

HCJ 8414/05

Ahmed Issa Abdallah Yassin, Bil'in Village Council Chairman

v.

1. The Government of Israel
2. The Military Commander in the West Bank
3. Green Park Inc.
4. Green Mount Inc.
5. The Land Redemption Planning and Development Fund
6. Ein Ami Enterprise & Development Company Ltd.
7. The Modi'in Illit Local Council
8. Heftsiba Construction and Development Ltd.

The Supreme Court sitting as High Court of Justice

[February 18 2007]

Before President D. Beinisch, Vice President E. Rivlin & Justice A. Procaccia

Petition for an *order nisi* and an *interlocutory injunction*

For petitioner: Michael Sfar

For respondents no. 1 & 2: Avi Licht

For respondents no. 3, 4 & 6: Renato Jarach, Shira Hay-Am

For respondent no. 5: Moshe Glick

For respondent no. 7: Gil'ad Rogel

For respondent no. 8: Yoram Bar Sela

JUDGMENT

President D. Beinisch:

This petition is against Land Sequestration Order no. Tav/40/04 (Boundary Alteration), issued by the military commander for construction of the security fence on land of the Village of Bil'in, east of the settlement of Modi'in Illit in the Modi'in Bloc, in the Judea and Samaria area.

Background

1. Modi'in Illit is an Israeli settlement in the area of Modi'in, lying east of the boundary of the Judea and Samaria area (hereinafter – "*area*"), north of road 443. Living in it are approximately 32,000 residents, most of whom are ultra-orthodox. Near Modi'in Illit are a number of Palestinian villages. As part of the Israeli Government's program to erect a security fence between Israel and the *area*, the route of the fence was planned to pass through this area, at "stage C" of the erection of the fence. The fence in this area separates the Modi'in bloc settlements (Mattityahu, Modi'in Illit and Hashmona'im) from the Palestinian villages of Bil'in, Saffa, Harbata, Dir Qaddis, Ni'lin and Al Midiya. It is intended to protect the residents of Modi'in Illit, and the residents of the Modi'in bloc and the city of Modi'in which are adjacent to it. The petition before us opposes the section of the fence being built on land of the village of Bil'in, a Palestinian village east of Modi'in Illit in which approximately 1,700 residents live. The route of the fence on the land of Bil'in is the continuation of the route passing through the land of Harbata, which is north of Bil'in. The route continues south on land of the village of Saffa, until it reaches road 443.

2. Three sequestration orders were issued in early 2004 for the purpose of the erection of the fence east of Modi'in Illit: Sequestration Order Tav/27/04 (of March 21 2004); Sequestration Order Tav/40/04 (of April 25 2004); and Sequestration Order Tav/44/04 (of April 25 2004). In the framework of examining administrative appeals filed by Bil'in residents against the route, the parties held a number of joint meetings and surveys in the field. On May 13 2004 the residents were informed of the rejection of their appeals. As a result of the judgment in the *Beit Sourik* case (HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 807), the military commander reexamined the fence route, in the light of the standards determined in that judgment. An amendment of the route was decided upon, by which the section of the fence passing through the Modi'im riverbed (west of Bil'in) would be moved west, so that the river crossing point would be 800 meters from the original crossing point. The route amendment was presented to the residents in October 2004, and on November 24 2004 an amended order of sequestration was issued – Sequestration Order Tav/40/04 (Boundary Alteration) – which is the order attacked in this petition.

3. The altered fence route that passes through land of the village of Bil'in is 1.7 km. long. It takes up 260 dunams. The route is as far as two kilometers from the outermost houses of Modi'in Illit. It leaves about one half of the land of the village of Bil'in (according to the British Mandate parcellation of the village lands) on the "Israeli" side of the fence. According to petitioner, the extent of Bil'in village lands which will remain in the "seamline" area between the fence and the boundary of the Judea and Samaria area is approximately 1,980 dunams, part privately owned by Bil'in residents and part village land cultivated by its residents. According to the data presented by respondents no. 1 & 2 (hereinafter – "*respondents*"), the route leaves approximately 1,647 dunams of Bil'in village land on the "Israeli" side, according to the British Mandate parcellation of the village land (the total of Bil'in land according to that parcellation is approximately 4,085 dunams). According to respondents, 678 dunams of the land to remain in the "seamline" area between the fence and the *area* boundary are privately owned by residents of the village, and the rest are within the boundaries of Israeli planning schemes. Approximately 196 dunams of the land are cultivated.

4. The route of the fence on Bil'in land makes an eastern flank around areas for which there are planning schemes for the expansion of Modi'in Illit; schemes which are at various stages of planning. One of the schemes is planning scheme 210/4/2, for construction of a residential neighborhood called "Naot HaPisga" east of Modi'in Illit, north of the Dolev riverbed. The great majority of the neighborhood is planned to be built on land of the village of Harbata. The "Naot HaPisga" neighborhood is being built according to a valid planning scheme, and infrastructure work for erecting the neighborhood began in 2004. 2,750 apartment units are planned to be built in the "Naot HaPisga" neighborhood, in high rise buildings. On the ground, to date, hundreds of apartment units have been built, and land development work has been carried out.

5. There is a planning scheme for constructing an additional residential neighborhood by the name of "East Mattityahu" south of the "Naot HaPisga" neighborhood, on the southern bank of the Dolev riverbed. The original plan for constructing the neighborhood was detailed planning scheme 210/8, which was approved and about which notice of coming into force was published in 1999. According to scheme 210/8, 1,500 apartment units have been planned in "East Mattityahu", on an area of 900 dunams which has been declared "state land". The main, central part of scheme 210/8 lies in the municipal area of Modi'in Illit, although parts of it stray beyond that settlement's area of municipal jurisdiction. *De facto*, until 2004, scheme 210/8 had not begun to be implemented. In the meantime, private developers of "East Mattityahu" and the Modi'in Illit Local Council began to advance an amended scheme for the construction of the neighborhood – scheme 210/8/1, which was supposed to make it possible to double the number of apartment units in the neighborhood to 3,000, by denser construction, while the area of the neighborhood would remain essentially similar to the area according to scheme 210/8. In February 2004 the settlement subcommittee of the Supreme Planning Council of the Area of Judea and Samaria (hereinafter – "*the settlement subcommittee*") approved scheme 210/8/1 for deposit, and notice of deposit was published in August 2004. However, during 2004, when scheme 210/8/1 was being considered by the planning authorities, contracting companies had already begun its implementation on the ground. It turns out that the developers took the law into their own hands and began to build the neighborhood according to the future scheme 210/8/1 before it had come into force. As a result, wide scale illegal building work was carried out in "East Mattityahu" starting in 2004.

6. In September 2005, soon after the petition before us was submitted, scheme 210/8/1 was approved to come into force. Note, in this context, that scheme 210/8/1 is divided into two parts: western phase A, and eastern phase B, including 1,082 apartment units. In the phase A area building may begin after the approval of the scheme. However, according to a decision of the Minister of Defense of August 2005, phase B cannot be developed and built in the first stage, and its marketing in the future will be conditional upon receiving additional approval from the Minister of Defense. *De facto*, building took place in the western area of the "East Mattityahu" neighborhood, in which hundreds of apartment units were built in three zones: two zones of respondent no. 8 and a zone of respondents no. 3-5. In one of respondent no. 8's zones, in which building had already begun in 2002, eight buildings have already begun to be inhabited, to various extents. All of the buildings were constructed

according to the planning in scheme 210/8/1 and not scheme 210/8, which was the scheme that was in effect at the time of their construction.

