At the Supreme Court in Jerusalem **HCJ 639/04**
Sitting as the High Court of Justice

In the matter of: **The Association for Civil Rights in Israel**

represented by attorneys Avner Pinchuk and/or Dan Yakir and/or Dana Alexander and/or Hadas Taggari and/or Auni Banna and/or Michal Pinchuk and/or Lila Margalit and/or Fatmeh El-A`jou and/or Banna Shughry-Badarne and/or Sharon Abraham-Weiss and/or No'a Stein and/or Sonia Bulus and/or Oded Feller
of the Association for Civil Rights in Israel
75 Nahlat Binyamin, Tel Aviv 65154
Tel. 03-5608185; Fax 03-5608165

The Petitioner

v.

1. **Commander of the IDF forces in Judea and Samaria**
   office of the OC Central Command, Military Post 02367, IDF
2. **Head, Civil Administration in Judea and Samaria**
   PO Box 10482, Bet El

The Respondents

Petition for Order Nisi

A petition is hereby filed for an Order Nisi, in which the Honorable Court is requested to order the Respondents to appear and show cause why they do not revoke the:

Declaration in the Matter of Closing Territory Number s/2/03 (seam area) (Judea and Samaria), 5764-2003;

General Permit to Enter and Stay in Seam Area, 5764 – 2003;

Regulations Regarding Permanent Resident Permit in the Seam Area, 5764 – 2003;

Regulations Regarding Permits to Enter and Stay in the Seam Area, 5764 – 2003;

Regulations Regarding Crossings in the Seam Area, 5764 – 2003;

Copies of the Declaration in the Matter of Closing the Territory and the regulations issued pursuant thereto are attached hereto as Appendixes P/1 – P/5.

Application for Urgent Hearing

1. This petition deals with the closing of the area that lies between the separation fence (the already completed Stage 1) and the State of Israel. The fence separates villages and communities, farmers and their farmland, workers and their work places. It keeps school pupils from their schools, patients from medical treatment centers, and all the residents from their families and friends.

2. The orders that are the subject of the petition restrict the movement and impair the living conditions of the protected Palestinians in the closed area, and subject them to a permit regime that critically impedes the daily routine of the civilian population and their ability to gain a living.

3. These impediments are aggravated by the extremely poor socioeconomic condition of the Palestinians living in the Occupied Territories.

4. In light of the above, the Honorable Court is requested to order that the petition be heard expeditiously.

The grounds for the petition are as follows:

Preface

For some thirty-seven years, the State of Israel has held the territory of the West Bank in belligerent occupation. It is now building the "separation fence," which tears strips of land from the region along with their residents, fields, and buildings. Following completion of Stage 1 of the fence project, Respondent 1 (hereinafter: the Respondent) declared these strips of land closed military areas. Instantly, the various regulations and orders ruined the fabric of life of Palestinians and of Palestinian communities in the area, which became "closed," and subjected them to a regime of permits: the daily routine of many people, soon to reach a total of hundreds of thousands of Palestinians, became a system of forms, documents, and authorizations. The permit regime harshly infringes fundamental rights of these protected persons, first and foremost, their right to freedom of movement and to dignity. These grave violations are likely to stifle the way of life of the protected Palestinians in the closed area, and will subsequently bring about their removal. As appears from the current situation, and as is clear from the route of the fence and the

manner in which it is being determined, the considerations that led to creation of the closed area, and to subjecting it to the permits regime, are primarily to strengthen the status of the Jewish settlements in the area and to increase their possession and control of the land. Possibly, these political matters will be arranged sometime in the future as part of peace agreement. Until then, however, the acts being carried out by the state in the present breach international humanitarian law and infringe the fundamental rights of the protected persons in the area. In addition, even if the security needs of the occupying state are taken into account, imposition of the permits regime is a disproportionate violation of the protected persons' fundamental rights, particularly in light of the harm that they have suffered following the segmenting of the area with fences.

The factual background

A. Creating the closed area: the fence moves eastward

1. The closed area that is the subject of this petition is the closed-in area between the territory of the State of Israel and the separation barrier, which is being built at this time inside the territories that have been held under military occupation for some thirty-seven years. The separation barrier is a system of fences, walls, trenches, patrol roads, smudge paths, and observation and warning devices, that is being constructed in accordance with the government's decision of 23 June 2002. The part of the barrier that has been built so far, which is the section that is the subject of this petition, stretches from Salim in the north to Elqana in the south, and from Salim eastwards towards the Jordan Valley.

2. Following a wave of hostile acts in October 2000, the idea of unilateral separation grew. This idea included, in part, the placement of obstructions, and later, a fence and wall that would form a partition between the State of Israel and the West Bank, which is held under belligerent occupation, and would prevent free movement of armed Palestinians and suicide-terrorists into the territory of the State of Israel.

3. In July 2001, a special steering committee, headed by the director of the National Security Council, Maj. Gen. Uzi Dayan, presented recommendations, among them a recommendation to erect in certain areas obstructions to separate the Occupied Territories from the State of Israel. However, as of April 2002, almost nothing was done to implement the plan (see State Comptroller's Office, *Duah ha-Biqqoret be-Nose Merhav ha-Tefer* [Report on the Seam Area], July 2002). Furthermore, the existing checkpoints and obstructions did not fulfill their objective, and most of the suicide-terrorists entered

Israel by passing through the checkpoints, where they were not thoroughly checked (Ibid., pp. 24, 35-36).

A copy of the relevant pages of the State Comptroller's Report on the seam area is attached hereto as Appendix P/6.

4. On 14 April 2002, the Ministerial Committee for National Security Matters decided to build a temporary barrier in the Umm al-Fahm, Qalqiliya-Tulkarm, and Jerusalem areas, the objective being to prevent the infiltration of assailants into Israel. The Ministerial Committee decided to establish a team of ministers, headed by the prime minister, to consider a long-term solution – the separation fence. On 23 June 2002, the cabinet approved in principle Stage 1 of the separation fence project. Also, the cabinet empowered the prime minister and the minister of defence to determine the final route of the fence.

A copy of a print-out from the Website of the Ministry of Defence, stating the purpose of the fence, is attached as Appendix P/7.

5. As stated, the declared purpose of the separation fence was, and continues to be, to restrict assailants from crossing from the Occupied Territories to the territory of the State of Israel, so as to protect the lives of residents of the state. However, the building of the fence raised a stormy public debate, revolving almost completely around the route that the fence would take. Politicians, public officials, retired army personnel, citizens living within the Green Line and citizens who settled in the Occupied Territories, all favored building the fence, and, more importantly, the route planned for its construction, with each person having his or her own considerations. Indeed, slowly the planned route of the fence shifted eastward, protruding deeper into the land being held in belligerent occupation. The length of the section comprising State 1, which stretched from Salim to Elqana, which was planned to be 96 kilometers, grew and now stands at 123 kilometers. 27 kilometers were added to the original route to run it within the Occupied Territories.

On the separation fence, see the relevant pages from B'Tselem's report, *Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier,* April 2003, attached hereto as Appendix P/8.

6. The many kilometers that have been added to the fence's route are intended to run the fence east of the settlements in the West Bank. For example, in June 2002 [sic], it was decided to change the route so as to annex the settlement Alfe Menashshe. Eli'ezer

Hasday, head of the Alfe Menashshe local authority stated that, following "intensive political activity," it was decided to envelop Alfe Menashshe within the separation fence, and in the second stage – because this solution, too, left the community outside the separation fence – further pressure led to a change in the route so that it swerved east of Alfe Menashshe (Meron Rappoport, "Uve-Libbam Homa" [A Wall in their Hearts], *Yedioth Ahronoth,* 23 May 2003; Ittay Ross, "Alfe Menashshe", *Ma'ariv Online*, 20 June 2002). Similarly, it was decided in July 2002 that three kilometers would be added to the fence to include the settlements Elqana, Sha'are Tiqwa and Ez Efrayim along the route (Attila Shumpleby, "Geder ha-Hafrada To'orakh we-Tikhlol et Elqana" [The Separation Fence to be Lengthened and will Include Elqana], *Ynet*, 24 July 2002).

A copy of the article written by Meron Rappoport, of 23 May 2003, is attached hereto as Appendix P/9.

A copy of the article written by Ittay Ross, of 30 June 2003 [sic], is attached hereto as Appendix P/10.

A copy of the article written by Attila Shumpleby, of 24 July 2003 [sic], is attached hereto as Appendix P/11.

7. As a result of the route that was chosen, for reasons extraneous to its declared purpose, the fence divides communities, detaches villages from their farmland, severs villages from municipal service centers, and establishes Palestinian enclaves within the route's loops and between it and the Green Line. The harm to the fabric of life of the tens of thousands of Palestinians living in these enclaves is intolerable. Some areas are completely trapped between the fence and the sovereign territory of the State of Israel. Other areas, such as the town of Qalqiliya, are almost completely surrounded, and a narrow territorial contiguity between them and the rest of the Occupied Territories creates a bottleneck, at the top of which is an IDF checkpoint.

   A map prepared and published by B'Tselem, which shows the route of the barrier in relation to the border of the sovereign territory of the State of Israel and how it drives deep in to the Occupied Territories, is attached hereto as Appendix P/12.

8. This petition focuses on the territory that is closed between the section of the fence that has already been built (Stage 1) and the territory of the State of Israel. The orders issued by the Respondent have turned this area into a "closed military area." Palestinians are forbidden to live or move about in this area unless they have a permit.

9. In a special report published on 24 November 2003 – *Report of the Secretary-General prepared pursuant to General Assembly Resolution ES 10/13* (hereinafter: the UN Secretary-General's report) – the UN Secretary-General reviews Stage 1 of the fence project. He finds that 56,000 Palestinians are imprisoned in the enclaves and 5,300 Palestinians currently live in the "closed" areas in fifteen communities. This figure is probably low: according to other important reports, the number of residents imprisoned by the fence is double that number (see, for example, the comprehensive report prepared by The Local Aid Coordination Committee, *The Impact of Israel's Separation Barrier on Affected West Bank Communities*, 4 May 200 (hereinafter: the World Bank report), p. 34; B'Tselem's report, *Behind the Barrier,* Appendix P/8, pp. 8-9). In addition, 38 communities, in which 73,000 Palestinians live, were directly harmed by Stage 1 of the fence, as a result of their loss of land, construction of access roads, and irrigation systems (World Bank report, p. 35)

A copy of the Secretary-General's report is attached hereto as Appendix P/13.

A copy of the relevant pages from the World Bank report is attached hereto as Appendix P/14.

10. The permits regime in the area that is the subject of this petition is only an omen of what will happen to the protected persons and other Palestinian groups: on 14 August 2003, the Ministerial Committee for National Security Matters approved the fence's final route. Long sections of this route run deep into Palestinian territory, 7.5 kilometers in some places, and in the heart of Samaria up to 22 kilometers, leaving entire Palestinian villages, plantations, farmland, access roads, schools, and businesses west of the fence. In part of the section, the fence creates Palestinian enclaves, closed on all sides by the fence, a result of the construction of depth [interior] fences near the Jewish settlements. The UN Secretary-General's report (Appendix P/7, p. 3) states that the separation fence is expected to run a distance of 750 kilometers, 2.5 times as long as the international border in Judea and Samaria, which is 290 kilometers (see the State Comptroller's report, Appendix P/6, p. 9). According to the planned route, 975 square kilometers, which comprise 16.6 percent of the area of the West Bank, will remain between the fence and the Green Line. This land area is home to 17,000 Palestinians in the West Bank and 220,000 Palestinians living in Jerusalem. Another 160,000 Palestinians will find themselves imprisoned in enclaves – the areas enclosed on almost all sides by the fence.

