

Translation Disclaimer: The English language text below is not an official translation and is provided for information purposes only. The original text of this document is in the Hebrew language. In the event of any discrepancies between the English translation and the Hebrew original, the Hebrew original shall prevail. Whilst every effort has been made to provide an accurate translation we are not liable for the proper and complete translation of the Hebrew original and we do not accept any liability for the use of, or reliance on, the English translation or for any errors or misunderstandings that may derive from the translation.

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

HCI 11344/03

In the matter of:

- 1. F. Salim**
- 2. I. A. M. H.**
- 3. Z.M.M.I.**
- 4. M.R.H**
- 5. S.A.Z**
- 6. The Association for Civil Rights in Israel**

all represented by attorneys Fatmeh El-A'jou and/or
Dan Yakir and/or Dana Alexander and/or Hadas Tagri
and/or Avner Pinchuk and/or Michal Pinchuk and/or
Auni Bana and/or Lila Margalit and/or Banna Shughry-
Badarne and/or Sharon Abraham-Weiss and/or Noa
Stein and/or Sonia Bulus and/or Oded Feller
of the Association for Civil Rights in Israel
PO Box 35401, Jerusalem 91352
Tel. 02-6521218; Fax 02-6521219

The Petitioners

v.

Commander of the IDF forces in Judea and Samaria
office of the OC Central Command 64
MP 02367, IDF

The Respondent

Petition for Order Nisi and Urgent Hearing

A petition is hereby filed for an Order Nisi, directing the Respondent to appear and show cause:

1. Why the permanent crossing points in the separation fence, including the crossing points near the villages Jayyus, Khirbet Jubara, Far'un, and Falamyia, are not opened to enable residents to cross 24 hours a day.
2. Why vehicles, farming equipment, and mechanical equipment are not allowed to cross the permanent crossing points in the separation fence, including the crossing points near the villages Jayyus, Khirbet Jubara, Far'un, and Falamyia.

Request for Urgent Hearing

1. This petition deals with the policy of opening the crossings in the separation fence that was built in the Occupied Territories, which separates residents of villages near the fence from their land, laborers from their workplaces, students from their schools, patients from treatment centers, and residents from their family members.
2. The urgency of the petition lies in the fact that now is the season for olive-picking and harvesting of crops.
3. The livelihood of thousands of households depends, to one degree or another, on farming, in general, and olive growing, in particular.
4. The situation is especially important in that, as we all know, the socioeconomic condition of Palestinians in the Occupied Territories is poor. The livelihood of tens of thousands of families is dependent this year, more than at any time in the past, on their ability to work their land, and pick and sell the olives.
5. Closing the crossings, thus making it impossible for farmers living near the fence to reach their land regularly from the beginning of the olive-picking and crop harvesting season, critically harms the civilian population, which relies on farming for most of their small income
6. In addition to the harm to the farmers, the failure to open the crossings regularly impairs all aspects of life of the civilian population, primarily students and the ill, who are unable to reach school regularly or medical facilities to receive treatment and medical services.
7. In light of the above, the Honorable Court is requested to order an urgent hearing on the petition.

The grounds for the petition are as follows:

Factual background

The separation barrier and the crossings

1. The “separation barrier” is a system of fences, trenches, patrol roads, and detection paths and observation and warning means, which was established in accordance with the government’s decision of 23 June 2002. The section that

has already been built, which is the section that is the subject of this petition, runs from Salim in the north to Elqana in the south.

A map of the route of the separation barrier, which is published on the Ministry of Defense's Website, is attached hereto as Appendix P/1. The completed section of the barrier is marked in purple.

2. The declared objective of the separation barrier is to restrict assailants from crossing from the Occupied Territories into the State of Israel, in order to protect the lives of residents of the state.

See the Ministry of Defense's Website, where a print of the objective of the seam area plan appears. The print is attached hereto as Appendix P/2.

Most of the fence between Salim and Elqana was established within the occupied Palestinian territory, and not between them and the territory of the State of Israel.

Attached hereto is a map of the barrier as published by B'Tselem, which shows the distance between the barrier's route and the Green Line, and how the barrier penetrates deep into the Occupied Territories. The map is marked Appendix P/3.

3. As a result of the route that was selected, ostensibly for reasons other than the declared purpose of the barrier, the fence divides communities, severs villages from the farm land of its residents, separates villages from the municipal service centers and creates enclaves within its loops and between it and the Green Line. These enclaves are home to a civilian population numbering in the thousands, who suffer intolerable harm as a result of the fence.
4. In light of the grave problems created by the route of the fence, it was necessary to place crossing points along the separation fence to lessen the grave harm to the civilian population, and to enable Palestinians to reach their farm land, schools, workplaces, and relatives located on the other side of the fence.
5. In HCJ 8352/02, *Rashid Abd al-Salam Salame et al. v. Commander of the IDF forces in the West Bank et al.* (unpublished), the petitioners objected to the requisition orders issued to build the fence. The state contended, in its response to the petition, that "both in planning the route, and in the plan for controlling the area, an effort is made to minimize the harm to the local residents... In the section that is the subject of the petition, these efforts are apparent ... in the creation of crossings in the barrier in

order to enable passage between the two sides of the barrier, which are aimed at preventing unnecessary restriction on freedom of movement of residents of the seam area and on their ability to maintain their daily routine, and to enable the cultivation of farm land lying west of the barrier by persons who live east of the barrier.”

6. Declaration on Closure of Land No. 'b/2/03 (Seam area) states that all the area between the separation fence and the Green Line is closed military area, and entry into the seam area or exit from it is to be done via the crossings delineated in Part 2 of the Declaration's annex.

A copy of the Declaration is attached hereto as Appendix P/4.

7. As the annex shows, in the section of the fence between Salim and Elqana – the section relevant in the petition herein – which extends, according to B'Tselem's estimation, for some 145 kilometers, forty-seven crossings points were established.
8. The petition deals with the policy of opening the crossing that were established in this section of the fence, which has negatively affected, according to B'Tselem, the lives of at least 210,000 Palestinians, who live in sixty-seven cities, towns, and villages.

See pages 4-8 of B'Tselem's position paper of March 2003, *Behind the Barrier: Human Rights Violations As a Result of Israel's Separation Barrier*, attached hereto as Appendix P/5.