7. Furthermore, as a result of the petition, the State Attorney's Office became aware of various faults in the proceedings to approve scheme 210/8/1, regarding, *inter alia*, the scheme's deviation from the area of Modi'in Illit's municipal jurisdiction. In the framework of the preparation of the response to the petition, the State Attorney's Office instructed the respondents not to publish notice of scheme 210/8/1's coming into force, as it was of the opinion that planning proceedings should be commenced anew, from the stage of deposit. Respondents also decided to reexamine claims of ownership of part of the land to which the scheme applies. Against that background, an additional petition was submitted by petitioner and the "Peace Now" movement, focusing upon the planning aspect of the "East Mattityahu" neighborhood (HCJ 143/06 of January 4 2006). In that petition, this Court was asked to annul the approval for coming into force which the settlement subcommittee had granted to planning scheme 210/8/1 in September 2005, and to order action necessary in order to enforce planning and construction law in "East Mattityahu". As soon as the petition was submitted, an interim injunction was issued (on January 6 2006) ordering immediate halt of any building without a building permit taking place in the area of planning scheme 210/8 and the area of planning scheme 210/8/1. The Court also ordered immediate cession of any activity to inhabit the buildings in the zone and prohibited transferring possession of additional apartment units in the zone. Entry into and use of apartment units were also prohibited. Later (on January 12 2006) an additional provision was added to the interim injunction, according to which all construction work taking place in the zone pursuant to building permits, whether pursuant to the original planning scheme (210/8) or the new planning scheme (210/8/1), was to be halted. As a result of severe financial difficulty encountered by the Heftsiba company (respondent no. 13 in HCJ 143/06, and respondent no. 8 in the petition before us), a wave of squatting on the part of apartment purchasers occurred at the company's building sites, including the Heftsiba site in the "East Mattityahu" neighborhood. As a result of that development, the Jerusalem District Court (Judge *D. Cheshin*) decided on August 6 2007 (in the framework of Bankruptcy Case 4202/07) that "at this point, purchasers are not to be evicted from apartments they entered". On that basis, the Supreme Court decided on August 27 2007, in its hearing of HCJ 143/06, that despite the existence of the interlocutory injunction, "at this point, and as long as all of the facts have not become clear regarding the Heftsiba company and the purchasers' chances of receiving the apartments they bought, or, alternatively, restitution of the consideration they paid for them, the status quo on the ground shall not be altered." It was further determined that no action would be taken at this point to evacuate the apartment residents who began squatting in Heftsiba apartments from August 1 2007 until August 6 2007.

8. After the petition before us was submitted, the agencies of the State ordered the annulment of the planning proceedings of scheme 210/8/1 and ordered that they be started again from the very beginning. Scheme 210/8/1 was redeposited. That scheme included enclaves of private land belonging to Palestinians from the village of Bil'in. The new scheme determined, regarding those enclaves, that they are not a part of the scheme, that any construction on or use made of the private enclaves shall cease, and that the *status quo ante* shall be reestablished by evacuating buildings, building material and any other refuse, and covering said area with garden soil. In

order to allow the initiators of the scheme to fulfill said precondition, work to reestablish the *status quo ante* in the private "enclaves" was excluded from the interim injunction. The renewed planning scheme was approved for deposit on February 15 2006, notice of its deposit was published on March 3 2006 (in Hebrew and Arabic language newspapers), and objections to it were heard. On July 3 2006 the settlement subcommittee made its decision regarding the objections. Subject to a number of changes in the scheme, and fulfillment of additional conditions in the scheme's bylaws, the committee decided to recommend to the Supreme Planning Council that it carry the scheme into force. On January 31 2007 the Supreme Planning Council made its decision to carry into force the new version of scheme 210/8/1. After the decision to carry the scheme into force and after the changes required by the decision had been made in the scheme's provisions, notice of the scheme's coming into force was published in the Hebrew and Arabic press in February 2007.

9. The route of the fence on Bil'in land has been discussed by this Court in a number of previous petitions. After sequestration orders Tav/27/04 and Tav/40/04 were issued (and after their amendment in November 2004) the Bil'in and Saffa village council chairmen submitted a joint petition against the route of the fence (HCJ 11363/04). In the framework of that petition an announcement stipulated by all the parties was submitted to the Court. The stipulated announcement relates, *inter alia*, to two sections of the fence on Bil'in land: "section C" beginning at the boundary of the land of Bil'in and Saffa and continuing north until the Dolev riverbed, and "section D", from the Dolev riverbed until the boundary of the land of Bil'in and Harbata. The announcement stated:

"C. From the land of the villages of Saffa and Bil'in, to the path east of the single house [section C], the parties agree that work toward implementation of sequestration order Tav/40/04 shall be carried out. The width of the area in which construction will carried out shall not, generally, exceed 50 meters. In carrying out the work, an effort shall be made to minimize harm to agricultural crops, and to keep the route on the western part of the sequestration order zone. The work shall begin only after the marking of the route on the ground, after respondents give petitioners' counsel the map of the planning scheme for the southeastern neighborhood of Modi'in Illit, and after receipt of final approval by petitioners' counsel.

D. From the path east of the single house to the boundary of the lands of Bil'in and Harbata [Section D], petitioners shall notify respondents, by December 12 2004 and after respondents have given petitioners' counsel the map of the planning scheme for the southeastern neighborhood of Modi'in Illit, their reply to the proposal which respondents presented to petitioners' counsel regarding alteration of the route."

In accordance with the procedural agreement between the parties, a survey in the field with counsel of the petitioners in HCJ 11363/04 (Ms. Atiyah, adv.) and with representatives of the village of Bil'in was held on December 22 2004. During the survey Ms. Atiyah was given the map of scheme 210/8. It appears, from the State's response to that petition, that despite what had been stipulated, Ms. Atiyah did not

appear at a meeting with respondents regarding sections C and D and did not relay any written response regarding those sections. At the opening of the hearing of said petition, it was relayed on behalf of Ms. Atiyah that the petitioners are rescinding their petition, and the petition was abated (on February 16 2005). The petition having been abated, respondents began implementation of sequestration order Tav/40/04 (Boundary Alteration) and the erection of the fence.

10. After just a few days a number of residents of Bil'in, represented by Ms. Atiya, adv., submitted a new petition (on February 21 2005; HCJ 1778/05). That petition was based on the argument that the fence construction work had begun without them having been given the right to a hearing and to appeal. The new petition did not mention the previous petition, which had been abated at the petitioners' request. At the end of the hearing of that petition, the Court ordered the abatement of the petition due to unclean hands (on March 3 2005). The Court wrote in the judgment:

"The fact of the existence – and abatement – of the petition in HCJ 11363/04 is essential and relates directly to the issue at hand. Petitioners, and at very least their counsel, are presumed to be aware of the existence of that petition and the proceedings which took place in its framework. In such circumstances, that lack of mention in the petition before us constitutes truly unclean hands, justifying the abatement of the petition.

Furthermore, considering the proceedings which took place in HCJ 11363/04, it appears that on the merits as well this petition should not have been submitted. Petitioners' arguments (via the chairmen of the village councils and their attorneys) regarding the appropriate route in their areas of residence were heard and discussed in a detailed fashion in the framework of respondents' position in HCJ 11363/04, and they were given serious answers which even led to the stipulation of various procedural arrangements. It is against that background that petitioners chose to retreat from their previous petition and to request its abatement. The petitioners before us have not presented any justification for renewing the hearing of what are the very same issues, in the framework of their present petitions."

