and the defense minister to establish the exact route of the barrier and, whether on their own or in the security cabinet.

21. Respondent 4, the seam zone administration, is a professional governmental inter-departmental body, established by the resolution of the security cabinet in its April 2002 meeting. It is headed by the director general of the ministry of defense. It is the duty of respondent 4 to execute the government resolution pursuant to the route approved by respondents 2 and 3 or by the security cabinet.

22. Respondent 5 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 Project (or Separation Barrier)

I. Construction procedures

23. The background for the decision to erect 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 police forces along the seam zone, and so it was resolved in November 2000 to establish a "barrier against vehicles".

24. In June 2001, respondent 2 ordered the establishment of a steering committee, headed by National Security Council Chair, Maj. Gen. Uzi Dayan, whose function it was to form a new plan to prevent the infiltration of Palestinians through the seam zone deep into the Green Line.

25. On July 18, 2001, the steering committee's recommendations were submitted to the security cabinet, which adopted them. Among the recommendations was the recommendation on the erection of a "barrier" against humans in certain segments of the seam zone where the level of risk was high.

26. On April 14, 2002, the cabinet reconvened to discuss the recommendation on the erection of a barrier against humans, for the implementation of which nothing had been done until that time. The cabinet decided on that day to erect a permanent barrier against humans in the seam zone. This resolution also included the establishment of the seam zone administration – namely, respondent 4.

27. In June 2002, a detailed proposal was presented to the Government of Israel for the erection of a permanent barrier against humans from the north-western edge of the Green Line (close to the village of 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").

28. On June 23, 2002, the Government of Israel approved the seam zone administration's proposal in principle, while authorizing respondents 2 and 3 to determine the exact route. The government resolution further established that if disagreements arose between these two respondents, the issue would be referred to the security cabinet (Government Resolution No. 2077).

29. On August 14, 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.

30. 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.

31. In July 2003, work on Stage A of the barrier was completed in most areas, except for the construction of the secondary barriers.

32. Since July 2003, construction of additional stages of the separation fence have begun and are still underway.

33. A large part of the fence's route runs through the West Bank and effectively splits the West Bank in two: the segment east of the fence to the Jordan river, and the segment between the fence and the Green Line – which is defined as the seam zone.

The seam zone map is attached and marked **A**.

34. In practice, the barrier creates a border line. The barrier re-divides the State of Israel and the Occupied Territories into two separate tracts of land, each with its own contiguous expanse – from the Jordan Valley and northern Dead Sea in the east to the barrier and from the barrier to the Mediterranean.

35. The fence therefore creates territories and a population which will huddle in detention camps surrounded by the fence, while watching their neighbors in the settlements enjoy 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 extremely grave – it is the creation of a discriminatory regime of the worst kind, in which one community is a detention camp for powerless inhabitants, adjacent to a settlement inhabited by free and independent people. It is not 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.

36. As we have stated in the introduction, the physical fences are completed by a legal regime which constitutes a legal wall forbidding residents of the occupied territory to enter the seam zone (which is, as recalled – segments of the West Bank which are west of the fence).

II. The permit regime – summary

37. On October 2, 2003, the **Declaration in the Matter of Closing Territory No. S/2/03 (The Seam Zone) (Judea and Samaria), 5764-2003 was issued.**

A copy of the declaration is attached and marked **B1**.

38. The declaration proclaimed the seam zone – the area between the separation fence and the Green Line – a closed zone. According to the declaration, anyone present in the seam zone must leave it immediately (section 3). This provision does not apply to Israelis and persons who were permitted to enter the seam zone and remain in it (section 4). An "Israeli" is defined as a citizen of Israel, a resident of the State of Israel and those eligible to immigrate to Israel under the Law of Return (section 1). Permanent residents, as defined in section 5, shall be permitted to enter the seam zone and remain in it provided they possess a written permit attesting to the fact that their permanent residence is in the seam zone. Additionally, the declaration specifies that entry to and exit from the seam zone shall be through the crossings, as specified in the permit.

39. <u>The result of these definitions in the original declaration: Palestinians who have been living for generations in the area require a permit in order to continue to live in their homes, whereas, the movement of any Jewish person, even if he is a temporary visitor in the area is not limited and the declaration does not apply to him</u>.

40. On the same day (October 2, 2003) the **General Permit to Enter and Remain in the Seam Zone (Judea and Samaria) 5764-2003** was issued.

A copy of the permit is attached and marked **B2**.