9. The seam area is almost completely an agricultural area, and to gain a living, the residents are dependent on working their land, by planting, irrigating, harvesting the crops, and transporting them to market. Their ability to do these tasks is severely impeded by the restrictions on movement. The yield that is not picked or marketed at the proper time rots and is discarded, and much of the crops withers because of the lack of timely and sufficient watering. Farmers are unable to buy fertilizer and farming equipment. When the fence's gates were closed, farmers lost much of their crops, guavas and vegetables for example. The olive sector also suffered greatly, as farmers were unable to pick the olives, press the yield at the olive presses, and transport the oil for sale and marketing.
10. As we shall illustrate below, the hours in which these vital crossings are open are extremely limited, and fail to meet the most basic needs of the population shut in on either side of the crossings. The limited opening hours are not announced in many cases, and when they are published, the crossings are not open as scheduled. Some gates have not been opened at all, and there are instances in which all the gates are closed for whole days at a time.

The Petitioners

11. Petitioners 1-5 are residents of communities near the separation barrier, whose details will be presented below. The Petitioners' villages appear on B'Tselem's map, Appendix P/3 above, and are marked in yellow.

Petitioners 1 and 2 – Jayyus

12. Petitioner 1 is the head of the Jayyus Village Council.
13. Petitioner 2 is a water systems engineer, a resident of Jayyus, and an active member of PENGON, the association of Palestinian non-governmental organizations.
14. Jayyus is situated northeast of Qalqiliya. It has 3,100 residents, ninety percent of whom gain a living from farming. All the residents, except for one eight-person family, live east of the fence. However, more than eighty percent (about 8700 dunams [four dunams = one acre]) of the farm land owned by village residents lie on the western side of the fence. Also, the village's principal water sources are located west of the fence. Another 800 dunams of farm land belonging to the villagers were expropriated to build the fence. West of the fence lie some 2,000 dunams of irrigated farm land, 3,000 dunams of olive and citrus orchards, and a few dozen greenhouses for growing vegetables, from which the villagers gained a living and supported themselves before the fence was built.
15. Six pumping stations, on which the residents rely for their farming and household needs, are situated west of the fence. Three of the stations are owned by Jayyus and three are held jointly with Falameya and Qalqiliya. East of the fence are excavated water holes and one pumping station, jointly held by Jayyus, Khirbet Sir, 'Azzun, and 'Izbat at Tabib. This station provides Jayyus with only sixty percent of the village's household water consumption.
16. The fence has severed the village from the pumping stations situated west of the fence, which serve the villagers' farming and household needs. Villagers now have to purchase water for drinking and basic household purposes from other villages, and transport them to Jayyus by tanker. The water they purchase is expensive and has risen in price following the villages' separation from their water sources near the fence, and as a result of the increased demand. Village residents have to pay about NIS 20 per cubic meter. In comparison, a cubic meter of water for household purposes in Israel ranges from NIS 3 to NIS 6, depending on consumption. The high cost of this basic and necessary staple is aggravated by the fact that, along with the

loss of the water sources, most of the villagers also lost their primary source of livelihood – farming.

17. Of the approximately 550 families living in the village, some 300 gain a living from irrigated farming on the said 2,000 dunams that are now situated west of the fence. Most of the other families earn their livelihood from crops, including vegetables, grains, and olives, on land that now lies west of the fence.
18. There are two gates in the separation fence near Jayyus, one south of the village and the other west of it. The western gate is located on the road leading to most of the village's land. The southern gate is located near the southern farm land and the house of the one family situated west of the fence. These gates are usually locked all day long and are not staffed. The IDF posted a note the western gate indicating that the gates will be opened three times a day, from 6:30-7:15, 13:25-13:45, and 17:30-18:15. In practice, the gates are not opened regularly, the hours vary, and they are generally opened for very short periods of time. Villagers wanting to go to their land sometimes have to wait hours until soldiers come and open the gate. The gates are opened by soldiers who patrol the length of the fence by jeep. When they come to the gate, they open it for the waiting residents who have permits, and often close it immediately afterwards and continue on their patrol, which brings them to the next fence, and so on. Very frequently, the gate remains open only long enough to allow those waiting to cross, the only choice the villagers have is to wait, to wait for hours, near the gate. In many cases, villagers come to the gate just as it is being closed and while the soldiers are still there. Despite the residents' pleas to let them cross to get to their fields or to their villages, the soldiers refuse to open the gate, and leave.
19. In addition to the limitations on timing and the length of time the gates are opened, there are restrictions on crossing when the gates are opened. Some 150 farmers have not received crossing permits, and are thus unable to get to their fields. During the Israeli holidays, from 4 October – 15 October 2003, the gates were not opened at all. From 15 October – 20 October, the gates were reopened, but males under thirty-eight years old (who comprise the main labor force in the farming sector) were prohibited from crossing. Later, the prohibition was dropped, and persons with permits were allowed to cross, regardless of age. Only forty percent of the village's farmers manage to get to their land and cultivate it. Most of them who succeed in reaching their land do so without their farming equipment. Only two farm vehicles, which are used for transport needs, were given permits to cross through the gate to get to the farm land.

20. The irregular opening of the gates, the short time they are kept open, the need to wait many hours, along with the other restrictions described above make it impossible for most of the farmers from Jayyus to work their land, irrigate it, and gain a living from it. The crops from their fields and greenhouses wither and are lost. Olive oil production is expected to be minimal because of the difficulties during the harvest and the lack of permits issued to the pickers. Some ninety percent of the guava harvest, which takes place at this time, were damaged and lost because the farmers were unable to harvest the crop. Owners of some thirty greenhouses for growing beans and twenty greenhouses used for growing cucumbers suffered because of the inability to water the produce regularly and to properly care for the plants.
21. Even in those cases in which a crop is harvested, marketing the crops is difficult. The farmers have to bring the crops to the gates and load them onto trucks that come from throughout the West Bank. This procedure depends on the changing times that the soldiers come to open the gates. Aggravating the situation is the fact that the trucks come from far away, and the drivers have difficulty in coordinating their arrival with the short length of time that the gates remain open.
22. Eight families in Jayyus gain a living from raising sheep and goats. Since the fence went up, the pens, which are located within the confines of the village, are separated from the grazing land of their owners, which is located on the other side of the fence. The inability to regularly go to and from the grazing land also makes it impossible to bring the fodder from the fields to the flocks. The flocks now receive about twenty percent of the normal amount of food, so that they are essentially starving, and their condition is steadily deteriorating.
23. When the farmers from the village realized that they were losing their sources of income, some seventy of them went to live in tin huts and tents in their fields. On 10 October 2003, IDF forces ordered them to vacate the area because it had been declared a closed military area.
24. The irregularity in opening the southern gate severely harms the family that found itself on the western side of the fence. They have not yet obtained crossing permits and are severed from their village, their schools, and even from the village water system. Two of the children in the family quit school after they lost so many school days and became fed up with being dependent on soldiers coming to open the gates. The four other children spent a great part of their days waiting alongside the gate for the IDF patrol to come and enable them to cross to go to school or return home. The irregularity in which the patrol comes to the gate has caused the children to lose many