Additional proceedings relating to the route of the fence in Bil'in were in HCJ 2874/04. That petition was originally against the route of the fence on land of the Village of Harbata, north of Bil'in. On April 26 2005 a motion to amend the petition was submitted, in which petitioners requested the enjoinder of residents of the Village of Bil'in and to direct the petition against the route of the fence on land of the Village of Bil'in as well. The Court decided to abate the motion to amend the petition "due to laches, due to unclean hands, and due to the fact that Mr. Shabita cannot request amendment of a petition that was submitted by others" (decision of June 14 2005).

The Petition and its Hearing

11. The petition before us was submitted on September 5 2005, on behalf of the chairman of the Bil'in Village Council. Petitioners request the distancing of the fence from the houses of the village, and from the agricultural lands of its residents. When

the petition was submitted, it was decided that it would be scheduled for hearing after judgment in the *Alfei Menashe* case (HCJ 7957/04 *Ma'arabe v. The Prime Minister of Israel* (yet unpublished, September 15 2005)), due to the legal question common to the two petitions, dealing with the effect of the Advisory Opinion of the International Court of Justice at the Hague. The judgment in the *Alfei Menashe* case having been handed down, the parties were asked to submit their updated positions in the petition. Respondents no. 3-6, real estate companies dealing in development and construction of the "East Mattityahu" neighborhood (hereinafter – *the real estate companies*) requested their enjoinder as respondents in the petition. Petitioner was of the opinion that the enjoinder should be made conditional upon proof by the real estate companies of their rights in the land with which the petition deals. The petition was heard on February 1 2006, before a panel consisting of President A. Barak and Justices D. Beinisch and E. Rivlin. Respondents' counsel argued that the petition should be rejected *in limine*. He noted that in the previous petitions as well, the respondents had clarified that the route was planned to protect the new neighborhoods to be constructed in Modi'in Illit, and that is within the authority of the military commander. At the end of the hearing, an *order nisi* as requested in the petition was issued. It was further decided to enjoin the real estate companies, the Modi'in Illit Local Council and the Heftsiba company, which had also built in the "East Mattityahu" neighborhood, as respondents to the petition. The Court did not see fit to issue an interlocutory injunction. Nonetheless, it recorded the State's declaration that a gate at the northern edge of "section C" would not be built, and that said area would remain open for free passage until decision of the petition on the merits.

12. After the affidavits of response were submitted, the petition was heard (on May 14 2006) by President A. Barak and Justices E. Rivlin and A. Procaccia. Colonel (res.) Dan Tirza, who served as the head of the "Color Spectrum" Agency (dealing with the planning of the obstacle route in the "seamline area"), appeared before the Court. Colonel (res.) Tirza provided a survey of the fence route and the considerations taken into account by the route planners. Respondents' counsel once again argued for rejection of the petition *in limine*. She also emphasized that the original scheme for "East Mattityahu" (210/8) was the basis for the route. Its boundaries are nearly exactly like those of the new scheme (210/8/1). The counsel for the real estate companies and the Modi'in Illit council voiced similar positions. Petitioner's counsel claimed, against those arguments, that the expansion of the "East Mattityahu" neighborhood, in which only 80 families presently live, should not be considered. Moreover, part of the construction work on the neighborhood was carried out without a permit, and part according to illegal building permits.

13. At the request of petitioner, we held an additional hearing after the retirement of President A. Barak. In that hearing (on February 18 2007) the parties once more presented their arguments and complaints regarding the route of the fence. Shortly before the hearing we were informed that the Supreme Planning Committee had decided to carry new scheme no. 210/8/1 into force, and that notice of said scheme's coming into force had been published in the press. Petitioner's counsel stated before us that at this time, the construction, *de facto*, is in the western part of the "East Mattityahu" neighborhood. The eastern part of the scheme, which is to be built at a distance as close as 80 meters from the fence, is at a preliminary stage, prior to tenders and prior to development. According to the provisions of the scheme, the implementation of the eastern part of the scheme is conditional upon approval by the

Minister of Defense. Respondents' counsel reiterated that the route was planned on the basis of scheme 210/8, and emphasized that the consideration behind it is a security consideration of defense of future residents. Colonel Ofer Hindi, who presently serves as the head of the "Color Spectrum" agency, also appeared before us at the hearing, stating that an agricultural gate had been built on site, which minimizes the harm to the Palestinian residents and allows them to enter the "seamline area" in order to cultivate their lands. The construction companies added that now, after approval of the new scheme no. 201/8/1, implementation of the plan to construct "East Mattityahu" is not merely a theoretical issue; it will take place with great speed.

14. On May 8 2007, respondents submitted a request to change the status quo, according to which, as per their commitment, a gate was not built at the northern edge of "section C", which would remain, with their consent, open for free passage until decision of the petition. They argued that maintaining the open crossing there is not necessary to fulfill the needs of the local farmers, and it constitutes a security risk and requires deploying a relatively large number of soldiers on site. They thus wished to open the gate three times a day for one half hour, while prohibiting the Palestinians from being in that area at night. On June 12 2007 we decided that opening the fence every day for an hour and a half, as requested by respondents, would worsen the harm to the residents of Bil'in and significantly detract from their access to their agricultural land and their ability to cultivate it. Nonetheless, we stated that we accept respondents' position that leaving the gate open during all hours of the day, and especially at night, is not necessary. Under such circumstances, wishing to minimize the danger to the soldiers stationed at the gate during the night, we determined that the Bil'in gate would remain open for free passage by Bil'in residents from 06:00 until 20:00, until decision of the petition.

15. Note, to complete the picture, that in the meantime petitioner submitted an additional petition, revolving around the status of the property rights in the land upon which "East Mattityahu" is planned (HCJ 3998/06, of May 14 2006). That was a petition for retrospective annulment of declaration no. 10/91 of January 15 1991 and declaration no. 20/90 of November 25 1990, by the Government and Abandoned Property Commissioner in the Judea and Samaria Area, in which certain areas of the lands of the Village of Bil'in were declared as government land. It was argued that the declarations should be annulled, due to the fact that they were based upon an act of fraud – a "secret circular deal" between respondents no. 1-2 and respondent no. 4. That petition was rejected on November 9 2006. The judgment, by *Rivlin J. (Barak P. and Procaccia J. concurring)*, stated, *inter alia*:

"we have reached the conclusion that a sufficient basis has not been laid before us to prove that a 'circular deal' indeed took place as alleged. In other words, it was not proven that the declarations attacked in the petition were issued in order to bypass the proceedings determined by law for instilling land rights of the type discussed."

The Petitioner's Arguments

16. Petitioner's central claim is that the fence route is not legal, as it was chosen for not security reasons, rather for the benefit of Modi'in Illit, which wishes to expand toward the area east of it. Including hundreds of dunams east of the built-up area of

Modi'in Illit was intended to include territory for future expansion of the settlement, upon territory contiguous with Israel. The fence does not serve a military need. It was claimed in the petition that the route of the fence follows the line of planning scheme 210/8/1, part of which is outside of Modi'in Illit's area of municipal jurisdiction, and not the topographic line, or the line of the settlement's houses, or any other line which could be considered to be a security line. A considerable part of the route passes through the bottom of a slope, which certainly cannot be considered a strategically controlling area. Petitioner notes that the scheme for the Modi'in Illit bloc also includes the agricultural land in the Dolev riverbed (between the "Naot HaPisga" neighborhood and the "East Mattityahu" neighborhood), which is private land belonging to Palestinian residents. The "East Mattityahu" neighborhood is part of that scheme. Thus, the roads in scheme no. 210/8/1 were planned as a part of a system of roads determined by the bloc scheme. The fence route in its entirety in fact follows the boundaries of the bloc scheme. Petitioner's concern is that respondents' intention is to take these areas over as well, in order to expand Modi'in Illit.