41. The permit specifies the "**types of people**" to whom a permit to enter the seam zone is granted (section 1). These types of people include persons who are not residents of the area and who have a valid foreign passport and Israeli visa; persons holding a valid work permit in an **Israeli community** inside the seam zone pursuant to the Order regarding Employment of Laborers in Certain Places (Judea and Samaria) (No 967) 5742-1982; persons holding a valid permit to leave the Area into Israel (appendix). The conditions stipulated in section 2 of the permit require persons entering the seam zone to carry a "document attesting they belong to one of the types of persons" specified in the appendix, as aforesaid. The appendix stresses that entry of persons who are not residents of the Area and holding valid foreign passports and Israeli visas is entry into the seam zone and remainder in it <u>for any purpose</u>.

42. On October 7, 2003, the **Orders regarding Crossings in the Seam Zone (Judea and Samaria) 5764-2003** were issued.

A copy of the orders are attached and marked **B3**.

43. These orders stress that permanent residents' entry into and exit out of the seam zone shall be only through the crossing stipulated in the permanent resident permit or the personal permit and upon presentation of the permit (section 2(a), section 3(a)). According to the provision of section 2(b), a permanent resident's entry into the seam zone with a vehicle will be possible only by special permit. The section further stresses that only vehicles registered to a permanent resident at the time the declaration came into force shall be considered vehicles for the purpose of this application. The entry of a permanent resident into the seam zone with a vehicle purchased after the date of the declaration requires a different type of application.

44. On October 7, 2003, the Orders relating to permits to Enter and Remain in the Seam Zone (Judea and Samaria) 5764-2003 were issued.

A copy of the orders are attached and marked **B4**.

45. The orders address permits to enter and remain in the seam zone for persons who have an interest in the seam zone pursuant to being a business owner, merchant, employee, farmer, teacher, student, a Palestinian Authority employee, a visitor, an international organization employee, a local authority/infrastructure company employee, a member of a medical team and any other purpose in the seam zone.

46. On May 27, 2004, the Declaration in the Matter of Closing Territory No. S/2/03 (The Seam Zone) (Judea and Samaria), 5764-2003 was amended: **Declaration in the Matter of Closing Territory No. S/2/03 (The Seam Zone) (Judea and Samaria) (Amendment No. 1), 5764-2003.**

A copy of the amendment to the declaration is attached and marked **B5**.

47. The amendment cancelled the definition of "Israeli" (amendment to section 1) and stipulated that the exceptions to the prohibition on entry into the seam zone would be "a permanent resident in the seam zone" (which replaced "Israeli") and the words "a person who has been granted a permit" shall be replaced by "a person holding a permit". Section 5 which defined permanent residents was revoked.

48. On May 27, 2004, the General Permit to Enter and Remain in the Seam Zone (Judea and Samaria) 5764-2003 was amended: **General Permit to Enter and Remain in the Seam Zone (Judea and Samaria) (Amendment No. 1) 5764-2003**.

A copy of the amendment to the permit is attached and marked **B6**.

49. According to the amendment, the first category of "types of people" who are granted a permit to enter the seam zone was amended and the words "a person who is not a resident of the Area and who holds a valid passport and valid Israeli visa" shall be replaced by, only a person holding a valid foreign passport and a valid Israeli visa. Additionally, two more "types of people" were added to the list of those permitted to enter the seam zone: a citizen of the State of Israel and a resident of the State of Israel. It shall be stressed that the entry of these three "types of people" into the seam zone and their remaining in it is for <u>any purpose</u>.

50. On June 3, 2004, the Orders regarding Crossings in the Seam Zone (Judea and Samaria) 5764-2003 were amended: **Orders regarding Crossings in the Seam Zone (Judea and Samaria) (Amendment No. 1) 5764-2003**.

A copy of the amendment to the orders is attached and marked **B7**.

51. The amendment replaced the word 'permit' with 'certificate'.

52. On June 3, 2004, the Orders regarding Permanent Resident in the Seam Zone Certificate (Judea and Samaria Area) 5764-2004 were issued.

A copy of the orders is attached and marked **B8**.

53. These orders defined who would be issued a permanent resident certificate: a person who was a permanent resident in the seam zone at the time the declaration came into force; a person who had a new seam zone resident permit who proved he had lived in the seam zone for a period of over two years; a person who turned 12 after the date of the declaration and who had been registered as accompanying in a permanent resident certificate.

54. In conclusion: the declaration establishes that the area between the separation fence and the Green Line is a closed military zone, requires those present therein to leave and those wishing to enter to apply for a special permit, does not apply to Israelis, tourists and persons to whom the military commander issued a permanent resident certificate. Palestinians, then, will be able to enter the zone only if they prove that they are residents of the area or if they receive a permit for special reasons (such as: for the purpose of agriculture or due to their employment as doctors etc.). **Israelis (whether they are settlers or not) do not need any entry permit and the walls and fences are transparent to them**.

