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

HCJ 3571/20

1. [redacted] **Khasib,** I.D. [redacted]

2. [redacted] **Hareshah,** I.D. [redacted]

3. [redacted] **‘Amar,** I.D. [redacted]

4. [redacted] **Sabah,** I.D. [redacted]

5. [redacted] **Hussein,** I.D. [redacted]

6. [redacted] **Daud,** I.D. [redacted]

7. Taysir Fathi Taha ‘Amarneh, Head of Akkabah Village Council, I.D. [redacted]

8. HaMoked: Center for the Defence of the Individual, Registered Association No. 580163517

Represented by Counsel, Adv. Michael Sfard and/or Haya Abu Warda and/or Hagai Benziman and/or Alon Sapir, of (for purposes of court submissions) 12 David Hachmi St., Tel Aviv, 6777812, Tel: 03-6206947/8/9, Fax: 03-6206950, email: contact@sfard.co.il

-- Versus --

1. **Prime Minister of Israel**
2. **Minister of Defense**
3. **IDF Commander in the Judea and Samaria Area**
4. **Ministry of Defense - Separation Fence Administration**

Represented by Counsel from the State Attorney’s Office, Ministry of Justice, 29 Salah a-Din St. Jerusalem.

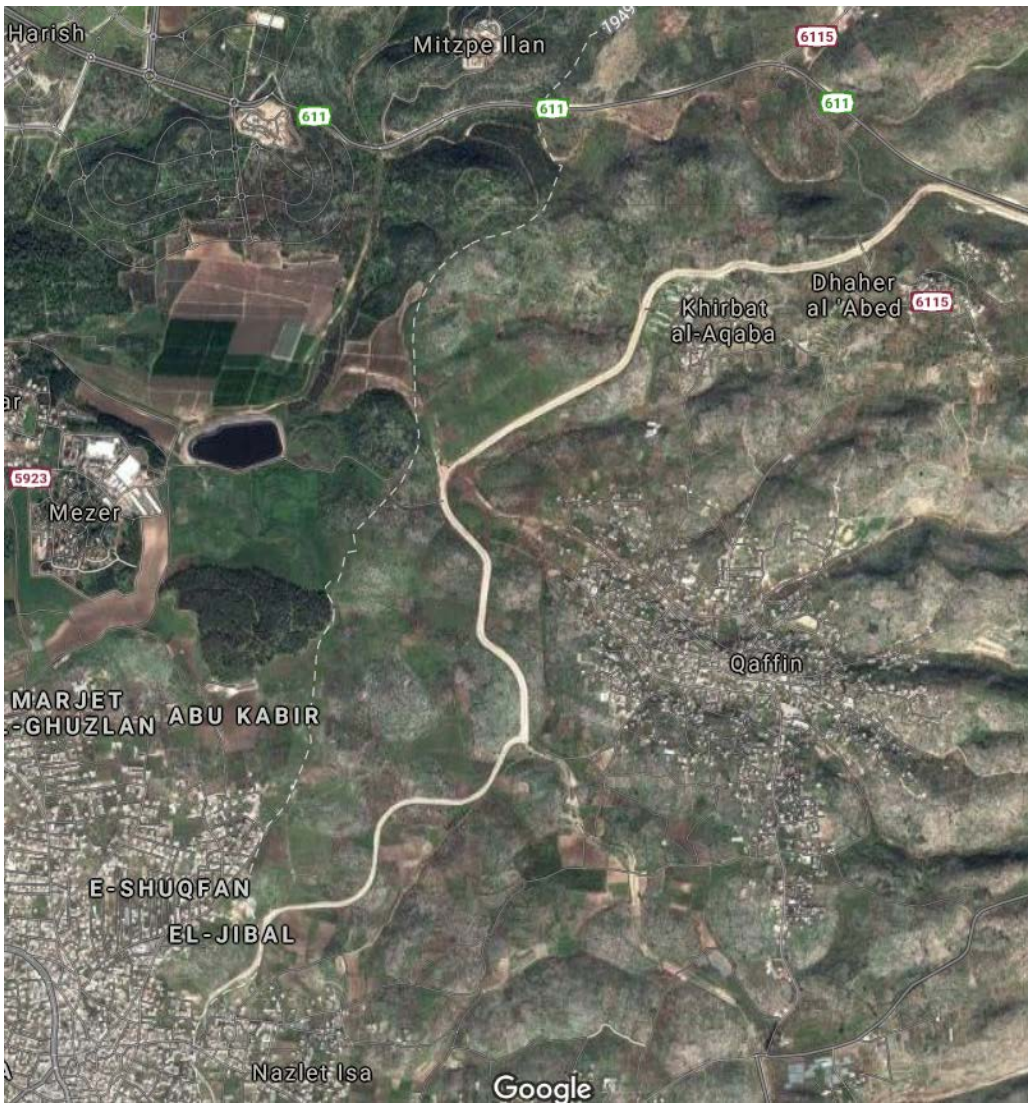
Petition for Order Nisi

The Honorable Court is hereby moved to instruct the Petitioners to appear and show cause why they should not order the dismantling of the route of the separation fence in the section of the villages Nazlat ‘Isa, Qaffin and Akkabah, from the Nazlat ‘Isa agricultural gate in the south to the meeting point between Road No. 161 and the Green Line in the north (hereinafter: the section), per the markings on the map attached as Annex 1, and, inasmuch as they so wish, its relocation west of the Israeli-Jordanian 1949 Armistice Line (the Green Line).

Part I: The Arguments

A. Introduction: The promise and it breach

1. This petition concerns a section of the separation fence located on lands belonging to three villages, Qaffin, Nazlat ‘Isa and Akkabah in the northwest occupied West Bank. The section traps thousands of dunams of farmland belonging to the three villages, effectively dispossessing residents of their property, livelihoods and way of life. The section in question begins in the south at the point where the separation fence meets the Green Line at the Nazlat ‘Isa gate and ends in the north at Road No. 161. In total, this section traps more than 3,000 dunams:



(In this aerial photo, the separation fence is marked in a thick white line, and the Green Line is marked with a dotted line).

2. This petition is filed some 15 years after this section of the fence was built. It rests on the experience accumulated of living "in the shadow" over this time. **The Petitioners herein demand the section be dismantled, and inasmuch as the Respondents so wish, relocated to the route of the Green Line.**

3. In this petition, it is argued below that in the years that have passed since this section of the fence was built, **it has been proven beyond doubt that the existence of the fence leads to the erasure of Palestinian life in the seam zone created by the section and the severance of connection between the lands and their owners.** It will also be argued that over the years, the Respondents have demonstrated that they are unable, and seemingly also unwilling, to fulfill the assurances they dispensed in the years during which the legality of building the separation fence was considered by this Honorable Court, to the effect that landowners' use of their lands beyond the fence would be protected and the connection Palestinian communities have to the area would be preserved.

4. In this petition, the Petitioners argue that given the severe harm inflicted on them and their communities, keeping the fence in its current location is extremely disproportionate. The Petitioners argue that the alternative solution for the section - a route along the Green Line is not only less injurious to the Petitioners and their communities, **but that in terms of security, it is no less desirable than the current section, and, in fact, probably preferable.** In this context, the Petitioners will present a security expert opinion provided by Colonel (reserves) Shaul Arieli, who assessed the alternative route (the Green Line route) as compared to the current route, and made the following assertion:

> [R]elocating the security barrier to a route that is based on the Green Line will attain the security goals in full, whilst removing the injury to residents of Qaffin, Akkabah and Nazlat 'Isa ... Moreover, a security barrier along the Green Line provides better security solutions to some of the needs compared to the existing route.

5. The petition addresses a section of the fence, the legality of which was not considered by the Honorable Court at the time of construction. A petition filed in mid-2002 challenging the entire fence route that was in early stages of construction at the time, running from Barta'a a-Sharqiya in the north to Khirbet Jarushiya in the south (HCJ 7783/02, 7784/02 **al-Hadi v. IDF Commander in the West Bank**, judgment dated November 17, 2002), was withdrawn after the justices told counsel for the petitioners that they must focus their challenges on specific sections of the route. At any rate, the route under discussion in that petition ultimately was changed in the part related to the section discussed herein. It was originally set to run east of Baq'a a-Sharqiyah, which would have left both it and the village of Nazlat 'Isa on the west side of the fence. Eventually, however, the section was built as shown on the map above and as described below.

6. The years since the fence was built have been terrible for farmers in the three villages whose farmlands have been trapped by the section. The Respondents failed to develop solutions that would give farmers effective access to their lands and enable them to exercise their proprietary rights to those lands. The result, as detailed below, is a 90% loss of income from lands in the seam zone section compared to yield before the fence was built!

7. Changes put in place by the Respondents to permit criteria over the years that have drastically decreased the number of individuals eligible for them; changes made over the years to the time periods permit holders may enter the seam zone that have severely reduced the windows of time that allowed cultivation in that area; the prohibitions that were added on bringing in farming equipment, herbicides and fertilizers; gate opening hours that were limited and unsuitable for farming work; restrictions that were put in place on use of the land for grazing livestock; the ever-increasing red tape and foot-dragging in processing permit applications and appeals against their rejections; and the practice by security forces stationed at the few gates in the Qaffin section of harming permit holders - as a result of all these, orchards have dried up, lands have been lying fallow, yield has dropped sharply in the trees that remain, and many farmers have given up and stopped trying to access their land.

8. As argued in this petition, the security features of the Qaffin enclave, seeing as it is far from any Israeli community or presence, along with the drastic change in the security situation since the fence was built, indicate that there is no longer any security imperative that justifies placing a barrier that veers east of the Green Line in this space.

9. The Petitioners will also argue that the violation of the Petitioners' and their community members' fundamental rights to freedom of movement, livelihoods, culture and dignity, make the fence disproportionate both in the sense that there is a less injurious alternative (the Green Line based barrier) and according to the proportionality test in the narrow sense, meaning the current harm to protected persons in the area greatly outweighs any security benefit offered by the current route.

10. Additionally, the Petitioners will argue that the mechanism for issuing permits to enter the seam zone, the very mechanism that was meant to fulfill the promises made by the Respondents regarding maximal landowner access to land in the seam zone has, in fact, emerged as a vehicle for the dispossession of farmers. As detailed below, the changes made to the permit regime over the years and the increasingly restrictive policy employed by Respondent 2 with respect to issuing permits indicate that the permit regime has been used to reduce the number of individuals eligible to enter the seam zone and to police traditional farming with a view to reducing its scope and subjecting it to obstructive standards that do not match the residents' needs or way of life.

11. So, for instance, the justification for restricting access to the seam zone, as presented in various proceedings before this Honorable Court regarding the separation fence, focused on security considerations. However, in recent years, the changes made by the Respondents to permit eligibility criteria rested on arguments related to botanical issues and agricultural feasibility, as interpreted by the Civil Administration Agriculture Staff Officer. The Petitioners will argue that these changes are an abuse of the permit regime, which was meant to focus on security issues.

12. Ultimately, the clear result of the escalation in the permit policy, with eligibility being only one of its facets, is a drastic reduction of Palestinian presence and farming in the area, a reduction in the types of crops that can be grown in the seam zone, severe harm to soil fertility and the crushing of farmers whose lives depended on their lands.

13. The rights to a livelihood, freedom of movement, family life, participation in cultural and social life, equality, dignity: The concrete walls and barbed wire fences that make up the separation fence shatter and trample every single one of the petitioners' basic rights and the rights of members of their community. We argue below that the

cumulative harm rises to a special degree of gravity that requires intervention from this Honorable Court and the immediate alteration of the route.

14. In this petition, the Court is asked to instruct the Respondents to dismantle a portion of the wall that has already been constructed. Contrary to most of the petitions regarding the separation fence (of which there have been dozens), this petition does not seek to persuade the Honorable Court that the construction of a certain route of the separation fence is **expected** to cause severe damage. This petition is unique in that it presents the court with **existing** harm, with figures that are the result of **actual experience** of living under the shadow of the fence in the Qaffin section of the seam zone for over a decade and a half.

15. This Honorable Court is the only Israeli state institution that has the ability to isolate the humanitarian consideration and grant remedy to innocent civilians who have committed no crime and have no political influence over the institutions that determine their future, people who have suffered a true calamity when the route of the fence was ultimately chosen and built in their area, sentencing their presence in their own lands to decline to the point of disappearance.