17. Petitioners further claim that the route of the fence separates the Village of Bil'in from more than one half of its remaining land. Presently on this land are thousands of olive trees, almond trees and vines. The land also serves as pastures for sheep herds owned by the residents of the villages. It constitutes the main source of livelihood for approximately 200 families in Bil'in. Without it, these families are doomed to lives of poverty. They further argue that in order to reach their land, the Palestinian residents will have to receive an entry permit into the closed area and pass a gate in the fence. In light of the intent to construct the "East Mattityahu" neighborhood, the construction of the fence will apparently put an end to the cultivation of the land. The fence in fact constitutes part of the tactic of taking over the cultivated land of the Village of Bil'in. The petition also contains arguments against the procedure of declaration of Bil'in land as "state land". Petitioner argues that it turns out, in retrospect, that the declaration procedure was apparently carried out with the Civil Administration's knowledge that the land is not abandoned or ownerless, and that there is a claim of purchase on the part of Jews. The procedure was not legal, as the land does not fulfill the conditions determined in the declaration law, and since the declaration was intended to conceal the real essence of the deal.

18. Regarding preliminary arguments, according to petitioner, Bil'in residents' former counsel (Ms. Atiyah, adv.) signed the stipulations without consulting the residents and without their knowledge, and faulty steps were taken by no fault of their own. Only in May 2005 did petitioner and the residents of the village find out about the stipulations which their counsel had signed on their behalf, and about the way she conducted the petitions and the reasons they were rejected. As a result of the sequence of events to date, despite the multiple proceedings, the Court has not adjudicated the substantive questions which arise from the determination of the fence route, and the residents have not had their day in court. Furthermore, petitioner only recently found out the truth about the motivation behind the determination of the route. During the period in which the previous proceedings were being conducted, petitioner and the residents of Bil'in had no information regarding the plan to expand Modi'in Illit and to fit it to the route of the fence planned in the area. The residents of Bil'in were confronted, he claims, by the Civil Administration's determined refusal of the request to give them copies of the Modi'in Illit planning scheme. Viewing of the scheme was allowed only a few weeks before the current petition was submitted, as a

result of a petition pursuant to the Freedom of Information Law which was submitted to the Court of Administrative Affairs in Jerusalem.

19. Petitioner's legal argument is that the construction of the fence on land in Judea and Samaria is unconstitutional, and constitutes a violation of public international law. The petition relies, *inter alia*, upon the Advisory Opinion of the International Court of Justice at the Hague (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (International Court of Justice, July 9, 2004), 43 IL M 1009 (2004)). According to that argument, the route was not chosen for security reasons, rather for purely political reasons, and is intended to annex territory for future development of Modi'in Illit to the State of Israel. Thus it is argued that the fence is being constructed *sine vires*, or *ultra vires*. It is further argued in the petition that the route of the fence is not proportional, as it causes harm of tremendous dimensions to the village and to the fundamental rights of its residents, including property rights, freedom of movement and the freedom to make a living. It is also claimed that the fence could have been built in a way that would not usurp the land of petitioner and the residents of his village, or violate their rights.

Respondents' Position

20. Respondents argue for rejection of the petition *in limine* due to intense laches, severely unclean hands on the part of petitioner and due to the existence of a valid agreement between respondents and petitioner. Rejection of the petition on the merits is also requested. Regarding laches, it is argued that petitioner was aware of the agreements signed by the attorney who was his counsel at the time, at the very latest, after the filing of the State's response to the motion to amend the petition in HCJ 2847/04. The petition was submitted four months after petitioner knew, by his own admission, the facts regarding the agreements, and almost three months after the decision to reject the motion in HCJ 2847/04. During that time the building of the fence was taking place in front of the eyes of the residents. The delay changed respondents' position for the worse. During those months various work took place in order to construct the fence. A great amount of money was invested in constructing the fence. Altering the route now will cause a severe and unreasonable delay in completing the fence, and will require investment of great additional resources. Regarding section C, respondents argue that estoppel prevents petitioner from raising any arguments whatsoever, in light of the agreement with his counsel on his behalf, according to which the sequestration order in that section can be implemented. Respondents note that although the agreement was not formally made, the continuation of the proceedings – which focused upon section D – clearly indicates the existence of agreement regarding section C. Rejection *in limine* is requested also on the grounds of severely unclean hands. The argument is based on the claim that in his petition, petitioner did not mention scheme 210/8, which has been in effect since 1999, focusing rather on scheme 210/8/1 which, at the time the petition was submitted, had not been approved.

21. On the merits, respondents argue that the fence route is legal, and is in line with the provisions of international law and the caselaw of this Court. Under the current security circumstances in the area, there is a necessary security need for the construction of the fence according to the route which has been determined. The

fence is a security means of the highest order, intended to defend the citizens of the State living in the Modi'in bloc, and the security of the State and its inhabitants. According to respondent's line of thinking, in the framework of the determination of the fence route the military commander is authorized to consider new planning schemes for expansion of Israeli settlements. The military commander is authorized to take new neighborhoods into account in the process of construction. He is also authorized to consider valid planning schemes that have real chances of being implemented within a reasonable period, as there is no logic in building the fence and leaving new neighborhoods beyond it. The weight that can be given to the existence of a planning scheme is not constant. It is a derivative of the progress in implementing the valid planning scheme. It depends both upon internal data regarding the population which the neighborhood is intended to serve and external data regarding the extent of harm to the Palestinian residents.

22. In this case, in determining the route of the fence, the military commander took into account the need to defend the neighborhood which has been approved for construction pursuant to scheme 210/8, which has high chances of being implemented and in whose area construction has even begun, albeit with grand violations of the provisions of the scheme. The planning scheme for its construction has been in force since 1999, and its western part is already partially built and inhabited, albeit with illegal construction, as it does not comply with the provisions of the effective scheme for its construction. Also taken into account was the need to defend the "Naot HaPisga" neighborhood, which is now in advanced stages of construction. As the aforementioned "East Mattityahu" neighborhood is to be built within the municipal boundaries of Modi'in Illit, and as under the circumstances of time and place there is a most reasonable chance that the fence will remain standing for a considerable number of years after the construction of the new neighborhood, there was nothing preventing the consideration of the fact of the planned construction of the new neighborhood in the framework of determining the route of the fence. The fact that the developers of the "East Mattityahu" neighborhood took the law into their own hands and chose to commence illegal construction in the area of the neighborhood should not prevent the assigning of appropriate weight, in determination of the route, to the fact that a new neighborhood will be built on site.

The Real Estate Companies' Position

23. The real estate companies also voice a series of preliminary arguments regarding severe laches and unclean hands, and claim reliance upon the agreement of December 15 2004 between petitioner and respondents, according to which construction will continue in section C according to the existing route. They further claim that the relief requested in the petition is indefinite and all-encompassing, and that petitioner has not proven ownership of the relevant land and has not indicated concrete harm to any of the residents of Bil'in. On the merits, the real estate companies argue that there is no justification for the alteration of the route of the fence. According to them, they are the owners of the land to which planning scheme 210/8 applies, after the land was purchased legally, at full price, from its Arab owners, many years ago. However, due to the concern that disclosing the documents of sale in public proceedings would endanger the lives of the sellers of the plots, the real estate companies refrained from attaching the documents which testify to that. For that reason, claim the real estate companies, the State declared the purchased plots – at

their request – as government land, and defined them as "private property under government administration". A large number of village residents submitted an appeal of that declaration, however, the appeals committee rejected most of the appeals, including that of petitioner, and approved the declaration of the plots as government property, subject to the decision to remove a number of plots from the area declared. According to the argument of the real estate companies, a large residential neighborhood is being erected on that land – the land of planning scheme 210/8 – which is an inseparable part of Modi'in Illit, and respondents are obligated to protect its residents and include its territory within the fence.