school days. The soldiers on patrol also prevent water tankers from crossing to supply water to the family, creating a shortage of water for the family's household use.

25. It should be mentioned that, before filing the petition, the Petitioner's were informed that, on 23 November 2003, the IDF blocked the road to the gate south of Jayyus by inserting nine poles with barbed wire connecting them, and announced that the crossing was intended solely for the Abu Amar family, which lives west of the fence, and that the fifty farmers who used the gate to attain access to their land would have to use the western gate. The Petitioners subsequently learned that, on 16 December 2003, the IDF informed the Abu Amar family that the gate was going to be permanently closed and that they would have to use the western gate to get to the village. Closing of the southern gate obstructs the family's connection with the village because of the great distance between the family's house and the western fence. It also impairs the access of fifty farmers to their farm land because they relied on the gate to enable them to go directly to their fields. Now they have to go via the western gate, which takes them far out of their way.

Petitioner 3 – Khirbet Jubara

26. Petitioner 3 is the deputy head of the Khirbet Jubara Village Council.
27. Khirbet Jubara is situated several kilometers south of Tulkarm and north west of the Sal'it settlement. The route of the fence turns east at this point, into the West Bank to [pass] east of the Sal'it settlement. This route leaves Khirbet Jubara, with its 300 residents, and most of their farm land, west of the separation fence, in an area that has been declared a closed military area.
28. In the area of Khirbet Jubara, the fence has one crossing point, which is intended solely for the use of school teachers and pupils.
29. The building of the fence near the village, and allowing only teachers and pupils to cross through the gate in the fence has caused the residents great financial loss. The farmers are unable to work their land that lies on the other side of the fence. These landowners have to make arrangements with farmers outside Khirbet Jubara to work their land at a payment amounting to half the crop production. Much of the crops are lost because the villagers are unable to market them. Before the fence went up, each farmer produced an average of about sixty tins of olive oil (eighteen kilograms per container). Since the fence went up, average production has fallen to five tins. Seventy percent of the greenhouses were in the village (on the western side of the fence). They are no longer operational because of the farmers' inability to bring the seedlings, fertilizer, and farming equipment necessary to operate the greenhouses.

30. The restrictions on crossing the fence with chickens, chicken food, equipment, and medicines necessary for raising chickens, which was a major branch of economic activity in the village prior to the building of the fence, have completely destroyed that sector.
31. Residents working outside the village have become unemployed because they were unable to get to work regularly.
32. Also, since the fence was built, the garbage truck has not entered the village, causing a grave sanitation problem. The villagers are now compelled to burn their refuse.
33. The village has no vital services, such as schools, medical clinics, and welfare services. Before the fence was erected, the residents went to Tulkarm and Qalqiliya and to nearby villages to obtain these services. Now, these towns and villages are situated on the other side of the fence. Near the village, in the direction of Tulkarm, there is a gate in the fence, which has been locked since 4 October 2003. According to the arrangement formulated by the DCL, the gate was to be opened daily for teachers and pupils between 6:30-8:00 and 12:30-14:00. This arrangement has not been kept. In practice, the gate is opened, as in other places, at irregular times, when the IDF patrol arrives, and only for a few minutes to let the pupils and teachers waiting there to cross. The gate is then closed and the soldiers leave. As a result, pupils and teachers lose hours of school-time, and sometimes whole days of school.
34. Residents of Khirbet Jubara and the adjacent village Ar Ras have close blood ties. Khirbet Jubara has residents whose parents live in Ar Ras, and vice-versa. Since the fence has been built, the family contacts between the two villages have been severed. Children from Khirbet Jubara go to schools that are located in Ar Ras.
35. A main road joins the two villages. The road heads east to the West Bank's cities. In the past, the farm produce from Khirbet Jubara was taken along this road to market. Now, this road is blocked by the fence, and the villagers' access to the West Bank entails their crossing the Jubara-Tulkarm checkpoint and traveling along a run-down, winding dirt road that extends the journey by at least ninety minutes. The blocking of the road between the villages has led to the cessation of public transportation, and the pupils and teachers have to walk one and a half kilometers to the gate, and then go by public transportation to the school in Ar Ras.
36. In the past, the main road from Khirbet Jubara to other communities in the West Bank, except for Tulkarm, was the road that has been bisected by the fence. Now, all traffic to and from the village is via the Jubara-Tulkarm checkpoint, which is often blocked to traffic.