16. As noted, this petition includes an expert opinion prepared by Colonel (reserves) Shaul Arieli at the Petitioners' request concerning the proportionality of the existing route of the separation fence when compared to an alternative route along the Green Line. Mr. Arieli was asked to write an expert opinion assessing the route of the separation fence in the Qaffin section from an operational-security perspective according to the criteria developed by the defense establishment and used to guide it in designing the entire route of the fence. As noted, in his expert opinion, Colonel Arieli assessed the option of relocating the section of the separation fence which is the subject of this petition to the Green Line and concluded that this alternative route provides Israel with the level of security it requires while reducing the harm to the villagers' fabric of life **and that it is superior to the existing route in terms of security.**

17. Below we present the parties to this petition, followed by the facts underlying it: the route chosen for the fence and the seam zone it created, the permit regime and the changes to it over the years, and figures the Petitioners have on the impact the fence has had on their livelihoods and on life in their communities. We then proceed to present our legal arguments that the current route of the fence is tainted by patent disproportionality to such an exceptional degree that necessitates the sought remedy.

B. Parties to the Petition

18. Petitioners 1-4 are residents of the village of Qaffin who own 25.25 dunams of farmland in the seam zone.

19. Petitioners 5-6 are residents of the village of Nazlat 'Isa who own 18.5 dunams of farmland in the seam zone.

20. Petitioner 7 is a resident of Akkabah who serves as the head of the Akkabah Village Council. He owns plots spanning 200 dunams in the seam zone.

21. Petitioner 8 is HaMoked: Center for the Defence of the Individual, a non-governmental organization which provides assistance to individuals who have fallen victim to violence, abuse or basic human rights violations perpetrated by the State and works to protect fundamental rights in any other way possible, including taking legal action, which extends to filing petitions to the Supreme Court sitting as the High Court of

Justice, whether on behalf of an individual claiming violation of a fundamental right or as an independent public petitioner.

22. Respondent 1 is the Government of Israel, which approved the route of the separation fence, whether directly or via the Prime Minister and the Minister of Defense who had been empowered by the government to do so, and, according to Basic Law: The Military, the military is subordinate to the government.

23. Respondent 2 is the Minister of Defense, who, under Basic Law: The Military, is the minister in charge of the military.

24. Respondent 3 is the military commander of the West Bank and the official in charge of both security and civilian life in the territory of the West Bank, occupied by Israel in 1967. This respondent is also responsible for issuing the closed military zone declaration and the orders issued pursuant thereto, which require **Palestinians only** to request and receive a permit should they wish to gain access to the enclave.

C. Exhaustion of Remedies

25. The section of the fence, which is the subject matter of the petition herein, has never been considered by the Honorable Court. In the days following the issuance of the seizure orders, and after the construction of the fence was completed, the petitioners and members of their communities innocently believed the promises they were given by officials speaking for Respondents 3 and 4 to the effect that the fence would not, in any way, hinder their ability to cultivate their lands and harvest their olive trees, that they would retain access to their lands, regulated by a permit regime, and that any "concrete" issue that would arise from the construction of the fence would be resolved by the Respondents.

26. After many years and more than one hundred petitions filed by Petitioner 8 on behalf of farmers whose access to their farmlands was blocked due to the provisions of the permit regime, the Petitioners have arrived at the conclusion that remedy in individual cases cannot resolve the systemic issues inherent in the current route of the fence, and that their only remaining course of action to avoid losing their lands was to demand the dismantling of the physical fence on the current route, so that it would no longer trap lands belonging to the villages of Akkabah, Qaffin and Nazlat 'Isa.

27. On January 8, 2020, the undersigned wrote to Respondent 3 on behalf of the Petitioners, asking them to dismantle the separation fence in the section which is the subject matter of this petition and relocate it to the Green Line. In the letter, counsel for the Petitioners listed the tremendous damage caused to farming in the area, the harm to livelihoods in local communities and the manner in which changes made to the orders governing the permit regime in the seam zone (the Seam Zone Standing Orders) have impacted landowners' access to their lands, in effect, limiting it so dramatically that farming in the seam zone was severely hurt, and, in part, completely halted.

28. In the aforesaid letter, the Petitioners presented figures about the variations in the number of permits issued for every year beginning in 2009 and ending in 2018. These figures were obtained through applications filed by Petitioner 8 under the Freedom of Information Act. The Petitioners also presented figures on the difference in yield and produce value in lands within the seam zone compared to land on the Palestinian side, as well as differences in yield before and after the fence was constructed. These figures

were based on information provided by the Petitioners, who farm and own land in the seam zone, in their affidavits.

29. On January 22, 2020, counsel for the Petitioners received a letter responding to this communication from the Office of the Legal Advisor to the Judea and Samaria Area, stating that after a review of Petitioners' arguments, a meeting is proposed between Petitioners' representatives and the relevant officials working for the Respondents, led by the head of the Fence Administration (referred to by the name Keshet Zevaim, or Rainbow of Colors), Colonel Ofer Hindi, to discuss the issues raised in the letter.

30. On February 26, 2020, the aforesaid meeting took place, in which, other than the undersigned and representatives from Petitioner 8, Executive Director Jessica Montell and Adv. Daniel Shenhar, was attended by Colonel Hindi, his deputy and representatives of the Civil Administration and the Efrayim Regional Brigade.

31. During the meeting, Respondents' representatives suggested the Petitioners contact them regarding concrete difficulties and vehemently refused to discuss any amendments to the route or systemic changes to the permit regime, which are already being discussed in various cases before the courts. Respondents' representatives insisted the changes made to the Seam Zone Standing Orders over the years (and listed below) were justified, and, in effect, did not respond to the argument the Petitioners made in their letter that the situation that has developed precludes the retention of their ties and their communities' ties to lands in the section.

32. The meeting concluded with a decision that the Respondents would respond to the Petitioners' request in writing. Despite many weeks since, no response was received prior to submission of this petition.

Part II: Factual Background

A. The physical fence

I. The legal basis for the construction of a physical obstacle

33. The decision to build the separation fence was preceded by various Government of Israel resolutions to create a barrier, sealed to varying degrees, that would prevent unmonitored entrance into the State of Israel by residents of the West Bank. In March 1996, the Government of Israel decided to install permanent barriers along the seam zone, blocking off alternative entry routes. In 1997, a decision was made to deploy the Border Police along the seam zone, and in November 2000, a decision was made to install a "vehicle barrier."

34. In June 2001, the Prime Minister at the time ordered the appointment of a steering team headed by the Head of the National Security Council at the time Major General Uzi Dayan, tasked with developing a new plan to prevent infiltration deep into Israeli territory by Palestinians via the seam zone.

35. On July 18, 2001, the steering team gave the Security Cabinet its recommendations, which the Cabinet adopted. One of these recommendations was to install an anti-personnel barrier in select segments of the seam zone, where risk level was high (See:

State Comptroller, **Report on the Seam Zone**, Report No. 2 (Jerusalem, July 2002), pp. 10-12).

36. On April 14, 2002, the Cabinet convened again to discuss the recommendation to install an anti-personnel barrier, after nothing had been done until then to implement the recommendation. The Cabinet decided that day to install a permanent anti-personnel barrier in the seam zone.

37. In June of 2002, the Government of Israel was presented with a detailed proposal for building a permanent anti-personnel barrier from the northwest edge of the Green Line (near the village of Salem), to the settlement of Elkana in the south. A detailed proposal for the route of the fence in the Jerusalem area (the "Jerusalem Envelope") was also presented.

38. On June 23, 2002, the Government of Israel approved the proposal submitted by the Seam Zone Administration in principle and empowered the Prime Minister and the Minister of Defense (Respondents 1 and 2) to determine the exact route. The government resolution further established that should these two Respondents disagree on an issue, said issue would be referred to the Security Cabinet for a decision (Government Resolution No. 2077).

39. On August 14, 2002, the Cabinet approved the final route for Phase 1, which spanned 96 kilometers between Salem and Elkana and 20 additional kilometers of the Jerusalem Envelope.

40. In early December 2002, the Cabinet approved the route for Phase 2, running eastward from Salem, along the Green Line and then veers south at al-Mutilla and on to Tayasir.

41. By July 2003, work was completed in most parts of Phase 1 of the barrier, except for the construction of the secondary barriers.

42. On October 2, 2003, Respondent 2 issued a Declaration regarding Closed Military Zone (Declaration No. 02/03) as well as a series of orders that instituted the permit regime in the seam zone, namely, the area between the barrier and the Green Line where the barrier protrudes into the West Bank.

43. The declaration regarding a military zone stipulates it does not apply to an "**Israeli**." The term Israeli is defined as a citizen of Israel, a resident of Israel and anyone eligible for citizenship under the Law of Return. In other words, the declaration does not apply to Jews (in the broad sense of the term as related to the Law of Return).

44. The declaration prohibits anyone who is not Israeli access to the seam zone without a permit and requires Palestinians living in this area to file an application for a resident stay permit, those working in the seam zone to request a teacher / farmer / medical crew / international organization employee stay permit and so forth. Palestinians who are in possession of one of these types of stay permits may enter and exit the seam zone only through the gates stipulated in the declaration.

45. The premise on which the construction of the fence was founded, and was approved in dozens of judgments delivered by the High Court of Justice (but wholly rejected in the Advisory Opinion of the International Court of Justice in The Hague), is that the law permits the military commander to seize land in a territory held under belligerent occupation, erect a barrier on this land and monitor and control passage through said

barrier to the other side in order to serve the security interest of defending the State of Israel and the Israeli settlements.

46. **The legal foundation for the construction of the fence is a presumption that the fences and concrete walls, the trace roads and concertina wire that make up the barrier are all <u>temporary</u> installations, and inasmuch as the security need for them expires or changes, the seizure orders issued for the barrier's construction would also expire**. This notion of temporariness is rooted both in the legal construct used to take the lands on which it was built - seizure, rather than expropriation, an inherently temporary measure which only assumes possession, not ownership, from the landowners, and in the jurisprudence of the Supreme Court, including in HCJ 9961/03 **HaMoked: Center for the Defence of the Individual v. Government of Israel et al.**, (published in Nevo), April 5, 2011, (hereinafter: **HaMoked**), where Honorable President Beinisch concluded her judgment with the following statements in paragraph 46:

> We cannot but express a wish and a hope that this state of affairs, in which a fence separates between parts of the population that seek a shared life with the rest of the population, is a transitory situation that is specific to a temporary, harsh reality.

47. The second element in the legal thesis supporting the construction of the fence is that its route must meet the test of **proportionality**. In other words, the route must serve the purpose for which the fence was built; there is no other measure that is less injurious to the rights of the persons affected that could achieve the express purpose for which the fence was constructed and that the impingement the fence inflicts on the rights of Palestinians is not greater than its contribution to the security interest, on the route chosen (compared to possible alternative routes). On this, see the instructive judgments in Beit Sourik: HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5) 806 (hereinafter: **Beit Sourik**) and HCJ 7957/04 **Mara'abe v. The Prime Minister of Israel**, (judgment dated September 15, 2005) hereinafter: **Alfei Menashe**).

<u>II. The Qaffin- Akkabah Section</u>

48. As noted above, in or around September 2002, a petition was filed with the Honorable Court against the entire route from Barta'a a-Sharqiyah in the north, through the section which is the subject matter of the petition herein and until Khirbet Jarushiya to the south of it (HCJ 7783,7784/02 **al-Hadi et al. v. IDF Commander in the West Bank**). The case culminated in an extremely brief judgment noting the decision made by counsel for the petitioners therein to withdraw the petition given the justices' remarks that he may contest specific portions of the fence to the administrative bodies of the Respondents and petition against their decisions.

A copy of the judgment in HCJ 7783/02 is attached hereto and marked <u>Exhibit 2.</u>

49. Neither the undersigned nor any of the Petitioners herein were able to locate submissions in this petition, with the exception of the judgment and the State's preliminary response. For this reason, we do not know whether any of the petitioners therein were residents of the villages of Akkabah, Qaffin or Nazlat 'Isa.

50. At any rate, the construction of the segment of the fence that is the subject of this petition concluded in 2005. Significant parts of this segment of the fence were built on a route that deviates from the Green Line, penetrating deep into the West Bank and creating an "enclave" hemmed in by the separation fence to the east and the Green Line to the west. This enclave has trapped vast farmlands belonging to the three villages of Qaffin, Akkabah and Nazlat 'Isa and owned by families living in these villages.

51. There are no Israeli settlements in this enclave, nor land belonging to Israelis, nor are any Israeli communities located adjacent to the Green Line in this area. In fact, the closest Israeli community is the kibbutz community of Metzer, which is located 1.5 kilometers as the crow flies west of the Green Line, and Baq'a al-Gharbiyeh, which is adjacent to the Green Line but located south of the section. Some 1.5 kilometers north of the section lies the community of Mitzpe Ilan.