11. Therefore, another objective has been added to the original declared purpose of the fence, i.e., blocking entry of assailants from the Occupied Territories into the territory of the State of Israel: placing the settlements established by the State of Israel in the Occupied Territories within the area controlled by the fence – "Where there is a Jewish majority, the fence surrounds the area to guaranty security" (Deputy Defence Minister Ze'ev Boim, at a session of the Knesset Plenum, 22 October 2003). Similar comments were made by the director-general of the Ministry of Defence, who previously stated that the route "is intended to provide a separation barrier that will reduce to a minimum infiltration of terror into the country and of persons illegally entering Israel from the territories" (Amir Rappoport, "Geder ha-Hafrada Tuqam gam mi-Mizrah la-Qaw ha-Yaroq" [Separation Fence also to be Built East of the Green Line], *Ynet*, 15 May 2002), says that, "If it means that the fence will include as many Israelis as possible for security reasons, the fence must also include the Ariel enclave" (Amir Rappoport, "En Pitron Yoter Tov min ha-Muvla'ot" [Enclaves are the Best Solution], *Ma'ariv Online*, 24 October 2003).

A copy of Divre ha-Keneset [the Knesset Record] of 22 October 2003 is attached hereto as Appendix P/15.

A copy of the article of Amir Rappoport of 15 May 2002, in *Ynet*, is attached hereto as Appendix P/16.

A copy of the article of Amir Rappoport of 24 October 2003, in *Ma'ariv Online*, is attached hereto as Appendix P/17.

B. <u>The Declaration on closing the area and on the permits regime</u>

12. On 2 October 2003, the area between the sovereign territory of the State of Israel and the completed section of the fence (Stage 1) was declared a closed area. In accordance with his authority pursuant to Articles 88 and 90 of Zaw bi-Devar Hora'ot Bittahon (Yehuda we-Shomeron) [Order Regarding Defence Regulations (Judea and Samaria)] (No. 378), 5730 – 1970, the Respondent issued the Hakhraza bi-Devar Segirat Shetah Mispar s/2/03 (Merhav ha-Tefer) (Yehuda we-Shomeron) [Declaration in the Matter of Closing Territory Number s/2/03 (seam area) (Judea and Samaria)], 5764-2003 (hereinafter: the Declaration – Appendix P/1 above). In practice, the Declaration divides the West Bank, tearing land space from it, with its residents, its homes, and its fields (hereinafter: the closed area).

13. The basic element of the Declaration is that nobody is permitted to stay in the closed area (Article 3 of the Declaration).

13.1 The above fundamental principle, which holds that the area is to be a space free of people, was subject to certain exceptions. The main exception is that Israelis are allowed to stay in the area, as in the past. Who is an Israeli? An "Israeli" is a citizen or resident of the State of Israel, and also any foreign subject who is Jewish and [*sic*] a relative of a Jew entitled to the right of return (Article 4(a)(1) of the Declaration, and as defined in Article 1 of the Declaration.

13.2 In accordance with the second exception, any person who not an "Israeli" and wishes to enter and stay in the closed area must have a special permit that allows him to do so (Article 4(a)(2) of the Declaration).

13.3 Below we shall describe the permits regime imposed on residents of the area by the Declaration and by the orders that the Respondents subsequently issued, which regulate the movement and way of life of many protected civilians in the area. First, we shall present the Declaration's supplemental orders which, together with the Declaration, constitute "the permits regime."

14. On 2 October 2003, the Respondent issued the General Permit to Enter and Stay in the Seam Area, 5764 - 2003 (hereinafter: the General Permit – Appendix P/2 above). This order enumerates "types of persons" who are allowed to enter and stay in the closed area without a special permit. If the Declaration only allowed "Israelis" to stay in the closed area without a permit, the circle of persons allowed to enter was slightly enlarged to include tourists. As a result, all "types of persons" are covered, in essence, except for the area's protected residents. The protected Palestinian residents, and they alone, require a special permit to stay in the closed area (protected Palestinian who have permits to work in Israel or in settlements in the closed area do not require an additional permit, issued pursuant to the permits regime).

15. On 7 October 2003, Respondent 2 issued the Regulations Regarding Permanent Resident Permit in the Seam Area, 5764 – 2003 (hereinafter: Regulations Regarding Resident Permit – Appendix P/3 above). This order states the procedure applying to a permanent resident of the closed area who wants to continue to live in his house, and, for that purpose, the right to obtain a "permanent resident permit."

16. On 7 October 2003, Respondent 2 issued the Regulations Regarding Permits to Enter and Stay in the Seam Area, 5764 – 2003 (hereinafter: Regulations Regarding Entry Permits – Appendix P/4 above). These regulations state the circumstances and the procedure by which a protected resident in the area who lives outside the closed area may request a permit to enter and stay in the closed area.

17. On 7 October 2003, Respondent 2 issued the Regulations Regarding Crossings in the Seam Area, 5764 – 2003 (hereinafter: Crossings Regulations – Appendix P/5 above). This order sets forth the conditions and restrictions on the entry and exit of protected residents who obtain permits to stay in the closed area. The order states, in part, that entry into and exit from the closed area by the permit holder is to be done at one fixed crossing, and only through it (Articles 2(a) and 3(a) of the Crossings Regulations). This restriction affects not only the range of movement of the protected residents, but also their daily routine, in that nearly all of the crossings are closed most of the day.

C. Life in the land of permits – the practical effect of the orders and regulations

18. Underlying the tortuous articles and sub-articles of the Declaration and its accompanying orders lies a rather simple principle: from now on, the movement of every protected person – residents and visitors in the closed area – will be restricted and subject to a permits regime. All other "types of persons" (in the language of the General Permit – Appendix P/2) are allowed to move about and stay in the closed area as they had previously. The Respondents proclaimed the closing of the area and prohibited every "person" from staying in it (Article 3 of the Declaration), and in the same breath defines all "types of persons" to exclude Palestinians, who are the protected residents of the area. The right and ability of the latter to stay or visit in the closed area will be subject to the discretion and good will of officials operating on behalf of the Respondents. Until yesterday, the Respondents needed a special reason to infringe the freedom of movement and impair the way of life of the protected persons in the closed area. From now on, a special reason will have to exist to enable that freedom of movement and way of life. If the reason is not on the list of reasons and purposes maintained by the Respondents, submission of the request will be subject to the discretion and good will of the competent governmental authority. Only it will decide whether the request is legitimate and deserving of a "permit for exceptional reasons," or is completely inappropriate and should not even be considered. Below, we shall examine the details of the permits regime

and see the revolutionary change that it makes in the lives of each protected resident who is connected, in one way or another, to the area closed pursuant to the Declaration.

19. The permits regime suspends the rights of a permanent resident in the closed area.

19.1 Every adult who, prior to publication of the Declaration, lived in the closed area, is not required to do the following unless he possesses the appropriate permit issued by the Respondents. A person whose "permanent place of residence" (Article 5(a) of the Declaration) is located in the closed area must go to the competent authority in the Civil Administration (the Civil District Coordination Office – hereinafter: the DCO) and submit a request to obtain a "permanent resident permit."

19.2 The request will be granted only after the competent authority, or a committee on behalf of Respondent 2, is convinced that, based on criteria that will be set, the applicant is indeed a "permanent resident" (Articles 2(a)(2) and 4 of the Regulations Regarding Resident Permit, Appendix P/3.)

19.3 The Regulations Regarding Resident Permit do not include the basic assumption, that is, the natural right of a resident of the closed area to receive a permit and live in his house. Lacking definition of the degree and quality of the connection that will satisfy the competent authority before it grants the desired permit, protected persons who live in the closed area but also have connections with other locations in the area are liable to lose their status as a person "whose permanent place of residence" is in the closed area (Article 5(a) of the Declaration). Already, many of the permits that the Respondents issued note, alongside the place of residence of the holder of the permit, the name of another community, the prior place of residence or a nearby city, that is situated outside the closed area (for example: "Jabara – Ras" or "Jabara – Tulkarm"), and state that the permit is not proof of the rights of the holder or that he resides in the closed area.

19.4 Even worse, the permits regime does not enshrine the right of the protected persons, who temporarily left their permanent place of residence in the "closed area," to obtain a resident permit. For example, a protected resident who went to study in the region or abroad is liable to be considered, based on the language of the orders, a non-permanent resident of the closed area. If he wants to exercise his

original intention to return to his permanent place of residence, he must beg for the mercy of the competent authority to allow him to become a "new resident."

19.5 Minors who are residents of the closed area must apply for the appropriate permit before they reach sixteen years of age. Otherwise, they lose their right to request a permanent resident permit (Article 2(a)(3) of the Regulations Regard Permit for Resident, Appendix P/3). A minor residing in the closed area who has passed the age of sixteen, and for some reason did not request a permit, automatically becomes another type of person – the remainder of the protected persons in the region.

19.6 The permanent resident permit is given for a short period of time, which is set individually by the competent authority that grants the permits (Article 2(b) of the Order Regarding Resident Permit). At the end of the period, the Respondents again examine the case, in that the applicant's ties to his place of residence may have diminished. In such case, until such time as the Respondents are "satisfied," the permit is not renewed.

19.7 We shall show below that the hardships placed on residents of the closed area by the permits regime cause many of them to divide their lives between the closed area and another location in the region – for example, in a location close to their workplace or school. In such case, the permits regime enables the Respondents to deny the protected persons recognition of his status as a "permanent resident" of the closed area, and with it, the right to live in his house.

19.8 In a similar manner, the permits regime interrupts the lives of protected persons who have moved to the area in recent years, and forces them to return to their former place of residence. For example only, we refer to the case of Mr. Kabha, a resident of Barta'a ash Sharqiya, whose request for a permit remained unapproved two months after he submitted it. The Civil Administration informed him that handling of his request took additional time because, until a year and a half ago, he had been living in a different community. At first, he was told to provide more and more evidence to alleviate the fears of the officials at the Civil Administration. Subsequently, after he returned time and again to learn the status of his request, he was told, as were others from his village, to go home and not return. It goes without saying that the competent authority did not exercise its authority and grant Mr. Kabha a temporary permit (pursuant to Article 4(c) of the

Regulations Regarding Resident Permit, Appendix P/3). In the meantime, he is "staying illegally" in his home.

19.9 As stated, the case of Mr. Kabha is presented only as an illustration. The harm to protected persons resulting from the permits regime is not due to rejections of one kind or another, but because the regime makes such rejection possible. This is a regime that requires Mr. Kabha, and all residents of the closed area, to beg until they "satisfy the competent authority" that they are entitled to live in their homes. This is a regime that turns Mr. Kabha into a criminal, for staying illegally in his home. This is a regime that seeks to reduce as much as possible the number of protected persons living in the closed area.

20. The permits regime restricts the right to move into the closed area.

20.1 And what is the law for a protected person, who is not a permanent resident of the closed area and wants to go and live there? The more that we investigate and learn about the nature of the permits regime, we wonder why a person would want to do this. Yet, life brings with it needs, hardships, and lack of options that force us to move our residence from one place to another.

20.2 In the permits regime, in order to move into the closed area, an individual needs a reason. Not every person, though, for we have already noted that an "Israeli," which includes a Jew and even the grandchild of a Jew, does not need a permit at all, even if he wants to go and live in a settlement or encampment in the closed area. But the protected residents of the region are not permitted to do so unless they have a good reason.

20.3 Application for a "new resident" permit is made by the applicant and by a family member who lives in the closed area, to teach you that a protected person who wants to be a "new resident" must be related to a permanent resident of the closed area (see Part 2 of the annex to the Regulations Regarding Resident Permit – Appendix P/3: Request Form to Obtain New Resident Permit).In practice, the only basis for submitting requests to move into the closed area is "family unification."