Petitioner 4 – Far'un

37. Petitioner 4 is a businessman who resides in Far'un.
38. Far'un is located several kilometers south of Tulkarm. West of the village, the fence runs along the Green Line but then changes course and penetrates east into the West Bank, leaving Far'un north of the fence, and the villagers' farm land south of the fence. Some 7,000 dunams, about seventy percent of the farm land, are situated on the other side of the fence. 4,000 of these are planted with olive trees, and the other 3,000 are used to grow vegetables.
39. The permanent gate near the village, which lies to its southwest, has never been opened. Until recently, the farmers had to go via the Artah checkpoint, which serves as a main gate in the fence. The farmers are regularly forbidden to cross to their land by vehicle, and young people are not allowed to cross to get to the farm land. The checkpoint has recently been designated as a commercial checkpoint. Farmers from the village are not allowed to cross it and are referred to the Jubara-Tulkarm checkpoint.
40. The villagers' farm land lies a few hundred meters from the houses. However, the fence and the failure to open the gate near the village require the residents to travel about three kilometers to the checkpoint and then make their way to their fields. The Jubara-Tulkarm checkpoint is indeed generally staffed throughout the day, but only persons with permits are allowed to pass, and farm vehicles are not allowed to cross. The only means of transport allowed to cross are donkey-drawn wagons, which the farmers have to rent, and which provide limited assistance. Being unable to bring farm vehicles to their land, the farmers are prevented from taking their crops from their fields to market. Entire crops, in particular the guava and lemon crops that are ripe at this time of year, have been lost because the farmers were unable to pick and market them under these conditions.
41. The army's failure to open the gate near the village, and the residents' being compelled to go to and from their fields via the IDF checkpoint, for which they need permits, effectively prohibits many farmers and laborers to get to the villagers' fields, and has critically harmed the current harvest and the planting of seedlings for future crops.
42. Of the 3,800 residents of Far'un, only some fifty have received permits. All the other farmers and laborers have been unable to get to their farm land.

Petitioner 5 - Falamyia

43. Petitioner 5 is an architect and resident of Falamya who owns ninety-five dunams of farm land situated west of the fence.
44. Falamya is situated a number of kilometers northwest of Jayyus. North of the village, the fence turns eastward so that the settlement Sal'it will be just west of the separation fence. South of the village, the fence again turns eastward and goes around the settlement Zufin to leave it west of the fence. The village has 850 residents, who primarily make a living from farming. About seventy-five percent of the villagers' land is separated from the village and lie west of the fence. Their land west of the fence is farm land among the most fertile in the West Bank, on which the villagers grow citrus and other fruits, vegetables, grains, and olives.
45. Two gates in the fence are found near the village, one to the west and the other to the south. The gates are opened only twice a day, for five to fifteen minutes, depending on the number of persons waiting alongside it. A note that the IDF hanged next to the southern fence indicates that the gates will be opened twice a day: once at 6:30 and again at 13:30. At night, the gates are closed. In practice, the gates are not opened at the times mentioned. A person can wait up to two and a half hours in the morning and up to eight hours in the afternoon! Sometimes, on Israeli holidays, or for other reasons, the gates are not opened at all during the day.
46. The limited time in which the gates are opened requires the farmers to wait a long time by the gates to make sure that they are present when the soldiers arrive, both when they want to go to their fields and to return to their homes. Because of the arbitrary and limited hours in which the gates are opened, the farmers are able to work their land only a few hours before they have to return again to the gate and wait at the fence, otherwise they will have to sleep in their fields. As a result, almost all the crops have diminished in quantity, and broad patches of land have withered because of insufficient irrigation.
47. The village's water sources lie west of the face, but the farmers are unable to regulate them and water their land during the limited time given them. It should be mentioned that the fence detaches the village from the fifteen water-pumping stations situated on the land. Operation of the pumping stations has been severely impeded because of the difficulty in reaching them on a regular basis to maintain them or even to provide the fuel to run them. Many of the pumping stations now lie idle, and the fields belonging to Falamya's residents suffer a water shortage as a result.

48. As a result of the failure to open the gates on a regularly scheduled basis, the farmers have not worked their land, harvested the crops, or picked the olives. Crops and trees withered in the fields.

Requests for assistance made by residents of villages near the fence to the emergency hotline of HaMoked: Center for the Defence of the Individual

49. HaMoked: Center for the Defence of the Individual operates an emergency hotline that handles claims of human right violations in the Occupied Territories, among them violations relating to the fences in the separation fence. HaMoked received many complaints, primarily about the irregularity of opening the gates and the failure to open them at all.
50. For example, on 4 November 2003, the emergency hotline received a complaint by telephone that a resident of Jayyus had waited by the gate south of Jayyus from 16:00 to 20:00, but the gate was not opened.
51. On 23 October 2003, the emergency hotline received a complaint by telephone that the gate north of Jayyus had been opened and closed at 18:00, and that farmers who had arrived at the gate at 18:05 did not manage to cross because the gate was closed.
52. On 31 August 2003, the emergency hotline received a complaint by telephone that the agricultural gate in Jayyus was not going to be opened again after 17:00, so the farmers who had crossed it would spend the night in the fields.
53. On 7 September 2003, around 18:00, a complaint was made whereby the driver of a truck stuck in the field and seven laborers who were in the truck wanted to return to their homes in Jayyus, but could not because the gate had already been closed. On 19 October 2003, at 17:00, at the gate north of Jayyus, soldiers in a patrol vehicle did not allow residents to cross through the gate to return to the village.
54. On 18 September 2003, a caller to the hotline reported that two ten-year-old school pupils were waiting at the Jayyus gate around 14:00 wanting to return home after finishing school for the day, and were told by soldiers to wait until 16:45.
55. That same day, a complaint was received at about 10:00, whereby soldiers at the Falamya gate did not allow the father of a four-day-old daughter needing emergency medical treatment to cross, despite his pleas. The other gate was closed, and no soldiers were nearby.
56. On 8 September 2003, a complaint was received indicating that soldiers at the Jayyus and Falamya gates did not allow farmers to cross with vehicles to get to their farm land.

57. On 29 September 2003, the emergency hotline received a complaint whereby the 'Azzun 'Atma gate, near Beit Amin village, had not been opened at all that day. Similarly, the Jayyus and Falamya gates remained closed all day long on 7 October 2003.
58. On 10 September 2003, soldiers at the Jayyus gate did not let Palestinians under age thirty-five cross. On 30 September, the gate was not opened on time, and when it was finally opened, only males over thirty-five and women over twenty-eight were allowed to cross.
59. It should be mentioned that the above complaints are only a few from among the more than one hundred that were made to the emergency hotline from 26 August to 6 November 2003, whereby it was impossible to pass through the gates in the fence.

A photocopy of the list of complaints is attached hereto as Appendix P/6.

In each instance in which the list states "checkpoint closed," it refers to a "closed crossing."