52. The section winds its way along some six kilometers traversing the lands of Qaffin, Nazlat 'Isa and Akkabah. The fence has trapped more than 3,000 dunams of the three villages' lands in the seam zone it created.

53. Three gates have been installed in the section: Gate 436, used by farmers from Qaffin; Gate 408, for residents of Akkabah and Gate 526 which serves residents of Nazlat 'Isa. Since 2005, Gates 436 and 408 have opened three times a week: In the morning, for 45 minutes between 6:30 and 7:15 A.M., in the afternoon, from noon to 12:30 P.M., and in the evening from 3:45 P.M. to 4:30 P.M. The gate providing access to Nazlat 'Isa lands opens every day from 5:00 A.M to 9:00 P.M.

54. As noted, the section of the fence, which is the subject of the petition herein runs through village lands, keeping more than 3,000 dunams of farmland belonging to members of these communities to its west. Given this is a predominantly agrarian area, the divide between residents and their lands caused by the fence has been immensely detrimental to their quality of life and their livelihoods.

55. The village of Akkabah, located in the northern part of the fence section that is the subject of the petition herein is home to some 85 families with a total of about 500 people. Eighty percent of the farmland belonging to the village is located in the seam zone. Sixty of the 85 families living in the village have farmland in the seam zone. In the past, village residents made their living mostly from farming, which included seasonal crops, year-round crops and shepherding. After the fence was built, cutting off lands, most residents were forced to look for work inside Israel or lease farmland on the east side of the fence and waste money on rent to ensure direct access and guaranteed farming work.

56. Qaffin is a Palestinian town with a population of some 12,300. Sixty percent of its residents have lands trapped in the seam zone. Like the residents of Akkabah, residents of Qaffin also relied mainly on farming in the past, but given the restrictions on accessing their lands and their curtailed ability to farm for their living, many residents have had to turn to odd jobs in Israel or work as civil servants in the Palestinian Authority.

57. Until the fence was built, local residents mainly made their living from farming. They relied on their ability to plant and sew, irrigate and harvest and take their produce to the markets. However, in the past decade and a half, ever since the fence was built and the permit regime was applied, this ability has grown increasingly limited, and the harm to the Petitioners and other residents of the area grew worse with the ever-increasing restrictions on their access to the space, causing agriculture in the area to wither and

blocking any attempt by the local communities to develop and rehabilitate the communities' farming-based economy.

58. The construction of the fence has had a dramatic impact on every aspect of life in the villages. Before the fence was built, villagers made their living selling the produce grown on their lands. They enjoyed financial independence and were able to support themselves and advance thanks to their lands. Local farmers grew almonds, watermelon, fava beans, cucumbers, tobacco and other seasonal crops. The soil in this area is rich, and local residents' farming experience and knowledge enabled them to make optimal use of the land.

59. The financial impact of the separation fence on the lives of the Petitioners and members of their communities is not confined to an inability to grow and sell seasonal crops, or reduced yield in the groves that remain, but extends to some steps they have been forced to take as a result of being disconnected from their lands. For instance, many farmers and shepherds who own land in the seam zone have had to lease land on the east side of the separation fence in order to continue making a living from farming or shepherding.

60. In addition to their financial reliance on their lands, the Petitioners and members of their communities have a strong cultural and traditional connection to their lands. They consider farming a family and cultural tradition, an essential part of their way of life and a key element of their identity. The plots and groves form an inseparable part of their living environment and their world.

61. Below, we provide figures on the permits given to residents of the villages connected to the area that is the subject of this petition. We highlight the bottom line at this early stage: The construction of the fence has produced a 90% drop in the income drawn by Petitioners 1-7 and members of their communities from lands trapped on the other side of the fence, compared to yield from these lands prior to the construction of the fence. This is partly the result of the continued erosion in the already restrictive arrangements around seam zone entry permits:

    A. <u>While, for instance, in 2014, 75% of the applications for farmer permits for the entire seam zone were approved (3,221 permits issued), in 2018, only 26% of the applications were approved (1,876 permits issued).</u>

    B. <u>Additionally, while between 2012-2014, 1,800 to 2,000 farmer and agricultural worker permits were issued each year to residents of Qaffin alone, that number has shrunk to about 350 a year, an 85% drop. The number of entry permits given to residents of Akkabah fell from an average of 165-189 until 2014, to just 65.</u>

62. The construction of the fence has effectively cut off the Petitioners and members of their communities from most of their lands and has meted financial ruin on them as the years went by. It has also severely impaired their way of life and agrarian culture.

B. The Legal Fence: The Permit Regime

I. The declaration, orders and regulations making up the permit regime

The Declaration

63. When the separation fence was built, Respondent 2 declared the areas that remained between the fence (on the route approved at the time) and the Green Line a closed military zone (Declaration No. 02/03). According to the Declaration, anyone present in

the seam zone had to leave immediately (Section 3). This provision does not apply to Israelis and persons granted a seam zone entry and stay permit (Section 4).

64. Israelis are defined as citizens or residents of Israel and anyone entitled to immigrate to Israel under the Law of Return (Section 1). Permanent residents of the seam zone, as they are defined in Section 5, may enter and remain in the seam zone provided they possess a written permit attesting to the fact that their permanent residence is located within the seam zone.

A copy of the Declaration dated October 2, 2003, is attached hereto and marked Exhibit 3.

Regulations and permits

65. Pursuant to the declaration of the seam zone as a closed military zone, Respondent 2 signed several military legislative acts listing provisions that determine the different types of permits that govern entry and stay by Palestinians and others in the seam zone, including, inter alia:

A. **General Permit to Enter and Stay in the Seam Zone (Judea and Samaria), 5764 – 2003, dated October 2, 2003:** The permit lists the "categories of people" who will be granted a general seam zone entry permit which exempts them from having to file an individual application (Section 2). These categories include individuals who are not residents of the Area and are in possession of a valid foreign passport and Israeli visa (tourists). The schedule added to the general permit stresses that persons who are not residents of the Area and possess a valid foreign passport and Israeli visa - in other words, tourists - may enter and stay in the seam zone for any purpose. A general permit is also granted to persons who hold a valid work permit in an **Israeli community** within the seam zone, pursuant to the Order regarding Employment of Laborers in Specific Locations (Judea and Samaria) (No. 967) 5742-1982 (Palestinian Laborers Working in Settlements), in other words, Palestinian laborers. The terms listed in Section 2 of the general permit also require a person entering the seam zone to carry a "document attesting he belongs to one of the categories of people listed in the schedule."

A copy of the General Entry Permit is attached hereto and marked Exhibit 4.

B. **Regulations Regarding Permits to Enter and Stay in the Seam Zone (Judea and Samaria), 5764–2003, dated October 7, 2003,** instituted a bureaucratic apparatus for processing applications for seam zone entry and stay permits and determined the reasons for which entry would be granted and the forms to be used in the applications.

A copy of the Regulations Regarding Permits to Enter and Stay in the Seam Zone (Judea and Samaria), dated October 7, 2003, is attached hereto and marked Exhibit 5.

C. **Regulations Regarding Permanent Resident Permit in the Seam Zone (Judea and Samaria), 5764–2003, dated October 7, 2003:** These regulations govern the (limited) entitlement of persons living in the seam zone to "permanent resident permits." They require permanent residents to

enter and exit the zone only through the gate listed in their permanent resident permit or personal permit and present their permit when doing so (Section 2(a), Section 3(a)). According to the provisions of Section 2(b), a permanent resident may enter the seam zone with a vehicle by special permit only. The Section notes that only a vehicle registered in the name of a permanent resident at the time the declaration went into effect would be considered a vehicle for purposes of such a request. Entry into the seam zone with a vehicle purchased after that date requires filing a different application.

D. Regulations Regarding Crossings in the Seam Zone, dated October 7, 2003.

66. As stated, these regulations concern permits to enter and stay in the seam zone for individuals who have ties to it by virtue of owning a business in the seam zone, supplying goods in it, holding a job, farming, teaching, studying, performing a function for the Palestinian Authority, visiting individuals, working for an international organization or a local authority, being part of a medical crew and any other purpose in the seam zone.

67. **The 2003 declaration was supplemented by other declarations regarding additional areas along the route of the fence. All of these, and the regulations, have been amended over the years.**

68. One of the amendments made to the closed zone declaration, on May 27, 2004, stipulated the declaration would apply to Israelis (as defined therein), and they would be given a general entry and stay permit for the seam zone (***Declaration regarding the Closing of Territory Number s/2/03 (Seam Zone) (Judea and Samaria) (Amendment No. 1), 5764-2003***).

69. And so, the **permit regime** is composed of declarations stating that the area between the separation fence and the Green Line is a closed military zone, requiring individuals present in it to exit and individuals wishing to enter it to ask for a special permit. Israelis and tourists have a general permit to enter and stay in the seam zone, as do those who have been granted a permanent resident certificate by the military commander. Palestinians may enter this area only if they prove they reside in it, or if they receive a permit for special reasons (such as farming needs or because they are physicians, etc.). Israelis (settlers and otherwise) require no permit. The walls and fences are invisible to them.

70. We cannot proceed without taking a moment to address the astounding significance of a declaration that those who have lived in the area for generations, have owned lands or businesses in it for decades, perhaps before the area was taken by the IDF in 1967, need a permit from the military commander in order to continue living in it or accessing it, while for any **Jew**, whether an Israeli or an American living in Brooklyn, the declaration has no relevance and they are not required to ask for a permit to access the area. We stated our position on this legal arrangement in the **HaMoked** petition in 2003 which challenged the legality of the permit regime, and we shall not repeat it here, despite the fact that our position that this a moral and legal crime has not wavered even after the Honorable Court delivered its judgment in that case.

The Standing Orders

71. In the years since the original declaration was signed, the Respondent has added standing orders to the declaration and the regulations. The list of orders is referred to by the name

Seam Zone Standing Orders. This is a collection of orders designed to manage the implementation of the permit regime and the processing of applications in minute detail. Standing Orders such as these were issued in 2010, 2014, 2017, and recently, in 2019.

A copy of the most recent Standing Orders, from 2019, is attached hereto and marked <u>Exhibit 6.</u>

72. The Standing Orders are updated from time to time to reflect changes the Respondents make to the permit regime. As detailed below, these changes pull the rug out from under the arguments that the permit regime is effective in reducing the harm the fence has inflicted on the rights of protected persons in the area.

73. The provisions included in the Standing Orders are meant, in part, to regulate issuance of farming permits. They make a distinction between a farmer permit issued to persons who prove proprietary ties to the land - i.e., a registered owner or their heir and a farm laborer permit issued to laborers hired by landowners. **Farmer permits for laborers are issued according to the Agriculture Staff Officer Table, which determines how many laborers are needed for different types of crops.**

74. In addition, the Standing Orders gives the Head of the District Coordination Office (DCO) discretionary power to issue permits in excess of the quota listed in the Agriculture Staff Officer Table.

75. Schedule 4 of Chapter 6 in the Standing Orders contains the Agriculture Staff Officer Table, presumably prepared by Civil Administration agronomists, which lists the number of laborers required per plot according to plot size and type of crop grown. Every line of this table screams bureaucratic absurdity. Farming is treated as an industrial production line with a uniform, predictable rhythm. A dunam of eggplant requires seven days of labor by three laborers per year - nothing more, nothing less. A dunam of okra requires seven days of labor by four laborers per year.

76. The table determines how many permits tens of thousands of farmers along the entire seam zone will receive as a function of agricultural financial feasibility. This approach, as detailed below, uses presumptions that are presented as objective, rational and rooted in agricultural economics as factors for determining the necessity of agricultural work and translates them into a legal prohibition that limits landowners' proprietary rights and their ties to their land. Aside from the fact that considerations of financial necessity cannot be a basis for restricting farmers' proprietary ties to their lands, partly because this concept defies the purpose presented to the honorable court when it considered the legality of the permit regime and the separation fence, this is a reduction that does not (and cannot) take into consideration the cultural and social rights and needs of the landowners.

77. According to Section 10.a.9.c of the Standing Orders (added in the Standing Orders from 2014), the Head of the DCO may order permits be issued for first degree relatives (parent, spouse or child) in excess of the laborer quota as needed, according to his assessment of the circumstances. This amendment was introduced into the Standing Orders to reflect the strong ties that landowners' future heirs and other relatives have to the land.