<u>3. Violation of Humanitarian Law and the Laws of Occupation</u>

<u>A. The Argument in Brief</u>

55. Below, we shall present an argument against the legal regime which accompanies the erection of the fence, which seeks to distinguish on the basis of national origin and creates an illegal and immoral apartheid which the honorable court is moved to strike down entirely.

56. Our position is that the permit regime, as described in the previous section of this petition, severely violates the fundamental principles of international humanitarian law and the provisions of the laws of occupation (belligerent occupation). **Our position is that the violation is so grave that its implementation may be considered a war crime**.

57. In addition, it shall be argued below (in the next section) that the permit regime constitutes a flagrant violation of the provisions of international human rights laws which the State of Israel undertook to uphold. In order to establish this argument we will dedicate a special subsection to the argument that human rights conventions apply to the Occupied Territories.

58. Finally, it shall be argued that the permit regime is also a violation of Israel's administrative law, which every soldier carries in his backpack.

59. Our argument will be based, as aforesaid, *inter alia*, on the provisions of international law relating to belligerent occupation. Inasmuch as the court considers it necessary, we undertake to provide a detailed argument as to the issue of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and extensive parts of its protocols signed in 1977 as having the status of enforceable customary international law. We have not included this argument in this petition, because to our understanding, there is no dispute regarding the applicability of the provisions relevant to this petition of the aforementioned documents.

60. Throughout our argumentation, we wish to recall the factual basis to which the legal argument refers: a legal regime which limits the movement of people on the basis of nationality and citizenship. Palestinians require a permit which is granted only of the applicant presents cause and justification of his wish to arrive at the seam zone and if the police/Israel Security Agency do not object to him entering the zone. Israelis and foreigners who have received an Israeli visa are free to move about the zone as they please.

B. General Principles: the Occupying Power as Administrator and Manager, Not Sovereign

61. International law, in the branch thereof which deals with the laws 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 establishing the set of obligations and rights that is applicable between them: **The first principle** determines that the occupying power is responsible for order and safety (without delving into the argument born of the expression 'vie public' in the French version of Regulation 43 of the Hague Regulations, 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. In this context, the remarks of the scholar Oppenheim that belligerent occupation has in it "not a single atom of sovereignty" are well known.

("The Legal Relations Between an Occupying Power and the Inhabitant", 33 **L.Q.R.**, 363, 364 (1917)).

62. 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.

63. In accordance with these supreme principles, the Geneva Convention, the Hague Regulations 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.

64. 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 **Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces**, *Piskey Din* 37(4) p. 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 Honorable Justice Barak (as was his title then) in the said HCJ 393/82 (p. 797 opposite the letter A), namely Regulation 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, 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 Defense et al.**, *Piskey Din* 36 (2) 622, p. 629).

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

66. In HCJ 393/82, in which a plan to build highways which was approved by the supreme planning committee was under review, Honorable Justice Barak summarized the case law on the considerations the military administration is required to consider when executing acts of government in the territory it occupies. *Inter alia*, Justice Barak ruled that:

> The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population… A territory held under belligerent occupation is not an open field for economic or other exploitation… This planning and implementation may not be carried out simply to serve the holding state.
>
> (pp. 194-795)

67. The quoted remarks were stated in the context of a plan that was to apply to private land, Regulation 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 Regulation 43 which is, as aforesaid, a general "supreme" norm, adds state lands to the list of assets which are to be managed by the military administration subject to the said restrictions.

68. The judgments of this honorable court have emphasized, without exception, that alongside the respondents' authority to administer public life in the Occupied Territories, only security grounds allow exercising the respondents' authorities of the type which is the subject matter of this petition. It was the failure of the security argument that resulted in the reversal of a decision to establish the settlement Eilon Moreh. (See HCJ 390/79 **Dweikat v. The Government of Israel** *Piskey Din* 34(1) 1).

69. It should be emphasized that, as aforesaid, in the abovementioned HCJ 393/82, when long term occupation is at issue, such as the one in our case, the role of the occupier cannot be reduced to maintaining order and safety in their narrow sense, but rather the duty of intervention is extended in order not to freeze life in the occupied territory.

70. Since the Hague Regulations do not expand on the duties of the occupier on this point, it must be interpreted in light of human rights law. Their simultaneous application is logical in view of the fact that underlying these two areas of law is one concept and they have shared goals (see below).

C. The Permit Regime – A Legally and Systematically Discriminatory Regime

71. 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.

72. The declaration regarding the military zone 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.

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

74. The significance of the declaration and the orders is that the zone becomes a closed military zone for Palestinians who have been living there for hundreds of years, and an open area without any restriction on freedom of movement for any Jew, including those of the Diaspora.