24. The real estate companies further claim that the current route provides a reasonable, if not optimal, solution to the fence's security objectives, and that any movement of the fence westward will frustrate the original objective of the fence and endanger the residents of Modi'in Illit. They claim that moving the fence westward will violate their proven rights unnecessarily and disproportionately. In this context, the real estate companies are of the opinion that the present route also takes the fabric of life of the residents of Bil'in into consideration, and emphasize that this route distances the fence from the residents' houses, despite the fact that said distancing involves a concession of necessary topographically controlling points. According to their argument, most of the land west of the route is owned by Jews; in most of it residential neighborhoods are being erected; there is no essential sign of the fabric of life of the Arab population on the ground; and although trees are planted in the Dolev riverbed, it is evident that the area has been neglected for years, is not taken care of and is not cultivated. According to their argument, in that state of affairs, the proper balance of interests requires the erection of the fence along its present route, which properly balances between security of the inhabitants of Israel, and specifically of Modi'in Illit, and the rights and fabric of life of the (Arab and Israeli) residents of the *area*, including the property rights of the real estate companies.

25. Regarding the faults discovered in scheme 210/8/1, the real estate companies clarify that they had no intention to build without a permit or to show disrespect for the law. They argue that they had every reason to assume that by the time work reached the relevant stages, they would already have building permits which reflect the new planning. The suspension of the coming into force of scheme 210/8/1 by the State Attorney's office is what made the construction, technically, "illegal". If events had followed their intended and expected route, as the Supreme Planning Council has always acted, the real estate companies would today have building permits, and all would be carried out according to law. The real estate companies further argue that the building violations, to the extent that they indeed exist in the area of scheme 210/8, have no relevance to the route of the fence in the Village of Bil'in.

26. Attached to the response of the real estate companies was the expert opinion of Major General (res.) Dr. Yom Tov Samiya, supporting their claims. Major General Samiya opined that from the security standpoint, the location of the fence route constitutes the outer edge of the military commander's ability to consider the rights of the local Arab population on the one hand, and to provide security (albeit not optimal) to the residents of Modi'in Illit on the other hand. The route allows control of the topographically controlling areas necessary for defending Modi'in Illit. On the other hand stands the most slight harm to the fabric of life of the Palestinians, who will need to pass through an agricultural crossing for three weeks of the year in order to

care for the trees and harvest the olives. The location of the route, at a reasonable distance from the houses of the Israeli settlement, is the preferable situation in terms of the security aspect, as opposed to locating the route on territory which is relatively topographically inferior to Modi'in Illit and Bil'in. In planning the route (which was altered after the *Beit Sourik* case), a series of controlling hills were already conceded, leaving them east of the fence. If the hills are used by the Palestinians as controlling territory, the casualties will be among the Israeli forces patrolling along the fence. Moving the route west will leave the houses of the "East Mattityahu" neighborhood and the "Naot HaPisga" neighborhood within the effective range of weapons in the possession of terrorist organizations in the area.

Discussion

27. Decision regarding the legality of the security fence being erected in the Judea and Samaria area is made on the basis of a two-stage examination. In the first stage the authority of the military commander is examined, and in the second stage, his discretion in employing his authority is examined (HCJ 1890/03 *Municipality of Bethlehem v. The State of Israel, the Ministry of Defense*, 59(4) PD 736, 747 (2005)). The military commander's powers stem from the rules of public international law regarding belligerent occupation, which are entrenched mainly in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – *The Hague Regulations*), the annex to Convention (IV) Respecting the Laws and Customs of War on Land. Those regulations reflect customary international law. The military commander's authority is also entrenched in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*). In accordance with the laws of belligerent occupation, the military commander is authorized to order the erection of a security fence in the Judea and Samaria area on the basis of security-military considerations (*Beit Sourik*; *Alfei Menashe*; HCJ 5488/04 *The a-Ram Local Council v. The Government of Israel* (yet unpublished, December 13 2006) (hereinafter – *a-Ram*)). He is authorized to take possession of land, including privately owned land, for that purpose.

28. The military commander's authority arises only when the reason behind the decision to erect the fence is a security-military one. "The military commander is not authorized to order the erection of the security fence if his reasons are political. The security fence cannot be decided upon in order to "annex" territory of the *area* to the State of Israel. The objective of the separation fence cannot be the drawing of a political border" (*Beit Sourik*, at p. 828; *see also Alfei Menashe*, paragraph 15). According to regulation 53 of the *Hague Regulations*, it is required that taking possession of property be for the needs of the army of occupation. According to Article 52 of the *Fourth Geneva Convention*, it is required that taking possession of property be absolutely necessary by military operation. The military commander's authority to erect a separation fence also entails authority to erect a fence for the protection of the lives and security of Israelis living in Israeli settlements in the Judea and Samaria area, even though the Israelis living in the *area* are not "protected persons" as that term is defined in Article 4 of the *Fourth Geneva Convention* (*see Alfei Menashe*, paragraphs 18-22; HCJ 3680/05 *The Teneh Settlement Committee v. The Prime Minister of Israel* (yet unpublished, February 1 2006) paragraphs 8-10, hereinafter – *Teneh*; HCJ 1998/06 *The Beit Arieh Local Council v. The Minister of Defense* (yet unpublished, May 21 2006), hereinafter – *Beit Arieh*; HCJ 1348/05 *The*

Mayor of Salfit v. The State of Israel (yet unpublished, July 17 2006), paragraph 20, hereinafter – *Salfit*). The question of the legality of the Israeli settlement in the *area* does not reflect upon the duty of the military commander to defend the lives and security of the Israeli settlers (*Alfei Menashe*, at paragraph 20).

29. The second stage in the examination of the legality of the fence is the examination of the military commander's discretion. The military commander is not at liberty to make any decision whatsoever that fulfills legitimate security needs. When determining the route of the fence, he must consider and balance a number of considerations. The first consideration is the security-military consideration. By force of that consideration, the military commander is permitted to take into account considerations regarding the defense of the security of the State and the security of the army. These considerations are considerations of military and security expertise, regarding which the military commander is granted wide discretion. It is he that is responsible for security. He has the security expertise, knowledge and responsibility. The Court grants great weight to his stance (*see Beit Sourik*, at paragraph 46; H CJ 258/79 *Amira v. The Minister of Defense*, 34(1) PD 90, 92 (1979); H CJ 390/79 *Duikat v. The Government of Israel*, 34(1) PD 25 (1979)). Accordingly, it has been said in our caselaw that "... we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders of, and to maintain the boundaries of, the military commander's discretion" (*Beit Sourik*, at pp. 842-843). The second consideration which the military commander must consider is the welfare of the local population who are "protected persons". The military commander must protect the human rights accepted in international law as rights of the local population (*see Alfei Menashe*, at paragraph 24; *Teneh*, at paragraph 10; *Beit Arieh*, at paragraph 8). The third consideration is the safeguarding of the human rights of the Israelis living in the *area* (*see* H CJ 1661/05 *The Gaza Coast Regional Council v. The Prime Minister*, 59(2) PD 481, 560 (2005), hereinafter – *Gaza Coast Regional Council*; *Alfei Menashe*, at paragraphs 18-22; *Teneh*, at paragraphs 8-10; *Beit Arieh*, at paragraph 8). That duty draws from the rules of international law and the rules of Israeli law. In determining the essence of the rights of Israelis living in the *area*, the character of the area under belligerent occupation and the forces of the military commander are to be considered.