78. Over the years, the permit issuance policy has grown more restrictive. The changes in the Standing Orders and their interpretation evince a restrictive and rigid approach that seeks to reduce eligibility for entry and stay permits to the smallest number possible of

farmers and laborers. More details are provided on this matter below, but, as an example: Under the 2017 Standing Orders, a "minuscule plot" does not entitle its owners to a farmer permit (and, consequently, there is no entitlement for a farming laborer permit either). We note that "minuscule plots" are determined in the Standing Orders by dividing the plot size by the number of owners. This fails to reflect the actual size of the plot.

79. Another example is the decision to calculate the size of a farmer's plot according to his relative share among the heirs of the registered owner. This, in conjunction with the ineligibility of "minuscule" plots for farmer permits, has produced a sharp drop in the number of individuals eligible for a permit.

II. Assurances given by the state with respect to the nature of the permit regime

80. To persuade the Court that the fence meets the tests of proportionality in the various petitions regarding its legality (both those addressing the legality of the fence in its entirety and those regarding particular segments of it), the Respondents dispensed numerous assurances. They vowed that management of Palestinians' access to lands they own west of the fence would be applied in a manner that prevents severe harm to their livelihoods and ties to the land. They promised the permit regime they put in place for the area would be liberal and allow maintaining Palestinian presence in the area and ties to it. The Respondents in the many petitions submitted regarding the fence gave the Justices of the Supreme Court their word, time and time again, that even though they were building a physical barrier that prevents Palestinians from accessing their lands, the gates installed in this barrier and the policy around their usage would greatly reduce the harm caused to farmers, business owners and anyone else with legitimate ties to the area that has been cut off.

81. So, for instance, in HCJ 8532/02 **Ibrahim v. IDF Commander in the West Bank** (published in Nevo, October 14, 2002), the first case concerning the legality of a segment of the separation fence (in the area near the villages north of Qalqiliyah) in which a ruling was given, the Honorable Court addressed the state's assurances as follows:

> In its response, the State listed in detail... a number of measures to be put in place in order to minimize the harm in cases where harm to local residents cannot be prevented [...] as well as the installation of entry gates that will allow residents access to their lands. The Respondents have also shown willingness to solve concrete issues on the ground after landowners are given an opportunity to file objections with respect to the route of the seizure.

82. In a previous petition challenging the legality of a segment that includes the one discussed herein and segments to the south of it (through the villages of Zeita, Deir al-Ghusun and Khirbet Jarushiya), the Respondents made wild promises about the ability to maintain ties to the land (HCJ 7784/02 **al-Hadi v. IDF Commander in the West Bank**). The Preliminary Response on behalf of the Respondents dated September 19, 2002, states (pp. 12-13):

> **Civilian life in seam zone villages** – Residents of the villages of Nazlat 'Isa and Baq'a a-Sharqeyah, which are located in the section of the seam zone discussed herein, will continue to maintain ties to the rest of the Area via a checkpoint to be

> installed east of Baq'a a-Sharqiyah and according to protocols to be instituted as part of the staff work carried out on this issue.
>
> With respect to other structures in the seam zone (that do not belong to the aforesaid villages), appropriate arrangements will be put in place to facilitate reasonable crossing by local residents in agricultural gates that will be installed along the barrier and addressed below.
>
> **Farmlands in the seam zone** – Palestinians whose lands remain in the seam zone will be permitted to enter the closed zone for the purpose of cultivating land via agricultural gates placed on the road between Zeita and Baq'a a- Sharqiyah and near the villages of Zeita, 'Attil, Deir al Ghusun and Khirbet al-Jarushiya. They will also have access to the checkpoint to be installed east of Baq'a a- Sharqiyah. To this end, reasonable crossing arrangements will be put in place, taking into consideration the need to have laborers cross and bring farming equipment on the one hand, and capacity to transport goods made in farmlands to villages east of it on the other.

83. The petition was ultimately dropped, as noted above.

84. In the matter of **HaMoked** (HCJ 9961/03), which addressed the legality of the permit regime, the Respondents undertook to introduce "a number of changes in the arrangements in place in the seam zone... **These include building roads for Palestinian traffic to allow easier passage between Palestinian communities as well as easier access by Palestinian farmers to the farmlands they cultivate**" (see paragraph 40 of the Preliminary Response on behalf of the Respondents, emphasis added). The response went on to state that "The Respondents are monitoring the impact of the barrier on the Palestinian community and wherever possible, they take action to alter the route, build and clear access roads for Palestinians and introduce further measures to mitigate the impact the construction of the barrier has had on the innocent Palestinian population's way of life" (paragraph 42, Ibid.).

A copy of the Response on behalf of the Respondents, dated January 1, 2004, in HCJ 9961/03, is attached hereto and marked <u>Exhibit 7.</u>

85. Additionally, paragraph 44 of the Respondents' response in the permit regime petition, expressly states (emphasis added):

> As held in the matter of the village of Yanun, a violation of a person's freedom of movement in a public area lawfully held under belligerent occupation is not comparable to a violation of their freedom of movement in their private property. Therefore, the Respondents maintain that the closure of the seam zone and **the simultaneous institution of a permit regime that <u>allows anyone with specific ties to lands in the seam zone to receive a permit to enter it</u>** or reside in it as the case may be, strikes a proper balance between the urgent security need underlying the measures taken and the violation of local residents' rights.

86. As far as making gates accessible, the State pledged to allow access through gates that are open year-round to anyone in possession of permits for gates that are opened intermittently (paragraph 33 of the judgment in HCJ 9961/03 HaMoked: Center for the Defence of the Individual):

> In this context, the state has pointed out in its response that a directive had been issued to the effect that wherever an agricultural gate near plots relevant to the matter of a particular resident is not open year-round, an additional gate or crossing that is open year-round, would be noted on the permit, and may be used by the resident to enter the zone, provided that the crossing does not necessitate the entry of the resident into Israel.

87. Additionally, a Ministry of Justice response to a report published by B'Tselem and Bimkom - Planners for Planning Rights entitled Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank (December 2005) (p. 93) reads:

> The barrier also imposes limitations on the free movement of Palestinians in a territory that is part of the area. This is a grave outcome, and the State of Israel does everything in its power to minimize these limitations and to be responsive to the population's needs [...] The State of Israel is attentive to the needs to find a solution to these matters. **Alterations were made in the arrangements applying to the seam zone, and additional modifications are planned. For example, these alterations include paving routes to enable easier passage between Palestinian towns, as well as easier travel of Palestinian farmers to the lands they cultivate, funding transportation services for transporting pupils from one side of the fence to schools on the other side, and back again, in an orderly and collective manner, etc.**

88. In the state's response to the petition in HCJ 11344/03 **Faiz Salim v. IDF Commander in the West Bank**, which addressed the policy governing the operation of crossing points in the separation barrier in the section between Salem and Elkana, the state reassured it was working on "formulating protocols to allow seam zone residents to exit the seam zone and arrangements to allow cultivation in farmlands inside the seam zone.

(See, paragraph 21 in the state's response).

Further reassurance was given that -

> The IDF is monitoring the impact of the barrier on the Palestinian community, and wherever possible, they take action to alter the route, build and clear access roads for Palestinians and introduce further measures to mitigate the impact the construction of the barrier has had on the innocent Palestinian population's way of life.

(Paragraph 30, Ibid).

A copy of the relevant pages of the State's response in the aforementioned HCJ 11344/03 is attached hereto and marked Exhibit 8.

89. In response to the petition in HCJ 4825/04 **'Alian v. Prime Minister et al.**, the Respondents acknowledged the grave harm the fence causes Palestinian farmers and pledged to keep working to minimize it:

> Palestinian residents are harmed by the construction of the barrier. This harm is caused by the seizure of land, harm to crops and the interruption of the lives of Palestinians left on the other side of the fence. The Respondents acknowledge this harm and take constant action to minimize it to the extent possible, both in the process of building the barrier and with respect to protecting the residents' fabric of life after it is completed [...] The challenge facing the barrier's planners is to produce a route that attains maximum security with minimum harm to local residents. **Meeting this challenge is an ongoing task, since even after the barrier is built, the interests of the Palestinian residents must be given constant consideration.**

(Paragraphs 62-63 of the state's response).

A copy of the relevant pages of the State's response in HCJ 4825/04 is attached hereto and marked <u>Exhibit 9.</u>

With respect to acts the state presented as designed to preserve landowners' access to their lands, the state has said: "Efforts are made to avoid cutting off landowners from their lands. Where such separation cannot be avoided, agricultural gates are installed to facilitate landowners' access to their lands" (Paragraph 70, Ibid.). Additionally, addressing an argument made by the UN Special Rapporteur on the Right to Food, Jean Ziegler[1] (hereinafter: the Ziegler report) regarding the separation of Palestinian farmers from their land, the state claimed the argument was "extremely overstated. **Landowners are able to continue cultivating the lands. Agricultural gates and checkpoints were installed along the entire barrier for the purpose of farmer access**." (Paragraph 396, Ibid.).

90. In the same petition, the Respondents argued that in an effort to improve Palestinian farmers' access to their lands on the west side of the separation fence -

> A recommendation was made to extend the opening hours of the agricultural gates and open some of the gates as long as there is daylight. It was further recommended to appoint permanent teams to open some of the agricultural gates in order to avoid a situation where the soldiers responsible for the gates are called to perform other tasks. These recommendations are also at the implementation stage.

(Paragraph 435, Ibid).

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[1] UN Commission on Human Rights, *The right to food : report : addendum / by the Special Rapporteur, Jean Ziegler. Addendum: Mission to the Occupied Palestinian Territories*, 31 October 2003, E/CN.4/2004/10/Add.2, available at: https://www.refworld.org/docid/45377acb0.html [accessed 11 May 2020]

91. In HCJ 7957/03 **Mara'abe v. Prime Minister of Israel** et al. (the Alfei Menashe enclave), where the undersigned represented the Petitioners, the petition was accepted, and the Honorable Court ordered an existing section of the separation fence dismantled and relocated to a less injurious route. In its response to the petition, the State argued that, "The Respondents have taken and will continue to take numerous measures designed to guarantee adequate and appropriate living conditions for residents of the enclave and reduce to the necessary minimum the harm caused to them by the fence. This has included the issuance of 1965 permits to enter the enclave to service providers [...] road infrastructure improvement is planned (paragraph 28 of the State's response).

A copy of the relevant pages of the State's response in HCJ 7957/03 is attached hereto and marked <u>Exhibit 10.</u>

92. These promises repeated by counsel for the State in hundreds of hearings before the Honorable Court held in scores of petitions challenging the legality of various segments of the fence led to the rejection of these petitions. The court accepted the principle that it is possible to build barriers and preserve Palestinians' connection to lands beyond it. Time and time again, the court took note of the promises made by the relevant officials to allow protected persons maximum access to their lands in the seam zone. These promises, the Court held, achieved a proper balance between the security necessity of building the separation fence and controlling passage through it, and the need to minimize the infringement on the protected persons' rights to property and full access to their lands.

93. **However, after living in the shadow of the fence for a decade and a half or so, the figures relating to the Qaffin segment, the bottom line of which has already been presented with details to follow, prove that, at least with respect to the area near the villages of Qaffin, Akkabah and Nazlat 'Isa, <u>the promise has not been kept</u>. The military's management of the seam zone, in policy and in practice, effectively deny residents of these villages the ability to engage in farming as it was prior to the construction of the fence, and every change or amendment made to procedures and practices effectively further limit and reduce landowners' ties to their propert**y.

94. It would appear that the Honorable Court has also long since noticed that the Respondents fail to meet their obligations with respect to the permit regime and various justices have demanded, more than once, the Respondents explain the discrepancy between their promises and the cases brought before the court, particularly in petitions challenging permit application denials.

95. So, for instance, during a hearing in HCJ 6411/18 **Yasin v. Military Commander of the West Bank**, which challenged the Respondents' denial of the petitioner's application for a permit to enter the seam zone citing "minuscule plot" as the reason, Justice Vogelman addressed counsel for the Respondents as follows: "Madam will not draw us in, Madam, in all fence cases, we remember everything and Madam will tell the Respondents."

96. During a hearing in HCJ 3594/13 **'Amur v. Military Commander of the West Bank et al.**, HCJ 3592/13 **'Odeh v. Military Commander of the West Bank et al.** and HCJ 3595/13 **Yasin v. Military Commander of the West Bank et al.** (joint hearing in three petitions filed by Petitioner No. 8, HaMoked: Center for the Defence of the Individual), Justice Joubran told counsel for the Respondents, "We are talking about people, sensitive people with rights and feelings. They must be respected, and a balance must be struck. We have asked the State to perform the balance in a manner that would be

least restrictive." Justice Joubran stressed, "the rule is to give, and the exception is to withhold" (p. 3 of the transcripts of the hearing dated June 6, 2013).