Requests made to the Respondent by the Petitioners

60. Petitioner 6 (hereinafter: the Petitioner) wrote to Col. Shlomo Politis, legal advisor for Judea and Samaria (hereinafter: the legal advisor) several times regarding the crossing gates and their opening and closing hours.
61. On 18 September 2003, the Petitioner inquired about the agricultural gates in the fence and warned the Respondent that he had the duty to prepare in advance for the olive-picking season so as to enable the residents and the landowners to harvest the olives, press them at the olive presses, and transport the olive oil to market and sale. The Respondent was requested, among other things, to provide the Petitioner with a list of active gates, the procedures, and opening hours, and the procedures to obtain permits to cross through the gates.
62. In his reply of 25 September 2003, which was received in the Petitioner's office on 7 October 2003, the assistant to the legal advisor wrote that procedures and instructions had been set for land owners and their employees to cross through the gates, including the opening and closing hours, and that these procedures and instructions had already been put into practice, the objective being to maintain – as far as possible – the residents' daily routine and way of life. The assistant legal advisor also wrote that information on the opening and closing hours of the crossing point were provided to the residents in each sector, based on the special characteristics of the sector, and in accordance with the relevant needs.

63. On 9 October 2003, the Petitioner again wrote to the legal advisor, charging that, from complaints residents made to the Petitioner, it appears that the residents knew nothing about procedures regarding the crossings, and that the opening and closing hours were left to the discretion of the soldiers and Border Police officers near the crossings.
64. Following reminders in writing and by telephone, the Petitioner received a reply on 28 October 2003 from the assistant legal advisor. The letter stated that some forty-seven agricultural gates were planned, and that

The crossings are opened three times a day at times varying from sector to sector depending on needs and security restrictions in each location, and in accordance with the changing circumstances. Naturally, the operating procedures are being learned by the security forces and solutions are being found to meet the problems and needs in each and every sector.

The reply added:

The matter of the gates' opening hours is being looked into intensively, with the inclination being to open them three times a day for as long as possible.

The rule is to allow orderly entry to each and every location, while exerting maximum effort to achieve a proper balance between security needs resulting and derived from a broad complex of considerations and in accordance with the overall circumstances and the situation at each site.

According to the report I received, the crossings are open.

65. On 31 October 2003, the Petitioner again wrote to the legal advisor and informed him that, regrettably, his letter did not accurately reflect the situation in the field. The Petitioner delineated the situation of many villages and the suffering of the residents, which are presented herein, that resulted from the closing of the crossings and the irregular opening hours, and requested that the legal advisor respond without delay.
66. To date, no response has been received from the legal advisor.

The Petitioner's letters and the Respondent's replies are attached hereto as Appendixes P/7-P/13, respectively.

Summary of Factual Background

67. It goes without saying that the situation described above regarding the four villages of Petitioners 1-5 is not unique to these villages, but characterizes all the villages located near the separation fence.

68. In May 2003, a report examining the expected effect of the separation barrier on Palestinian communities located near the Green Line was published. The report was prepared by a committee of experts at the request of the World Bank, UNESCO, the United States, the European Union, and Norway. According to the report, these communities have suffered economically since the outbreak of the Al-Aqsa Intifada. The deterioration resulted from the restrictions on entry of Palestinians into Israel and the reduction in trade with Israel, to almost none at all. Building the fence along the current route struck another financial blow at the residents, and it results in the land lying fallow, reducing even further the little income generated from farming. According to the report, the average output in this area reached \$430,000 per square kilometer of farm land (p. 11, Article 24). Now the separation fence comes and prevents thousands of families from working their fertile fields.

According to statistics provided in the report, unemployment in the areas affected by the fence had reached 39.3 percent back in 2001. The report adds that, according to World Bank statistics of 2001, at the end of 1997, 21.9 percent of the residents of this area were living in poverty, with the poverty line standing at an income of \$2.10 per person per day (p. 31).

The fence's route isolates many Palestinians from schools, medical clinics, and welfare services, clearly affecting the level of education and medical services provided in these areas (p. 12, Article 27).

The report predicted that the separation fence in the area of Tulkarm, Qalqiliya, and Jenin will directly affect about 7,400 students. The report also stated that a substantial portion of the teachers in these areas will join their colleagues, who already encountered difficulties in reaching school (pp. 40-41).

The report points out that the fence is likely to aggravate the health and sanitation problems in areas near the fence because the villages situated west of the fence will lose almost all access to health services, and that emergency medical care will not be available for residents of these areas (p. 41).

The Impact of Israel's Separation Barrier on Affected West Bank Communities, 4 May 2003, as published on the Website of the UN's Office of Coordination of Humanitarian Affairs: www.reliefweb.int/hic-opt/docs/HEPG/Wallreport.pdf.

The relevant pages are attached hereto as Appendix P/14.

69. The predictions regarding the effects of the fence became reality. Today, to meet their basic needs, residents of villages on both sides of the fence are completely dependent on the opening and closing of one particular gate in the fence. The residents rely on the gate to get to their farm land, to gain a living and continue to survive, to get to work or school, to visit their relatives, and to receive regular and emergency medical treatment.
70. A humanitarian update, published by the UN's Office of Coordination of Humanitarian Affairs (OCHA) indicates that the gates cause hardship and damage crops. The update states:

Only Palestinians with permits can pass through the Wall gates, but even then movement is not guaranteed.

The IDF in Tulkarm announced that agricultural gates will open at 06:00, 12:00 and 18:00 for 20 minutes. OCHA's monitoring indicates that in practice, permit holders experience irregular opening times and arbitrary passage.

All gates have been closed for prolonged periods following the Haifa and Tulkarm suicide attacks on 5 and 9 October and during the Yom Kippur holiday. On 19 October, the IDF announced that a number of agricultural gates would re-open and checkpoints and roadblocks would be removed making travel between villages easier. However, Palestinians are still subject to major delays.

According to UN's World Food Programme, virtually all crops have perished because of delays in timely harvesting and transportation. The price of fresh vegetables and fruits has risen.

A copy of the Update of the UN's Office of Coordination of Humanitarian Affairs – Occupied Palestinian Territories, which was published at the end of October 2003, is attached hereto as Appendix P/15 at p. 4.

71. A report of the Secretary [General] of the UN, of 24 November 2003, describes the serious effects of the completed sections of the separation fence on farming in the most fertile area of the West Bank. The report points out that many crops were lost because of the arbitrary times in which the gates were opened. The report also mentioned that, according to a survey recently taken by the World Food Program, the lost crops increased the food shortage in the area and increased the number of needy persons by 25,000 (p. 6, Article 25).

