

At the Supreme Court
Sitting as the High Court of Justice

HCJ 9961/03
HCJ 639/04

**HaMoked: Center for the Defence of the Individual
founded by Dr. Lotte Salzberger (Resigestered Non-Profit
No. 58-016-3517)**
Represented by Att. Avigdor Feldman and/or Michael Sfard of
49 Ahad HaAm St. Tel Aviv, Tel: 03-6206947, Fax: 03-
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The Petitioner in HCJ 9961/03

v.

1-5. Government of Israel
Represented by Att. Aner Helman of the State Attorney's
Office, Ministry of Justice, Jerusalem, Tel: 02-6466472, Fax:
6467011
**6. Fence for Life, Public Movement for the Security
Fence**
Represented by Att. Ilan Zion and/or Gilad Rogel, 7 Aba Hillel
St. Ramat Gan, Tel: 03-5757240, Fax: 03-5757241
7. Shurat HaDin, Israel Law Center
Represented by Att. Nitzana Darshan Leitner, 28 Emek
Ayalon St., Modiin, Tel: 03-5608185, Fax: 03-7361520

The Respondents in HCJ 9961/03

The Association for Civil Rights in Israel
Represented by Att. Limor Yehuda et al., 75 Nahalat
Binyamin St., Tel Aviv, Tel: 03-5608185, Fax: 03-5608165

The Petitioners in HCJ 639/04

v.

Commander of IDF Forces in the Judea and Samaria Area
Represented by Att. Aner Helman of the State Attorney's
Office, Ministry of Justice, Jerusalem, Tel: 02-6466472, Fax:
6467011

The Respondents in HCJ 639/04

**Response on behalf of HaMoked: Center for the Defence of the Individual,
the Petitioner in HCJ 9961/03 to the Updating Notices on behalf of the
State**

In accordance with the decision of the Honorable President Beinisch, the petitioner in HCJ 9961/03 hereby respectfully submits its response to the Updating Notices on behalf of the State which were submitted on May 26, 2009 and August 2, 2009.

A. Joining the Response on behalf of the Petitioner in HCJ 639/04 and its Request for Prompt Ruling

1. This petition concerns the permit regime – a regime which was created through a combination of primary legislation, subsidiary legislation and policy and applied to the area between the Green Line and the route of the separation fence (“the seam zone”). This petition concerns the inclusion in a book of formal legal discrimination and the institution of rights and prohibitions on the basis of nationality, all directed at creating a territorial unit devoid of Palestinian movement with the exception of those who obtained permits, while movement of Israelis and tourists into and within it is free.
2. Therefore, and in an unusual and unprecedented manner, the petitioner in HCJ 9961/03 (hereinafter: the petitioner) claimed in its amended petition that this is nothing short of **apartheid** as the term is defined in international law, and even compared the declarations and orders which compose the permit regime to the array of “pass laws” which were instituted in South Africa and limited passage of blacks into “white” zones (pp. 4-6 of the amended petition).
3. The petitioner repeats all its arguments as detailed in the amended petition of April 4, 2006 and orally argued in a hearing held on February 2, 2007 (over two and a half years ago!), including, **and more forcefully**, the argument that the permit regime comes under the terms of **the crime of apartheid** which is classified as a crime against humanity.
4. In the state’s updating notices, submitted in accordance with the decision of the Honorable President Beinisch dated February 12, 2009, the respondents updated the honorable court and the petitioners regarding data collected from the implementation of the permit regime in 2007, 2008 and part of 2009.
5. The petitioner’s counsel had the advantage of reading the response of the petitioner in HCJ 639/04 (The Association for Civil Rights in Israel, hereinafter: ACRI) to the state’s updating notices before preparing this response. That being the case, and since the factual analysis performed by ACRI’s counsels is entirely accepted by the petitioner at bar, as well as ACRI’s legal arguments, and in order not to overburden the honorable court and not to repeat the arguments – **the petitioner joins all of the arguments presented by ACRI, as well as the factual analysis and factual conclusions which it drew from the state’s data and shall not repeat those in this response.**
6. The petitioner also joins ACRI’s request that this case be decided as promptly as possible, noting its age and the fact that every agricultural season which goes by under the permit regime causes immense damage to tens of thousands of protected civilians in the West Bank.
7. Therefore, the petitioner will use the right it was granted to respond in order to shed light on an issue which arises from the data **that is not found** in the Updating Notices on behalf of the State.
8. Before we do so, we wish to recall, in general terms, what is at stake and what is the regime the legality of which is being challenged in this petition.

