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At the Supreme Court
Sitting as the High Court of Justice

HCJ 2732/05

1. **Head of Azzun City Council, Mr. _____ Hassin**
(ID No. _____)
2. **Head of Nabi Elias Village, Mr. _____ Radwan**
(ID No. _____)
3. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger - RA

all represented by counsel, Advocate Michael Sfar
31 Rothschild Blvd. Tel Aviv 66883
Tel: 03-5607345; Fax: 03-5607346

The Petitioners

v.

1. **Government of Israel**
2. **Military Commander of the West Bank**

all represented by an attorney from the State Attorney's Office,
Ministry of Justice, Salah al-Din Street, Jerusalem

The Respondents

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, if they so wish, why that segment of the separation fence located south and east of the Zufin settlement, and which is marked on the map attached hereto as **Exhibit A** in a bold red line, should not be dismantled.

First Part: Legal Framework

A. *Preface*

1. This petition concerns a segment of the separation fence which was erected some time ago east and south of the settlement Zufin (hereinafter: the **settlement**), a segment known as the "Zufin enclave".
2. Curiously enough, the route of the fence which was chosen "surrounds" not only the settlement but also hundreds of dunams of agricultural lands owned and farmed by farmers from the city of Azzun and the Nabi Elias village. The distance between the last buildings of the settlement and the east part of the fence amounts to two and a half kilometers, namely, a large enclave was created around the settlement (hereinafter: the **enclave**).
3. In this petition the honorable court is requested to order that the fence in this route, which caused and continues to cause severe damages to the residents of the two above mentioned Palestinian communities, be dismantled. **It will be argued in the petition below that the route of the fence was not chosen based on security reasons but rather for reasons associated with the Zufin settlement, which requested and still requests to expand towards the areas located to its east. As indicated in the map Exhibit A, the route of the fence follows the (un-built) municipal areas of Zufin rather than a topographic line or the line of the settlement's houses or any line which may be considered as a security line.**
4. It should already be stated that the residents of the Palestinian communities filed in the past a petition with this honorable court against the lawfulness of the seizure orders which were issued for the erection of said segment of the fence (HCJ 8172, 8532/02). At that time the court denied the residents' petition in view of respondents' undertakings to solve the problems associated with the encirclement of the lands with a fence. From the date the above judgment was given (on October 14, 2002) many legal changes occurred which caused the respondents to re-plan and make significant changes in the route of the separation fence, but only in those segments in which the fence has not yet been erected. We have no doubt that if the segment of the fence being the subject matter of this petition had not yet been built, the respondents would have entirely changed it in view of the court's judgment in HCJ 2056/03 **Beit Sourik Village Council et al. v. Government of Israel et al.** (not reported yet).
5. However, and more importantly, after the judgment was given it became evident that the problems which were anticipated by the petitioners indeed materialized on scene, and the respondents did not succeed to solve neither one of these problems.
6. The two years which passed from completion of the erection of the fence were two very bad years for the farmers of the two villages. The military and the civil administration did not succeed to find solutions which would enable the farmers to reach their lands, farm them and harvest the olive trees owned by them. The immediate result: lost livelihood of between 50-100 percent. These were two arid years for Azzun and Nabi Elias, not as a result of drought or locust, but rather as a result of the erection of the fence.
7. **The route of the fence which was chosen for the Zufin enclave is especially brazen: it is a route which patently serves no security need but follows the municipal jurisdiction lines of the settlement. Private lands of Palestinian farmers were left on the west side of the fence only because an annexing hand determined that they were designated for the settlement's future development. In our case the motive is to annex or at least to "settle" which is unlawful and immoral.**

8. The entire separation fence is an unlawful project. The state of Israel breached the international law which applies to it while having erected the fence, and it continues to violate it and commit a continuous breach for as long as it does not dismantle the fence and fails to compensate the farmers for the severe damages which were caused to them at no fault of their part. The International Court for Justice in Hague held that the route of the fence and the walls was not lawful, that the establishment and maintenance of the settlements constituted a breach of the obligations of the state of Israel, that there was no security need which justified deviation from the green line and that as a result of this illegal project – fundamental rights of protected citizens are violated.
9. As far as we are concerned, the wall contradicts both international law as well as internal Israel law – constitutional and administrative. It severely violates the rights of the residents, and the route which was chosen for it in the Zufin area does not comply with the proportionality tests.
10. We shall now specify the factual data underlying this petition and will describe the chain of events which lead to its filing. We shall then specify our legal arguments.