20.4 A person who wants to be a new resident in the closed area must pass a kind of "admissions committee" operating on behalf of the Respondents (the "committee" established by Respondent 2 to examine requests – see Article 1 of

the Regulations Regarding Resident Permit), which decides whether to approve the person's entry for a test period of not less than two years (Article 6 of the Regulations Regarding Resident Permit – Appendix P/3). Only after the test period has ended is the candidate allowed to request a permanent resident permit (Article 2(a)(2) of the said regulations) and hope that the Respondents will grant the request.

20.5 The Committee's discretion is unlimited. Among the officials who give their opinion on the request are the General Security Service [GSS], the Police, and the head of the population registry – giving an indication of the broad range of considerations and criteria built into the permits regime that serve to prevent protected persons from living and working in their country.

20.6 In sum, the permits regime does not even enable protected persons in the region to request permission to move into the closed area other than through "family unification." Furthermore, family unification of a person living in the closed area and a person living elsewhere in the region requires the consent of the Respondents and compliance with the conditions and with the protracted and distressing procedures – a situation that recalls the procedure for family unification of a protected person living in the region and a person living abroad. However, "family unification" of this kind is not a right that the Respondents are accustomed to respect. Thus, simultaneously, an ordinary, routine act linked to marriage – moving to live together in the spouse's home – depends on the benevolence of the Respondents.

21. The permits regime in the closed area restricts the movement of protected persons living outside its borders.

21.1 The Regulations Regarding Entry Permits (Appendix P/4) state the specific grounds on which a person is permitted to request permission to enter the closed area, based on the purpose for which entry is requested: business, trade, employment, farming, teaching, studying, and a small number of other tasks and actions (Annex 1 to the Regulations Regarding Entry Permits). As in the case of a person wanting to go and live in the closed area, in this instance, too, the applicant needs a reason or purpose that satisfies the Respondents.

21.2 We shall see below that, even where a reason exists – for example, the need to work and earn a living – is insufficient, and the permits regime leaves many protected persons without a means of support. First, however, we shall discuss the "lack of reason" pretext.

21.3 A person who cannot squeeze himself into one of the ten available categories is allowed to request entry into the closed area for purposes of a "visit," but in that case, the permit is limited to one visit only and for a specific number of days (Part 9 of the Annex to the Regulations Regarding Entry Permits). Take, for example, the villages al-Ras and Khirbet Jabara. Family ties and jointly held property are common in these adjacent villages. The fence separates them. It also severs the road that connected the two villages. Before the fence went up, it took minutes to go from one to the other; now, it takes an hour and a half. And if that is not sufficient, now every family visit will require a permit.

21.4 There is another possibility available for a person who does not come within the closed list of "purposes" but still wants to move about in the closed area. He can request what is defined in advance as an "Extraordinary Permit." An extraordinary permit, is as its name indicates; accordingly, the rule is that a person is not allowed to visit in the closed area except for one of the purposes set forth in the closed and limited list.

21.5 The permit to enter the closed area does not mean that the holder is allowed to stay in the area. Each of the forms, which are appended to the Regulations Regarding Entry Permits, allocates a special place for a request for an "optional" permit to spend the night in the closed area. Here, too, the applicant needs a special "reason" that satisfies the Respondents.

21.6 The checkpoints and roadblocks in the region have for some time exacted a heavy price from everyone wanting to cross them. The travel along roads that continue on interminably are torturous and nerve-wracking, and the travelers must cope with the heat, the cold, and the degradation and abuse at the checkpoint – all these factors cause many Palestinians to forego returning to their homes, and to spend the night at their place of work. However, the permits regime does not recognize that a person who works his land should be allowed to sleep there. If he wishes to do that, he needs a separate reason. Anyone who does not obtain a permit to spend the night presumably will ultimately be found to

have violated the prohibition on "staying the night" – the hardships along the way and at the checkpoint have their own effect.

21.7 Furthermore, many protected persons working in the closed area already have found themselves imprisoned in the closed area when the crossing gates were closed. Most of the crossing points are open only for short periods of time during the day, and the schedule for opening the gates changes despite the promises and commitments made by the Respondent (see Article 23.4 ff. below, and the petition recently filed by the Petitioner regarding the closed crossings – HCJ 11344/03, *Fa'iz Salim and the Association for Civil Rights in Israel v. Commander of the IDF Forces in Judea and Samaria*). Take, for example, the village of Jayyus, which is situated in the Qalqiliya area and is home to some 3,100 persons, most of whom gain a living from farming. Some 80 percent of the village's land lies west of the separation fence. According to reports received by the Petitioner, when the farmers realized that difficulties entailed in crossing the fence endangered their livelihood, about 70 farmers went to live in tin huts and tents on their farmland. On 10 October 2003, IDF forces ordered them to vacate the place because it was closed military area.

21.8 Spending the nights in the closed area turns the farmers into offenders, and their action will surely result in the revocation of the limited permit given them. By its nature, the permits regime harms protected persons, while making a culprit out of every protected person who spends the night on his land.

22. The permits regime shrinks the fabric of life in the closed area into a closed list of reasons and forms.

22.1 As noted, the permits regime conditions the stay of protected persons in the closed area on their holding a permit. A necessary (though not sufficient in itself) condition for obtaining a permit is the existence of a reason, one that "satisfies" the competent authority: a request to go and live in the closed area requires family ties. Protected persons who are not "permanent residents" are permitted to enter the closed area only for "proper" purposes: to study, work, cultivate farmland, provide services, and the like. Without a reason or purpose of this kind, no permit is granted. And a protected person without a permit has no place in the closed area.

22.2 Neither the individual's life nor the community's life are restricted to the closed list made by the Respondents. Indeed, our life's routine – in the case of most "types of persons" – is conducted along fixed channels: home, work, school, market, family members, friends. But life is more than plain routine. People are not robots, and their lives are not series of programmed actions arranged on a form. People create new ties, discard old ties, fall in love, go to visit acquaintances, are hosted by relatives, journey to the areas in which they grew up.

22.3 A person moves from place to place for many and varied reasons and purposes. Persons of all "kinds" move in their country for purposes other than those specified on the Respondents' closed list. For example, a person who wants to visit a childhood friend who lives in the closed area cannot do so any more without a permit. Visiting old friends is not on the Respondents' list.

22.4 How, for example, may a permanent resident invite relatives and friends to come to his home to celebrate his getting married, a holiday, or just to have fun? Will he have to inform them months in advance and provide them with a "confirmation" so that they can rush to the "competent authority" and request a visiting permit?

22.5 Take, for example, a young person who lives in the region who wants to court a young woman who lives in the closed area. Which form will he need when he wants to request the Respondents to show mercy and permit him to visit at her parents' home? What evidence will he have to provide to the competent authority or to "the committee?" The longing of his heart? The blush of his cheek?

22.6 The permits regime overturns the natural way of life in the closed area. Those "types of persons" to whom the new regime applies are declared to be undesirable in the closed area, and from now on, if they want to stay there, they require a permit. Until yesterday, the Respondents had to have a special reason to restrict the freedom of movement and the way of life of the protected persons in the closed area. From now on, a special reason will be required to do all these things. In the case of a reason that is not among those on the Respondents' list of reasons and purposes, the very submission of requests depends on the discretion and kindness of the competent authority. Only it can decide if the request deserves an

"extraordinary permit" or, contrarily, is a farfetched request that does not even deserve consideration.

23. The permits regime also creates hardship for holders of a permit and allows them to move about only along a defined route.

23.1 Every protected person who obtains a permit to stay in the closed area, whether a resident of the closed area or not, is allowed to enter and leave the closed area only through a designated gate (Articles 2(a) and 3(a) of the Crossings Regulations – Appendix P/5).

23.2 Thus, the movement of the protected residents is limited when they want to enter or leave the closed area. For example, a permanent resident of the closed area must leave through a certain crossing, even if his destination can be more readily reached if he exited through another gate.

23.3 Furthermore, in that the closed area lacks geographic contiguity, a resident of the closed area is compelled at times to leave it to reach another community inside the closed area. To achieve his objective, he must obtain a special permit to pass through another crossing point. The permits issued to residents of the closed area expressly state that they do not constitute a permit to enter "any closed military area within the seam area." In practice, the permits regime isolates residents of the closed area not only from other protected residents in the region, but also among themselves.

23.4 This limitation applies not only to the route the protected residents must take to get from one place to another, but also to their daily routine, in that most of the crossings are open for short periods of time. Thus, for example, the 3,100 residents of the above-mentioned village of Jayyus are separated from their farmland. The gates intended to enable the farmers to reach their farmland are closed most of the day, are not opened at fixed times, and not according to the schedule set, and are opened for an unreasonably short period of time. At times, residents who want to go to their fields have to wait hours until soldiers arrive and open the gate. There have even been cases in which residents arrived at the gate just after it was closed, but the soldiers, who were still by the gate, refused the farmers entreaties to open the gate again.

23.5 This occurs, for example, to young children from Jabara, who have to wait in the cold and rain for the gate between their homes and the school they attend in al-Ras to be opened, while soldiers sit alongside the gate and refuse to open it (in the meantime, UNICEF set up a tent for the waiting children to protect them from the rain, but the Respondents are not moved by this shameful sight). Meanwhile, the children's parents' resident permits do not allow them (the parents) to cross at that gate, which leads to the school, but must cross at the Jabara checkpoint. Each resident has a permit, each resident has a gate, each resident has a time and place, for conducting his or her life in the shadow of the separation fence.

23.6 The petition filed by the Petitioner on 28 December 2003 (HCJ 11344/03, *Fa'iz Salim and the Association for Civil Rights in Israel v. Commander of the IDF Forces in Judea and Samaria*), describes the way in which the Respondents prevent regular passage through the fixed gates in the separation fence. Thus, the permits regime is tied to the closed gates regime, making the daily routine of protected persons leaving and entering the closed area a hellish ordeal.

24. The permits regime restricts vehicles from entering and leaving the closed area.

24.1 A permanent resident holding a permit to enter and stay in the closed area finds the permit insufficient if he wants to enter or leave the closed area with his vehicle. To enable him to do this, he must submit a separate request (Articles 2(b) and 2(c) of the Crossings Regulations).

24.2 The request is passed on to the staff officers and GSS officials, after which the competent authority decides whether to grant the request. Whereas, at least on the face of it, obtaining a permanent resident only requires proof that the application is a permanent resident of the closed area, where a vehicle is involved, more is required. Permits to bring vehicles into the closed area are given only to a specific person. Thus, a person who wants to use a friend's or relative's vehicle requires a special permit.

24.3 Of course, therefore, the Crossings Regulations also denies the free movement of vehicles of a person who is not a resident of the closed area. Here, too, the assumption is that the protected residents are not free to move about in their vehicles in the closed area, and the Respondents have not set any criteria for allowing them to do so.

24.4 For example, the entire village of Jayyus, with its 3,100 residents, was "granted" a permit for only two farm vehicles. As a result, the residents have to move goods using the "back to back" method, using two trucks, making transportation of goods much more difficult. Furthermore, this practice works infrequently because the gates are not opened according to a fixed schedule.

24.5 The situation is similar in Jabara, which is an enclave in the closed area. Its residents have problems removing their crops and produce from their farmland because most of the vehicles that they are accustomed to using are no longer allowed to enter. The vehicles that are permitted to enter are stuck from time to time at the checkpoint located at the entrance to the village. Even vehicles used to empty trash and pump the sewage are not always allowed to enter. As a result, agricultural activity declined in Jabara (limited mostly to raising chickens) and many of its residents are in financial distress, in addition to being engulfed in sewage and dung.

24.6 In the absence of another regulation, a special permit is required for emergency and medical vehicles. Thus, emergency and medical services intended to serve the residents of the closed area also are subject to the permits regime.