B. Beyond Data: The Principles and Values at Stake

Dividing humanity into two groups

9. The very core of the permit regime, the reason for its existence and its purpose is the division of humans into two groups: those who **require a permit** in order to enter and be present in the seam

zone and those who **do not require a permit**.

10. This is not a regular screening of permit holders and non permit holders. Many places restrict people's entry – the ticket person at the entrance to a movie theatre allows only those who have a valid ticket to enter, the one at the pool will only admit members. In these two examples, **everyone in the world has to purchase a ticket or a membership in order to gain admission**. In terms of the permit regime – **everyone needs a permit**.
11. **The uniqueness of the seam zone permit regime is not the requirement to obtain a permit to enter and/or be present therein, but rather the fact that there is a group of humans that requires a permit to enter and/or be present in the zone and there is a group of humans which needs no permit whatsoever.**
12. Therefore, the seam zone permit regime divides humanity into two groups **from the outset**: those who require a permit (“the group requiring permits”) and are, therefore, required to meet the criteria set for obtaining a permit and those who need no permit **and are, therefore, not required to meet the criteria for obtaining a permit** (“the group entitled to enter and be present in the seam zone”).
13. It follows that the first impression of the permit regime is deceiving. It appears as though the permit divides the world into those who hold a permit and those who do not, yet this is not so. What makes the permit regime a discriminatory regime is the fact that there are people who are required to meet certain criteria in order to enjoy freedom of movement and the rest of the rights bound in the possibility of entering the aforesaid zone and there are people who are not required to meet any criteria – they have a **right**.

The “business” criteria

14. The permit regime turns the tables when it comes to the group requiring permits: while the known rule is that a person seeking to fulfill a fundamental right is not required to present a reason for doing so, whereas the person seeking to restrict him must provide justification by proving an interest that would be impaired by the fulfillment of the right; the permit regime establishes the opposite rule.
15. Regarding the group requiring permits, the rule established by the permit regime is that there is no right to enter the seam zone. Those wishing to avoid the rule (and obtain a permit) are required to prove that they have a legitimate interest in the zone: lands, clients, business, patients, work.
16. The group of persons who do not need permits, naturally, does not need to present any reason for entering or being present in the zone. *They* do not need a permit; they are exempt from the restrictions of the permit issuing mechanism. They have a true **right** and restricting it is what requires justification.
17. In other words: **the group requiring permits must show, to put it colloquially, that they have “business” in the zone, that they have some legitimate interest which justifies their entering and being present therein. On the other hand, the group entitled to enter and be present are not required to present any reason – their entering and being present in the seam zone is justified simply by their wish as autonomous individuals who have free will to do so.**

On the basis of nationality

18. Interim summary:

- A. The permit regime creates two groups – those requiring permits and those entitled to enter and be present [in the seam zone].
 - B. Members of the group requiring permits are required, as an imperative but not necessarily sufficient condition, to demonstrate that they have some legitimate interest in the seam zone; the group entitled to enter and be present in the seam zone are not required to present any reason for fulfilling their aforesaid right.
19. We have now reached the third and complementary characteristic of the permit regime. Painting both groups as human groups.
20. According to the declarations and orders which constitute the permit regime, these two groups are:
- A. The group entitled to enter and be present in the seam zone: **Israelis and tourists who hold Israeli visas.**
 - B. The group requiring permits: **Palestinians.**
21. In order to address the complexity and in order not to be blamed for ignoring the cosmetic changes made to the permit regime, we shall recall that the Palestinian permanent residents of the seam zone do not need a “permit” but a “permanent resident certificate”. This does not fundamentally change the analysis of the characteristics of the permit regime presented above, since those Palestinian permanent residents of the seam zone are entitled to enter and be present therein **owing to the fact that they have demonstrated that they have “business” in the zone – they live in it.** Therefore, analytically, they do indeed belong to the group requiring permits (the permit, in this case, is titled “permanent resident certificate”). They are required to submit an application for a certificate, just as their compatriots who live outside the zone but have business inside it are required to submit an application for a permit. Examination of their eligibility is performed on an individual basis.
22. Israelis, to whom the permit regime did not apply in the past, have, ostensibly, been brought under its wings and now enjoy, just as do tourists holding Israeli visas, the “general permit”. This cosmetic change also does not detract from the analysis presented above and both Israelis and tourists are among the group entitled to enter and be present in the seam zone.
23. This stems from the following: the general permit granted to Israelis and tourists exempts them from the duty to present a reason for their entering and remaining in the seam zone. They do not need to explain what “business” they have there. Therefore – analytically – the issue is not a permit granted pursuant to some reason external to the fact that they belong to the Israeli (or Jewish) nationality or to the group of holders of Israeli visas. Therefore, analytically, they have a **right** to enter and be present in the seam zone, a **right**, which does not depend on their reason for entering, but only on their affiliation.
24. **Conclusion:**
- A. The permit regime prohibits Palestinians of any kind and gender to enter or be present in the 120,000 dunam of the seam zone (according to figures appearing in sections 10 and 18 of the updating notice).
 - B. The permit regime requires Palestinians interested in entering and being present in one or more of the 120,000 dunam of the seam zone to demonstrate a legitimate reason justifying this.