B. The Factual Background

The parties to the petition

11. Petitioner 1 is the head of the Azzun city council. He was elected by democratic elections which were conducted in January 2005. About 8000 inhabitants live in Azzun.
12. Petitioner 2 is the head of the Nabi Elias village council. About 2000 inhabitants live in the village.
13. The petitioner, a not-for profit association, HaMoked: Center for the Defence of the Individual, is a non-governmental organization which has taken upon itself "to assist victims of cruelty or deprivation of fundamental rights by state authorities... and protect these fundamental rights in any way, including by defending their rights in court and by filing a petition with the Supreme Court sitting as a High Court of Justice, either as counsel to persons whose fundamental rights had been allegedly violated or in its own name as a public petitioner."
14. Respondent 1 is the government of Israel which approved the route of the separation fence, either by itself or through the Prime Minister and Minister of Defence which were authorized by it for this purpose.
15. Respondent 2 is the military commander of the West Bank who is vested with all governmental authorities over the Area by virtue of international humanitarian law and laws of belligerent occupation.

The Route of the Fence

16. The route of the separation fence in the area being the subject matter of the petition follows the green line west of Tulkarm, in the south corner of which it diverges there-from eastwards, winding around in a manner which creates two enclaves – the first one around the Salit settlement and the other one – the one which concerns the case at hand, around the Zufin settlement.

- **A map of the area of the enclave is attached and marked Exhibit A.**

- **An aerial photograph of the Zufin enclave, with markings of the fence, the areas owned by the Azzun and Nabi Elias' inhabitants and the municipal areas of the settlement, is attached and marked Exhibit B.**

17. The planners of the Zufin enclave (the area between the green line and the route of the fence in the settlement area) did not satisfy themselves with the encirclement of the settlement's built area and not even in the addition of a security zone of a few dozens of meters east of the settlement's houses. Instead, an extremely intrusive route was established which draws into the enclave **1200 dunams** of land which are owned by the inhabitants of Azzun and Nabi Elias.
18. **A comparison between the route of the fence and the map of the municipal jurisdiction of the Zufin settlement, reveals an extremely unlawful practice according to which the route is established not according to security needs – namely - not according to consideration pertaining to the distance from the houses of the village or a topographic outline – but rather, according to the annexation and thickening plans of the settlement. It should be emphasized that nothing stated above may be interpreted as an agreement with the argument that protection of settlements constitutes a "security need" which is recognized by humanitarian law and which justifies the infliction of an injury, of the sort described above, on protected citizens.**
19. The architect of the fence has also installed two gates along the fence, the first one on its east side, near Jayyus village (hereinafter: the **Jayyus gate**), and the other, on its southern part, near the entrance to the settlement (hereinafter: the **Zufin gate**).
20. The "permit regime" which is regarded by the petitioners as a legal outrage, was applied to the Zufin enclave, in the same manner in which it was applied to all other enclaves which were created as a result of the penetration of the fences into the Occupied Palestinian Territories (OPT). Under this regime, **Palestinian** residents need permits to reach their homes (like in the case of Alfei Menashe enclave located south of Zufin), or their lands (like in the case being the subject matter of this petition). **Jews** are not required to obtain any permit and the declaration of a closed military zone does not concern them. This concerns a legal entrenchment of ethnic discrimination, which has no like in Israeli law or in any other democratic regime.
21. Therefore, in order to reach their lands the inhabitants must obtain an entry permit into the closed area and go through the Jayyus gate or the Zufin gate. In both cases the gates are located far away from the villages and far away from the lands, but the most important thing is that the road from these gates to the lands of the two villages which are located on the south-east part of the enclave, is a very long, mountainous road, impassable by vehicles and in most cases by pedestrians.
22. Under these circumstances, the land owners have no practical way of reaching their agricultural areas, nor can they carry their produce back with them on the long and hard way back.
23. A review of the topographic map of the enclave area shows how mountainous and impassable the road from the gates to the lands is: the Jayyus village is located on the top of a hill, 274 meters above sea level. The Jayyus gate is located in a height of 180 meters. A person who wishes to reach the Nabi-Elias-Azzun lands through the Jayyus gate, must descend to a height of 140 meters, climb to a height of 215 meters and descend again sometimes to height of 120 meters. As aforesaid, a long and steep route.