75. Amending the orders in a manner which exempts local Palestinian residents from filing an application for a permit to remain does not diminish or change the discriminatory dimension of the regime. No Israeli needs to prove a connection to the seam zone – only Palestinians do. No Israeli must carry a resident's certificate in order to be exempt from the burden of the declaration – only Palestinians do.

76. 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 enter), 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.

D. The Violations

I. General

77. And if matters are not self evident, there are legal codices which clarify why a regime such as the permit regime is illegal. In this section, as stated, we shall focus on the norms of humanitarian law and the laws of belligerent occupation whereas in the next section we shall address violations stemming from human rights law.

78. The permit regime violates a large variety of the human rights of those Palestinians living in the zone as well as those living outside it.

79. These are classic liberal rights such as freedom of movement and the right to property; economic rights such as the right to a livelihood, education and health; collective rights such as the right to culture and a social and community life; **all combined with a severe and extreme violation of the right to equality and through it and because of it the right to dignity**.

80. The fundamental classic liberal rights, like the economic and collective rights were not disregarded in the laws of belligerent occupation and therefore, were not denied the citizens of the occupied territory. Modern international laws of occupation have completely changed the set of rights and duties in the relationship between an occupier and the occupied population, as these had been until the 19th century and the formulation of the Hague Regulations (regarding which current accepted opinion is that they set in writing customary international law already in existence). They were primarily designed to protect occupied civilians while granting many rights originating in the human rights philosophy 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.
>
> (The Handbook of Humanitarian Law in Armed Conflicts , (Dieter Fleck (editor), Oxford Un Press, 1995), p. 240)

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

II. The prohibition on discrimination

82. the Geneva Convention, pursuant to 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; emphasis added)

83. It should be emphasized that the Article quoted above refers to wrongful discrimination between protected civilians, and there is great doubt whether the settlers are entitled to that status. Either way, the prohibition on any discrimination between the residents of the occupied territory and the citizens of the occupying power who settle therein derives from this article *a fortiori.*

84. Additionally, Article 3 which is identical in the four Geneva Conventions and applies to any armed conflict, international or domestic, also prohibits discrimination on the basis of nationality:

> Persons taking no active part in hostilities… shall in all circumstances be treated humanely, **without adverse distinction founded on race, colour, religion or faith, sex, birth or health, or any other similar criteria**.

85. And there is no doubt, nor can there be doubt, that the permit regime contravenes this very principle as it imposes severe restrictions on one group, chosen according to a national criteria.

III. Prohibition on harm to property, livelihood and movement

86. The restrictions on movement which follow from the permit regime cause severe impediments to the ability of protected civilians to reach their lands beyond the separation fence. These difficulties prevent them from actualizing their property (whether agricultural lands or lands designated for construction).

87. The winding fence, along with the permit regime, create a reality whereby roads which previously connected communities and villages have become cul-des-sacs which come up against the fence and the legal prohibition to cross it.

88. Against the background of the basic principles regarding the authorities of an occupying power over land it holds under belligerent occupation which were specified above, the laws of occupation include several concrete provisions which limit the occupying power's ability to violate the rights of protected civilians. These rights were also entrenched in the various human rights conventions.

89. In our case, as stated in the previous section, the segments of the separation barrier which run inside the Palestinian territory violate the rights of hundreds of thousands of protected civilians in all areas, including the rights of property, freedom of movement and the ability to earn a living.

90. First let us focus on the right to property. Regulation 46 of the Regulations annexed to the Hague Convention prohibits the expropriation of private land in occupied territories (emphases added):

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

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

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

92. 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 <u>absolutely necessary by military operations</u>**.

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

94. The duty to care for the livelihood and welfare of the residents of an occupied territory also derives from the laws of belligerent occupation. The said duty is part of a full fabric of duties an occupying power has toward the 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 residents 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).

95. Freedom of movement and the right to earn a dignified living are therefore derived, simultaneously, both from the duty of restoring order and safety and the duty of arranging for the residents' basic needs, and from the right to dignity – which, in both Israeli constitutional law and the laws of belligerent occupation – is the primary right, from which many other basic rights emanate.

IV. The prohibition on impeding family, community and social life

96. The restrictions imposed on residents of the seam zone, and, at the same time, the impediments (which practically border on complete prohibition) on family and friends who are not residents of the zone to visit their relatives and friends in the zone obliterate the possibility for these communities to continue to have a social, family and cultural life.

97. The duty to respect family honor and rights is explicitly set forth in the laws of belligerent occupation and appears in Regulation 46 of the Hague Regulations. It is also possible to learn of the importance of the right to cultural life from the provision of Article 24 of the Geneva Convention according to which the education of orphans shall be entrusted, to the extent possible, to persons of a similar cultural tradition, as well as from the provision of Article 103 which addresses ensuring the cultural welfare of internees. From the latter article one can conclude that if the right is recognized to persons with reduced rights, such as internees, it exists for ordinary protected civilians *a fortiori*.