24.7 Permits allowing a vehicle to enter, like all the other permits, are for a limited period, after which the vehicle owner must go to the Respondents and request renewal of the permit (Articles 2(d) and 3(c) of the Crossings Regulations) – Appendix P/5). The length of the period "will be set" by the competent authority in accordance with procedures that "will be determined." At the end of the period, the authority determines whether to allow the vehicle to enter. Likely, the vehicle staff officer gives his approval if the traffic fines are paid; the GSS official summons the vehicle owner for an interview; the applicant is required to provide an updated photocopy of the insurance certificate (see the forms in the annex to the Crossings Regulations). Time passes, the permit expires, the vehicle owned by the resident of the closed area is parked in his yard, a truck that carries farm produce from the fields to other elsewhere in the region ceases its activity. This is the situation until the permit is renewed, if the authorities grant the renewal, and the process is repeated over and over.

25. The permits regime, by definition, completely blocks entry of protected "types of persons."

25.1 The permits regime by its very definition guarantees that many protected persons will no longer be able to visit and stay in the closed area: naturally, when some official has the power to determine who receives, or does not receive, a permit, some individuals will be left wanting.

25.2 The Respondents' declared aim is to prevent protected persons with a "security past" from entering and staying in the closed area. To achieve their objective, the GSS and the Police conduct a security check of each and every request. As Mr. Nezah Mashiah, head of the Seam Area Administration, in the Ministry of Defence, said: "Also in the case in which the son of a farmer has a security record, he will not pass. The farmer should take this into account. If even one [assailant] passes through an agricultural gate, that crossing will become a wall. Nobody will pass through there" (Meron Rappoport, "A Wall in their Heart," *Yedioth Ahronoth,* 23 May 2003).

25.3 This is not a trifling concern, and many requests have been refused on this ground. For example, requests of many farmers from Jayyus and Barta'a were rejected for security reasons, which prevented them from working their land that was located in the closed area. This happened to Mr. Al-Mara'ibi, 66, a resident of Tulat Village, whose land is locked in the closed area. On November 2003, he submitted a request for a permit to enter the area. It was rejected, he was told, on security grounds. No details were provided. When he resubmitted the request, it, too, was rejected. His son was also denied a permit for security reasons. The result: his family is unable to benefit from its property and to earn a livelihood.

25.4 The range of circumstances and facts used by the Respondents to classify persons as having a security record is extremely broad and includes membership in a hostile organization years before, political involvement, incarceration years earlier for participating in demonstrations, and even having "dangerous" relatives.

25.5 Real and ostensible security criteria prevent protected persons from entering the territory of the State of Israel to receive medical treatment (see, for example, the case involved in HCJ 7632/02, *Abu Safiyya Sami v. Commander of the IDF Forces in the West Bank, Taqdin Elyon* 2002 (3) 2896); "family unification" (see, for example, HCJ 567/00, *Hijazi v. Minister of the Interior, Taqdin Elyon* 2000 (2) 1990); and employment (see B'Tselem, *Builders of Zion: Human Rights Violations of Palestinians from the Occupied Territories Working in Israel and*

the Settlements, August 1999). Similarly, in the past, Israel closed the al-Mawasi refugee camp, and its residents were subject to a policy like that which is the subject of this petition, whereby most of the residents found themselves imprisoned, either continuously or periodically. According to the IDF Spokesperson, "control over the passage of young males is very tight in light of the great likelihood that terrorists will come from this population. Therefore, Palestinians in this group must coordinate their movement in the Mawasi area to and from the territory of the Palestinian Authority… through officials at the Israeli District Coordinating Office" (see B'Tselem, *Al-Mawasi, Gaza Strip: Intolerable Life in an Isolated Enclave,* September 2003).

The relevant pages of the B'Tselem report on worker's rights in the Occupied Territories are attached hereto as Appendix P/18.

The relevant pages of the B'Tselem report on al-Mawasi in the Gaza Strip are attached hereto as Appendix P/19. `

25.6 The same considerations that formerly prevented protected persons from receiving a permit to enter the territory of the State of Israel are used in the permits regime to prevent protected persons from entering the area. However, unlike the prohibition on entering Israel, the effect here is that the protected persons are restricted to residing and moving about in their country. The separation fence does not separate protected persons from the territory of the State of Israel, and therefore, as if it being detached from the closed area is not enough, a permits regime is now being instituted to restrict movement within the closed area, making it analogous to a part of the State of Israel.

26. The permits regime establishes sweeping, vague arrangements, which are therefore arbitrary.

26.1 The permits regime severely harms the freedom of movement of residents of the region and embitters the lives of everyone whose existence is tied to the closed area. However, the above description fails to give a complete picture of the gravity of the harm to the fabric of life in the area: the arrangements established in the orders and regulations that are the subject of the present petition are general, broad, and vague, and allow the officials implementing the policy on

behalf of the Respondents to establish their content, criteria, and procedures "that will be established."

26.2 The regulations provide no criteria for the granting or rejection of requests. According to the regulations, the competent authority (the DCO in the Civil Administration and the relevant committee that will be established), may accept or reject a request – that and no more.

26.3 Sweeping authority which is both broad and vague inevitably results in arbitrary decisions. We refer, for example, to the findings of B'Tselem's report, which discussed the issuance of permits to work in Israel:

> **One of the features of decisions reached by the Israeli authorities in the Occupied Territories is the lack of transparency. The lack of transparency is generally accompanied by extensive reliance on "security considerations" to justify all decisions and policies. This phenomenon is especially conspicuous in the policy regarding the granting of various permits. The arbitrariness is apparent in the refusals that are reversed after human rights organizations or international organizations intervene. In other words, the "security interest" for which the individual was denied a permit disappears immediately upon the demand for an explanation by a third party.**
>
> **Although the criteria for their issuance are known, the granting of work permits is also subject to arbitrariness and extraneous considerations. The arbitrariness may be the refusal to grant the permit to a person who meets the criteria, or even the revocation of a permit that had been used properly, as will be described below.**

(*Builders of Zion: Human Rights Violations of Palestinians from the Occupied Territories Working in Israel and the Settlements* - Appendix P/18, at page 45.)

For an example of the arbitrariness in refusing permits on security grounds, see HCJ 567/00, *Hijazi v. Minister of the Interior, Taqdin Elyon* 2000, p. 1990, where the petitioners had to petition the court to clarify that there had never been an actual security reason for denying the applicant's request for family unification.

26.4 A person who obtains a permit is still subject to arbitrary treatment by the competent authority, which has the power to condition and limit the permits in accordance with the "conditions set forth in the permit" (Article 4(a)(2) of the Declaration). Thus, in addition to the restrictions previously set forth in the orders – such as entry being allowed only at one crossing point, prohibition on entering in a vehicle, and restriction on the period of stay in the closed area – the DCO may set further limitations and conditions on the freedom of movement of protected persons. These conditions and limitations sometimes differ from permit to permit, based on the considerations and criteria that "will be established" – if at all – by each competent authority.

26.5 Furthermore, the various permits issued to the various "types of persons" are limited "to a period that will be set" in accordance with "procedures that will be established" (Articles 2(b) and 3(c) of the Regulations for Permanent Resident; Article 2(b) of the Regulations Regarding Entry Permits). Permits allowing the entry of a vehicle are also issued for a limited period of time, which "will be established" by the competent authority "in accordance with procedures that shall be established" (Articles 2(d) and 3(c) of the Crossings Regulations). Here, too, the competent authority is allowed to establish procedures, criteria, and exceptions to the criteria that give the governmental authority total freedom in determining how much time will pass before any person or "types of persons" has to begin the bureaucratic hassle to obtain a new permit.

26.6 For example, permits for permanent residents are issued for periods of three months, six months, or one year – depending on the identity of the permanent resident. Permits to enter the closed area (a permit to a person who is not a permanent resident of the area) are given for shorter periods – generally for three months. Residents of Jayyus and of Jabara, who need to reach their olive groves

(in the case of Jayyus, the groves are situated in the closed area, and in the case of Jabara, outside it), the residents received permits lasting only one month – to cover the period of the olive picking, but do not enable them to care for the olive trees to raise their productivity the following year.

27. The permits regime is a tool for blackmailing the protected residents.

27.1 The greater the vagueness and extent of the power of the competent governmental authority, the broader its discretion, the greater the lack of criteria, the more the system can be exploited to achieve improper objectives.

27.2 The information and testimonies obtained by B'Tselem for its report on this subject shows that the State of Israel, through the GSS, uses its authority to deny work permits to residents of the Occupied Territories as a means to pressure them to collaborate. (B'Tselem report – Appendix P/18, Chapter Four, p. 27); see, also, B'Tselem, *Collaborators in the Occupied Territories: Human Rights Abuses and Violations*, January 1994). "In most cases that B'Tselem is aware of, the purpose of the GSS pressure, promising to return the worker his permit, was not solely to obtain specific information, but was intended to turn the worker into a collaborator" (Ibid., p. 35) "…this is based on the background of economic distress and high unemployment in the Occupied Territories, which has made many Palestinian families financially dependent on the family member working in Israel" (Ibid., p. 56). The Petitioner also receives regularly complaints from protected residents whereby they are requested, when seeking a permit to enter Israel, to collaborate as a condition for obtaining the permit.

The relevant pages of B'Tselem's report on collaborators are attached hereto as Appendix P/20.

28. The permits regime places an impossible burden of proof on applicants for permits.

28.1 For each and every step they take, the protected residents require a permit, and to obtain a permit, they have to provide various and sundry documents to support their request. For example, a person wanting to work his land in the closed area must provide documents of ownership. Over the years, most of the land passed by inheritance without documentation, so that many farmers have difficulty proving ownership. This inability can lead to a loss of their property and livelihood.

28.2 Difficulties in providing the requisite proofs occur in the application process for many kinds of permits. Examples are the following: a merchant must present a business license, and proof of his rights in the business; a tradesman must present a trade license; a teacher has to present teaching certificates. If the documents are not provided, the request is rejected. As a result, only licensed practitioners can continue to work in their occupations. The immediate sanction for failing to meet the bureaucratic conditions, which have nothing to do with state security, is the loss of gaining a livelihood. At this time, in which the protected residents suffer great financial distress, these new conditions aggravate their condition.

28.3 The difficulty in making these proofs in order to obtain permits for the defined purposes deemed proper by the Respondents (as set forth in the Regulations Regards Entry Permits) are nothing compared to those required to make a "simple" visit to a relative or friend. Is it reasonable to think that the competent authorities would give a permit based on a class picture? Or love letters? Or a family tree that proves that the grandmother of the person wanting to enter was indeed the aunt of a resident of the closed area?

29. The permits regime turns the ordinary routine of life into a bureaucratic nightmare.

29.1 Last and certainly not least, the permits regime turns the lives of many persons into a bureaucratic hell. The same "phenomenon we witness on a daily, hourly basis: the individual standing in line at the government counter, and the line winds and plods forward, longer and longer." (HCJ 164/97, *Conterm Ltd. v. Ministry of Finance, Piskei Din* 52 (1) 289, 367) [Translation: Supreme Court website]. To understand the bureaucratic chaos, it is necessary to once again mention that, following closure of the area and imposition of the permits regime, thousands of persons have had to go time and again to the DCOs to request permits, which they require in the same way they need air to breath. Every request entails detailed review, the applicants have to provide documents of proof, approval by the police and the GSS, and other entities, is a necessity. Handling of a request for a permit takes time, a long time. If rejected, an opportunity to be heard is given. Sometimes appeals are filed. The desks at the DCO office are piled high with requests. A report published by Machsom Watch presents harsh findings on the operation of the DCOs, which even prior to the permits regime were overburdened with work and are unable to keep up with the

pace of issuing the permits. The report tells of abandoned posts at the DCO offices, the arbitrary closing of service counters, and harassment of the local residents. (Machsom Watch – Women for Human Rights, *Mahsom Watch Matria'* [Machsom Watch Cautions], November 2003).

A copy of the Machsom Watch report of November 2003 is attached as Appendix P/21.