A photocopy of the report is attached hereto as Appendix P/16.

Legal Argument

Preface

72. The sweeping restrictions that the Respondent placed on movement of Palestinians since completion of construction of the separation barrier between Salim and Elqana have caused an unprecedented low in the economic well-being of residents of the villages situated near the barrier and of Palestinians on whose land the fence was built.
73. The Respondent's policy on closing the gates creates unemployment, whose magnitude is unprecedented. This policy prevents workers from regularly reaching their workplaces, farmers from reaching their farm land, and merchants from reaching their markets. In this way, the fence paralyzes commerce and industry.
74. In addition to the economic harm, the policy of closing the gates affects the education system and the residents' rights to proper education and medical treatment.
75. Also, the closing of the gates severed ties of the residents with their relatives and friends living on the other side of the fence.
76. In response to the petition filed against the separation fence, the Respondent contended that the fence would have crossings to minimize the harm that the fence causes to the civilian population, and to enable the Palestinians to conduct a normal way of life. This petition is filed in objection to the Respondent's failure to meet that promise.
77. It should not be understood that the Petitioners accept the separation barrier itself along the route which it was built, or its legality. The petition concentrates itself on opposition to the policy of opening the crossing gates in the fence.

78. It should be noted that, had the fence not been built inside Palestinian territory, in a manner that separates farmers from their fields, villages from their water sources, students from their schools, workers from their source of livelihood, patients from medical care, this petition would never have been filed. However, when the route of the fence ran through the occupied territory and within the living space of large numbers of Palestinians, who live in villages near the fence, the Respondent had the duty to enable regular, orderly crossing of the Palestinian population, those living on either side of the fence, so that they can conduct a normal way of life.

Obligation to enable the civilian population to live a normal life

79. Article 43 of the Regulations attached to the Hague Convention Respecting the Laws and Customs of War on Land (1907) (hereinafter: the Hague Regulations), imposes on the state, as the occupying power, the obligation to ensure the well-being and safety of the Palestinians living in the occupied territory.
80. The military commander fails to meet his obligation by ensuring only the safety of the region. The Respondent is responsible for preserving public order and ensuring that the civil population lives a normal life to the extent possible in areas in which he holds effective control. The military commander in the area is responsible for the lives and quality of life of the residents in all aspects of life in modern society.

HCJ 393/82, *Jimm'at Askan Almu'almun v. Commander of the IDF Forces*, Piskei Din 37 (4) 785, 797-798.

HCJ 202/81, *Tabib et al. v. Minister of Defense et al.*, Piskei Din 36 (2) 622, 629.

HCJ 3933/92, *Barakat v. OC Central Commander*, Piskei Din 36 (5) 1, 6.

HCJ 69, 493/81, *Abu Aita et al. v. The Regional Commander of Judea and Samaria et al.*, Piskei Din 37 (2) 197, 309-310.

81. In HCJ 256/72, *Electric Company for the Jerusalem District Ltd. v. Minister of Defense*, Piskei Din 27 (1) 124, the Court states, at pp. 138-139:

The obligations and rights of a military administration are defined according to his own military needs on the one hand, and, on the other hand, by the need to ensure, to the extent possible, the normal living conditions of the local population (and see HCJ 337/71, cited above, at pp. 581-

582). In providing these needs, the military administration is required to respect the local laws and the property rights of the residents in the territory under its control. In this spirit, Article 43 of the Hague Regulations require that it ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

82. As described in the factual chapter, closing the gates and not enabling the villages' residents to reach in orderly manner their farm land, water sources, sources of livelihood, markets for selling their goods, educational institutions, and medical institutions, harm the residents' way of life, and flagrantly breaches the Respondent's said obligation. International humanitarian law limits the authority of the occupying state to cause sweeping and prolonged harm to the systems in which the population under occupation conducts its daily life. This prohibition is derived from Article 43 of the Hague Regulations.

See *Jimm'at Askan Almu'almun*, cited above, at p. 789.

83. From the moment that the military administration built the physical barrier inside populated areas of occupied territory, it has the absolute duty to ensure that the civilian population is able to cross regularly from both sides of the barrier, their ability to cross being necessary for them to conduct their lives in normal fashion, and also to enable them to obtain their minimal living needs.

Infringement of fundamental rights of the civilian population

84. The policy on closing the gates harms every aspect of life of the civilian population, including fundamental rights of the residents of the towns and villages near the fence.

Violation of freedom of movement

85. Freedom of movement is a basic right of everyone in Israel. Restricting freedom of movement results in grave harm to human dignity by denying almost completely the personal autonomy of the individual. On the status of freedom of movement, see the comments of President Barak in H CJ 5016/96, *Horev et al. v. Minister of Transportation et al.*, *Piskei Din* 51 (4) 1, 49, 59.
86. This right is one of the basic needs of society, and its infringement is extremely grave in that it restricts the movement of residents in the very area

in which they live, and differs from a prohibition on the residents to travel to other states.

See HCJ 448/85, *Daher et al. v. Minister of the Interior*, Piskei Din 40 (2) 701, 708.

It should be mentioned that international norms also distinguish between the right to move about within the state and the right to cross the state's border and go elsewhere.

See the Universal Declaration of Human Rights (1948), Article 13(1); the International Covenant on Civil and Political Rights (1966), Article 12; the International Convention on the Elimination of All Forms of Racial Discrimination (1966), Article 15(d)(1).

87. Freedom of movement also includes the need to ensure normal movement of transportation vehicles. Residents of the villages who have to get to market in nearby towns, or take children to school, or the elderly to medical clinics some distance away, either during the stifling summer months or in the freezing days of winter, and have to cross through the gates in the fence, are prevented in many instances from doing so by vehicle.
88. The use of private vehicles is vital in preserving the economy and in providing individual and public social and cultural needs, especially in an area like the West Bank, where there is no regular transportation system. The sweeping and excessive prohibition on the use of vehicles brings life to a halt and returns it to the distant past, in which residents had to walk long distances by foot or relied on donkeys.