V. Collective punishment

98. Finally, we shall argue below that the permit regime is a violation of the principle prohibiting collective punishment which is a fundamental principle of the laws of war and the laws of belligerent occupation.

99. The principles of the prohibition on collective punishment, which is no doubt part of the fundamental 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 Regulations appended to the Hague Convention.)

100. The permit regime was instituted, so we understand and so was declared, in order to face the danger of terrorism. However, the permit regime is not directed at terrorists, or even persons suspected of initiating and executing terrorist attacks, unless it is directed at the entire Palestinian nation as one. Every Palestinian, whether a newborn baby or an elderly person, requires a permit to enter and remain in the seam zone, unless he is a permanent resident therein, in which case he requires a permanent resident certificate. Every Israeli, whether he is honest and innocent or malicious, or perhaps even a terrorist interested in harming Palestinians – needs no visa and no permit and may move in the seam zone, into it and out of it as he pleases.

101. In so doing, the military commander created a regime which is entirely punitive and directed at a group whose members, it is clear to all, are not all sinners. This is prohibited collective punishment.

4. International Human Rights Law

A. International Human Rights Law – Applicability in the Occupied Territories

I. Presentation of the issue

102. The State of Israel signed and ratified six human rights conventions. Therefore, Israel is obligated to respect these, certainly on the international relations level.

103. Israel's position, as stated before the various UN committees is that human rights conventions do not apply to the Occupied Territories.

104. This position is based on three major arguments: two different and separate legal systems are at issue – human rights law and humanitarian law and they are not to be applied together; human

rights conventions apply only within the sovereign territory of the state; Israel has no effective control over these territories and therefore, even if the argument that the conventions are to apply beyond Israel's sovereign territory, Israel cannot be considered responsible for upholding the provisions of these conventions in the territories of the West Bank.

For Israel's position in this issue see reports it filed:

* State of Israel Implementation of the International Covenant on Economic, Social and Cultural Rights - Second Periodic Report, 3 Aug. 2001, para. 5-8, UN Doc. E/1990/6/Add.32 (2001);

* State of Israel *International Covenant on Civil and Political Rights - Second Periodic Report*, 20 Nov. 2001, para. 8, UN Doc. CCPR/C/ISR/2001/2 (2001);

* Israel's position before the International Committee on the Rights of the Child *Summary Record of the 829th meeting: Israel*, 10 Oct. 2002, para. 39-42, UN Doc. CRC/C/SR.829 (2002); Israel's position before the International Committee on the Elimination of Racial Discrimination UN Doc. CERD/C/282 (1995).

II. The universal application of human rights law

105. Indeed, international humanitarian law and international human rights law are two separate legal systems which were created against different backdrops and designed to regulate different situations. However, this difference has no bearing on the question of their applicability.

106. International tribunals have determined that the purpose of humanitarian law and human rights law is identical – to protect human dignity and the rights derived from human dignity.

As the International Criminal Court for the Former Yugoslavia noted in the ***Furundzija*** case:

> …The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law...

(*Prosecutor v. Furundzija*, ICTY Trial Chamber, judgment of 10 Dec. 1998, para. 183)

For more on this issue see:

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 (I) I.C.J. 66;

Prosecutor v Delalic**,** judgment of 16 Nov. 1998, (ICTY Trial Chamber);

11.137 ***Abella v. Argentina***, n.1.OEA/Ser.L/V.97, Doc. 38 (I/A Comm'n H.R., 1997).

107. In the Legality of the Threat or Use of Nuclear Weapons case (above), it was established that the relationship between human rights law and humanitarian law is as that between *lex generalis* and *lex specialis*. Even according to this restrictive approach, human rights law applies to every

situation to which humanitarian law does not provide a clear and unequivocal answer.

108. International courts have expressed their position that humanitarian law is not to be considered an alternative system to human rights law, but rather an exception to the full and universal applicability of human rights law, the purpose of which is to protect all human beings in any situation**.**

109. Moreover, in the advisory opinion of the International Court of Justice on the separation wall, aforementioned, it was found that human rights law applies simultaneously with humanitarian law and the exceptions to its applicability are found within it, as can be seen in Article 4 of the ICCPR, as stated in Sec. 106 of the advisory opinion:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in art. 4 of the ICCPR…

110. Regarding the universal application of human rights law one can also learn from Article 2 of the Universal Declaration of Human Rights:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

111. The practice of international bodies also attests to this approach:

Daniel O'Donnell*, "Trends in the Application of Interninterpreation ational Humanitarian Law by the United Nations Human Rights Mechanisms"* 38 **Int. Rev. Red Cross** (1998) 481.