29.2 From accumulated experience with administrative agencies in Israel, and even more so in the Occupied Territories, it is clear that the bureaucratic processes of this kind are liable to be complex and exhausting, and often an exhausting process without purpose (see, for example, the Seven Departments of Hell that Israeli citizens have to pass through when marrying a foreign citizen: HCJ 7139/02, *'Abbas Basa v. Minister of the Interior, Piskei Din* 57 (3) 481). The hours spent waiting, the harassment, the never-ending demand for documents, the many work days wasted, the arbitrary treatment, the rigidity – all lead to major violation of rights:

> **Exposing the public to prolonged waits, outside, without proper physical conditions, is unreasonable, and even violates, indirectly, rights of the residents** (HCJ 2783/03, *Jabra v. Minister of the Interior*, not yet published, judgment given on 3 December 2003, Par. 7).

30. In sum, the permits regime seeks to turn the routine life of the residents into an intolerable realm of requests and documents, waiting in line, malfunctions, obstructions, conditions and criteria "that will be established." As Amira Hass summarized the situation:

> Israeli army committees will determine which Palestinian is allowed to cross and live in the closed are, and which is not. Army officers will determine which of the permanent residents will be allowed to move about: "to leave" the area for a nearby Palestinian village (on the other side of the fence), or to a nearby Palestinian city, and return. They will also determine when it is possible to leave and when to return. Twice a day or three times a month, for example. Israeli army committees will be empowered to decide which Palestinians who are not "permanent residents" can enter the area, and when. A person whose entire land lies in the area can enter only at the mercy of those army officers. The same is

true of drivers of garbage trucks, physicians, relatives, friends, teachers, telephone technicians, and employees of the Palestinian Water Company. All these persons and others will have to fill out forms, requests, provide proofs and supporting documents, in a process that, as experience has shown, will be both lengthy and irritant throughout its course at the Civil Administration – in order to receive (or not to receive) a permit to enter the forbidden area" (Amira Hass, "Ha-Zava Yahlit Mihu Toshav" [The Army will Decide who is a Resident], *Ha'aretz,* 15 October 2003).

D. First fruits – Strangulation of the fabric of life begins

31. Immediately following the Declaration closing the area and institution of the permits regime, the army began to force the new permits on residents of the area. Representatives of the Respondents distributed temporary permits to the heads of the villages. But even at the start, the permits were issued selectively, and many residents did not receive permits, which meant they were staying in their homes illegally. Meanwhile, residents in the closed area voiced opposition to the decree, which they could not endure. The opposition was quickly crushed. For example, in Jabara, residents were at first forbidden to leave the village. After a short period under siege, the army allowed the residents to move about freely, until 20 December 2003, when many families went to Tulkarm, and on their return, the army blocked their entry to Jabara. The residents, young and old, women and children, waited hours in the rain at the checkpoint, until they finally gave in and accepted the permits. In that way, the army crushed the residents' refusal to take part in the permits regime. Many residents of the village did not receive permits, and some received permits for three months, which are currently expiring.

32. As we have seen, many residents in the closed area did not receive permits, or were given temporary permits, which put a stop to their lives. Even worse was the complete obstruction of the lives of the large percentage of Palestinians who lived outside the closed area and wanted to visit there for various purposes – either regularly or from time to time. Similarly, movement of vehicles into the closed area was drastically cut. As a result, economic life – the manufacturing and trade that took place in the area before it became a "closed area" – suffered enormously.

33. Take, for example, the case of Barta'a ash Sharqiya, a village of 5,000 residents located south of Jenin. Since the separation fence was built east of the village, its residents have been imprisoned in the closed area. Before then, the residents had close commercial

relations and other ties with Jenin, on which residents relied for services. Now, the village is detached and isolated. The effects of the new situation were not long in coming – 80 percent of the businesses and shops have closed as a result of the poor economic situation.

34. Another example involves the residents of 'Arab ar Ramadin. When the fence was routed east of the Alfe Menashshe settlement, it separated residents from their grazing lands. Attempts to bring food to their animals by vehicle failed because they were not allowed to bring vehicles into the closed area, a prohibition that made it impossible for them to conduct commerce and trade of any kind. The income of the residents fell sharply, and they were left with no hope for recovery. The village is dying an economic and social death. The poor economic situation has forced the shepherds to sell their herds and seek work in industry in the Alfe Menashe settlement.

35. The village Far'un, situated near Tulkarm, is detached from most of its farmland, which is trapped inside the closed area. The farmland includes some 4,000 dunams of olive groves and 3,000 dunams of land used to grow vegetables. Much of the crops, particularly the guava and lemon crops, which ripen at this time of year, have been lost because the farmers were unable to pick the fruit and market it under these conditions. The army's failure to open the gate near the village, requiring the residents to obtain permits to cross the IDF checkpoint, prevents many farmers and laborers from reaching their lands, and critically harms both the current year's harvest and the planting for the future. Of Far'un's 3,000 residents, a small number, about 50 persons, received crossing permits. All the other farmers and laborers have been denied entry to their farmland.

36. The above are examples that reflect the bitter reality encountered by every Palestinian whose life is connected with the "closed" area. As mentioned above, the grave consequences on freedom of movement have directly affected 15 communities in the closed area and 38 communities near the fence, which are detached from their lands, irrigation systems and access roads, schools, service centers, electricity grids, medical clinics, and businesses.

37. The UN Secretary-General's report delineates the humanitarian and socioeconomic damage caused by the fence. The damage is especially grave because the area is particularly fertile, yielding a substantial portion of the farm produce in the Occupied Territories. The restrictions on movement, as well as the large amounts of land taken to build the fence, have caused many Palestinians to lose their livelihood, and some 25,000

Palestinians have joined the ranks of those who are starving and now require the food assistance that is provided by humanitarian bodies (UN Secretary-General's report – Appendix P/13, p. 6).

E. <u>Expected effect of closing the area and imposition of the permits regime</u>

38. Closing the area and imposing the permits regime create an intolerable situation for thousands of protected Palestinians. The fabric of life of Palestinians living in the closed area and others who visit there, the daily activity that forms the way of life of masses of people, is now subject to a bureaucratic and arbitrary regime that assumes no protected person is entitled to stay in the area unless permitted to do so.

39. The permits regime is a certain recipe for the slow and inevitable death of the communities in the area, and will ensure that no protected persons remain in the closed area. One does not have to wait until the damage occurs to realize the anticipated consequences, which can readily be learned from the bitter experience of other protected persons.

40. This was, for example, the fate of the Palestinian community in the old city in Hebron – an area that was closed, and entry into the area was restricted in order to maintain the Jewish settlement there. In 1994, following the massacre in the Tomb of the Patriarchs, the main street in the neighborhood was closed to Palestinians who did not live in the neighborhood, and the entry of Palestinian vehicles was completely forbidden. The merchants in the neighborhoods suffered greatly, and many closed their businesses and left their homes (see B'Tselem, *Impossible Coexistence: Human Rights in Hebron since the Massacre at the Cave of the Patriarchs,* September 1995). In recent years, the daily routine of Palestinians in Hebron has been choked even further. Many families left their homes in the old city because they could no longer cope with their harsh situation. Of the 300 or so families who lived in the Sahala neighborhood before the al-Aqsa Intifada, only 20 live there now. The old city is slowly becoming a ghost town, with the homes of Palestinians being abandoned one after the other, the occupants no longer being able to weather the economic and social hardships. One of the features of the breakdown in the social fabric of life in the old city is the closing of many businesses in central locations in the city (see B'Tselem, *Area H-2 in Hebron: Settlements Cause Mass Departure of Palestinians*, August 2003).

The relevant pages of B'Tselem's report on human rights in Hebron are attached hereto as Appendix P/22.

The relevant pages of B'Tselem's report on Area H-2 in Hebron are attached hereto as Appendix P/23.

41. Another example, from which one can learn of the fate protected persons in the Occupied Territories can expect, is drawn from the al-Mawasi refugee camp, which was closed to movement in May 2002. Residents in the camp were given magnetic cards that allowed them to enter. Severe restrictions have been placed on persons who did not live in the camp. Vehicles are not allowed to enter or leave the camp. Every movement made by the residents requires a permit and the good will of the soldiers. Many residents, who make a living from farming, are unable to remove their produce from the closed area. Fishing is forbidden. School children cannot study properly because the army makes it difficult for teachers to enter and prohibits the entry of basic educational equipment. The two medical clinics in al-Mawasi are insufficient to meet the needs of the residents, but the army restricts residents from leaving the camp to obtain treatment. Many residents lost their livelihood, prices rose, and unemployment, poverty, and hardship increased (B'Tselem, *Al-Mawasi* – Appendix P/19).

42. The startling figures of Palestinians who have left Qaliqiliya, a city that has for a long time been subject to harsh restrictions on movement, are instructive. These restrictions worsened following construction of the fence, which envelops the city and turns it into an enclave. The World Bank's report (Appendix P/14, p. 45, footnote 93) points out that, in recent years, from 6,000 to 8,000 (out of 45,000) residents left the city to live in the interior of the West Bank.

43. This trend conforms to the aim of the Respondents, as we see, for example, in the way they have acted in Nu'aman, a neighborhood in Jerusalem. This Palestinian village has been situated for years inside the municipal borders of Jerusalem, but its residents have never received Israeli residency. Now, with the separation fence built east of the village, the village is separated from the nearby communities, which provided Nu'aman's residents with various services, and the residents find themselves in a situation very much like that of Palestinian villages in the closed area. According to a report by B'Tselem, in March 2003, a person who identified himself as a representative of the Ministry of Defence went to the village, accompanied by Border Police. He requested the residents to move voluntarily to areas in the West Bank, and threatened that if they refused, they

would find themselves like a tree without water, and the village would be completely broken off from the surroundings areas. In July 2003, after the residents refused to leave, a wave of arrests of residents of the village began. They were charged with staying illegally in Israel. The residents petitioned the High Court of Justice (HCJ 7218/03). The state retreated and announced that it would not make any further arrests (B'Tselem, *Nu'aman: Life under the Threat of Expulsion,* September 2003).

The relevant pages of the report on Nu'aman are attached hereto as Appendix P/24.

44. The above examples illustrate the known effect of severe restrictions on movement of the kind that the Respondents impose in the closed area. The residents' fear that they, too, will soon be compelled to leave their villages and flee eastward, and become refugees in their own country, is well based, as appears from the major reports dealing with the anticipated effects of closing the area and implementation of the permits regime.

45. For example, according to the World Bank report (Appendix P/13, at pp. 4-5), continuation of the restrictions on movement and the severe harm to the residents will compel them to move east of the fence, leaving their homes behind:

> **It is feared that the Wall will isolate, fragment, and, in some cases, impoverish those Palestinians affected by its construction. The Wall may severely constrain the delivery of basic social services and commercial exchange and certainly will do so if it does not feature a sufficient number of access points for the movement of persons and goods, and if the movement through the Wall is seriously hampered. Concern was also expressed to mission members by many Palestinians interviewed in the course of fieldwork that families cut off by the Wall from livelihood and/or services might have to migrate east into the West Bank.**

46. Similar forecasts appear in the UN Secretary-General's report. The report warns against a situation in which Palestinians will have to ignore their land because of the severe restrictions on movement. Based on past experience, there is reason to fear that the situation will be exploited to take legal control of the land. It will be recalled that in *Elon More,* the Honorable Court prohibited the Respondents from violating he fundamental rights of protected persons in order to establish settlements that are not "military" (HCJ

390/79, *Duweikat v. Government of Israel, Piskei Din* 34 (1) 1). Following the decision, the State of Israel ceased expropriating private land, and most of the enormous settlement enterprise was established on "Sultan" lands, which had not been worked by their possessors for more than three years. Now, Palestinian farmers are worried that if three years pass, during which they are not allowed to work their land, they will lose it forever. This is not an "oriental fantasy," but a real concern, that is inspired by various statements, such as that of Major General (Res.) Uzi Dayan, who until recently headed the steering committee for the separation fence. Dayan explained that, "the Green Line is not holy. There are places where area should be added to it as part of long-range thinking" (Meron Rappoport, "A Wall in their Heart" – Appendix P/9).