30. The human rights to which the "protected persons" and the Israelis in the *area* are entitled are not absolute. As all human rights, they are relative. They can be restricted. Some of the restrictions stem from the need to consider the rights of others. Some of the restrictions stem from the security interest. The military commander must balance the various considerations, which at times clash with each other. A central standard in this balancing is "proportionality", which is examined in a three part test. The first test determines that a link of fit is needed between the objective and the means. The second test determines that among the means employable in order to realize the objective, the means which causes the least harm should be employed. The third test determines that the damage caused to the individual by the employed means should maintain a proper proportion to the benefit stemming for it. Regarding the three components of the proportionality test, it has been noted that "not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a 'zone of proportionality' must be

recognized (similar to a 'zone of reasonableness'). Any means chosen by the administrative body that is within the zone of proportionality is proportionate" (*Beit Sourik*, at p. 840; *see also Alfei Menashe*, at paragraph 30).

The Legality of the Fence on Bil'in Land – the Outline of the Discussion

31. We shall commence our discussion of the legality of the fence on the land of Bil'in with the examination of respondents' preliminary arguments. Then we shall proceed to examination of the question whether the fence on Bil'in land was erected within the military commander's authority. That discussion will examine the reasons for the construction of the fence beside Modi'in Illit. After the examination of authority, we shall progress to examination of the scope of the harm to the local residents, and examine whether that harm is proportional. We shall conclude our discussion with an examination of the relief which is called for in light of the entire legal analysis.

The Preliminary Arguments

32. In their responses, respondents and the real estate companies raise three preliminary arguments: laches, unclean hands and the existence of an agreement with petitioner regarding "section C" of the fence. Petitioner's counsel notes, in response, that before the petition was submitted, petitioner and the residents of Bil'in had no information regarding the plans for expansion of Modi'in Illit or regarding their fit with the planned fence route in the area. Only shortly before the petition was submitted did he become aware of scheme 210/8/1 and the illegal construction. Nor did petitioner know at the time about the scheme for Modi'in Illit. Thus, petitioner should not be considered to have delayed the filing of the petition, to have unclean hands, or to be silenced by estoppel due to the agreement with his counsel in the previous petitions. Petitioner's current counsel further claimed in the hearing before us that since the petition was submitted, additional facts have been discovered, justifying, in and of themselves, the reopening of the discussion of the issue.

33. In our opinion, the preliminary arguments cannot lead to the rejection of the petition. We accept petitioner's argument that the previous contacts and acts regarding the fence at Bil'in took place with only partial information regarding the planning situation of the "East Mattityahu" neighborhood, about the construction work *de facto* and about the considerations behind the planning of the fence route. As it appears from the material before us, petitioner's previous counsel had been presented with scheme 210/8 in the past, but not with scheme 210/8/1, according to which construction was actually being carried out. Thus, great weight is not to be assigned to the procedural agreement regarding "section C" (adjacent to scheme 210/8/1), which did not even reach the status of a formally binding agreement. Furthermore, in the State's response to HCJ 11363/04, the two new neighborhoods of Modi'in Illit were mentioned only generally, without note of planning scheme numbers. Nor was the name of the neighborhood of "East Mattityahu" mentioned in the response, rather only the names "Naot HaPisga" and "Or Sameach" (paragraph 26 of the State's response to HCJ 11363/04 of January 8 2005. Moreover, the State's response contained no clue of scheme 210/8's deviation from Modi'in Illit's area of municipal jurisdiction or the construction taking place in the "enclave" of private Palestinian land. In its response, the State even emphasized that "the land located

within the boundaries of the planning scheme are, necessarily, State lands or lands purchased by Israelis" (paragraph 15 of the State's response to HCJ 11363/04 of January 9 2005). Only as a result of the submitting of the current petitions did the severe faults in scheme 210/8/1 come to light, requiring wide scale amendments and new approval proceedings. Imprecision was also found in additional information presented before the Court. Thus, for example, the figure stated by respondents regarding the scope of the land owned privately by Palestinians remaining on the "Israeli" side of the fence rose by 500 dunams, to 678 dunams. Under such circumstances, when petitioner confronted difficulties in clarifying the relevant basis for the petition; when the data presented before his counsel and before the Court did not reflect the full picture; due to the substantive faults that were discovered over time regarding construction without an approved planning scheme; and due to information regarding the detailed planning scheme which was not relayed – the preliminary arguments raised by respondents and the real estate companies are not to be accepted. Even if there is fault in the fact that the petition before us does not mention planning scheme 210/8 (which is the formally valid one), and that the arguments revolved around scheme 210/8/1 (according to which the construction was carried out *de facto*), due to the intensity of the faults discovered in the conduct of respondents and the real estate companies, I am not of the opinion that such a fault can lead to the rejection of the petition *in limine*, without discussion of it on the merits.

The Authority of the Military Commander

34. We shall thus turn to the first component of examination of the legality of the fence, which is the authority component. The question is whether the reason behind the route of the fence on Bil'in land is a security-military reason, or a political reason as claimed in the petition. Using the tools at our disposal, we examined the motivation behind the erection of the fence. We cannot accept the argument that the objective of the fence is to annex territory of the Judea and Samaria area to the territory of Israel and to the settlement of Modi'in Illit. According to the factual basis which has been laid before us, the motivation for constructing the security fence in the area relevant to the petition is a security one. The principled decision to construct the fence did not arise as a political idea of annexing territory, rather stemmed from military-security needs, and as a necessary means for defending the State and protecting its citizens. The decision to construct the fence north and east of the Modi'in bloc and the settlement of Modi'in Illit was made against the background of the reality of severe terrorism which has plagued Israel since September 2000 and created a necessary security need to employ means to protect the lives and wellbeing of the citizens of Israel. In the framework of those means, the government decided upon the erection of the security fence, whose objective is to frustrate and prevent infiltration of terrorist activity from Judea and Samaria into Israel. We have already ruled in our caselaw that at the foundation of the decision to construct the fence is a security need, and not a political motivation (*Beit Sourik*, at p. 830; *see also Alfei Menashe*, at paragraph 100).