112. Thus, Israel's position that the two legal systems do not apply together and that only one must be chosen does not correspond with current common interpretation nor with the practice of international courts and various international bodies.

III. Application in a territory under the "effective control" of a member state

113. Israel's other claim is that human rights conventions apply only to the state's sovereign territory.

114. Although some human rights conventions specify their applicability to be within the state's jurisdiction, they do not define what is considered "jurisdiction".

115. The restrictive interpretation which Israel espouses, whereby jurisdiction applies only to the sovereign territory of the state, if accepted, creates a situation whereby only some people who are **under the state's control** are protected. This situation in which many people who are under the control of a state which is a signatory to human rights conventions remain outside the application of these conventions is intolerable. According to the rationale of human rights law, the term "jurisdiction" must be broadly interpreted as this law was designed to protect the individual's dignity against abuse of power by the authorities.

116. In addition, so long as Israel has influence over the lives of the residents of the Territories, one must consider these territories to be under its jurisdiction.

117. The concept according to which international human rights law is to be considered as applicable everywhere a country has "**effective control**" has been accepted by the various UN bodies entrusted with enforcing human rights law.

118. Thus, since the seam zone is under the **effective control** of the State of Israel, the duties incumbent upon it pursuant to international law apply to this territory as well.

119. See the guiding judgment on this issue by the European Court of Human Rights which established exactly what we are saying – there, regarding the applicability of the European Convention on Human Rights to Northern Cyprus, which, it was claimed, was under the effective control of Turkey. And so ruled the European Court of Human Rights:

> **The responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful – it exercises effective control of an area outside its national territory**. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".

*(**Loizidou v. Turkey,*** 310 Eur. Ct. H.R. (ser A)(1995) 23. para. 62).

120. Moreover, the UN Human Rights Committee also established that the Covenant was applicable to official state acts which have extra-territorial effects, regardless of where they took place and even where there is no effective control in the territory in which the violation occurred:

> … if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant...

(Comm. no. 470/1991 ***Kindler v. Canada,*** U.N. Doc. CCPR/C/48/D/470/1991, para. 6.2 (1993);

Comm. no. 469/1991 ***Ng v. Canada,*** U.N. Doc. CCPR/C/49/D/469/1991, para. 6.2 (1994).)

121. In 2001, the European Court of Human Rights repeated the rule of the applicability of the European Convention on Human Rights in the territories under the effective control of a member state, and added that any other interpretation is unreasonable, as it would create a vacuum in the system of human rights protection in the relevant territory. This, since the original (local) authorities which are to see to the protection of human rights – lack effective control, which is at the hands of the occupying power.

(See: ***Cyprus v. Turkey***, [GC], no. 25781/94, § 233, ECHR 2001-IV.)

122. The aforementioned rule according to which the test of the applicability of international human rights law is the test of effective control was mitigated by the European Court of Human Rights in the Bankovic case (see: ***Bankovic v. Belguim,*** 123 I.L.R. (2003) 94). In this case the European Court somewhat retreated to the territorial test of sovereignty. However, in its judgment, the court ruled that cases of occupation do fall under the category of exceptional cases in which the

Convention is applicable extra-territorially (***Bankovic v. Belguim***, 123 I.L.R. (2003) 94, para. 60, 70-71). Thus, this judgment does not weaken the argument regarding extra territorial applicability of human rights conventions in occupied territory.

123. The International Court of Justice in the Hague has also found that human rights conventions apply in an area under belligerent occupation, in its advisory opinion regarding the separation fence:

See:

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 2004, para.102-114.

IV. Applicability to actions by member state organs

124. Another approach which expands the applicability of human rights law beyond the sovereign borders of the state can be found in the doctrine which sees the area to which human rights law extends as any area in which an organ of a state that is bound by human rights conventions is active.

125. An example of the application of this approach can be found in the remarks of the Honorable late Justice Haim Cohen in the Qawasmeh case:

> In a law abiding state there is no security, political, ideological or other consideration which may justify violation of law on the part of the authorities. And in a law abiding state, there is no government authority which may deny a person any of his legal rights, unless it was explicitly empowered to do so in law…
>
> … this court does not measure but with equal measure to all. Not only **are the commander of the Area and those under his command agents of the State of Israel, but whatever the locality in which they perform their mission, they must act in accordance with the custom of their state, which is the custom of a lawful state…**

(HCJ 320/80 **Yusra Qassem Qawasmeh v. Minister of Defense**, *Piskey Din* 35(3) 113, pp. 127-128).