Infringement of other fundamental rights

89. The infringement of freedom of movement leads to the infringement of other fundamental rights of the civilian population.
90. Preventing the regular, orderly crossing of farmers and vehicles to carry equipment and goods, and the severe restrictions placed on individuals working in other occupations to reach their workplaces, critically harms the right to gain a living and to live in dignity. This right is part of human dignity, which is enshrined in the Basic Law: Human Dignity and Liberty (see CAP 4905/98, *Gamzu v. Yesha 'yahu*, Piskei Din 55 (3) 360, 375), and is also incorporated in international law, humanitarian and general (see Article 39 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights).

91. Locking the gates and thus preventing the residents of the villages from reaching their farm land constitutes a grave breach of the property rights of the residents and diminishes their ability to use their land. The inability of farmers and owners of farm land to work their land, plant seedlings and seeds, water them, harvest the crops and market the farm produce impairs the main value of the farm land, which is the ability to produce fruits and market them to gain a living. These rights are also enshrined in Article 3 of the Basic Law: Human Dignity and Liberty. Protection of private property is also incorporated in international humanitarian law, such as Article 46 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.

92. Many villages located in or near the seam area east of the fence do not have schools. In most instances, the pupils have to go to nearby villages or the large towns to gain an education, and have to cross the fence to get there. Closing of the gates at times in which school pupils and teachers need to cross to go to and from school impairs the pupils' right to education and the proper functioning of the educational system in general. The right to education is enshrined in Article 50 of the Fourth Geneva Convention and in Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966).

On the status of the right to education as a fundamental right, see HCJ 2599/00, *Yated - Non-Profit Organization for Parents of Children with Down Syndrome et al. v. Ministry of Education*, Piskei Din 56 (5) 834, 844-845. See also HCJ 4363/00, *Chairperson of the Upper Poriyya Committee v. Minister of Education*, Piskei Din 56 (4) 203, 206.

93. One of the gravest consequences of the restrictions is the harm it causes to persons needing medical treatment who are unable to reach the medical centers. The right to receive proper medical treatment is enshrined in Article 14(1) of the First Additional Protocol to the Geneva Conventions. Article 55 of the Fourth Geneva Convention requires the occupying state to ensure, to the fullest extent of the means available to it, the provision of food and medical equipment to the local population. Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 25(1) of the Universal Declaration of Human Rights (1948) also protect this right.

94. In addition to the above, the closing of the gates severed ties of the villagers with their relatives and friends living on the other side of the fence. The right

to family ties is a natural and constitutional right, in that it expresses the customary connection between a parent and child or between siblings. The right to a normal family life and to life in a societal context, with all that entails, is protected by international humanitarian law and by the Basic Law: Human Dignity and Liberty (see CA 7155/96, *John Doe v. Attorney General*, *Piskei Din* 51 (1) 160, 175).

Article 27 of the Fourth Geneva Convention protects the right of the civilian population to be treated with respect as regards their honor, their family rights, their religious convictions and practices, and their manners and customs. Article 46 of the Hague Regulations states that family honor and family rights are to be respected. Similar provision is found in Article 23 of the International Covenant on Civil and Political Rights (1966).

The Respondent's policy is unreasonable and disproportionate

95. The Respondent's policy, as described above, in which the gates of the separation fence are opened, if at all, for extremely short and varying times, makes the policy disproportionate and unreasonable.

Lack of proportionality

96. As stated, the declared objective of the separation fence is to restrict assailants from crossing from the Occupied Territories into the territory of the State of Israel, and is intended to protect the lives of residents of the state. Yet, the Respondent's policy restricts, and frequently completely prevents, residents of villages near the fence from crossing, not to the territory of the State of Israel, but to their own lands – their farm land and nearby towns and villages, on which the residents rely for a variety of vital needs.
97. Examination of the Respondent's policy – locking the gates all day long day after day, opening gates for very short times that are set arbitrarily, the failure to open the gates in the evening to enable farmers to return to their villages – indicates clearly and unequivocally that there is no connection between the purpose for which the separation fence was built and the means of setting the crossing hours.
98. The Respondent did not consider, as he was required to do, alternate ways to supervise the crossing of Palestinians, ways that would lessen the hardship to the Palestinian population. The rule is that civilians may be harmed only when alternative ways, that would cause lesser harm, are examined and

rejected, after decision was made that they are incapable of achieving the desired objective.

See HCJ 3477/95, *Ben Atiyya et al. v. Minister of Education, Culture and Sport, Piskei Din* 49 (5) 1.

99. The Respondent can achieve the objective of his policy by supervising the crossings in a manner that, on the one hand, prevents the entry of assailants to the territory of the state, and, on the other hand, substantially reduces the harm to the civilian population.
100. The Respondent took the easiest measure to achieve the objective: closing the gates without a “gatekeeper,” and thus severed the local population from its surroundings and its essential needs without any opportunity to speak with someone at the gate, which are not staffed except for the time that they are kept open. As pointed out above, the gates are opened only three times a day, for a total of about sixty minutes.
101. Indeed, staffing the gates requires allocation of more resources than would be required by hermetically closing the gates most of the day; however, this consideration does not justify implementation of such a disproportionate measure.
102. This Honorable Court has ruled more than once that logistical and budgetary problems are insufficient, by themselves, to justify substantial infringement of, or disregard for, human rights.

See HCJ 4541/94, *Miller v. Minister of Defense, Piskei Din* 49 (4) 94, 122, where Justice Strasberg-Cohen held:

A society that respects its fundamental values and the fundamental rights of its members must be willing to pay a reasonable price to ensure that equality does not become a value lacking substance, but finds expression and is implemented in practice.

See HCJ 2753/03, *Michael Kirsch v. IDF General Staff, Takdin Elyon* 2003 (3) 825, Par. 9 of the opinion of Justice Dorner; PPA 4463/94, *Golan v. Prisons Service, Piskei Din* 50 (4) 136, 169-171; and also A. Barak, *Judicial Interpretation – Constitutional Interpretation* (5754 – 1994), 526-528.

Lack of reasonableness

103. In exercising the discretion given him, the Respondent must balance military needs, which require supervision of the crossing of Palestinians at the crossing points, and harm to the civil population.

See HCJ 358/88, *The Association for Civil Rights in Israel et al. v. OC Central Command et al.*, Piskei Din 43 (2) 529, 538.