- **A topographic map of the Zufin enclave is attached and marked Exhibit C.**

The Ramification of the route on the inhabitants of Azzun and Nabi-Elias

24. During the two years which passed from the erection of the fence the livelihood of the inhabitants of Azzun and Nabi-Elias was critically injured. The difficulty – not to say the inability – to reach the lands, resulted in the complete collapse of the agricultural activity in the areas being the subject matter of this petition.
25. The petitioners collected accurate data concerning the scope and extent of injury caused to the agricultural produce of the inhabitants of their villages during the years in which the fence exists:
- **The Affidavit of petitioner 1 together with a chart specifying data concerning the agricultural produce of Azzun which was attached as an exhibit thereto, is attached and marked Exhibit D1.**
 - **The Affidavit of petitioner 2 together with a chart specifying data concerning the agricultural produce of Nab-Elias which was attached as an exhibit thereto, is attached and marked Exhibit D2.**
26. According to the data attached to petitioners' affidavits, the erection of the fence caused the destruction of the agricultural activity in the lands located west of the fence. A review of the data reveals a difficult picture according to which in 200-2004 the annual agricultural produce of Azzun and Nab-Elias from their lands located across the fence has decreased dramatically:
- a. Nine families from Azzun **completely lost** their crops in these years.
 - b. The other families from Azzun lost between 50-80 percent of their crops.
 - c. The livelihood of **831** citizens from Azzun was injured as a result of the erection of the fence.
 - d. Six families from Nabi-Elias **completely lost** their crops in these years.
 - e. The other families lost between 50-80 percent of their crops.
 - f. The livelihood of **488** citizens from Nabi Elias was injured as a result of the erection of the fence.
27. Families that in 2002 produced from their lands 1500 Kg of olive oil, produced in 2003-2004 between 300 to 500 Kg only. Other families that produced about 200 Kg, lost their entire produce in 2003-2004. All due to the reception of the fence, obviously.

Petitioners' applications to the authorities

28. As stated in the preface to the petition, immediately upon the distribution of the seizure order for the purpose of the erection of the fence, the inhabitants of Azzun and Nabi-Elias took legal action for the cancellation of the orders. This activity resulted in the filing of petitions to the honorable court against the validity of the orders – H CJ 8172, 8532/02 **Ibtisam Muhammad Ibrahim et al., v. Commander of IDF Forces in the West Bank**, TakSC 2002(4) 1078 (hereinafter: the **previous petition**).
29. At the time the petitions were filed, the farmers of Azzun and Nabi Elias could not have estimated yet the destructive effect of the fence and the fact that the promises made by military personnel that the farmers would be able to continue to farm the lands and harvest the olive trees without any difficulty after its erection, were false. In its judgment which denied the petitions, the honorable court relied on the promises of the state (our emphases):

In its response the state specified in length the efforts taken to minimize the damage that the barrier will cause to the residents of the area. Thus, for instance, an effort is made to erect the barrier, to the extent possible, in lands which are not private lands and in lands which are not farmed. In addition an effort is made not to separate between lands and their owners. In addition, the state specifies a host of measures which would be taken to minimize the injury in cases in which causing injury to the inhabitants may not be prevented. Thus, for instance, giving compensation to the owners of the lands which were seized, effort to move trees to other locations instead of cutting them down, **and the creation of entrance gates which would provide the inhabitants access to their lands. The respondents have also showed willingness to solve specific problems on scene**, after giving the land owners an opportunity to file appeals concerning the route of the seizure. **In the hearing before us the state representative stated that even in this stage it will be willing to take into consideration specific problems which would be raised by the inhabitants before the executing agencies and the military authorities if such problems may be solved on scene without posing any risk to security."**