126. This approach was also expressed in the decision of the UN Human Rights Committee, which rejected Uruguay's position that the International Covenant on Civil and Political Rights applied only in the territory of the member state. In a well known decision, the UN committee ruled that a state shall bear responsibility for violations of the rights entrenched in the Covenant which were committed by its organs outside state territory, regardless of the question of whether the organ acted under the auspices of the government or in contravention of its policy.

See:

Comm. R.12/52 ***Lopez Burgos v. Uruguay***, UN. Doc. A/36/40 (1981) 176 (Individual Opinion, Tomuschat);

Comm. 56/1979 ***Casariego v. Uruguay***, UN Doc. CCPR/C/OP/1 (1984)(Individual Opinion, Tomuschat.

V. Applicability of human rights law in the Occupied Territories – Israeli and international case law

127. The question of the applicability of international human rights law in the Occupied Territories via Israel's commitment to respect the conventions of this legal field was reviewed by the honorable court as well as UN human rights bodies.

128. The international bodies have all ruled **without exception** that international human rights law applies to the Occupied Territories:

** Concluding Observations of the Committee on the Rights of the Child: Israel*, 9 Oct. 2002, para. 2, UN Doc. CRC/C/15/Add.195 (2002);

** Concluding Observations of the Committee on Economic, Social and CulturalRights: Israel,* 31 Aug. 2001, para. 11-12, UN Doc. E/C.12/1/Add.69 (2001);

** Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel,* 30 March *1998*, para. 12, UN Doc. CERD/C/304/Add.45 (1998);

** Concluding Observations of the Human Rights Committee:Israel*, 18 Aug. 1998, para. 10, UN Doc CCPR/C/79/Add.93 (1998);

** Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Israel,* 12 August 1997, para. 170, UN Doc. A/52/38/Rev.1, Part II, para. 132-183 (1997);

** Concluding Observations of the Committee on the Elimination of RacialDiscrimination: Israel,* 19 *Aug*. 1994, para. 74, UN Doc. A/49/18 (1994).

129. We shall note that despite Israel's official position that human rights conventions do not apply in the Occupied Territories, the court has noted more than once that the essence of human rights law must be considered when the proportionality and reasonableness of the actions of the military commander in the occupied territories are reviewed.

As President Shamgar remarked in the Shahin case:

> I am not delving, at this stage, into the question of the applicability of the obligations arising from the various agreements and declarations which shall be mentioned below, as this issue was not raised in the arguments before use. For the purposes of the concrete case entrusted to us, **at this point, I depart from the premise that the content of the aforesaid legal documents may be treated as relevant documents**."

(HCJ 13/86 **'Adel Ahmad Shahin v. Commander of IDF Forces in the Area**, *Piskey Din* 41(1), 197, pp. 210-211);

and, as Justice Procaccia remarked in the Haas case:

> The Hague Convention authorizes the Area Commander to operate in two main spheres: one – ensuring the legitimate security interest of the occupier, and the other - ensuring the needs of the local population in an area under belligerent occupation… Within the latter the Area Commander is responsible not only for maintaining the inhabitants' order and security but also for protecting their rights, particularly the constitutional human rights

> conferred to them. The concern for human rights lies at the heart of the humanitarian considerations which the commander must consider…

(HCJ 10356/02 **Yoav Haas v. IDF Commander in the West Bank, GOC Central Command**, *Piskey Din* 57(3) 443, pp. 455-456);

and in HCJ 3239/02 **Iyad Ashak Mahmud Mar'ab v. IDF Commander** *Takdin Elyon* 2003(1), 937, the court applied international human rights law to arrest proceedings;

and recently, the remarks of President Barak in the Mara'abe case:

> However, we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.

(HCJ 7957/04 **Zaharan Yunis Muhammad Mara'abe et al. v. Prime Minister et al.**, Sec. 27 of the judgment) (not yet published)).

(All emphases added)

VI. Conclusion of the application issue

130. On the question of the duty to apply human rights conventions in the Occupied Territories, it is possible to say that according to the interpretation of the Israeli court and international tribunals, and according to the practice of international bodies, human rights conventions have extra-territorial applicability when a state organ performs an act which affects the residents of a different state and in an occupied territory over which the state has effective control. Therefore, the six human rights conventions to which Israel is a signatory apply to the Occupied Territories and Israel is bound by them.

B. International Human Rights Law – The Violations

I. General – the crime of apartheid

131. It is crystal clear to anyone analyzing, even superficially, the reality imposed on the Palestinians due to the permit regime that this regime creates "multi-system" harm to a variety of fundamental rights which are recognized both in international treaty law and in international customary law.

132. Since it seems to us that the matter is self evident, we shall only specify the list of rights and refer to the sources in which these rights are entrenched in international law.

133. Yet, before we do this, we shall momentarily address the overall violation created by the regime which is the subject matter of this petition: the violation of the prohibition on creating a legal regime of racial separation – **apartheid**.