97. In the hearing in HCJ 5078/11 **Muhammad Esbah Mahmoud Abu Zer et al. v. GOC Southern Command et al.** (reported in Nevo, February 27, 2011), held on July 27, 2011, too, Honorable Justice Vogelman also expressed his discontent with the Respondents' conduct, addressing them as follows (transcripts, p. 2):

> In all fence cases, you explain to us that there is no problem with the seam line, and now we see reality, so stand behind what you have said... I am sensing a double message here.

98. During a hearing in HCJ 4034/11, held on September 7, 2011, Justice Vogelman addressed the following remarks to Respondents' counsel:

> The feeling in every case of this kind is uncomfortable. You have appeared in the fence petitions, and the statements that have been made have consequences. You said appropriate permits will be given to minimize the harm to the fabric of life. The petitions were dismissed, and we see that this does not meet the test of reality.

A copy of the transcripts quoted above is attached hereto and marked <u>Exhibit 11.</u>

99. The bottom line is that the construction of the fence has produced a 90% drop in the income drawn by Petitioners 1-7 and members of their communities from lands trapped on the other side of the fence, compared to yield from these lands prior to the construction of the fence. This is partly the result of the continued erosion in the already restrictive arrangements around seam zone entry permits:

A. <u>While, for instance, 75% of the applications for seam zone entry permits made by farmers in 2014 were approved (3221 permits issued), in 2018, only 26% of the applications were approved (1876 permits issued).</u>

B. <u>While between 2012 and 2014, 1800 to 2000 permits of various types were issued each year to residents of Qaffin alone, that number has shrunk to about 350 a year, an 85% drop. The number of entry permits given to residents of Akkabah fell from an average of 165-189 until 2014, to just 65.</u>

100. Reality, as it is reflected in the experience of individuals with ties to lands in the Qaffin section of the seam zone, proves there is no viable option of sustaining Palestinian farming in this area, and so long as the fence remains in its place, farming in this area will disappear entirely, and with it Palestinians' ties to their lands.

101. Indeed, the policies and practices in the management of the seam zone have joined into a great force that will soon make Palestinian presence in the Qaffin section of the seam zone <u>completely disappear</u>.

<u>C. Restrictions on maintaining Palestinian ties to lands in the seam zone over the years</u>

102. As noted, in the years that have passed, a great deal of information has been gathered with respect to the impact the changing permit regime has had on Palestinian residents in general and on residents of the Qaffin section in particular. **This information reflects**

directly both on the proportionality of the barrier itself if left in its original route and on the proportionality of the permit regime, which has undergone many changes since it was announced and as it was considered at the time the judgments in this matter were handed down.

I. Restrictions on gate crossing: hours of operation and prohibition on transfer of farming equipment

103. As noted above, the seam zone was declared a closed military zone by order of the IDF Commander in the West Bank, meaning Palestinians who wish to access it for farming or other purposes must file an application for a special permit according to a list of categories. Farmers whose application has been approved must cross at designated gates to reach their lands in the seam zone. It is important to note that even after managing to get through the exhausting process of obtaining an entry permit, village residents wishing to access their lands must cross at a gate located far from their communities, and in some cases, far from their plots, and must traverse a long, hilly, and sometimes impassable route to get to the plots.

104. The section leading from the villages of Qaffin and Akkabah to the seam zone has one gate used by farmers from Qaffin, Gate 436, and one gate for residents of Akkabah, Gate 408. Since 2005, these gates have opened three days a week: In the morning, for 45 minutes between 6:30 and 7:15 A.M., in the afternoon, for just ten minutes (!), from noon to 12:10 P.M., and in the evening from 3:45 P.M. to 4:30 P.M. These very brief periods of time are often not enough even for those who reach the crossing and must wait in line. Soldiers often close the gates to permit holders for any number of reasons, the most ridiculous of which is that they are not dressed for farming work.

105. The restricted opening times of the gates that preclude regular access to lands severely harm the local population. These restrictions disrupt farming, restrict farmers' ability to work their lands consistently and generate conditions that make it impossible to achieve the level of production seen before the construction of the fence. In addition, gate opening hours are not suitable for farmers' needs as they force them to work during the hottest hours of the day, when traditionally, farmers worked before and after the heat. Gate opening hours also preclude working on weekends, which prevents many farmers who have second jobs from cultivating their lands in their free time.

106. Restricted operating hours are compounded by a ban on crossing with vehicles and farming equipment. Even if permit holders may physically enter the seam zone, they are not allowed to bring equipment for essential farming tasks such as regular watering, pruning, plowing and spraying.

107. These restrictions, coupled with the ban on bringing fertilizer into the seam zone, result in a situation where a large amount of produce that is not picked in time rots and ends up being discarded; other crops dry out due to lack of irrigation and yield drops. Aside from the damage to soil fertility, farmers' livelihoods suffer immeasurable damage.

108. All of these have forced many farmers to forgo some crops that require constant cultivation such as almonds, cucumber, za'atar, okra and tobacco and rely on crops that require less work, such as olives, wheat and sesame.

II. Reduced eligibility for permits: Changes to the Standing Orders over the years

109. In addition to the limited opening hours and restrictions on usage of farming equipment, which result in restricted access ill-suited for routine farming needs, stricter conditions

for receiving permits and the reduction in the number of people eligible for them has exacerbated the landowners' predicament and further reduced farmers' capacity to work their lands and make a living off them. The dramatic reduction in the number of people eligible for seam zone farmer permits and in the eligibility criteria has not only undermined the workforce and the ability to produce, but has severely impaired local residents' way of life, as farming is a social, family occasion for them.

110. As described in the judgment in **HaMoked** (HCJ 9961/03), when the permit regime was applied, proof of "ties" to land was sufficient for permit eligibility. At the time, the agricultural ties category included relatives of the registered landowners and a certain quota for laborers hired to help with cultivation.

111. The first Standing Orders, which President Beinisch used to assess the proportionality of the permit regime in **HaMoked**, stated that "farmers who prove a connection to agricultural land in the seam zone, will be issued, as a general rule, permits valid for two years" (see paragraph 27 of the judgment in **HaMoked**). These permits were issued to landowners, their relatives and their hired laborers.

112. Since that time, permit eligibility criteria have changed in the following manner:

A. A restriction whereby agricultural employment permits (for hired laborers) would not be issued for plots smaller than five dunams in size;

B. As of 2014, relatives and spouses (even if they are future heirs) are no longer eligible for permits on behalf of the landowners. The result is that cultivation now rests solely on the landowners, who are often elderly individuals who are unable to do this manual, labor-intensive work. This has produced a severe shortage of labor, and many landowners simply gave up on cultivation, which would have been more feasible without the restrictions.

C. In 2017, a minimum plot size requirement was introduced into the Standing Orders, under which, as a rule, there is no eligibility for a farmer permit (the size in question is 330 square meters, and the Standing Orders refer to them as "minuscule plots"). Lands are often divided between the original landowners' heirs, sometimes while the latter are still alive, in part because they have difficulty farming due to their age and would have had to carry on doing so on their own because of the restrictions listed in the previous section. Since size is determined in the Standing Orders by dividing the plot by the number of owners, regardless of the true size of the land, each heir's plot is considered a "minuscule plot" under the new Standing Orders.

D. This, in turn, means landowners who are heirs are not entitled to a farmer permit at all. To access their own land, they must apply for a personal needs permit (which is a one-time permit for a few months at most). Having to make an application for a personal needs permit every time one wishes to access the plot is extremely burdensome, particularly given the timetables the Standing Orders set forth for application submission and processing. These timelines are not suitable for farming work (We note that a petition challenging the minuscule plot restriction is pending before the High Court of Justice - HCJ 6896/18 **Ta'meh v. Military Commander in the West Bank**. HaMoked: Center for the Defence of the Individual is Petitioner No. 3 therein).

E. The 2017 Standing Orders also introduced additional restrictions on shepherds, requiring them to graze their flocks only in the flock owner's plot. This contradicts the custom in the area whereby grazing is welcomed by other plot owners as it improves the soil. Grazing times were also restricted, and a new provision stating permits will be issued only if the grazing field is located no more than 2.5 km from where the livestock is kept. These restrictions have reduced the size of the grazing area available to shepherds to an extent that made it entirely unfeasible to continue shepherding, causing severe financial damage to flock owners and their families.

Since 2017, heirs of lands registered in the land registry who applied for permits have been required to transfer the registered ownership of the plots from the original owner to the heir and pay a fee. This is a complicated, expensive and exhausting undertaking. We note that the fact that more than two-thirds of West Bank lands are unregistered is the result of a decision made by the commander of the IDF in the West Bank to halt the registration process immediately after the occupation in 1967. In any event, this requirement made many farmers give up the fight for a permit, further reducing the number of farmers with seam zone permits.

F. In 2019, the Standing Orders were updated such that permits are no longer given for the purpose of **maintaining ties to the land**, but rather **cultivation according to agricultural need**.

G. Another change made in the 2019 Standing Orders was the introduction of a quota on permits for landowners according to the extent of access needed for each type of cultivation, as determined by the Agriculture Staff Officer. The result is that while landowners previously received permits valid for two years, they now receive "punch card" permits with a limited number of entries.

113. The aforesaid deleterious changes have directly resulted in a reduction in the number of individuals eligible for permits in the seam zone in general and in the Qaffin section in particular.

114. **As detailed below, and as gleaned from responses received by Petitioner 8 in Freedom of Information proceedings it undertook, the entire seam zone has experienced a drop in the number of eligible individuals. While in 2014, 75% of permit applicants received a permit, in 2018, only 26% of all applicants received a permit**.

115. It is important to note that even when the fight for a permit ends in success, the permit is received after a long delay, and in the meantime, the land, left uncultivated and untended dries up, crops are damaged, and yield is lost.

116. In **HaMoked** we argued that the security purpose attributed to the separation fence and the permit regime was nothing but a cover for another purpose, which was, to "slowly empty the closed zone of its Palestinian residents and dispossess them of their lands... in a manner amounting to prohibited annexation under the rules of international law" (paragraph 16 of the judgment of the President). **There is no possible interpretation for the changes made to the permit regime, as described above, other than their being intended to empty the space of Palestinian presence and dispossess them of**

lands, as argued a decade ago in the HaMoked case. In retrospect, these changes also prove the lack of good faith shown by Respondents 1-2 in their pledges to the Supreme Court that the permit regime is the way to guarantee Palestinians access to their lands.

III. The permit bureaucracy

117. Even those who are eligible for a permit and have the documents required to prove their ownership of the land face enormous difficulties in the form of exhausting red tape.

118. The first obstacle is the protocol whereby landowners may not submit applications directly with the Israeli District Coordination Office (DCO), but must contact their local councils, which then forward the applications to the Palestinian Civil Liaison Administration (DCL). This requirement produces many delays. It sometimes takes weeks for applications to get from the Palestinian DCL to the Israeli DCO, and sometimes applicants find out the application never reached its destination, and they must repeat the lengthy process.

119. Similarly, it is sometimes revealed that the application was denied shortly after it was filed, but the applicant was never notified, and therefore continued to wait for the permit in vain. In many cases, the Palestinian DCL notifies the applicant that the application had been denied, but instead of being told immediately and being notified that they may appeal the decision, the applicants are instructed to submit another application, because not only had the application been denied, but due to the time that had elapsed since the initial refusal was issued, it was no longer possible to appeal.

120. If a permit application is refused, the applicant is referred to a multi-phase bureaucratic procedure before they may take legal action against the military's decision. In most cases, the applicant must request a hearing with the Head of the DCO. The applicant must then wait for several weeks until the hearing is held, and then two more weeks for the decision of the Head of the DCO. If the Head of the DCO decides not to approve the permit application, the Palestinian applicant is referred to another Civil Administration appeal instance - the Appeals Committee. The waiting period for a hearing before the committee is a full month, and after the hearing, another week goes by before a decision is issued.

121. It is noted that the Standing Orders provide a timetable for farmer permit application processing times and for Head of DCO hearings. According to the Standing Orders, initial processing of applications for agricultural needs and agricultural employment should take no longer than **four weeks.** If the application is refused, the Standing Orders stipulate that a resident who files an appeal would receive a hearing with the Head of the DCO **within two weeks** of the appeal submission date. In practice, however, the military fails to meet the already lengthy and complicated timelines listed in the Standing Orders.