30. How easy it is to promise, how hard to keep it. How easy it is to promise "gates which will enable access" and "solution for specific problems", how promises are forgotten as soon as the judgment is signed.
31. In fact the fence was erected and the gates which installed therein did not enable access to the lands as specified above. In addition, the gates were not manned most of the day (the Jayyus gate operates three times per day, each time for an hour and even less; the Zufin gate is indeed manned throughout the day but for the travelling needs of the Zufin settlers and not for the inhabitants of Azzun and Nabi Elias).
32. Following the erection of the fence, and as it turned out that the gates which were installed could not assist the farmers of Azzun and Nabi Elias, the inhabitants of the villages turned to Civil Administration officers and requested that another gate would be installed near the lands, in the area of the gas station "Tahsin Mansur" near Izbat Al-Tabib (north of Nabi Elias).
33. This request remained unanswered.
34. On September 27, 2004, the undersigned sent, on petitioners' behalf, a similar request to provide a partial and urgent solution for the immediate needs of the inhabitants of the villages in view of the upcoming olive harvest of 2004. It should be emphasized that the purpose of this request was to reduce the damage but no acceptance whatsoever of the erection of the fence could have been implied there-from, as was explicitly stated in the letter.
35. I added in my letter the obvious, that the failure to open a gate may cause the entire annual olive produce to be lost.
 - **A copy of the letter dated September 27, 2004 is attached and marked Exhibit**
36. Said letter remained unanswered and **the vast majority of the olive produce of 2004 was indeed lost.**

37. The failure of the addressees of said letter to respond to the above mentioned request, demonstrates the fact that the promises and declarations made by respondents' representatives before this honorable court, in the previous petition, were completely devoid of any real substance.
38. Following the above, on November 23, 2004, the undersigned wrote to the Prime Minister of Israel, to the Attorney General and to the legal advisor of the Civil Administration, and in a detailed letter demanded that the fence being the subject matter of this petition would be dismantled immediately. In said letter the undersigned specified all factual and legal arguments which appear in this petition and even clarified that the request was made as a last measure before filing a petition with the honorable court.
- **A copy of the letter dated November 23, 2004 (without its exhibits, which were all attached as exhibits to this petition) is attached and marked Exhibit F.**
39. This time respondent 2's representatives responded to the letter and invited the undersigned and the petitioners for a tour in the enclave area to acquaint themselves with the problems created by the fence. This tour finally took place on February 3, 2005.
40. On February 7, 2005 Captain Rubi Ziegler, sent the undersigned a response letter on behalf of the advisor of the Civil Administration.
- **A copy of the response letter dated February 2, 2005 is attached and marked Exhibit G.**
41. In his letter Captain Ziegler chose not to respond to the main argument made by the undersigned according to which there was no military need whatsoever which justified the route of the fence in its current form. Captain Ziegler also failed to respond to arguments which were based on the advisory opinion of the International Court of Justice in Hague and only referred to a response which was to be filed by the State Attorney's Office to this honorable court in HCJ 4825/04 Alian and 4938/04 Shuqba Village Council.
42. With respect to the specific arguments, Captain Ziegler notified in his letter that the military authorities decided to open an additional gate in the fence, near the gas station Tahsin Mansur (the gate which was been requested by the petitioners a long time ago). Until the date hereof, no works have been commenced for the execution of said decision.
43. It should be noted that the permits that the Civil Administration is willing to issue to the inhabitants of Azzun and Nabi-Elias **are seasonal rather than annual permits**, namely: **no inhabitant of the two Palestinian villages can reach his lands other than during the harvest season only**.
44. And again the petitioners are requested to trust the military authorities. They speak again of "gates which will provide access (paragraph 7 of Captain Ziegler's letter) and "solutions for specific problems" (paragraph 15 of Captain Ziegler's letter). However the age of innocence ended and the petitioners neither believe nor trust the respondents.
45. In his letter Captain Ziegler also fails to respond a major argument according to which the route was not chosen for security reasons. On this issue it should be noted that when the previous petition was filed the petitioners did not have in their possession the information which they currently have regarding the absolute correlation between the route and the municipal jurisdiction of the settlement. Captain Ziegler's failure to respond to this argument speaks for itself. The petitioners have no doubt that the route which purports to serve security needs, was actually intended to serve