35. Nonetheless, in the case before us it is clearly apparent that the determination of the fence route was significantly affected by the plans to erect new neighborhoods east of Modi'in Illit. To the extent that the planning schemes considered in determining the route were in advanced stages of implementation and inhabitation, their consideration does not present difficulty, for various reasons. Thus it is

regarding the "Naot HaPisga" neighborhood which is being built according to a valid planning scheme. Hundreds of apartment units have already been built and have been partially inhabited in that neighborhood. That neighborhood is part of Modi'in Illit and is in need of defense just like it. Thus, the fact that one of the considerations in planning the route was the defense of the "Naot HaPisga" neighborhood does not derogate from the authority of the military commander. However, it turns out that an additional dominant consideration in planning the route was the defense of the "East Mattityahu" neighborhood. Due to the planning situation of the "East Mattityahu" neighborhood, and the decisive weight which the military commander granted the defense of this future neighborhood, difficulty arises regarding the legality of the route that takes that consideration into account. As is known, the planning of the route for the security fence should not be based on the desire to include, on the "Israeli" side of the fence, territory intended for expansion of settlements, specifically when the planning schemes are not about to be implemented in the near future (*see Alfei Menashe*, at paragraph 113; *Salfit*, at paragraph 29; H CJ 2732/05 *The Chairman of the Azoun City Council v. The Government of Israel* (yet unpublished, June 15 2006)). Regarding the "East Mattityahu" neighborhood, it turned out that scheme 210/8/1 replaced, *de facto*, scheme 210/8 which had been in effect since 1999 but had not been implemented. The route of the fence thus took into account a planning scheme which had been abandoned, prior to the approval of the new planning scheme. In that state of affairs, one could not continue to rely on the original planning scheme, which had been abandoned by the developers and the local government, in order to justify the fence route. It should be emphasized that due to the temporary nature of the fence as a security measure (*Alfei Menashe*, at paragraph 100), the planning of the route cannot include considerations related to invalid planning schemes, or future schemes which neither have been realized nor are expected to be realized in the near future. Today as well, despite the fact that scheme 210/8/1 has passed the new approval proceedings, due to the fact that implementation of phase B (the eastern part) is conditional upon approval of the Minister of Defense, there is great doubt whether the fence route can be based upon the desire to include the neighborhood, in its entirety, west of the fence. The planning aspect of the "East Mattityahu" neighborhood is complex. It has undergone upheavals since approval of scheme 210/8 and since the planning of the fence route. The planning scheme's provisions are also complex. Due to that complexity, and due to the conclusion we have reached on the question of proportionality, we refrain from deciding the question whether the fact that the "East Mattityahu" neighborhood was a decisive consideration in the planning of the route leads to the conclusion that a fault occurred regarding the military commander's very authority to order the erection of the fence on Bil'in land, or whether it should be determined that it is a fault in discretion, as opposed to lack of authority. We thus assume, for the sake of discussion, that the construction of the fence was within the authority granted to the military commander. We shall progress, then, to the examination of the question whether the use of the authority granted to the military commander was proportionate.

The Proportionality of the Route

36. The fence route harms the residents of Bil'in. That harm is caused as a result of the sequestration of the land for the construction of the fence itself, uprooting of trees located along the route, and sealing off of cultivated agricultural land on the "Israeli" side of the fence. The fence route takes up 260 dunams. In addition, the

route detaches the residents of Bil'in from hundreds of dunams of private land and cultivated agricultural land. That land is planted with olive trees, grapevines and almonds, and is also used as grazing land for the sheep herds of the village residents. For many of the residents of Bil'in it is the source of their livelihood. Access to this land will be restricted to a crossing at an agricultural gate for permit holders, with all the difficulties that entails. Respondents do not deny the harm to the residents of Bil'in. However, their position is that the harm is proportional, due to the necessary security need which includes, in their opinion, protection of the residents who will live in the new neighborhoods east of Modi'in Illit, including the two phases of the "East Mattityahu" neighborhood, a need which can be fulfilled, according to their argument, only by erecting the fence along the route on which it has been constructed. Respondents note in this context that they intend to lessen the harm to the residents of Bil'in, and that they are also willing to pay compensation and regular payments for use due to the seizing of the land for construction of the fence.

37. Is the harm to the residents of Bil'in proportional? It appears that the fence withstands the rational link test. The fence realizes the security objective behind the decision to construct it, which is separation between the Israeli settlements and the Palestinian settlements in the Judea and Samaria area, and protection of Israelis from terrorist attacks. Does the route of the fence withstand the second subtest – the least harmful means test? It was claimed before us that the security objective can be attained by using an alternative route which would be closer to the houses of Modi'in Illit, on the basis of the existing fence of the settlement. At the hearing before us, petitioner further claimed that even if the desire is to include the houses which have been built in the "East Mattityahu" neighborhood on the "Israeli" side of the fence, the fence can still be moved west and the harm to the residents of Bil'in can be reduced. Respondents' stance is that there is no other reasonable means that can attain the necessary security objective for which the fence was built, while harming the residents of Bil'in to a lesser extent. That position is based upon their approach, according to which the security objective is defending the residents who will live in the future in the "Naot HaPisga" and "East Mattityahu" neighborhoods. That position can be accepted, to the extent that it relates to the neighborhood of "Naot HaPisga" which is in advanced stages of construction and inhabitation. That is not the case regarding "East Mattityahu". As it appears from our discussion, the route based upon the planning scheme for the construction of "East Mattityahu" raises substantial difficulties. The point of departure at this time for examining the route of the fence must thus be, as aforementioned, scheme 210/8/1, both in terms of its planning status and provisions, and in terms of its realization *de facto*. Planning scheme 210/8/1 is divided into two parts. Phase A (the western phase) can be realized when the planning scheme comes into force. Development and marketing of phase B (the eastern phase), however, is conditional upon approval of the Minister of Defense. It is uncontroversial that more than forty buildings have been built in the "East Mattityahu" neighborhood, including hundreds of apartment units. Tens of apartments have already been inhabited, but the construction is solely in the western part of the neighborhood. In the eastern part no development or construction work has been carried out. That part is yet far from implementation, both normatively and practically. The future implementation of phase B is not certain whatsoever. Under such circumstances, we cannot accept the argument that defending the eastern part of the "East Mattityahu" neighborhood is a necessary security objective. Regarding the eastern part, it is but a future need. Considering the lack of certainty regarding

construction of phase B of the neighborhood, and considering the temporary nature of the fence, it is not at this time absolutely necessary by military operation. Furthermore, as detailed below, it seems that due to the desire to ensure the future construction of the eastern neighborhood, the fence route was determined in a place which lacks security advantages.

38. Thus, the question requiring decision is whether there is an alternate route that provides protection to the houses being built in the western part of "East Mattityahu" whose harm to the Palestinian residents is lesser. Respondents did not explain why the security objective behind the decision to construct the fence cannot be attained via a route that would circumvent the western part of "East Mattityahu" but leave Palestinian land in the Dolev riverbed and additional land, as well as the "enclaves" in scheme 210/8/1, outside the fence. Respondents did not relay data regarding the distance between the fence route and the houses which have already been built in the "East Mattityahu" neighborhood. Nor was data relayed regarding the distance between the fence route and the boundary of phase A of "East Mattityahu" as it appears from the aforementioned. Given the factual basis as it was presented to us, the current route of the fence also leads one to wonder about the security advantage it provides. It is uncontroversial that the route passes mostly through territory which is topographically inferior both to Modi'in Illit and Bil'in. It leaves a number of hills on the Palestinian side and two hills on the Israeli side. It endangers the forces patrolling the route. Against the background of the security outlook presented to us in many other cases, according to which it is important from a security standpoint to construct the fence on topographically controlling territory, the current route leads one to wonder. In general, the military commander presents the possession of controlling hills as a significant security advantage in many cases regarding fence route planning, but in this case a route has been determined that is at least partially on territory which is inferior vis-à-vis the hills. This route cannot be explained by anything save the desire to include the eastern part of "East Mattityahu" west of the fence, otherwise it is doubtful whether there is a security-military reason for determining the route of the fence where it is now. Respondents do not even deny that, stating expressly in their arguments that the route was chosen according to the security objective, including protection of the new neighborhoods to be built in the future, and that the distances of the route from the Israeli settlements were measured in accordance with the lines of the future planning scheme, and not according to existing construction. Rejection of "option A", which was intended to exclude the Dolev riverbed from the "seamline area" was reasoned by respondents by the argument that "'option A does not provide an appropriate security solution for the residents of the new neighborhoods and the residents of Modi'in Illit, due to its proximity to the housing in the new neighborhoods". It is to be remembered, as aforementioned, that the intention to develop the eastern part of "East Mattityahu" in the future does not even constitute a consideration to be considered at this point. Under such circumstances, we have not been persuaded that it is necessary, due to security-military reasons, to maintain the present route that passes through Bil'in land. We have not been persuaded that without considering planning scheme 210/8 in its entirety, there is no appropriate security alternative for construction of the fence for protecting the residents of Modi'in Illit. It appears to us that against the background of respondents' clinging to the original scheme 210/8, no detailed examination was made of an alternate route that can ensure the security of the residents in the western part of "East Mattityahu" with less harm to the residents of Bil'in. All the alternatives considered by