47. Indeed, the Respondents describe the separation fence as a "temporary" measure, until a final political arrangement is reached between Israel and the Palestinian Authority. However, based on past "temporary" steps in the Occupied Territories, in particular the settlements that involved large numbers of Israelis, it is hard not to visualize the present temporary steps – creating an irreversible situation, and annexing the closed area into the State of Israel. In this framework, the "seam area" is more and more likely to become stitched to the area of the State of Israel, with the separation fence separating it and the other areas held under belligerent occupation. This is the only way to understand the above comments of Major General Dayan regarding the formation of the fence as part of "long-range thinking", the comments of the builder of the fence – Mr. Nezah Mashiah, whereby "the politicians found the wording, but I think that the fence will be the border" ("A Wall in their Heart" – Appendix P/9), or the comments recently made by the Prime Minister: "The Palestinians should already have understood that what they did not receive today, may be impossible to give them tomorrow. Had they not begun the wave off terror, there may not have been a need for the fence, and now we are vigorously putting up the fence and we won't stop" (Aluf Ben, "Prime Minister Warns Palestinians: What You can Receive Today – You won't Receive Tomorrow," *Ha'aretz,* 28 November 2003).

` A copy of Aluf Ben's article is attached hereto as Appendix P/25.

F. The Petitioner's requests to the Respondents

48. For a long time, the Petitioner has been warning the Respondents about the infringement of the rights of the protected residents resulting from the construction of the fence deep in Palestinian territory, both as regards the Declaration closing the area and the permits regime and as regards operation of the crossing points. Regarding the crossings, on 28

December 2003, the Petitioner filed a petition with this Honorable Court after its requests dealing with the times that the gates were opened and the manner in which the gates failed to lead to any improvement.

49. On 22 October 2003, Attorney Fatmeh El-A`jou, on behalf of the Petitioner, wrote to the Respondent and the legal advisor for Judea and Samaria, demanding that the order on closing the area, and its accompanying regulations, be revoked. In a letter of 28 October, Captain Gil Limon, assistant to the legal advisor for security matters, rejected the demand, contending that the Declaration was proportional. He further contended that, "The requirement to carry a permit does not affect in any way the right of any permanent resident in the seam area to continue to live in the area." His contention is erroneous. The Declaration expressly states that from the moment it takes effect, every resident must leave the closed area, and they are forbidden to stay there, unless they have a permit.

A copy of the Petitioner's letter of 22 October 2003 is attached hereto as Appendix P/26. A copy of the letter of Captain Gil Limon, assistant to the legal advisor for Judea and Samaria, is attached hereto as Appendix P/27.

The Legal Argumentation

50. The Declaration closing the land and imposing the permits regime on the Palestinian residents and on the other protected persons who want to move about within the area gravely affects the way of life of the protected persons in the Occupied Territories, affecting both individuals and communities. The Respondents' actions violate fundamental rights of the local population, breaching the basic values of Israel's legal system and it obligations to the Respondents pursuant to the laws of belligerent occupation – international humanitarian law. The Respondent's measures must be revoked in that they violate humanitarian law, are based on extraneous considerations, and unreasonably and disproportionately violate the fundamental rights of protected persons.

51. Had the fence not been placed inside Palestinian territory, in a way that did not separate protected residents from their families and communities, farmers from their farmland, villages from their water sources, students from their schools, workers from their workplaces, patients from their medical clinics, this petition would never have been filed. However, when the fence was routed inside the Occupied Territories and within the area in which large numbers of Palestinians work and live, the Respondents were obligated to

enable the local population living on both sides of the fence to carry on their normal way of life.

52. The Respondents argue that state security requires the closing of part of the region inside the "seam area." The events leading to the current situation indicate that security reasons also supported the original route, which did not require uprooting part of the area and communities from the region. However, to the degree that shutting off areas and enclosing protected persons between the fence and the State of Israel were necessary for security purposes, such security measures must be sufficient, with the severe violation of the rights of the protected persons: in a way that balances between the "two poles," demarcates the powers of the military commander, and considers the need to respect the fundamental rights of the protected persons in the face of the security needs. However, the scale tips heavily in the direction of violation of rights, a result of the route and the "temporary" seizure of land and severe restrictions on movement that will automatically be imposed on the residents. The additional imposition of the permits regime clearly pushes the balance in the direction of an extremely disproportionate and unreasonable violation of the fundamental rights of the protected residents.

Breach of the obligation of the occupying power to maintain order and public life

53. The military commander is empowered to close area and restrict the movement to and from the area. This power is incorporated in Articles 88 and 90 of the Order Regarding Defence Regulations (Judea and Samaria) (No. 378), 5730 – 1970. The normative framework in which the military commander must exercise his discretion before exercising this authority is based on military constraints of the occupying army, while also considering the fundamental rights of the protected persons and preservation of their way of life and their well-being.

54. The acts of the occupying power and the military commander operating in the occupied territory on its behalf are subject to the Regulations Attached to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, of 1907 (hereinafter: the Hague Regulations) and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949.

55. In accordance with Article 43 of the Hague Regulations, the Respondents are required to ensure, as far as possible, order and public life, while respecting the laws in force in the country, unless absolutely prevented from doing so. The military commander in the

region is responsible for the lives of the residents and the quality of their lives in the context of modern society (see HCJ 69/81, A*bu 'Ita v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 37 (2) 197, 309; HCJ 202/81, *Tabib v. Minister of Defence, Piskei Din* 36 (2) 622, 629; HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 37 (4) 785, 797).

56. The occupying power's obligation to ensure "public order and safety" has been interpreted by this Honorable Court to refer also to "the maintenance of a regime that protects civil rights and ensures the maximum well-being of the population" (HCJ 202/81, *Tabib*, cited above, at p. 632).

57. Proclaiming the area "closed" and subjecting the protected persons to the permits regime results in sweeping harm to public order and life of the population living under occupation. By dividing the region by means of the wall, closing the area between the fence and the State of Israel, restricting the free movement of the protected persons so as to prevent any and all movement, and the resulting harm to the fabric of life of individuals and communities in the closed area, the Respondents breach, in extreme and crude fashion, the obligations imposed on them.

58. Furthermore, "The life of a population, like that of an individual, does not sit by idly, but is in constant motion of development, growth, and change. A military administration cannot ignore all this. It is not allowed to suspend life" (HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun*, cited above, at p. 804). This prohibition, not to cause, by inaction, suspension of life applies even more so to the permits regime, which is an emphatic action taken by the Respondents that suspends and stops the course of life, pushes the residents into enclaves, and reduces the scope of their lives.

59. Breach of the occupier's obligations to the civilian population is aggravated by the length of time that the occupation has lasted. "In determining the scope of the powers of the military administration according to the "public order and safety" formulation, consideration should be given to the distinction between a short-term military administration and a military administration of long duration… It is natural, however, that in a short military occupation, military-security needs are primary. Contrarily, in a long military occupation, the needs of the local population are given greater importance" (HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun*, cited above, at p. 800, 801; see, also, HCJ 69/81, A*bu 'Ita*, cited above, at p. 314).

60. Thus, in balancing the desire of the occupying power to safeguard its military interests and its obligation to preserve and protect the rights of the protected persons living in the occupied territory, the dimension of time serves as a criterion, which increasingly leans the balance in the direction of the occupying state's obligation to the local population. This would also move in the direction of an equal balance, if only the littlest bit, for the ongoing oppression, from which the protected persons have been suffering now over fourth decades, in which they are subject to "a ruling government that does not exist at their choice" (HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun*, cited above, at p. 802), and in light of the suspension of their civil rights and loss of control over their fate.

The permits regime breaches fundamental rights of the protected persons

61. The military administration has a dual normative nature. The legality of the military commander's orders, as with the legality of all the actions, taken by the occupying power, are examined in two ways, according to international law and according to Israeli law (CA 6860/01, *Hamada v. Israeli Automobile Insurance Pool, Piskei Din* 57 (3) 8, 16; see, also, Amnon Rubinstein and Barak Medina, *Ha-Mishpat ha-Qonstituzyoni shel Medinat Yisra'el* [The Constitutional Law of the State of Israel], 5th Edition (Tel Aviv, 1996) pp. 1174-1175).

62. ["] Along with the obligations derived from the laws of belligerent occupation, the military commander must exercise judgment and act in accordance with the criteria and principles of Israeli administrative law" (HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun*, cited above, at p. 792; HCJ 9293/01, *MK Barakeh v. Minister of Defence, Piskei Din* 56 (2) 509, 515). In our case, of importance are the fundamental principles regarding the duty of every governmental authority to act reasonably and proportionately, giving proper balance to the individual's freedom and the public's needs (HCJ 3239/02, *Marab v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 57 (2) 349, 364). In addition to breach of the general obligation to protect and ensure public order and safety, the permits regime violates several fundamental rights that are enshrined in local law, general international law, and the laws of belligerent occupation.

Prohibited violation of freedom of movement

63. By proclaiming the area "closed" and subjecting it to the permits regime, to sweeping and harsh prohibitions and restrictions on movement, the Respondents infringe the freedom of

movement of the protected persons. This fundamental right is grounded in human dignity and liberty. "It is necessary for an individual's self-fulfillment" (HCJ 5016/96, *Horev v. Minister of Transportation, Piskei Din* 51 (4) 1, 95).

64. Violation of the freedom of movement is especially grave because it restricts the movement of protected persons in the districts in which they live, in their country, in their homes, and differs from a prohibition on traveling abroad. "… [T]he freedom to travel within the country's border is generally understood as being of greater constitutional importance… Freedom of movement within the country's borders is usually placed on a constitutional plane similar to that of freedom of expression" (HCJ 5016/96, *Horev*, at page 49; and see HCJ 448/95, *Dahir v. Minister of the Interior, Piskei Din* 40 (2) 701, 708; HCJ 488/83, *Baransi v. Tov, Piskei Din* 37 (3) 722, 724). [Translation: Supreme Court website]

65. International law, too, protects freedom of movement, giving especial emphasis to the right to move about within the state (see Article 13(1) of the Universal Declaration on Human Rights, of 1948; Article 12 of the International Covenant on Civil and Political Rights, of 1966; Article 15(d)(1) of the International Covenant on the Elimination of all Forms of Racial Discrimination, of 1966).

66. Contained within the freedom of movement of a person is the "freedom to choose his residence" (Article 12(1) of the International Covenant on Civil and Political Rights). In our case, the permits regime even denies protected persons temporarily living elsewhere than in their permanent residence to return to their homes. Their temporary absence, even for a long period of time, does not deny protected persons their residence in the closed area. "Residence attachment expresses not only the substantive connection a person has with his home in the physical sense, but his connection with his center of life, the pivot around which his life revolves, practically, physically and psychologically" (HCJ 17/66, *Wadek v. Ziv'oni, Piskei Din* 20 (3) 383, 386; see, also, CA 4127/95, *Zalkind v. Bet Zayit, Piskei Din* 52 (2) 306, 319; "Home, in the Old Sense, is not What it Once Was, With all that that Entails," Judge Türkel, EOA (Beersheva) 207/95, Hazzan *v. Revivo, Taqdin Mehozi* 95 (3) 4, 6).

67. Freedom of movement also includes the need to ensure the proper movement of vehicles. "The use of private vehicles is becoming more and more necessary for economic needs and for social and cultural needs of the public and the individual" (CrimA 217/68, *Isramax Ltd. v. The State of Israel, Piskei Din* 22 (2) 343, 363). Furthermore, regular

public transportation does not exist in the West Bank (compare: Ibid.). The sweeping and disproportionate prohibition on the use of vehicles results in a suspension of life and a return to earlier times, when residents had to walk long distances by foot or traveled by donkey.