C. The permit regime acknowledges the right of Israelis and tourist holding visas permitting entry into and presence in Israel to enter and be present in the seam zone for any reason or purpose.

25. The permit regime does not make distinctions on an individual basis; that is, the decision whether a person belongs to the group requiring permits or the group entitled to enter does not involve discretion regarding his specific attributes (such as the level of risk he poses). **It follows that the permit regime sets rights and prohibitions on the basis of group identity – anyone belonging to the group of Palestinians requires a permit, anyone belonging to the group of Israelis or tourists holding Israeli visas does not need a permit.**
26. This is what is called a legal regime which creates institutionalized and direct discrimination in the granting of rights and imposition of prohibitions.

C. The Missing Data: Those Who Have No “Business” in the Seam Zone

The data supplied by the respondents

27. One must examine the respondents’ data regarding permits granted and refused through 2007 and 2008 with attention to the characteristics of the permit regime detailed above.
28. To the understanding of the petitioner at bar, the respondents’ data, even if it did demonstrate a liberal and lenient policy regarding the granting of permits, would be unable to deny the basic impurity of this regime – dividing the civilian population into two groups and entrenching institutionalized and systematic discrimination between the two based primarily on national origin. What difference is it whether 30,000 or 40,000 permits were issued if the permit is required only because the applicant was born of a Palestinian mother, and were he born of a Jewish mother, he would have been exempt from the need for it? Would anyone in Israel claim that a driving ban imposed on Jews in a certain part of the world is not so terrible because the licensing office authority in that place generously grants permits to Jews who demonstrate they must drive in order to make a living??
29. Thus, at the outset, even before we looked at the data, we were of the opinion that the data, whatever it may be, can do nothing to affect the legal-moral position one must take vis-à-vis a regime the entirety of which is a legal villainy and a moral crime.
30. In any event, if anyone thinks that one may skip the “big” principles and values and examine the regime through the lens of “its implementation in everyday practice”, in case it emerges that even if it is, as we claim, a legal infection – its effective injury is not so grave; the data proves that even under the test of implementation, the regime is as horrifying as we had anticipated.
31. In this matter we need do nothing more than refer to ACRI’s response, beginning at page 10, which describes how the number of farmers who received a permanent permit had dropped drastically, how restrictions on Palestinian farmers’ access to their lands had increased, how the validity of the permits had been shortened and how attempts to provide assistance in individual cases had failed time and again.
32. This is indeed our position, which we included in the amended petition and argued orally in the hearing: it is an illusion to think that one can hold a population of hundreds of thousands of people and administer it through a bureaucratic permit regime, and in this manner maintain the lives of people, communities and a nation. It is impossible, even if any among the respondents has good intentions, to allow the continuance of the “fabric of life” within the boundaries and goals of the permit regime. It is impossible, as human beings are not machines that can be operated in accordance

to a manual with firm rules detailing how many hours they should be operated for one purpose or another.

The data the respondents did not provide

33. The thick document full of diagrams and tables presented by the respondents omitted a number of important statistical data.
34. The respondents specified the number of Palestinians who applied for permits in 2007 and 2008 and through a part of 2009, the number of Palestinians whose request was granted and the break down of reasons due to which refused applications were denied.
35. In other words, the respondents' data relates to Palestinians who claim "**they have business in the seam zone**" and details how many of these claims were accepted by the security apparatus.
36. The respondents did not provide data as to the number of Palestinians who do not claim they have business in the seam zone.
37. Also absent from the respondents' data is the number of persons allowed to enter the zone without having to demonstrate they "**had business in it**", i.e. the size of the group of people who do not require a permit, or, as we called it: the group entitled to enter and be present in the seam zone.
38. Due to this omission by the respondents, we shall present the number ourselves. As this case is complicated enough, we shall ignore, for the purpose of this response, Palestinians living in the Gaza Strip, as their status requires review and resolution in a different framework. And this is the data:

A. Palestinians who "have no business" in the seam zone

- According to figures provided by the Palestinian Authority's Central Bureau of Statistics, a census held in 2007 found there are **2,350,000** Palestinians living in the West Bank (see the census final report: http://www.pcbs.gov.ps/Portals/_PCBS/Downloads/book1487.pdf, p. 61).
- Of whom, 42,835 applied for certificates and permits to the seam zone in 2007 and 41,285 in 2008.
- It follows that some **2,308,000 (two million, three hundred and eight thousand) Palestinians did not claim in 2007 and 2008 that "they have business in the seam zone"**.

B. Foreigners holding visas to enter and remain in Israel

- According to the Ministry of Tourism statistical report, 2,294,000 tourists visited Israel in 2007 (see: **Tourism in Israel 2007 – Statistical Report**, available on the Ministry of Tourism website - <http://www.tourism.gov.il/NR/rdonlyres/1821434D-B583-4AA2-8047-0E6BEE530EB2/8805/statisticalreport2007.pdf>).
- In 2008, 3,034,000 tourists visited Israel (see: **Tourism in Israel 2008 – Statistical Report**, p. 3 - <http://www.tourism.gov.il/NR/rdonlyres/1821434D-B583-4AA2-8047-0E6BEE530EB2/15864/statisticalreport2008.pdf>).

C. Israelis

- In 2007, there were 7,243,000 residents and citizens in Israel (figures of the Central Bureau of Statistics - http://www.cbs.gov.il/www/yarhon/b1_h.htm).

- In 2008, there were 7,374,000 residents and citizens (ibid).

39. The above figures indicate:

- A. In 2007 and 2008 there were more than **two million three hundred thousand** Palestinians who were required to present a reason in order to enter the seam zone and were either unable or unwilling to do so, whereas **an identical number (in 2007) and even higher (in 2008) of foreigners lacking any kind of tie to the zone** were allowed to enter it without needing to present any reason for doing so.
- B. In 2007 and 2008 there were more than **two million three hundred thousand** Palestinians who were required to present a reason in order to enter the seam zone and were either unable or unwilling to do so, whereas more than **seven million Israelis** were allowed to enter without needing to present any reason for doing so.
- C. In 2007 and 2008, the population requiring permits was (excluding residents of the Gaza Strip) **two million, three hundred and fifty thousand** men and women, whereas the group entitled to enter and be present in the seam zone was some **ten million** men and women.

40. All this with regards to a zone which is located in the West Bank, a single geo-political unit in which all members of the group requiring permits live. Ten million people who live outside the West Bank (minus the 250,000 settlers) have rights the former do not vis-à-vis a territory of which international law determines they are citizens.

D. Conclusion

41. There is absolutely no way of diminishing the grave injury caused by the severe, systematic, institutionalized and unacceptable discrimination of the permit regime in the seam zone.
42. The security needs of the seam zone can be fulfilled through screening at the separation fence crossing points. Any attempt to create one legal status for Palestinians and another for others – is a crime the end of which no one can foresee.
43. This is not a slippery slope, but a well lubricated water slide on which it is impossible to stand still at one spot – for indeed, if it is legitimate to create a zone in which we distinguish among people based on their national origin, then, why not build separate roads, or perhaps even special beaches at the Dead Sea for Palestinians and separate toilets and drinking fountains.
44. This has to be uttered aloud: there is no difference between the regime which is the subject matter of this petition and which the respondents created and the regime of racial segregation in the southern United States in the first half of the 20th century.
45. And should the respondents claim that the two have entirely different motives and purposes, we shall reply that this difference may be an argument for leniency in sentencing, but has no bearing on the question of the commission of the grave breach.
46. **Therefore, this is the moment at which the Court of Justice must defend, with its body, the fundamental principles of our legal and value system and state loudly and clearly: this shall not be. We have not come here, to the land of Israel, from all corners of the world where we had been discriminated against, persecuted and denied rights because of our national identity – only to discriminate against those who are not us!**

Therefore, and in light of all the statements made in the petition and in this response, and in light of all the arguments made in the hearing that was held, the honorable court is moved to accept the petition and revoke the declaration and the orders composing the permit regime.

Michael Sfar, Att.
Counsel for the petitioner

Date: November 1, 2009.