"settlement" purposes, as simple logic and a review of the maps clearly lead to this inevitable conclusion.

For the tree of the field is man's life (Deuteronomy 20; 19)

46. The opening of the additional promised gate (assuming that this time the promises will be kept) will indeed provide access to parts of the lands which were previously inaccessible. However, said access is conditioned on a permit **and during the harvest season only**. This means, that the respondents are of the opinion that the Azzun and Nabi Elias inhabitants should not be provided any access to their lands, with the exception of those few days which are determined by respondent 2 as the days during which the annual harvest is to be carried out.
47. The response of the Civil Administration reveals an attitude which regards trees and land as machines in a factory. However, for their owners the lands have a meaning which reaches far beyond their economic value. In files such as this, the land owners as well as the organizations and the attorneys who represent them, usually emphasize the fact that the fence violates fundamental rights for property and livelihood. This emphasis sometimes causes us to forget that the fence blocks not only sources of livelihood but also ways of life; that human beings not only bring forth bread from the earth but also find solace and comfort over there; that trees and land do not only mean labor but also relaxation.
48. For the last two years the children of Azzun and Nabi-Elias were unable to take a walk in their lands. For the last two years the Azzun and Nabi-Elias' families were unable to visit their lands, have a meal under the trees or play ball in the orchards. For the last two years the school children were unable to go out for excursions in the bosom of nature. Because the bosom of nature disappeared behind the fence and is inaccessible.
49. The petitioners described to the undersigned the deep pain involved in the separation from their lands and clarified in all meetings with him that it was deep and hard regardless of the economic deficiency which derived there-from. Time and time again they explained that the lands played a much greater role in their lives than the value of their agricultural produce, that the trees, fields and hills constitute an inherent part of their community, that they form a substantial part of their identity.
50. The route of the fence in the Zufin area removed an organ from the bodies of petitioners' villages. Two years following this operation, it turns out beyond any doubt, that it is an extremely vital organ for the economy, livelihood, dignity, way of life and quality of life of the petitioners.
51. In addition to the above, it should be noted that access to the lands is also required year round for agricultural reasons, for the purpose of cutting weeds and taking care of the trees in a manner that will prevent damage to their produce, and for the purpose of providing proper care to the other crops which require constant care – planting, plowing, spraying etc.
52. In this context, we attach the affidavit of Mr. _____ 'Awwad, a resident of Azzun who own sixty dunams of seasonal crops. In his affidavit he testifies to the fact that as a result of the separation from his land, he and his family were unable to plow their land, plant, plow and spray and consequently he had no produce in those parcels of land in which he grows seasonal crops.

- **The affidavit of Mr. _____ 'Awwad is attached and marked Exhibit H.**

C. The Legal Argument

General

53. The penetration of the separation fence into the areas of the occupied territory and the creation of the Zufin enclave are unlawful for three independent reasons, which concern absence of authority, excess of authority and excess of the proportionality test.
54. The argument concerning excess of authority was accepted in the judgment of the International Court in Hague, in its advisory opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9th July 2004.
55. The parameters for the examination of proportionality were established in H CJ 2056/04 **Beit Sourik Village Council et al. v. Government of Israel et al.** (not yet published).
56. Therefore, our arguments in this petition are that:
 - a. Firstly, the enclave is a project the purpose of which is to make a permanent change (or at least a long term change) in the arrangement which apply in the occupied territory contrary to the administrative powers vested with the occupying power;
 - b. Secondly, as the factual data presented above shows, the enclave hugely violates the fundamental rights of protected citizens for movement, ownership of property and livelihood in a manner which violates the principle of proportionality;
 - c. Thirdly, the actually causes a prohibited annexation of occupied territory and it is unlawful for this reason as well.
57. **The above three arguments are made against the backdrop of the argument that the enclave was not created for the security needs of the occupying force or occupying power and not even for the security needs of the Zufin settlers, contrary to the causes which justify seizure an violation of rights. This case concerns a route which was chosen based on an extraneous and inappropriate consideration.**