68. Residents of the region who need to get to work, to commercial centers, to transport the elderly to medical clinics, and children to schools, whether in the heat of summer or the cold of winter, need motor vehicles. Furthermore, restricting vehicles from entering the area critically harms the livelihood of residents of the closed area. "This harm is much graver" than the harm caused to the secular residents in the area of Bar-Ilan Street in Jerusalem, the closing of which on the Sabbath requires them to travel an extra kilometer to get to their destination, so that "they, their family, and their guests – [can get] to their homes" (compare, *Horev*, at pp. 59, 67).

69. The normal practice in the world is that freedom of movement is the rule and restriction on freedom of movement is the exception. Closing the area and imposing the permits regime reverses normal practice: now, the rule is that the protected persons are denied freedom of movement, they do not have the vested right to live in their homes or to move about in parts of the region that are an inherent part of their lives, except at the mercy of the military commander. Such harsh restrictions on movement must be imposed on a case-by-case basis, and periodic checks of each and every restriction have to be made.

70. Restriction on freedom of movement generates many other human rights violations, the existence of which depends on free movement from place to place. An ill person whose right to move about is stopped at the entrance to the hospital is denied the right to receive medical treatment; the farmer who is unable to reach his orchards and fields is denied his right to gain a living; sons and daughters who are unable to reach their parents' home are no longer able to exercise their right to family life.

The permits regime leads to the breach of other fundamental rights:

The freedom of occupation, the right to gain a living and live in dignity, and the rights to family life, health, education, and property

71. The permits regime places harsh restrictions, and in many cases even prohibits, the orderly and regular movement of people, motor vehicles, and various kinds of personal property – raw materials and other inputs, crops and merchandise, all of which are needed for economic activity and to ensure employment and sources of income.

72. Prevention of many employers and employees from reaching their workplaces, restrictions on movement of others, and "drying up" economic activity in the closed area all impede the freedom of occupation and the right to work (see Hoq Yesod: Hofesh ha-Issuq [Basic Law: Freedom of Occupation], Article 6 of the International Covenant on Economic, Social, and Cultural Rights, of 1966; HCJFH 4191/97, *Rakanet v National Labor Court, Piskei Din* 54 (5) 330).

73. In addition, the permits regime infringes the right of protected persons to gain a living and live in dignity. These rights are derived from human dignity, which is enshrined in Hoq Yesod: Kevod ha-Adam we-Heruto [Basic Law: Human Dignity and Liberty] (see LCA 4905/98, *Gamzu v.Yesha'yahu, Piskei Din* 55 (3) 360, 375) and in the laws of belligerent occupation and general international law (see Article 39 of the Fourth Geneva Convention; Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights, of 1966).

74. The closing of area and the permits regime infringes the right to family life, a right that is recognized in Israeli and international law. This right requires that the state respect the family unit. It forbids the state from separating husbands and wives, parents and children, grandparents and grandchildren. The Respondents have the obligation to respect the right of protected persons to family life and to enable them to maintain family ties without intrusion. This obligation is found in the laws of belligerent occupation (see Article 46 of the Hague Regulations and Article 27 of the Fourth Geneva Convention), general international law (Article 23 of the International Covenant on Civil and Political Rights, of 1966), and Israeli constitutional law (see CA 7155/96, *John Doe v. Attorney General, Piskei Din* 51 (1) 160, 175).

75. Restricting the freedom of movement of school pupils and teachers who live in the closed area disrupts the educational system and infringes the right to education. In doing so, the Respondents breach their obligation, pursuant to the laws of belligerent occupation, to "facilitate the proper working of all institutions devoted to the care and education of children" (Article 50 of the Fourth Geneva Convention), and infringes the fundamental right to education, which is recognized as a protected human right in international law (see Article 13 of the International Covenant on Economic, Social and Cultural Rights, of 1966) and as a fundamental right in domestic law (see HCJ 1554/95, *Shohare GILAT v. Minister of Education and Culture, Piskei Din* 50 (3) 2, 24; HCJ 2599/00, *Yated v.*

Ministry of Education, Piskei Din 56 (5) 834, 944; HCJ 4363/00, *Poriyya Illit Committee v. Minister of Education, Piskei Din* 56 (4) 203, 206).

76. The permits regime infringes the protected persons' right to property, a fundamental right, which is enshrined in domestic law in the Basic Law: Human Dignity and Liberty, and in international law in Article 46 of the Hague Regulations. We should mention that, prior to the imposition of the permits regime, Israel had violated property rights by seizing land, destroying fields, and uprooting orchards, which lay along the route of the fence in the area. Now, as if the above were insufficient, the area is closed, and the protected residents are denied access to their property, farmers are separated from their fields, olive pickers from their orchards, merchants from their shops. Sometimes, the obstruction is complete, and sometimes, partial. In both instances, the Respondents deny the residents the opportunity to benefit from their property, to reap its fruits. Many are also denied the chance to protect their property – to expel trespassers or to satisfy the conditions necessary to maintain their rights in the land. They are thus also exposed, unwillingly, to the loss of their property pursuant to the Ottoman property laws, which enable expropriation of land that remains uncultivated, which the state has previously relied on in the past.

Infringement of the right to equality

77. "The military commander's obligation to treat all residents of the region equally does not terminate when security tension increases. The obligation continues, and applies all the time" (HCJ 168/91, *Marcus v. Minister of Defence, Piskei Din* 45 (1) 467, 471).

78. Above, we surveyed the perverse and humiliating way that the orders relevant herein are drafted. The area was closed and every human being was commanded to leave it, and in the blink of an eye, all non-Palestinian "types of persons" were "returned" to it. The "population of the occupied territory", the "protected persons", who lived in the area before it was occupied – they alone find themselves in a situation in which their right to continue to live and move about on their land is subject to a system of permits and rules, to procedures "that will be announced" (or will not), and to bureaucratic tyranny.

79. In this way, the right of the protected persons, "the population of the occupied territory", to dignity and equality is breached. It seems that as far as matters regarding the area are concerned, the Respondents don't even act for appearance's sake, so much so that they have not hesitated to divide "mankind" into "types of persons", and turned the residents

of the area into guests, while protecting the excess rights of every "Israeli". On second thought, we should be precise and admit that the Respondents do act a tiny bit for appearance's sake, and behind the wordings, the definitions and the references lies a simple determination, whereby the "closed" area is not closed to any person with Jewish blood flowing through his veins. Though, for refinement's sake, "Jew is written in 61 letters." (B. Mikha'el, *Yedioth Ahronoth,* 25 October 2003.)

80. The regime of discrimination and separation, which turns indigenous persons into guests in their country, and citizens of the occupying state into its masters, has been condemned for some time by international law, and seemed to have faded from the world at the end of the last century.

Displacement and assigned residence

81. "The displacement of a person from his place of residence and his forcible assignment to another place seriously harm his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships ... Several basic human rights are harmed as a result of an involuntary displacement of a person from his home." (HCJ 7015/02, *Ajuri v. Commander of the IDF Forces in the West Bank, Piskei Din* 56 (6) 352, 365.) [Translation: Supreme Court website]

82. Closing the area to protected persons and requiring them to obtain a permit to enter and stay in it are assigned residence that is forbidden. Conditioning the rights of a permanent resident of the closed area on recognition of the competent governmental authority, denial of the vested right of a resident who temporarily left the territory to return to his home, requiring protected persons to obtain a permit to go and live in the closed area, if at all, according to the whims of the competent authority upset the natural order of things –the rule from now on is displacement of protected persons from their homes and assignment of their residence. Rather than the Respondents having to substantiate and defend their decision to prevent a person from living in the closed area, the protected persons will have to prove and defend their right to live there.

83. Closing the area and conditioning the vested right of residents living in it assigns, by its nature and language, the residence of "types of persons." It is a sweeping measure taken against a large group of people, rather than on an individual basis, as required when such

an extreme measure is considered. The permits regime is a harmful attempt of the military commander to avoid his obligation to consider from time to time the decision to assign the residence of an individual.

84. The permits regime violates the philosophy of the "Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents. Therefore, these measures may be adopted only in extreme and exceptional cases" (*Ajuri,* cited above, p. 371).

Collective punishment

85. The permits regime infringes the rights of tens of thousands of protected residents, strikes a sharp blow at their livelihood, and turns their lives into a bureaucratic hell, forcing them out of the closed area. This being the case, the permits regime constitutes collective punishment, which is prohibited by the laws of belligerent occupation (Article 50 of the Hague Regulations and Article 33 of the Fourth Geneva Convention).

Extraneous considerations

86. The premise, which is logical and is enshrined in law, is that a person intends the natural consequences of his acts. As regards the permits regime, by its nature and from past experience and its sordid results, as described above, the end is dictated by the beginning: the closed area will slowly become free of only one type of person – the protected Palestinians. This is the only logic that can explain the prime minister's statement that the Palestinians must learn the lesson of the fence and understand that what they can achieve today "may be impossible to give them tomorrow" (see Article 47 above).

87. However, "the military administration is not permitted to create in its territory facts to meet its military needs, which are intended from the start to exist also after military rule in that territory ends, when they still do not know the fate of the territory following military rule" (HCJ 390/79, *Duweikat v. Government of Israel, Piskei Din* 34 (1) 1, 22). Indeed, the occupying power may argue its rights in the territory that it holds under belligerent occupation. However, the military administration's role and powers, as set forth in the laws of belligerent occupation, do not include actions intended to promote these territorial claims, and certainly not when it severely violates fundamental rights of the protected residents.

88. The Respondents took into account another extraneous consideration when they set the route that led to Declaration of the "closed area": protection of the settlements. It should be noted that safeguarding the lives of all persons is a sacred duty. Residents of the settlements are entitled to defence and protection of their lives, and the state must fulfill this obligation. To do so, the state may take various and sundry measures, such as enclosing the settlements by their own separation fence or by returning the settlers to the area within the state's border, in a way that does not infringe the rights of the protected residents, by relying cynically on norms that are aimed at protecting their safety and well-being.

89. It is undisputed that the rights of citizens of the occupying power are protected by general international law, and in Israel, by the basic laws and the paramount principles of the legal system. However, these laws and principles do not make them part of the "population of the occupied territory," to which the Hague Regulations refer, or to "protected persons," who are the focus of the Fourth Geneva Convention. The fate of citizens of the occupying power was not the concern of the parties to the Hague Regulations when they required the military commander to ensure public safety and welfare. The drafters of the Fourth Geneva Convention, when they discussed "protected persons," were not concerned about the well-being of citizens of the occupying power, nor did they anticipate that the occupying state's citizens would be staying in the occupied territory, in that Article 49 of the Convention prohibits their settling in the occupied territory.

90. The "needs of the civilian population under the control" of the military commander (HCJ 393/82, *Jam'iyyat Iskan al-Mu'allimun*, cited above, at p. 797) do not include the needs of the residents living in the settlements in the Occupied Territories. Therefore, the powers given to the military commander in Article 43 of the Huge Regulations do not include the power to sever the protected residents from their land, to move them, to harass them, or to subject them to seven variants of the permits regime, only so the settlers are provided with a reformulation of the space to enable them to live there, for all intents and purposes, as if they were residents living on sovereign soil of the State of Israel.

91. And take note: the Petitioner does not seek "… to renew the eternal dispute over jurisdiction in political matters" (HCJ 606/78, *Ayoob v. Minister of Defence, Piskei Din* 33 (2) 113, 124). The Court has held for some time that "a judicial determination, which

does not concern individual rights, should defer to a political process of great importance and great significance" (HCJ 4481/91, *Bargil v. Government of Israel, Piskei Din* 47 (4) 210, 220, [Translation: Supreme Court website] and see, also, the comments of Justice Or at the end of the judgment). However, it has also been noted and stated that, in the case of the infringement of fundamental rights, "it is hard to believe that the court will not aid a particular individual because his right may be part of a disagreement in political negotiations" (*Ayoob,* cited above, at p. 124).