respondents were rejected for security reasons regarding the defense of the new neighborhoods, including the two phases of the "East Mattityahu" neighborhood, and in fact the military commander did not even examine any possibility which does not consider, for example, the future phase B of the "East Mattityahu" neighborhood. It must be remembered that moving the route westward will apparently lead to the construction of the fence on the territory of planning scheme 210/8. That territory is mostly "state land" and not privately owned Palestinian land, a fact that will also reduce the harm to the Palestinian residents. Respondents must reconsider the current route, and examine the possibility of an alternate route that is not based upon defending phase B of "East Mattityahu".

39. We have not overlooked the real estate companies' claims that moving the fence west will lead to a violation of their property rights and their economic expectations. However, these arguments cannot derogate from the conclusion that the respondents must reexamine the route, for a number of reasons. First, there is a gap between the respondents' stance, according to which the territory upon which the "East Mattityahu" neighborhood is planned to be erected is "state land", and the real estate companies' stance according to which it is private land purchased by them or for them. In accordance with the ruling of this Court in H CJ 3998/06 *Yassin v. The Military Commander in the West Bank* (yet unpublished, November 9 2006), the land to which planning scheme 210/8 applies has been declared as government land on the basis of it being "state land" and not on the basis of a claim of ownership by private entities. That declaration does not, in and of itself, determine or create rights of ownership in the land. To date there has been no substantive law determination of property rights held by any of the real estate companies. The discussion of the fence route itself is not the fitting procedural framework to clarify the rights of ownership. Second, even if we assume for the sake of the discussion that the real estate companies are the owners of the plots of land to which planning scheme 210/8 applies, that cannot prevent moving the fence west. As security needs are likely to require harming the land of the local residents and their use of it, so are they likely to also require harming land of Israelis and their ability to use it (*see, e.g.*, H CJ 5495/06 *Hevrat HaKeren L'Yad Midreshet Eretz Yisrael v. The Minister of Defense* (yet unpublished, August 15 2006)). The proportionality rules in planning the fence route are likely also to leave Israeli residents and Israeli assets on the "Palestinian" side of the fence (*see, inter alia, Teneh*, H CJ 399/06 *Sussia – Agricultural Cooperative Society for Community Settlement Ltd. v. The Government of Israel* (yet unpublished, July 6 2006); *a-Ram; Bir Nabala*; H CJ 1844/06 *Rinawi v. The Prime Minister* (yet unpublished, June 15 2006)). The balancing between the various interests – security needs, the rights of the Palestinian residents, and the rights of the Israelis – must be performed by the military commander in the framework of the reexamination of the fence route.

40. In summary, we have not been persuaded that the second subtest of proportionality has been fulfilled in the fence route through Bil'in land. We have not been persuaded that it is absolutely necessary by military operation to preserve the existing route of the fence which passes through topographically inferior territory on Bil'in land and that there is no worthy security alternative for construction the fence in order to protect the residents of Modi'in Illit. Respondents must reconsider the existing route and examine an alternative route that can ensure the security of the residents in the western part of "East Mattityahu" and whose harm to the residents of

Bil'in will be lesser. We are aware of the fact that such alteration cannot be made in a day, as it requires taking down the existing fence and building a new fence along certain parts of the route. Due to the continuing harm to the residents of Bil'in, respondents must perform the reexamination within a reasonable period of time.

41. Due to our determination regarding the second subtest, we could have left to future decision the question whether the fence route fulfills the third proportionality test – the test of proportionality *stricto sensu*. However, we see fit to state that due to the entirety of the data and the considerations we discussed above, the fence route does not withstand the third proportionality test either. That test examines the question whether the fence route's harm to petitioners is of proper proportion to the benefit which the construction of the fence on the chosen route entails. In this case, the chosen route causes severe harm to the residents of Bil'in. The harm is caused by the seizure of land for constructing the fence, uprooting of trees located along the route, and trapping agricultural land on the "Israeli" side of the fence. As aforementioned, the route of the fence separates the village of Bil'in from a large part of the land still belonging to the village. The route of the fence itself takes up approximately 260 dunams; approximately 1,700 additional dunams of its land according to the British Mandate distribution of the land, more than 670 of which are privately owned by residents of Bil'in, remain on the western side of the fence. On this land there are currently thousands of olive trees, almond trees and grapevines. The land is also used as grazing land for the sheep herds owned by residents of the village. They are the main source of income for approximately 200 families in Bil'in. Respondents do not deny the harm to the residents of Bil'in, yet they are of the opinion that the harm is reasonable and proportional. They argue that the harm to the residents of the Village of Bil'in is proportional to the necessary security need to defend the inhabitants of Israel in general and the residents of the Modi'in bloc specifically. We cannot accept that stance. The construction of the fence on part of the land of Bil'in, and restricting the access of the residents of Bil'in to substantial additional parts of their land, by erecting checkpoints and an agricultural fence for permit holders only, create significant difficulties for the residents of Bil'in, and substantially harm the fabric of their lives. And on the other hand, the security benefit expected from the present route, which today defends the territory upon which construction has not been carried out, is not comparable to the harm to the "protected persons". Thus, the chosen route deviates from the balance between security needs and the needs and welfare of the residents of Bil'in. Although we accept respondents' argument that choosing the route adjacent to the houses of Modi'in Illit does not provide a fitting security solution, respondents' stance was formulated in accordance with the boundaries of the future planning scheme of the "East Mattityahu" neighborhood, and not according to the existing construction on the ground. As we ruled above, the existence of an intention to develop the eastern part of "East Mattityahu" in the future does not constitute a consideration that can be taken into account at this point, and thus it appears that the harm to the local residents can be lessened by choosing an alternate route which will not take into account territory intended for the future construction of phase B of the "East Mattityahu" neighborhood.

42. As mentioned above, in the hearings before us, data regarding the proper alternate route to replace the fence route attacked in the petition was not presented to us, and in fact such a route was not even examined by respondents. Thus, we have

decided to make the *order nisi* an *order absolute*, as follows: Respondents no. 1 and 2 must, within a reasonable period of time, reconsider an alternative to the route of the separation fence on Bil'in land, which will harm the residents of Bil'in to a lesser extent, and leave the cultivated land on the east side of the fence to the extent possible; in this context, the alternative is to be examined such that the territory of phase A of "East Mattityahu" will remain on the west side of the security fence, whereas the agricultural land in the Dolev riverbed and the land planned for future construction of phase B of the "East Mattityahu" neighborhood will remain on the east side of the fence. Until completion of the examination of the alternate route, the interlocutory injunction of June 12 2007 shall remain in effect, such that the Bil'in gate shall remain open to passage by Bil'in residents from 6am to 8pm.

Vice President E. Rivlin:

I concur.

Justice A. Procaccia:

I concur.

Decided as per the judgment of President D. Beinisch.

Given today, 21 Elul 5767 (September 4 2007).