Annexation *de facto*

58. The fence which was erected within the occupied territory, in fact, re-divides the territory, as a result of which a continuous, wide open space without any barrier/wall/fence lies from the Jordan river up to the enclave and another continuous space lies from the fence to the sea.
59. Hence, *de facto*, the fence creates a permanent change (or at least a long term change) the meaning of which is a practical annexation of the lands located in the enclave to the green line, to the area which under the absolute control of the state of Israel.
60. The Zufin settlers who are well aware of the long term ramifications of the fence in their area, have already commenced construction works and marketing of a grandiose plan for tripling the number

of inhabitants in the area. Putting the fence in the location which was chosen turned out to be a very good real estate investment as it has also caused the value of the apartments in the settlement to rise.

61. The prohibition on the forcible acquisition of territories is a fundamental principle of humanitarian law, and therefore the annexation of a territory under belligerent occupation constitutes a breach of this international area of the law and is unlawful. On this issue reference is made to the advisory opinion of the International Court of Justice which also held that the erection of the fence created a *fait accompli* – an 'accomplished fact' which in fact constitutes a prohibited annexation of a territory.
62. In the Zufin enclave the accomplished fact is especially conspicuous. The area surrounded by the wall has no Palestinian citizens and provides free access to the Zufin settlers. Accordingly, a territorial continuity is created between the enclave (which includes petitioners' lands) and the state of Israel, and a territorial division between the enclave area and petitioners' villages. Israelis can come and go from the enclave with no difficulty whereas the land owners are allowed to enter the area (if they receive permits, off course) for a scarce number of days per year.

The absence of a military need

63. The Zufin enclave map speaks for itself. There is no doubt that the fence penetrated eastward deep into the OPT in this area only to include the Zufin settlement located west of the fence, in a territorial continuity with the state of Israel. It is also clear that the purpose of the inclusion of dozens of dunams located east of Zufin within the boundaries of the enclave was to include lands for the future development of the settlement in the same area which maintains a territorial continuity with the state of Israel – as is clearly indicated by the area of jurisdiction map. Obviously, the fact that the route of the fence converges with the municipal border lines cannot be accidental. Finally, it is clear that the other option could have been a fence on the route of the green line and the encirclement of Zufin with a security fence (which anyway exists) thus, providing it with peripheral protection. This option impinges on the petitioners to a much lesser extent and therefore complies with the principle of proportionality.
64. The "military need" interest (the the "security need"), which is recognized by humanitarian law and by the laws of belligerent occupation as a principle which enables a proportionate violation of the rights of citizens (in certain cases only), consists of security interests of the occupying power and of the occupying force but **it does not consist of interests of citizens of the occupying power who decided to emigrate and settle within the occupied territory**. The interests of said emigrants (the settlers) are taken into consideration in the context of the administrative authorities and the restoration of security and order only, but in and of themselves cannot be used as an empowering source for the violation of so many rights of the residents – the protected citizens.
65. The case at hand is an especially "easy" case since the fence does not only encircle the east side of the settlement but also engulfs dozens of additional dunams located far from it, **a fact which exposes the underlying consideration of the route of the fence, which is not a security consideration but rather an "annexing" or "settling" one.**
66. Without going into the question of the lawfulness of settlements of citizens of the occupying power within the occupied territory, the legal position of this honorable court has always been that the only thing which justifies seizure of land is "military need":

"The main thing is that as far as the pure security consideration is concerned there is no doubt that the existence of settlements in an

occupied territory – even "civilians"- of citizens of the occupying power makes a significant contribution to the security in that area and assists the army to fulfill its duties."