122. A petition may be filed with the Supreme Court only after the decision of the appeals committee, and the time it takes until a hearing is held and a judgment is given is added to the already lengthy wait times of the previous stages. During all this time, the Palestinian applicant has no access to their land. Additionally, in defiance of the Standing Orders, which prohibit processing new applications within nine months of a refusal, the military often instructs applicants to submit a new permit application,

sometimes after they were found eligible for a permit in the appeal process. Filing a new application means starting the bureaucratic process all over again.

123. Often, the bureaucratic ordeal does not end even when approval is given, and there have been many cases in which applicants had to wait for many more weeks until they were given the actual permit. In many cases, Palestinian applicants receive the permits well after they come into effect, which shortens the time they can use them before having to begin the renewal process.

124. The aforesaid may sound like a parody about a bureaucratic mechanism, but it is not. This is the system Respondent 2 has been employing, and this is the system that is meant to run the farming lives of communities with hundreds of families and thousands of people (thousands just in the Qaffin section, of course). It is noted that due to the reasons listed above, only a small number of people who are interested in accessing land enter this bureaucratic web in the first place. However, even among those who have mustered the strength needed to follow the steps involved in a permit application, many do not last until the end of the line and drop out at various junctures in the process. **This is not an unwanted ancillary outcome of the bureaucracy created by the Standing Orders - it is its purpose: to reduce the number of permit holders as much as possible, to empty the seam zone of Palestinian presence, and this purpose is achieved, as we detail below.**

D. The impact of the permit regime on the Qaffin-Akkabah area since its inception

I. Figures on village lands trapped in the seam zone

125. The Petitioners are residents of the villages of Qaffin, Akkabah and Nazlat ‘Isa, in the northwest West Bank. The route of the fence runs through lands belonging to these villages, keeping more than 3,000 dunams of farmland belonging to the Petitioners and members of their communities to its west. The separation fence, along with the permit regime imposed in the area severely harms the rights of all local residents, the Petitioners included, impedes their freedom of movement, undermines their ability to draw income from their property and disrupts their fabric of life as it impedes access to farmlands and cuts them off from their main source of income.

126. The livelihoods of residents of two of the aforesaid villages critically rely on the yield borne by lands remaining in the seam zone: Some 60% of the farmlands belonging to Qaffin are located within the seam zone and [80%] of the farmlands belonging to Akkabah. And so, given that these are agrarian communities, defined by their deep connection to and reliance on the land and its cultivation, and given the large proportion of their lands that have been “trapped” in the seam zone, the effect the fence has on the lives of residents in these villages is powerful and permeates nearly every aspect of their lives.

127. In 2005, large scale fires broke out (partly due to lack of weeding and general neglect of the lands) and destroyed some 80% of the groves in these lands. The damage caused by the fires lasted for years thereafter, compounded by lack of regular access to the lands, and resulted in a drop of some 70% in agricultural yield from 2002 to 2010. Between 2010 and 2014, landowners were able to partially rehabilitate their lands, but the restrictions on bringing in fertilizer and farming equipment remained in place, which precluded full rehabilitation and resulted in production contracting to 40%.

128. Beginning in 2014, the policy designed to significantly reduce seam zone permit eligibility went into effect, which reduced the workforce, ultimately causing a further contraction in yield in the seam zone.

II. Restrictions on access to land in numbers

129. The dispossession of local residents of their lands in the seam zone has been pursued by various means, gradually, over time. Along with the physical barrier that impedes their access to the seam zone, local residents also face a legal barrier (the permit regime), part and parcel to which is the bureaucratic barrier that makes it difficult to apply for and receive permits.

130. Policy: Over the years, as described above, the Standing Orders have been updated several times, reducing eligibility for seam zone entry permits. This exacerbated the harm to the population that makes its living off lands in the seam zone and reduced both the average number of permits issued each year and their validity period. The grounds cited for these changes varied and had no connection to security, and, unfortunately, no connection to logic either.

131. The **overall** (regarding the entire seam zone) figures, as provided by the Respondent in its Preliminary Response in HCJ 6896/18 **Ta'meh v. Military Commander in the West Bank** is incriminating, patently clear and alarming:

> In 2014, 4,288 applications for a seam zone farmer permit were submitted, 3,221 of which were approved. In other words, **some 75% of the applications were approved.**
>
> In 2015, 4,347 applications for a seam zone farmer permit were submitted, 2,661 of which were approved. In other words, **some 61% of the applications were approved.**
>
> In 2016, 9,687 applications for a seam zone farmer permit were submitted, 4,311 of which were approved. In other words, **some 45% of the applications were approved.**
>
> In 2017, 5,460 applications for a seam zone farmer permit were submitted, 2,389 of which were approved. In other words, **some 44% of the applications were approved.**
>
> In 2018, 7,187 applications for a seam zone farmer permit were submitted, 1,876 of which were approved. In other words, **some 26% of the applications were approved.**
>
> **A copy of the relevant pages of the State's Preliminary Response in the aforesaid matter of Ta'meh is attached hereto and marked Exhibit 12.**

132. These changes were felt in the Qaffin section as well. The figures relating to the Qaffin section, as provided by Respondent 3 in response to a Freedom of Information application filed by Petitioner 8, paint a clear picture with respect to applications for farmer permits and agricultural worker permits filed by residents of Qaffin: In 2014, 1,778 farmer and agricultural worker permit applications were filed on behalf of Qaffin residents, of which 1,256 were approved (**71% of applications filed**). In 2018, 1,181 such applications were recorded, and **only 51% of them were approved**. The table below, which was compiled based on figures provided by the Respondent, clearly

demonstrates a sharp drop both in the number of applications filed and the number of applications approved.

Year	Total applications	Approvals given		Denials	Denial rate
2014	1,778	1,256	71%	522	29%
Farmer	291	151	52%	140	48%
First degree relative					
Agricultural worker	1,386	1,025	74%	361	26%
2015	1,706				
2016	1,406				
2017	1,181				
2018	**1,182**	**606**	**51%**	**575**	**49%**
Farmer	464	103	22%	361	78%
First degree relative	441	379	86%	62	14%
Agricultural worker	148	0	0%	148	100%

133. Practice: As the policy exacerbated the harm by reducing eligibility, the practices around actual access via the gates further impeded access. The term practice refers to actual gate opening hours in the Qaffin sections, the screening at the gates and the manner in which security forces stationed at the gates decide who may cross and when. The obstacles put in the path of farmers on the ground reduce farming beyond the reduction caused by the permit policy. The combined result is the severing of ties that remain between local residents and their lands in the seam zone.

III. Farming through the years - before and after the construction of the fence

134. One of the repercussions of the access restrictions and the denial of entry by farmers to farmlands in the Qaffin section of the seam zone can be seen through the changes in the state of lands in the area.

135. While the permit regime did allow daily access by seasonal farmer permit holders, according to the aforementioned gate opening hours, the restrictions on bringing in farming equipment and the restricted work hours have resulted in many farmers in the Qaffin section dropping seasonal crops that require constant care, forcing them to rely on crops that require less work and no irrigation, mostly olive trees.

136. However, due to climate change, the sharp drop in the workforce caused by the stricter permit policy and the restrictions that precluded use of materials and equipment to address pests, olive growing has also suffered a great deal.

137. Consequently, olive tree yield in the seam zone dropped dramatically, both compared to yield prior to the construction of the fence and compared to olive yield in trees on the Palestinian side of the separation fence.

138. As an example, figures on annual agricultural production collected by Petitioner No. 7, Head of the Akkabah Village Council, Mr. Taysir ‘Amarneh, indicate that in 2017-2018, the average olive tree yield in lands belonging to Akkabah residents **declined by some 65%**, compared to yield in the same groves prior to the construction of the fence. In lands belonging to Qaffin, yield **dropped by some 90%** compared to annual production prior to the construction of the fence.

139. **A study conducted by the UN Office of the Coordination of Humanitarian Affairs (OCHA) in lands belonging to Akkabah and Qaffin shows that the yield from trees**

in the seam zone is less than that of trees in groves west of the fence (and therefore freely accessible) in the range between 50% and 78% in most cases and most years.

A copy of the OCHA study is attached hereto and marked Exhibit 13.

140. Below, as an example, is a list of the direct financial harm caused to Petitioners 1-7 due to the construction of the fence, the implementation of the permit regime and the deleterious changes over the years.

The affidavits of the Petitioners, on which the following description is based, are attached hereto marked Exhibit 14.

A. **Petitioner 1**, [redacted] **Khasib**, is a resident of Qaffin, born in 1958, married and father of eight, also serves as a member of the Qaffin Village Council. Mr. Khasib's family owns nine dunams of land in Plot [redacted], Lot 2 in Qaffin. Prior to the construction of the fence, in addition to olives, Mr. Khasib grew cucumbers, barley and wheat. Until the fence was built, he was able to produce 120 containers of olive oil each year. Today, the lands trapped in the seam zone produce no more than about ten oil containers each year, and Mr. Khasib estimates his losses at more than 50,000 ILS per year.

B. **Petitioner 2**, [redacted] **Hareshah**, is a resident of Qaffin, born in 1952, married. Mr. Hareshah's family owns 12.5 dunams of land in Plot [redacted], Lot 2 in the Qaffin lands in the seam zone. The land was passed down by his father, and his grandfather before him. Currently, Mr. Hareshah grows olive trees and makes a living off the oil he produces from the yield. Prior to the construction of the fence, the land had almond trees, watermelon, fava beans, lentils and chickpeas, and Mr. Hareshah relied solely on agriculture for his living. Now, given the restrictions on access to the lands and on what may be brought into them, and the resulting severe harm to his livelihood, Mr. Hareshah was forced to find another source of income and opened a grocery store. The olive tree yield in his land dropped from an average of 50 containers of oil per season to about five. The difference in income he draws from agriculture before and after the construction of the fence reaches 25,000 ILS per year.

C. **Petitioner 3**, [redacted] **'Amar**, is a resident of Qaffin, married and father of seven. Mr. 'Amar's family owns 58 dunams in several plots of Qaffin lands and in other lands on the Palestinian side. Before the fence was built, the family grew olive trees, tomatoes, sesame, watermelons, melons, herbs, wheat, barley, almonds and more. They relied mainly on almond and olive sales for their living. In the years that followed the construction of the fence and because of the access restrictions, all the almond trees dried up and farming income dropped to a third of what it was prior to the construction of the fence. Mr. 'Amar has also suffered humiliating treatment by the soldiers stationed at the gate on more than one occasion. For example, he was asked several times to throw out the food he had brought with him when he went out to work in the seam zone. In 2017, his farmer permit application was denied on the (erroneous) claim that the plot was not in the seam zone. The decision was overturned after lengthy, exhausting proceedings, in which Mr. 'Amar was represented by HaMoked: Center for the Defence of the Individual.

D. **Petitioner 4**, [redacted] **Sabah**, is a resident of Qaffin, born in 1965, married and father of seven. He is a member of the Qaffin Municipal Council and has served as mayor. Mr. Sabah's family owns 2.5 dunams of land in Plot [redacted], Lot 6 in the Qaffin lands in the seam zone. Until the fence was built, Mr. Sabah and his family graze flocks in the seam zone and made their living selling dairy products and sheep. In the years after the fence was built, given the restrictions on access and on grazing flocks in the seam zone, Mr. Sabah was forced to sell most of the flock. The family also drew some income from selling olive oil produced from an olive grove in the plot. In the past, 50 to 60 containers of olive oil, which brought in about 25,000 ILS per year, were produced from the grove. Yield has now declined to an average of just five oil containers each year. As the financial situation of the family deteriorated, Mr. Sabah was forced to lease farmland on the east side of the fence and look for construction work in Israel, which he was able to do until he was put under a security ban in 2015.

E. **Petitioner 5**, [redacted] **Hussein**, is a resident of Nazlat 'Isa, born in 1957, married and father of seven. Mr. Hussien's family owns 15 dunams of land in Plot [redacted], Lot 2 in the Nazlat 'Isa lands in the seam zone. The land was passed down by his mother, and her father before her. Until the fence was built, the family produced and sold 50 to 60 containers of olive oil every season. In 2019, a soldier stationed at the Nazlat 'Isa confiscated his permit without stating why.

F. **Petitioner 6**, [redacted] **Daud**, is a resident of Nazlat 'Isa, born in 1961, married and father of four. Mr. Daud's family owns six dunams of land in Plot [redacted], Lot 2 in Nazlat 'Isa. The separation fence runs through his plot, splitting it in two. Until the fence was built, the land was used to grow citrus trees and produced 400 to 500 crates of fruit each year. Currently, given the restrictions on access and cultivation tools and materials, the crops have been mostly replaced with olive trees, which are much less profitable. Mr. Daud still grows seasonal crops such as tomatoes, eggplant and wheat in the land he has on the east side of the fence.