134. The International Convention on the Suppression and Punishment of the Crime of Apartheid of November 30 1973 defines in Articles II (c) and (d) the crime of apartheid as the use of various legislative measures toward different racial groups while violating the rights of one:

> For the purpose of the present Convention, the term "the crime of apartheid", **which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa,** shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

…..

c. **Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association**;

d. Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof.

135. We regret to say this, but it is our professional and moral duty: the permit regime fulfills the components of the definition of the crime of apartheid as cited above.

136. International law is consistent in denouncing regimes which discriminate on the basis of group affiliation: the Rome Statue, which is the statute of the International Criminal Court determines in Article 17(1)(h) that violation of human rights on the basis of ethnicity 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;

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;

137. Thus, violation of fundamental rights on the basis 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 infringes upon fundamental rights (to freedom of movement, property, livelihood, education, health and mostly dignity) and there is no dispute that they are directed at and apply only to persons who are neither Jewish nor tourists – namely Palestinians.

138. Is it for this that we have established a country? Is it for this that we have gathered from every corner of the world, the survivors of regimes which persecuted, discriminated and denied every possible right simply because of our origin, in order to establish a state whose army will implement a discriminatory regime over millions who are not us?

139. In this matter, the court is thus moved to stand strong and block the severe deterioration in the legal and moral standards of the security legislation and arrangements which we, as an occupying power, apply to the residents of the occupied territory.

II. Concrete Rights

140. The permit regime severely restricts the freedom of movement of the protected persons. The right to freedom of movement is entrenched in Article 13 of the Universal Declaration of Human Rights and in Article 12 of the International Covenant on Civil and Political Rights.

141. As stated, the restriction of freedom of movement is not limited to infringement upon this right only and leads to infringements on additional rights whose realization depends on freedom of movement.

Infringement on property, livelihood and the right to live in dignity

142. The permit regime infringes on property rights wherein a protected person who is denied access to land he owns cannot realize this ownership. The right to property is entrenched in Article 17 of the Universal Declaration of Human Rights which cites property rights and the prohibition on the arbitrary denial of this right.

143. Denial and restriction of access to land deny the land owner's source of livelihood. The right to a livelihood is entrenched in Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic Social and Cultural Rights. The Articles first focus on the right to work and then on the right to choose one's place of work.

144. All these necessarily harm the right to live in dignity which is entrenched in Articles 6 and 11 of the International Covenant on Economic Social and Cultural Rights. The right to live in dignity was also recognized in our legal system as a derivative of Basic Law: Human Dignity and Liberty and reviewed in HCJ 336/03 **Commitment to Peace and Social Justice Association v. Minister of Finance** (not yet published).

Infringement on the right to family, community and social life

145. The permit regime infringes upon the right to family and social life wherein those living in the [seam] zone are limited in their ability to host relatives and friends. Recognition of the family as the natural and basic unit of society and as such as entitled to protection is entrenched in Article 17 of the Universal Declaration of Human Rights; Article 23 of the International Covenant on Civil and Political Rights; Article 10 of the International Covenant on Economic Social and Cultural Rights and Article 8 of the International Convention on the Rights of the Child.

The right to equality and the prohibition on discrimination

146. As stated, the permit regime discriminates between Palestinian residents and Israelis and foreigners who wish to enter and leave the seam zone.

147. This discrimination contravenes the obligation to uphold the duties included in the conventions toward all persons without distinction of any kind, including distinction based on race, religion and nationality as this appears in Article 2(1) which is shared by the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights and in Article 26 of the International Covenant on Civil and Political Rights.

148. Additionally, the prohibition on such discrimination also contravenes Articles 1,2,3,5 of the International Convention on the Elimination of all Forms of Racial Discrimination. This Convention was ratified by Israel in 1977.

In this Convention, the term "racial discrimination" shall mean **any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

…

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) **Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons** or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) **Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;**

….

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

…

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

…

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

…

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment…

…

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks

149. In conclusion, the permit regime is a regime denounced by every legal system and in any legal field chosen.

150. The permit regime is a flagrant violation of humanitarian law and constitutes a war crime. The permit regime may amount to a crime against humanity under the definitions in international criminal law. The permit regime creates an extensive violation of international human rights law.

151. For all the aforementioned reasons, the honorable court is moved to block the respondents' legislative act and revoke the declarations and orders creating the same.

152. The court is therefore requested to declare that the orders and the declaration are contaminated by wrongful discrimination and are therefore invalid.

Therefore, the honorable court is moved to issue an order nisi as sought and render it absolute after a hearing.

_____ _____

Michael Sfard, Att. Avigdor Feldman, Att.

Counsels for the petitioner