(HCJ 606/78 **Saliman Taufik Ayub and 11 others v. Minister of Defence and 2 others**, IsrSC 33(2) 113).

67. The winding fence, which intrudes and expels does not serve any military need. Considerations concerning Zufin's future guided the determination of the route of the fence, **which is not a consideration of a security need, but rather an extraneous consideration which makes the decision and the execution thereof unlawful.**

The Ruling of the International Court of Justice

68. On July 9, 2004, the advisory opinion of the International Court of Justice in Hague regarding the lawfulness of the erection of the separation fence was published:

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9th July 2004.

69. In its opinion, the International Court of Justice adopted all above arguments.
70. The court held that the route of the separation fence clearly indicated that it was intended to protect the settlements and as such it did not serve any legitimate military purpose (paragraphs 118-122 of the judgment).
71. The court held that the fence created a new geo-social reality which caused the actual annexation of the territories located west of the fence and was unlawful for this reason as well (last part of paragraph 122).
72. The court also accepted the argument that there was no "military need" which justified deviation from the green line (paragraphs 136 and 136 of the judgment), and rejected the argument that Article 51 of the Charter of the United Nations on self defense of states applied to the situation, in view of the fact that it applied only to relations between states rather than to relations between a state and citizens under its effective control (paragraphs 138 and 139 of the judgment).
73. The court has therefore concluded that there was no authorization under international humanitarian law for the erection of the fence in the route which was chosen, and hence, that the entire project exceeded authority and constituted a breach of international law.
74. In addition, the court also held that international human rights law also applied to this issue and that the erection of the wall constituted a violation of substantial human rights protected by said international body of law.
75. Finally, the state of Israel was ordered by the International Court in Hague, to disassemble the separation wall and compensate the Palestinian residents for the damages caused to them. The court held that for as long as the fence remained in place, the violation of international law continued and that the state of Israel, the international community and the various institutions of the UN must take all necessary action to stop said violation.
76. The state of Israel, as a signatory of the Charter of the United Nations and of the constitution of the International Court of Justice, is obligated to respect international law, avoid violations and cease violations which take place. The advisory opinion has the status of a declaratory judgment, and the

state of Israel, which wishes to belong to the community of enlightened countries, must respect its decisions.

Disproportionate violation of fundamental rights

77. There is no dispute, nor can there be any dispute, that the enclave in the route in which it was erected, critically violates the freedom of movement, the right to earn a living and the right to own property of the petitioners and the inhabitants of their communities.
78. This case concerns an unnecessary violation of fundamental rights which are entrenched both in the international laws concerning belligerent occupation and in international human rights law, and finally in Israeli constitutional and administrative law. As such, the enclave is unlawful since it fails to comply with the principle of proportionality. As recalled, the principle is composed of three dimensions, and a decision according to which the act of the authority is disproportionate may be sufficiently made if either one of them has been violated:
 - a. A rational relation between the injury and the objective it wishes to achieve;
 - b. The ability to achieve the objective in a less injurious manner;
 - c. There is no proper proportion between the injury and its underlying interests.
79. Humanitarian law, international human rights law and our constitutional law all entrench freedom of movement, the right to earn a living and the right to own property as fundamental human rights. Clearly, these rights were severely violated as a result of the erection of the fence in the Zufin area. It is also clear that the fence could have been built in a manner which would not deprive the residents of their lands and would not violate their above mentioned rights.
80. In the case at hand the declared objective – security – could have been achieved by a fence along the green line possibly with light changes which arise from topographic or engineering considerations, rather than by penetration into the OPT, unless occasionally required, including a retreat backward into the green line boundaries.
81. Even if we assume (an assumption which is totally rejected by us) that the security of the settlement can serve as a basis for the argument of military need, even then the current route does not achieve the objective in a manner which inflicts a lesser injury on the rights of the inhabitants of the OPT. As aforesaid, the settlement can be encircled with a fence (which already exists, and if necessary may be thickened up) and in any event, there is no justification for the erection of the fence in a distance of kilometers from the houses of the inhabitants.
82. Therefore, the route of the fence of the Zufin enclave does not satisfy the third subtest of the proportionality test either – the relation between the injury and the interest (proportionality in the narrow sense). This substance should be examined against the backdrop of the possibility to achieve the objective in a less injurious manner – as aforesaid, and it also governs a scenario in which the less injurious objective has a smaller security advantage.
83. As far as we are concerned, we do not think that a change of the route as suggested above may lead to a reduction in the security level provided to the state of Israel, and in any event it is clear that the huge damage caused to the petitioners and to the inhabitants of their communities justifies a change of the route even a certain price must be paid for it.
84. In many aspects, this case is very similar to H CJ 2056/03 **Beit Sourik Village Council**, which also concerned the encirclement of large agricultural areas with a fence, while making promises for the