G. **Petitioner 7**, **Taysir Fathi Taha 'Amarneh**, is a resident of the village of Akkabah, born in 1963, married and father of eight. Mr. 'Amarneh serves as the head of the Akkabah Village Council. His family owns 200 dunams in several plots in Lot 3 of the Akkabah lands in the seam zone. Until the fence was built, family lands were used for growing seasonal crops such as okra, tobacco, wheat and barley. Following the construction of the fence, between 2008 and 2014, 60-80 dunams were used to grow tobacco. In the past year, due to restrictions on access and use of farming equipment, as well as the reduction in permits given to farm laborers, the family has had to reduce tobacco to just three dunams. The family's olive grove yield has also dropped from 300-400 kg of olive oil every year to 50-80 kg per year. The family's sheep and goat flock was reduced from 400 prior to the fence to 100 today.

141. **According to these figures, the result of all the above is shocking: Yield in olive groves belonging to the villages, crops in their fields and hothouses have all but disappeared. Without permits to bring in farm laborers, particularly after the significant permit policy changes of 2015, the short opening hours of the gates and**

the restrictions on bringing in farming equipment - all together have resulted in the following:

A. **The number of individuals eligible for farmer permits fell between 60% to 90%;**

B. **Tree yield in the seam zone is lower than that of trees outside it by 50% to 78%;**

C. **Overall effective yield is 10% of what it was before the fence was built.**

E. Colonel (reserves) Shaul Arieli's expert opinion on the security benefits of the route and the possibility of relocating it to the Green Line

142. Before moving on to the legal arguments, we wish to present the expert opinion provided by Colonel (reserves) Shaul Arieli, examining, at the Petitioners' request, the possibility of relocating the section of the fence discussed herein to the Green Line from a security perspective.

A copy of Col. Shaul Arieli's expert opinion is attached hereto and marked Exhibit 15.

143. Colonel Arieli reviewed the existing and the alternative route according to the parameters the defense establishment put in place for the separation barrier and reached the conclusion that **the alternative route is more beneficial in terms of security than the existing route.**

144. As stated in the conclusion of the expert opinion, the reason for this is that a route matching the Green Line (with slight corrections due to topography) **improves security responses** in all the following aspects:

> [B]arrier crossing, early detection, dominating terrain in observation and fields of fire, proximity to urbanized terrain, security of troops operating along the barrier, reduction of barrier length, reduction in the number of agricultural gates, drastic reduction of permits for village residents, reduction of barrier and agricultural gate maintenance costs.

145. The significance of this expert opinion will be revisited in the section concerning the legal arguments, in the context of proportionality, both in the sense of least injurious means and proportionality in the narrow sense.

Part III: The legal argument

A. The violation of Petitioners' rights

146. The restrictions brought on by the separation barrier in the section that is the subject of this petition, coupled with Respondents' policies of policing and limiting landowners' connection to their lands grievously impede access to lands by the landowners, members of their communities and their employees, and the landowners' ability to exercise their property rights. The access restrictions that come with the permit regime violate Petitioners' rights to property, freedom of occupation, freedom of movement, as well as the most fundamental right to maintain their spiritual, cultural and familial connection to their lands, which forms an integral part of their identity and a fundamental element of their right to dignity - the right to culture and community life.

147. The winding fence, and the permit regime that comes with it, have created a reality in which areas that were once a rich, thriving source of income, a reason on their own for family and cultural gatherings for generations of farmers and landowners have become forbidden zones, deserted, barren, out of bounds unless one proves an "agricultural" need according to standards that are alien to the landowners and their needs.

148. These rules that define "agricultural need" and stipulate, based on certain financial parameters, that landowners do not need their crops (in "minuscule" plots for instance), or that their connection to the land and need for it is not genuine and does not require work beyond a certain amount of time or labor beyond a certain level, result in the complete cessation of cultivation in lands used for generations and the elimination of the traditional family cultivation of lands. This harm touches the core of the Respondents' obligations toward protected persons, and it contravenes the Respondents' undertakings before this Court and before residents with lands in the seam zone.

149. Given the fundamental principles regarding the powers of an occupying country in the areas it holds under belligerent occupation, the laws of occupation contain several specific provisions that limit the capacity of the occupying power to breach the rights of protected persons. These rights have also been enshrined in various human rights instruments.

150. In the matter at hand, as stated in the previous part, the section of the fence that is the subject of this petition violates the rights of thousands of protected persons in every aspect, including property rights, freedom of movement and the ability to make a living.

151. Classic, fundamental liberal rights have not been left out of the laws of belligerent occupation, and consequently, residents of an occupied territory are not deprived of these rights (contrary to civil rights such as voting and running for office, which are suspended during occupation). The modern, international law of occupation has codified the array of rights and obligations in the relationship between occupier and occupied over the course of the 19th Century, and in the process of drafting The Hague Regulations in the early 20th century (which is commonly believed to have been the process of recording existing customary international law). This law is designed primarily to protect civilians living under occupation, granting them numerous rights originating in human rights philosophy which developed in tandem:

> The international law of belligerent occupation lays down the rights and obligations of the belligerent power in occupation of foreign territory. The law of belligerent occupation has undergone major development over the past two centuries: while the population of such territories originally had virtually no rights at all, their status and rights have now been greatly improved and are securely anchored in international law.
>
> …
>
> Belligerent occupation is a form of foreign domination. Its effects on the population are mitigated by the provisions of international law on belligerent occupation. Hence Geneva 4th Convention appears as a bill of rights with a catalogue of fundamental rights which, immediately upon occupation and without any further actions… becomes applicable to the

> occupied territory and limits the authority of the occupying power.
>
> (**The Handbook of Humanitarian Law in Armed Conflicts** (Dieter Fleck (editor), Oxford Un. Press, 1995), p. 240)

152. The "bill of rights" of protected persons, therefore, includes numerous rights, the central of which is the right to life and **dignity**, noted in Articles 27 of the Geneva Convention and 75 of its First Protocol.

153. We focus first on the right to property. Article 46 of The Hague Regulations prohibits the expropriation of private land in occupied territory (emphasis added):

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

Note well: Expropriation is prohibited with no exceptions, including security needs.

154. Article 23(g) of The Hague Regulations prohibits the destruction or seizure of enemy property unless "imperatively demanded by the necessities of war."

155. Article 53 of the Geneva Convention, which also addresses destruction and damage of private and public property, stipulates a narrower legal formula for the circumstances in which harm would be permitted (emphasis added):

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, **except where such destruction is rendered absolutely necessary by military operations**.

156. As demonstrated, military necessity (and not, for instance, the absence of a farming necessity) is the *conditio sine qua non* for impinging on the property rights of residents of an occupied territory, and even when the condition is met, expropriation remains absolutely prohibited with no exceptions.

157. The duty to see to the livelihoods and welfare of residents of the occupied territory also stems from the laws of belligerent occupation. The aforesaid duty is part of an array of obligations the occupying power has towards protected persons: The occupying power must facilitate a properly functioning education system (Article 50 of the Convention. The article goes into great detail about the duty to register children and supervise institutions that care for orphans, and more); the occupying power is also responsible for ensuring residents of an occupied territory receive basic supplies (Article 55); making sure a proper health care system and hospitals are in place (Articles 56-57); the operation of religious services (Article 58). The occupying power is responsible for food supply (Article 55) and humanitarian aid programs (Article 59, though this does not absolve it of the responsibility to provide basic supplies - Article 60).

158. Alongside all the above, freedom of movement and the right to a living are also enshrined in the laws of occupation, deriving at the same time from the duty to restore public order and safety, the duty to provide for the residents' basic needs and the right to dignity. The latter, in international law as in Israeli constitutional law, gives rise to many other fundamental rights.

B. Specific rights

I. The right to property

159. As noted above, the separation fence and permit regime violate the right to property of the Petitioners and members of their communities who are denied access to land they own and whose ability to exercise their property rights in these lands is denied. The right to property is enshrined in Article 17 of the Universal Declaration of Human Rights, which notes the right to property and the prohibition on its arbitrary denial.

160. Withholding and limiting access to land deny landowners their source of income. The right to a livelihood is enshrined in Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights (1966). These articles focus first on the right to work and second on the right to choose a place of work.

161. All of the above necessarily violate the right to live in dignity enshrined in Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights. The right to property has also been enshrined in our legal system, as a derivative of Basic Law: Human Dignity and Liberty, and was discussed as far back as the case concerning the evacuation of Elon Moreh in HCJ 390/79 **Duweikat et al. v. Government of Israel** et al., IsrSC 34(1) 1, 4 (1979). In that judgment, Honorable President Landau (as was his title at the time) addressed the gravity of violating the right to property of protected persons:

> [W]hen individual property rights are at issue, one cannot dismiss the issue on the argument of the "relativity" of the right. In our legal system, individual property rights are an important legal value that is protected by both civil and criminal law, and it makes no difference, as regards the right of the landowner for legal protection of his property, whether the land is cultivated or simply rocky terrain.
>
> The principle of protecting individual property also applies in the laws of war, which, on this matter, are expressed in Article 46 of the Hague Regulations. A military administration which seeks to infringe upon individual property rights must present a legal source thereto and cannot exempt itself from judicial review of its actions on the claim of non-justiciability (page 14 of the judgment (Hebrew)).

162. The court has repeated this in countless judgments. So, for instance, in HCJ 1980/03 **Bethlehem Municipality v. State of Israel Ministry of Defense**, (February 3, 2005) (hereinafter: Bethlehem Municipality):

> The right to property is also a fundamental human right. This right has been recognized as a fundamental right worthy of the

> protection of this Honorable Court (see, e.g., HCJ 390/79 **Duweikat v. Government of Israel**, IsrSC 34(1) 1, 14-15; HCJFH 4466/94 **Nuseibah v. Minister of Finance**, IsrSC 59(4) 68, 83-85) and has been explicitly enshrined in Section 3 of Basic Law: Human Dignity and Liberty. This right is also recognized in international law, and in matters concerning belligerent occupation, it is enshrined, among others, in the Hague Convention and the Fourth Geneva Convention (paragraph 20 of the judgment of the Honorable Justice, as was her title at the time).

See on this issue, also -

> [The right to property] is also recognized as a protected constitutional right. It is so recognized under constitutional law in Israel, according to Section 3 of Basic Law: Human Dignity and Liberty. It is protected against violation under international law as well. Infringements on the right to property, including the property rights of the individual are prohibited under the laws of war, unless necessary for military needs.

(HCJ 7862/04 - **Zuhriyyah Hassan Murshed Bin Hussein Abu Daher v. IDF Commander in Judea and Samaria**, IsrSC (59)5, 368, p. 376-377).

163. In the judgment delivered in the case of the illegal outpost of Migron on August 2, 2011, HCJ **Yusef Musa 'Abd a-Razeq al-Nabut et al. v. Minister of Defense**, the Honorable Court addressed the positive obligation to uphold Palestinian residents' property rights. Paragraph 16 of the judgment notes as follows:

> ... the guiding, decisive line for our judicial rulings is that state authorities must uphold and enforce the law in the area, particularly when a breach of the law violates the property rights of protected persons. As noted previously, this is congruent with the declared position of the state, as presented to us on many occasions. There is no dispute that, by law, no community must be established on land that is privately owned by Palestinian residents. The Respondents agree that interference with the right to property of these residents must be considered very grave. Following on this, the state has prioritized this principle for law enforcement in the area. The official policy of the Government of Israel is congruent with the basic principle that has guided this court from the earliest hearings on the issue of building communities in the Judea and Samaria Area.

II. The right to movement

164. The existing route of the separation barrier in the section discussed in this petition, together with the Respondents' permit regime policies, severely curtails the freedom of movement of protected persons who own land in the seam zone. The right to freedom of movement is enshrined in Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights of 1966.

165. As stated, access restrictions go beyond a violation of the right to freedom of movement alone, and lead to additional violations of rights that require freedom of movement to be exercised.

166. The right to freedom of movement has been recognized in Israeli jurisprudence as a fundamental right in the context of the rights of Palestinians in the West Bank as well. So, for instance, in paragraph 15 of her judgment in the **Bethlehem Municipality** case, Honorable Justice Beinisch held:

> Freedom of movement is a basic human right. We have stated that in our legal system, freedom of movement has been recognized both as a right per se, and as a right derived from the right to liberty. Some contend that it is also a right derived from human dignity (see paragraph 15 of the judgment and the citations therein). Freedom of movement is also recognized as a fundamental right under international law, and it is enshrined in a number of international instruments.