Lack of proportion and reasonableness

92. "Since the end of September 2000, fierce fighting has been taking place in Judea, Samaria, and the Gaza Strip… It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents… Bereavement and pain overwhelm us" (HCJ 7015/02, *Ajuri*, cited above, at p. 358). Over the past year, the Respondents have used this quotation at the start of every explanation they have been required to give for the violation of fundamental rights of protected persons in the Occupied Territories. The same is true in regard to the route of the fence.

93. But "state security is not a magic word" (HCJ 4541/94, *Miller v. Minister of Defence, Piskei Din* 49 (4) 94, 124). Protecting lives and preventing the infiltration of assailants into the territory of the State of Israel does not justify drastic measures that infringe the fundamental rights of the protected Palestinians to an extent greater than necessary. Alongside the obligations, as derived from the laws of belligerent occupation, "the military commander must exercise judgment and act in accordance with the criteria and principles of Israeli administrative law… His acts must comply with the principle of proportionality" (HCJ 9293/01, *MK Barakeh*, cited above, at p. 515). "Just as the purpose of the breach – protecting human life – is extremely important, and as a rule, the rights give way to it if there is no option, this importance does not exempt the governmental authority from acting in a proportionate manner" (HCJ 2753/03, *Kirsch v. IDF Chief of Staff*, not yet published, judgment given on 1 September 2003).

94. When the military commander exercises discretion, there "must be a reasonable relationship between the military objective and the action taken, and the means taken must… conform to the magnitude of the threat, taking into account the likelihood it will

occur… It goes without saying that the magnitude of the right of the potential injured person affects the reasonableness of the commander's action" (HCJ 2271/98, *Abed v. Minister of the Interior*, *Piskei* Din 55 (5) 778, 793, and see, also, HCJ 6195/98, *Goldstein v. OC Central Command, Piskei Din* 53 (5) 317, 335).

95. On the backdrop of the goal of preventing the infiltration of assailants into Israel, trapping protected persons in the "closed area" between the fence and the sovereign borders of Israel, and making them subject to the permits regime are inconsistent with the test of proportionality (HCJ 3477/95, *Ben-Atiya v. Minister of Education, Cultural and Sport, Piskei Din* 49 (5) 1, 14; HCJ 5016/96, *Horev v. Minister of Transportation, Piskei Din* 51 (4) 1, 53). When infringing the right of a protected person, the means that causes a lesser degree of harm must be used (HCJ 1715/97, *Investment Directors Office v. Minister of Finance, Piskei Din* 51 (4) 367, 384). Therefore, prior to instituting the permits regime, the Respondents were required to consider alternative means that do not bring about further violation of the rights of the protected persons.

96. Until recently, many state and defence system leaders believed that preventing suicide terrorists from entering the State of Israel did not required complete physical separation between the Occupied Territories and Israel, and now, in the blink of an eye, they took a sharp turn – they set the fence's route in a way that imprisons and closes off the living space of the protected residents, and immediately thereafter imposed a system that restricts their presence and activities in the area. It would have been proper for the state officials to check first whether a more limited means was capable of achieving the desired goal (compare HCJ 660/88, *In'ash al-Usra v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 43 (3) 673, 678).

97. As regards protection of the residents in the settlements, we have already mentioned that, to achieve this objective, the Respondents should have taken other measures, ones that did not impede daily life and infringe the rights of the protected persons. For example, it was possible to surround the settlements with a fence and a security ring, as the defence establishment intended to do before the fence's route was moved eastwards, and as was done at settlements located far from the Israeli border, so that even a capricious "seam area" cannot include them. Furthermore, the Respondents can strengthen the number of forces in the closed area.

98. In the matter of the original and declared purpose of the fence – prevention of the infiltration of assailants into Israel, the Respondent must settle for carrying out checks at

the crossing points in the fence, an action that will prevent the entry of armed assailants into its territory, which is located west of the fence. Such a check would prevent the entry of assailants without infringing the right of the protected residents to continue to live in their districts. If such checks are insufficient, the Respondent can reinforce their troops in the closed area. As noted, the State Comptroller pointed out that the existing checkpoints in the seam area are not set up to check properly the persons and vehicles wanting to cross (see Article 3 above). The failure to try measures of these kinds to see if they work is prima facie proof that the Respondents did not satisfy the lesser-harm test.

99. Furthermore, the fence's route is not a goal in and of itself, nor is it a natural law, which serves as a backdrop for the examination of the proportionality of the permits regime. The fence's route is one of the means taken to prevent infiltration of assailants into Israel. To the degree that no means have yet been taken to achieve the desired goal, the new means and the additional harm to human rights should not be tested until everything that has been done to this point is reconsidered. Before piling one injustice on another, Israeli officials should reexamine the balance of harm and benefit that will result from building a fence along a route that fragments the living space of the protected residents.

100. These comments apply to both the lesser-harm test and to the other proportionality test, which examines the relationship between the harm caused by the measure and the latter's contribution in achieving the objective. In determining the proper balance between the violation of fundamental rights and the values and interests that the Israeli authorities seek to further by means of the permits regime, the court must consider the harm caused by the permits regime along with the harm that the protected residents have already suffered as a result of the fence project: the expropriated land, the olive trees that have been uprooted, the roads that have been blocked, the barbed-wire and stone fences that have partitioned their living space and turned their houses into prisons.

101. The permits regime fails, therefore, to meet the proportionality test. Certainly, its does not meet the more stringent tests. The state should "… seek to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law. As a result, not every effective measure is also a lawful measure… Human rights cannot receive complete protection, as if there were no terror, and state security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required." (HCJ 7015/02, *Ajuri*, cited above, pp. 382-383.)

Freedom of movement and the array of basic rights dependent on it are fundamental human rights. This category of rights may be breached only where the measure is an "imperative social need" (HCJ 5016/96, *Horev*, cited above, p. 53) and is needed to meet a clear and present danger to public safety (Ibid., p. 52).

102. The permits regime is also unreasonable because of the sweeping powers delegated to staff officials to review the requests, to approve or reject them, and to set conditions and restrictions in the permits. At times, the actions are taken pursuant to procedures "that will be established" (in the language of the regulations), and sometimes according to the gut feeling of the particular commander. Criteria that lie in the commander's desk drawer and "do not see the light of day, invite arbitrary action" (HCJ 3648/97, *Stamka v. Minister of the Interior, Piskei Din* 53 (2) 728, 774). This is true even more so when no criteria exist at all, which the Respondents may deem a way to bring about efficient administration of the permits regime, "but efficiency is not really an advantage where human rights violations are involved." (HCJ 5936/97, *Dr. Lam v. Dal, Piskei Din* 53 (4) 673, 684.) The individuals' activity in their homes, at work, in their family life, and in every act they perform in their daily lives has become subject to the capriciousness of the official at the Civil Administration. Each official is a king – "'king' in the sense of king in earlier times. He is the overseer who determines whether something passes or fails." (HCJ 2740/96, *Shansi v. Supervisor of Diamonds, Piskei Din* 51 (4) 481, 514.)

103. The permits regime is completely unreasonable in that it destroys communities and towns and villages. And as has already been said, "It is inconceivable that this court will sanction the destruction of whole communities because of the acts of a few" (HCJ 1730/96, *Sabih v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 50 (1) 353, 364). These comments were indeed made in a minority opinion, but that was because the majority of the court panel refused to extend the prohibition to the destruction of a single house. It was clear that the destruction of "whole communities" would not be allowed, in the event – which is hard to visualize – that it would be permitted to "dry up" whole communities and to destroy them economically and socially. It is inconceivable that, after giving proper weight to the dreadful consequences of the permits regime, a reasonable commander would conclude that such a system should be imposed. The clear conclusion is that, in establishing the permits regime, on the backdrop of the current route of the fence, Israeli officials did not take into account the irreversible damage to many individuals and to dozens of communities.

104. Finally, the cruel wisdom of history (which, unfortunately, we have not yet learned) is this: not only will destruction of villages, communities and persons fail to prevent the infiltration of assailants, it will increase it. This factual conclusion is supported by the assessment of the former head of the Mossad [the Institute for Intelligence and Special Operations], Avraham Bendor (Shalom):

> **Such a fence is liable to increase the terror. The fence makes the Arabs feel oppressed and humiliated. Imprison them behind fences, embitter their lives, and take away, in essence, their land. They will always see the settlers moving about easily, and their sense of oppression and discrimination will soar. On the other hand, the settlers will increasingly express the feelings of supremacy and arrogance of master of the land, privileged and lords over the indigenous Arabs.** (Avraham Bendor, "The Evil Fence," *Ha'aretz,* 28 November 2003)

The article of Avraham Bendor (Shalom) is attached hereto as Appendix P/28.

Conclusion – "A Wall in their Hearts"

> **Hiding behind the separation fence are thousands of personal tragedies that are perfectly obvious to the Israeli public. Who here cares about a farmer like Nir Ahmad, who in one day lost access to his land, which he and his fathers worked for generations? Who cares about a shepherd like Naji Yusuf, who was forced to sell his flock because the fence blocked access to grazing land? Who is bothered by the fact that a high school principal like Muhammad Shahin from Ras at Tira has to use donkeys to bring school books from Qalqiliya because all the roads to the city are blocked by the fence?… This kind of occupation may not kill. Not immediately, in any case. But it is kills the people's spirit.** (Meron Rappoport, "A Wall in their Hearts," *Yedioth Ahronoth*, 23 May 2003)

We have seen from the above how the separation fence, which seeks to keep fighters apart and block assailants from reaching Israeli soil, indeed separates… the protected Palestinians from themselves. Meanwhile, the "seam line" has managed to grow and expand, to swallow up homes,

to destroy fields and inject itself into the hearts of the local residents. Now, another blow strikes at them, in the form of the permits regime, which oppress that "type of people," those called "Palestinians."

Closing the area and imposing the permits regime, like the choice of the route that led to the imprisonment of protected residents between the fence and Israel's border, has resulted in an unprecedented violation of human rights intended to advance extraneous objectives. The Court's intervention is necessary, first and foremost, to enforce fundamental norms set forth in the laws of belligerent occupation to protect "the population of the occupied territory." But no less important, the Court's intervention is required to illuminate the way for the military commander and for us all: perhaps we have not only crossed the physical border? Perhaps – "It is close and we are forbidden there?"

"A man does not have time to do everything," the poet writes. A person must love "and hate and forgive and remember and forget, to arrange and confuse and consume and digest…" Is that so? Do the Respondents really believe that there are "types of persons" who can do all of these things only with a permit, given them from time to time, for "a period that will be determined" and all in accordance with "procedures that will be established?"

The person wandering around the outskirts of the closed area rapidly loses orientation: fence to the right, fence to the left, and in front… One moment he is "inside the fence" and then "outside." Like in a maze, with every step he encounters fences, closed gates, soldiers, who possibly… possibly will allow him to cross. Life, it seems, is carried on between the fences. But the permits regime has already had its effect on the children, who wait in the cold in front of a closed gate on their way to school, and in the eyes of the many residents who sit around idly, not being allowed to cross and get to the olive groves. And in the fields, "The leaves wither on the ground, the bare branches point to the place where there's time for everything." (Yehuda Ammihay, "Adam be-Hayyaw" [A Man in His Life]).

Therefore, the Honorable Court is requested to issue the Order Nisi as requested in the beginning of the petition, and after receiving the Respondents' response, to make it absolute.

19 January 2004

[signed]

Avner Pinchuk, Attorney

Counsel for the Petitioner