104. There is no justification for paralyzing the life of the civilian population and imprisoning the Palestinians in a way that severs them from their family and social milieu, their farm land, markets, source of livelihood, educational and health institutions, on the grounds that the achievement of security warrants such paralysis.

105. The Respondent did not weigh the severe violation of human rights on a daily, even hourly, basis, in which farmers are not allowed to reach their farm land or workers to get to their workplaces or school pupils to reach their schools or patients to visit their physicians or individuals to visit their family. Crossing the separation fence for each of these reasons is crucial to maintaining a normal life in contemporary society.

106. Among all the considerations to be taken into account, the Respondent should have considered that the separation fence and the gates are not a passing phenomenon. As long as the fence is standing, the civilian population will be dependent on the gates in living their daily lives. It should be mentioned that the considerations to be taken into account when restrictions are imposed for a limited period of time are clearly different from the considerations to be weighed when the restrictions are imposed for a prolonged period of time. Even if there are similar and/or identical considerations, the weight to be given to each consideration differs in each case. Where the situation is expected to remain for a long time, greater weight should be given to the welfare of the local population and its ability to maintain an orderly and normal way of life.

See HCJ 5820/91, *Father Samuel Panous et a. v. Danny Yatom et al.*, *Takdin Elyon* 92 (1) 270; HCJ 660/88, *Inesh al-Usra Association et al. v. Commander of the IDF forces in Judea and Samaria*, Piskei Din 43 (3) 673, 677-678.

107. The Respondent erred in failing to give proper weight to the grave harm to Palestinian life.

108. It should be noted that closing the gates is not only a matter of inconvenience, but a violation of fundamental human rights, which, if continued, is liable to endanger the life of the civilian population living near the fence.
109. As a result of the Respondent's gate-closing policy, the villages near the fence have become a kind of prison, with the Respondent serving as prison guard, ordering it to be opened and closed at his absolute discretion. The policy is liable to cause an accumulation of frustration, rage, poverty, unemployment, tension, hatred, and the like. It goes without saying that these conditions and feelings are liable to lead to more people taking part in the cycle of violence.
110. Therefore, the Respondent's policy, which creates such profound harm to the life of the civilian population, is liable to lead to public disturbances and security violations and an increased motivation to harm Israelis, in utter contrast to the objective for which the fence was purportedly built and the gates closed. In establishing his policy, the Respondent ignored the fact that the well-being of the civilian population does not necessarily conflict with security considerations. Quite the opposite.

Collective punishment

111. Article 50 of the Hague Regulations prohibits collective punishment of the local population because of the acts of individuals. Also, Article 33 of the Fourth Geneva Convention sets forth the principle that a person may be "punished only for an offense that he or she has committed." This article protects a humanitarian right, and is thus included in the humanitarian provisions of the Fourth Geneva Convention, which the State of Israel has declared that it honors.

See the comments of Justice D. Levin in H CJ 591/88, *Taha et al. v. Minister of Defense et al.*, *Piskei Din* 45 (2) 45, 54, and the comments of Justice Bach in H CJ 1113/90, *Shaw v. Commander of the IDF Forces in the Gaza Region*, *Piskei Din* 44 (4) 590, 591.

112. Closing the gates, which prevents, in the form of a collective measure, the crossing of civilians and vehicles from the villages on both sides of the fence, causes great daily suffering to the villagers in all aspects of daily life, and is implemented because of the acts of individuals, who did not necessarily enter the territory of Israel from the area of the villages.

113. By instituting the sweeping closing of the crossings, the Respondent punishes Palestinians without relating to the specific circumstances of each and every village and of each and every villager. The Respondent views Palestinians as one block, labels them all as the enemy and treats them accordingly. In addition, the Respondent takes events that occur in the entire region (i.e., the Occupied Territories and the State of Israel) and establishes a general policy that is implemented without distinction against the entire population, including persons who are not suspected of any wrongdoing. Thus, the Respondent's policy is punitive, and is neither preventive nor deterrent. This was the case during the Israeli holidays this year, which ran from the beginning to the middle of October. During that approximately two-week period, the Respondent closed the crossings completely, thus collectively punishing the residents for an act that was committed by an individual.

The Respondent breached his commitments to the High Court of Justice

114. In HCJ 8532/02, *Rashid Abd al-Salam Salame et al. v. Commander of the IDF forces in the West Bank et al.* (unpublished), the Respondent contended, in his response to the petition filed against orders of requisition to build the fence, that:

Both in planning the route, and in the plan for use of the space, an effort was made to minimize the harm to the local residents... In the section that is the subject of the petition, this effort was seen... in the establishment of crossings in the barrier to enable crossing from one side to the other, to prevent unnecessary infringement of the freedom of movement of residents of the seam area and of their routine way of life, and to enable persons living east of the barrier to cultivate land situated on the western side of the barrier.

The relevant page of the Respondent's response is attached hereto as Appendix P/17.

115. The Respondent made commitments of this kind at various times: for example, HCJ 7784/02, *Sa'al Awani Rawaf Abd al-Hadi et al. v. Commander of the IDF Forces in the West Bank*, and HCJ 3771/02, *Ar-Ras Village Council v. Military Commander in Judea and Samaria, Yitzhak Eitan, et al.*

116. Presumably, making this commitment to enable residents to cross the fence was part of the grounds for denying petitions that were submitted against the route of the barrier.

See, for example, the judgment in HCJ 8172, 8532/02, *Ibtisam Muhammad Ibrahim et al. v. Commander of the IDF forces in the West Bank*, of 14 October 2002 (unpublished), attached hereto as Appendix P/18.

117. As appears from the factual chapter above, the Respondent breached his commitment to the High Court of Justice to enable residents to cross the fence in a manner that will lessen the harm to the residents and to their normal way of life. In failing to honor his commitments, the Respondent did not act in good faith and wrongfully exploited the fact that the High Court of Justice denied petitions filed against the route of the barrier that were based, in part, on the grave infringement of the rights of the civilian population.

Therefore, the Honorable Court is requested to grant the Order Nisi as requested, and after receiving the Respondent's response, to make it absolute.

Today, 24 December 2003

/signed/
Fatmeh El-A'jou,
Attorney
Counsel for Petitioners