167. This Honorable Court has also ruled that the right to freedom of movement holds considerable weight in the context of denying someone access to their own land. See: HCJ 9593/04 **Morar v. IDF Commander in Judea and Samaria**, IsrSC 61 (1) 844, 863 (2006), where the following was stated:

> It is important to emphasize that in our case we are not speaking of the movement of Palestinian residents in nonspecific areas throughout Judaea and Samaria but of the access of the residents to land that belongs to them. In such circumstances, where the movement is taking place in a private domain, especially great weight should be afforded to the right to freedom of movement and the restrictions imposed on it should be reduced to a minimum. It is clear that restrictions that are imposed on freedom of movement in public areas should be examined differently from restrictions that are imposed on a person's freedom of movement within the area connected to his home, and the former cannot be compared to the latter.

III. The right to culture and community life

168. In addition to the financial harm suffered by protected residents as a result of reduced access to their lands, cutting off the Petitioners and members of their communities from their lands and applying the rules of the Standing Orders with respect to agricultural needs constitute a severe violation of the rights of protected persons to cultural and community life. This is the case as these rules disrupt the customs of family farming that are deeply rooted in the culture of local residents and impede their profound connection to lands passed down through the generations.

169. Policing the Petitioners' connection to the land and subjecting it to financial feasibility calculations that result in limits on the number of days landowners may cultivate their lands and the number of people (including heirs and relatives) eligible for permits severely undermine the traditions and cultural life of the local population and their historical ties to the land.

170. The right to participate in a community's cultural life is enshrined in Article 27(1) of the Universal Declaration of Human Rights:

> Article 27:
>
> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

171. The International Covenant on Economic, Social and Cultural Rights (1966), signed and ratified by Israel, also stipulates in Article 15 (1) and 15(2) thereof the duty states have to respect the right to a cultural life, as follows:

> Art. 15:
>
> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) **To take part in cultural life**;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. **The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture**.

172. The value in protecting the cultural, traditional and spiritual connection indigenous people have to the land has also found expression in the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169), which sets forth:

> Article 13
>
> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
>
> The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

173. Moreover, Article 23 of the Indigenous and Tribal Peoples Convention enshrines the duty to acknowledge and respect the strong ties indigenous peoples have to natural resources in their environment and their financial and cultural reliance on them:

> Article 23

> 1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

174. **Thus, the fence harms protected rights of residents of occupied territory.** International law, like Israeli law, conditions the legality of such harm on the principle of proportionality (see paragraph 37 of the judgment in **Beit Sourik**). In the matter herein, we assess the harm through the prism of the proportionality rules established in Israeli administrative law, and more specifically, in **Beit Sourik**, which governs the matter herein.

C. The route of the fence fails to meet the tests of proportionality established in case law

175. The Petitioners will argue below that the diversion of the separation wall into the occupied territory and the creation of an enclave in the Qaffin area, coupled with the permit regime instituted in the seam zone by the Respondents stands in contrast to the jurisprudence of this Honorable Court, disproportionately violates the right to property of the Petitioners and other residents of the area and inflicts serious, colossal, damage on their fabric of life.

176. It will also be argued that the provisions the Respondents entered into the Standing Orders with regards to calculating the size of agricultural plots, as well as the inclusion of family members in the farm laborer quota disregards the cultural tradition of family farming and fails to adequately consider the spiritual and cultural ties local communities have to their lands.

177. Therefore, the Petitioners will argue that the permit regime cannot and, likely, is not designed to allow Palestinian agrarian life in the Qaffin section. The eligibility changes in the Standing Orders reveal a trend towards gradual dispossession of the Petitioners who own land in the seam zone from their lands and severe interference in their ties to their lands.

178. The Petitioners will further argue that the counter-weight to the scales of proportionality - the security need - has changed and is now much lighter than it was at the time the fence was constructed, in the midst of the second intifada. In any event, there are no Israeli communities in the Qaffin section, no Israeli-owned land and no Israeli presence, nor should there be such a presence. Therefore, the security need for the enclave created by the fence, west of the villages where the Petitioners reside is weak. This weakness is particularly apparent when the intifada and fighting have been absent for more than a decade.

179. We recall that the Honorable Court has acknowledged the authority to build the fence as emanating from the exclusion written into Article 52 of The Hague Regulations and Article 53 of the Fourth Geneva Convention. Both articles prohibit interference with private property, but do allow an exception should there be a military need for such interference temporarily, as stated above.

180. In light of the aforesaid, the Petitioners will argue that given the attributes of the Qaffin enclave in terms of security, and particularly given the change in security circumstances since the construction of the fence, there is no longer a security need for a barrier in the Qaffin section that is not aligned with the Green Line.

181. The Petitioners will also argue that the violation of the Petitioners' and their community members' fundamental rights to freedom of movement, property, livelihoods and culture, make the fence disproportionate both in the sense that there is a less injurious alternative (a barrier on the Green Line) and according to proportionality in the narrow sense, meaning the harm to the Petitioners greatly outweighs any security benefit compared to the alternative.

D. The existence of a less injurious alternative

182. The deviation from the Green Line causes harm beyond what is necessary, since the legitimate purpose of protecting residents of the State of Israel can be achieved without causing any (or greatly reducing) the harm to residents of the occupied territory. As stated, this may be achieved by aligning the route of the fence with the Green Line, with technical variations necessitated by the topography of the area, which do not necessarily require incursions into the occupied territory, but rather by diverting the fence into the State of Israel.

183. We recall that the relevant Israeli communities in this section are the Metzer kibbutz in the middle of the route, and Mitzpe Ilan to its north. Both communities are located within the sovereign territory of the State of Israel, at a great distance from the existing route and from the Green Line - the possible alternative route.

184. As stated, a security expert opinion prepared by Colonel (reserves) Shaul Arieli is attached to this petition, wherein Col. Arieli examined the route of the fence in the section that is the subject of the petition herein compared to an alternative route aligned with the Green Line. The examination was conducted according to the proportionality tests instituted by the Honorable Court and from a security planning perspective based on criteria developed by the defense establishment itself.

185. Colonel Arieli reached the conclusion that a route along the Green Line would be far more beneficial to security than the current route. Colonel Arieli asserts the following, among other conclusions:

- The proposed route along the Green Line would be located in open terrain that provides far better detection capabilities than the current route. The existing route runs immediately adjacent to the built-up area of the Palestinian villages, which reduces potential for early detection of possible infiltrators. In result, therefore, relocating the fence to the route of the Green Line will improve capacity for identifying suspected infiltrators before they reach the barrier.

- The proposed route would create a pursuit space that is larger relative to such spaces in other sections of the fence. While the existing route of the fence does provide a larger pursuit space, aligning the fence with the Green Line would still leave a pursuit space that is larger than commonly found in other parts of the fence, while significantly reducing the infringement on the rights of the Palestinian residents.

- The proposed route of the fence also improves security responses in terms of observation, as it is placed on dominating terrain, which offers superior protection for forces patrolling along the route compared to the current route.

- Transferring much farmland to the east side of the fence would reduce the number of permits required, and the number of farmers crossing to the west side. Reducing this friction and presence west of the barrier is also a security advantage.

186. In conclusion, not only is there a much less injurious alternative providing the same results, in fact, this alternative is **superior and delivers better results in terms of security**.

187. Thus, according to the criteria in Colonel Arieli's opinion - military mission response, seam zone and security pursuit, the route selected in the section which is the subject of the petition fails the test of less injurious means as an alternative is available that is less intrusive than the current route and meets security needs better than the existing route.

E. The undertakings made by Respondents 1-2 to preserve landowners' connection to their lands cannot be upheld in the current route

188. The facts underlying this petition leave no room for doubt. The separation fence and the permit regime, in their current format, will eradicate Palestinian life in the seam zone section that is the subject of this petition.

189. On the presumption that Respondents' declarations that this is not their intent should be believed, a solution must be found to allow Palestinian life in the seam zone. Our position is that the current route makes that impossible.

190. **If anything has been proven in the 15 years since the fence was built, it is that a regime of permits, gates and roadblocks is incompatible with sustainable agriculture.**

191. This is not a question of one condition or another within the permit regime, but the idea that lies at its foundation, certainly in an area in the vicinity of which there are no Israeli communities. The fence and the regime that comes with it are geared towards limiting movement into the space. This policy is destined to grow stricter over time, just as the number of individuals with ties to the lands grows over time.

192. Therefore, the Petitioners maintain that any route that means farmers from the Petitioners' villages must obtain permits to access their lands would preclude preserving the connection to the land - a promise made by the Respondents in the fence petitions heard a decade ago.

Conclusion

193. Fifteen years after the construction of the separation barrier, the cumulative testimonies of residents of the area who own farmland trapped in the seam zone and existing figures about the scale of the harm inflicted as a result of the separation of local residents from their lands leave no room for doubt as to the magnitude of the violation of these residents' rights caused by the construction of the fence. They force the conclusion that the fence, in the route chosen, is illegal, or, at least, no longer legal.

194. Therefore, the situation depicted above compels a re-evaluation of the balance established in jurisprudence on the legality of the fence and the proportionality of the harm it causes, given the change in the factual foundation. When the decision to build the fence was made, the future harm to Palestinians was speculative. Today, however, we have access to figures that allow for an accurate evaluation of the full impact the fence has had on the lives of local residents.

195. The change in the security situation since the turn of the millennium and the wave of terrorist suicide attacks in Israeli streets at the time, which motivated the decision to build a separation barrier, also compels a re-evaluation, which leads to a different result specifically for the Qaffin section.

196. International humanitarian law, international human rights law and our own constitutional law all enshrine freedom of movement, the right to a livelihood and the right to property as fundamental human rights. These rights have clearly been severely violated by the separation fence, which cuts off individuals from their lands and sources of income. Furthermore, it is clear that the fence could have been built in a manner that would not have taken land away from local residents or violated their aforesaid rights.

197. In the case at hand, the professed purpose - security - can be achieved with a fence aligned with the Green Line, with slight corrections necessitated by topographic or engineering constraints, which would divert the fence into Israel rather than into the occupied territory. Even if this route has some disadvantages compared to the route that incurs into the West Bank, the security disadvantage is not dramatic enough to justify the colossal harm to the people of Qaffin and Akkabah.

198. Therefore, to our understanding, at this point in time, the route of the fence fails to meet the second and third proportionality subtests, which also cover situations in which the less injurious means presents some security disadvantages.

199. It is our position that the manner in which the permit regime is applied, which has the effect of emptying the seam zone of Palestinians by reducing permit eligibility and issuance, without any security logic or justification for this policy, supports the conclusion that the route of the fence is disproportionate.

200. The permit regime was presented by military and state representatives as a mechanism that would guarantee that communities cut off from their lands would be able to maintain their connection to it. The permit regime was meant to balance the harm to Palestinians, to create proportionality. So, for instance, in **'Alian**, the court ruled that "In assessing the proportionality of the harm produced by the fence, the geographic route, the permit regime and crossing points to lands remaining west of the fence go hand in hand," see: HCJ 4825/04 **Muhammad Khaled 'Alian v. Prime Minister** ([reported in Nevo] March 16, 2006).

201. However, the permit regime turned out to be a tool for dispossession that made it increasingly impossible for farmers to preserve their ties to their lands over the years. In the Qaffin area, the permit regime turned out to have caused a near complete collapse of local farming. A 90% drop in yield constitutes debilitating harm to the local economy.

202. The alibi that was cracked in the early years, has been shattered in recent years. In the Qaffin section, at the very least, the fence has been left with nothing to counterbalance the harm it causes.

203. All this is added to the obvious changes in security conditions, which weaken the initial justification for the route chosen for the fence.

204. The Petitioners believed (quite naively, it must be said) Civil Administration personnel when they said a solution would be found for every problem that would arise from the construction of the wall. It took a decade and a half of living in the shadow of the separation fence and permit regime for them to learn that these were nothing but empty promises.

205. The Petitioners mustered the courage, and after much soul searching, decided to seek assistance from this Honorable Court.

206. Given all the aforesaid and for all the reasons noted, the Honorable Court is requested to issue an Order Nisi, as requested at the opening of this petition, and, after receiving Respondents' response, render it absolute.

207. The Honorable Court is also moved to issue a costs order against the Respondents for Petitioners' legal expenses and fees, VAT added, as required by law.

Date: _____

Michael Sfard, Adv.	Haya Abu-Warda, Adv.

Counsel for Petitioners