opening of agricultural gates and the provision of partial solutions to the inhabitants of the Palestinian villages.

85. The route in our case, like the route in the Beit Sourik case, is not proportionate and does not adequately take into consideration the needs the Palestinian communities which live in the area.
86. For all of the above reasons, the route of the fence which was chosen is not lawful and the court is requested to order that it be dismantled.

D. Conclusion

87. For two years the petitioners have been living in the shade of fence. Over the course of these two years they have realized that the fence deprived them of their livelihood and that a process by which their lands were taken away from them has commenced.
88. Recently, the petitioners also realized one more thing: that the route of the fence coincides with the municipal jurisdiction of the Zufin settlement. Said discovery was extremely significant since it has unveiled the underlying sham upon which the security argument was premised, an argument which was presented by the respondents throughout the years.
89. Petitioners' applications, through the undersigned, to the respondents, in which explanations to the above matter were demanded, were to no avail, and the respondents refrained from giving answers. Thus, we were left with a fence, the annexation and settlement motivation of which is conspicuous and not hidden.
90. As described above, to date, the petitioners cannot reach their lands at all due to the location of the gates which was established without any regard for their needs.
91. The respondents, on their behalf, consistently make promises (and for the meanwhile consistently fail to fulfill them). They promise to open another gate and suggest the petitioners and the inhabitants of their villages to accept a reality in which they cannot reach their lands with the exception of several days throughout the year, and that also subject to the filing of a permit application with the Civil Administration.
92. There is no doubt (nor can there be any doubt) that the erection of a fence between a man and his land violates his rights. There can be no doubt that the creation of a reality which obligates a person to apply for a permit for the purpose of using his own property also violates the most fundamental human rights. It is sometimes said that in the balancing between the rights which were violated and other legitimate interests such as security, there is no alternative and a certain violation of said rights is required. However, in this case the injury was not balanced against any **legitimate** interest. The petitioners and the inhabitants of their villages are distanced from their lands, lose their livelihood and are torn from what constitutes part of their personal and collective identity – so that the Zufun settlers will be able to expand their settlement and market hundreds and thousands of residential units which benefit from the real estate and promotional advantages provided by the fence. And indeed, the marketing personnel of Zufin already tell potential buyers that despite the fact the area is currently under the jurisdiction of the Shomron Regional Council, it is only a matter of time before the settlement will be made part of a regional council in Israel (this was conveyed to a representative of the "Bimkom" association who visited the settlement).
93. The dispute between the petitioners and the respondents pertains not only to the proper route of the fence. There is a complete misunderstanding between the parties as to what is a violation of a fundamental right. Respondents' proposal to open another gate and enable "seasonal" passage

demonstrates a flawed understanding of the importance of the lands and the freedom of movement to and from them for the petitioners.

94. The petitioners represent the farmers of the villages of Azzun and Nabi Elias. For these farmers, like for any other farmer in Israel and in the world, land is a way of life. The fence destroys the farmers' way of life without any security or other justification.

In view of all of the above, the honorable court is hereby requested to issue an *order nisi* as requested in the beginning of this petition, and after receiving respondents' response and following a hearing, make the order absolute.

Michael Sfard, Advocate
Counsel to Petitioners