The Supreme Court in Jerusalem **HCJ 413/13**
HCJ 1039/13

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Petitioners in HCJ 1039/13

vs.

1. **Minister of Defense**
2. **Commander of IDF Forces in Judea and Samaria**
Represented by the State Attorney
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Tel: 02-6466194; Fax: 02-6467011
Respondents

Respondents' Response to the Petition

[Summary of legal arguments supporting Respondents' position that the Petitions should be denied]

[EDITOR'S NOTE: The paragraph numbers below refer to the corresponding numbers in the Hebrew original for ease of future reference. All emphasis in the form of text appearing in bold and underline is that of the Respondents in the original.]

The Normative Framework

114. Since the end of the Six-Day War, the area of Judea and Samaria has been held under belligerent occupation. Therefore, the laws of belligerent occupation constitute the normative framework for IDF forces in the area.

115. The Court has determined in its rulings that not only international law applies, but also the local law that was in force at the time that the IDF occupied the area – Jordanian law – as well as military security legislation, and the fundamental principles of Israeli administrative law. A recent ruling of the High Court of Justice (HCJ) affirmed this, noting that the Military Commander derives his authority from the rules of belligerent occupation under international law, the local Jordanian law in force prior to military occupation, and new legislation promulgated by the Military Commander.

116. This Court has determined in the past that the Hague Convention IV of 1907, which encompasses the laws and customs regarding land warfare and reflect customary international law, constitutes the core of international law rules relating to belligerent occupation. The laws of belligerent occupation are also set forth in the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. While the consistent position declared repeatedly by the State of Israel is that Israel operates in accordance with the humanitarian provisions of this Geneva Convention, the court has refrained from determining that this Convention applies to the area of Judea and Samaria.

Authority of the Military Commander to Declare Closed Areas

118. The authority of the Military Commander to declare closed areas is enshrined in the local law that was in force in the area at the time of the entry of IDF forces, as well as in security legislation that constitutes part of the laws of belligerent occupation.

119. The local law that was in force at the time of the entry of IDF forces also includes the 1945 British Mandate Defence (Emergency) Regulations (hereinafter "**Defence Regulations**") that apply to the entire Mandate area. As established in a 1979 HCJ ruling, these Regulations remained in force when the West Bank was occupied by the Jordanian Legion in 1948. According to Hague Regulation 43, which obligates the military commander to respect the law in force in the occupied area at the time of belligerent occupation unless absolutely prevented, the Defence Regulations continued to apply even after the IDF entry, and they remain in force today.

120. Regulation 125 of the Defence Regulations grants the military commander the authority to declare an area closed by order. Any person entering or exiting the closed area during the period that the order is in force without written authorization from the military commander, or by his authority, will be charged with committing an offence under these Regulations.

121. The Defence Regulations constituted part of the local law in force in Judea and Samaria prior to its occupation and they remain in force pursuant to the Decree concerning Governance and Law Arrangements (Judea and Samaria)(No.2), 1967, whose provisions accord with the rules of public international law.

122. The military commander's authority to declare a closed area is in addition enshrined in military security legislation that also constituted part of the law in force prior to the occupation of Judea and Samaria. Clause 318 of the Order concerning Security Provisions authorizes the military commander to issue a closure decree and to prohibit entry or exit without a permit. Accordingly, this provision authorizes every soldier, policeman or agency so appointed to remove the violator from the closed area. Firing Zone 918 was decreed by the authority of Clause 318 of the Order concerning Security Provisions (a decree that was amended on 12 November 1982).

123. Since the establishment of the State, Regulation 125 has been used to declare areas closed for the purpose of military exercises and training, authority that has been acknowledged by the HCJ. In an unpublished ruling from 2006, this Court elaborated on this

point, stating that the declaration of a closed area serves the public interest by preserving public order.

124. The HCJ has denied a number of previous petitions that dealt with military decisions to evict those present in firing zones, with the court refusing to intervene in the eviction orders. In one case cited, the court emphasized that the structures addressed in the petition were not permanent dwellings but designated for seasonal shepherding, the construction of which constituted trespassing. The question in the petitions cited centered on the critical question of whether the petitioners in each case actually resided in the firing zone, or were present only temporarily or seasonally.

126. As stated in the Order concerning Security Provisions, the authority to evict from a closed area does not apply to a "permanent resident of the closed area". However, in this case, the Petitioners are not "permanent residents" of the firing zone and were not there on a permanent basis when the area was closed and the eviction orders issued.

Who is a "permanent resident"?

127. The original formulation of the clause relating to the closure of areas in the Order concerning Security Provisions (Clause 70 of the 1967 Order) (hereinafter the "**Order**") did not include any reference to permanent residents of the closed area. The clause related to a punishable offence for any person entering or exiting the closed area without a permit while the order was in force.

128. The protection granted to a "permanent resident" is also not included in Defence Regulation 125.

129. The authority granted to the military commander to declare an area closed, and to prevent entry and exit to this area without a permit, which is enshrined in the original wording of the above Order, and in the local law in force at the time of the occupation (the Defence Regulations), does not make the distinction of "permanent resident". This categorization was enshrined in the Order concerning Security Provisions only in 1978, through Amendment 14, which adds a sentence at the end of Clause 90 (3) stating that "This sub-clause shall not apply to a permanent resident of the area, or of the place that is closed."

130. No definition of the term "permanent resident of a closed area" appears in the Order. Understanding of the term requires examination of the exception itself, and its purpose, as set forth in Clause 318 of the Order. In a similar matter, the HCJ determined that the expression "permanent dwelling" is an ambiguous term whose meaning must be understood through examining the legislative purpose.

131. The wording of Clause 318 suggests that the military legislator decided to protect individuals for whom the prospective harm they might suffer, and the harm to their daily routine, would be greater – those whose homes and center of life are in the closed area. This exception even has the practical benefit of obviating the necessity to arrange entry and exit permits to the closed area for those residing there.

132. It is patently clear that this exception was not intended to protect one who chose to build his home in a closed area after the area was declared closed by the Military Commander. The use of the term "permanent resident" demonstrates that the legislator did not intend to include in this exception those who are temporarily present in the closed area, but only those who reside there permanently.

133. The HCJ was required to rule on interpretation of a similar term ("permanent dwelling") as it appears in Emergency Regulations (Security Areas), 1949, in a petition before it in 1951. These regulations authorized the Minister of Defence to declare "security areas" in which the presence of persons was prohibited without a permit. However, these regulations also provided a special arrangement for a person "dwelling permanently" in these areas, by which the prohibition would not apply to said person until 14 days after notice was served that he would have to leave the area. The question in this case centered on whether the petitioners were considered to be "permanent residents" of the area prior to the decree. In making their determination, the court determined that "domicile" tests could be used as aids, the rules of which are part of private international law that serve to determine in which country a person lives. The court also acknowledged the difficulties in relying on these tests, intended to determine the country of residence, for the more complex question of determining residence in a village or city.

136. This Court (in the framework of previous petitions) reached two conclusions regarding the determination of "permanent residence": 1) a person cannot be considered a "permanent resident" in more than one location (village or city); and 2) it is possible to have a situation in which a person is considered a "permanent resident" of a particular country, but not a "permanent resident" of any particular city or village in that country.

137. The court established that the test used to determine permanent residency must include both factual and subjective data. The objective aspect entails data that demonstrates the individual's actual presence in the community in which he claims to be a permanent resident. Some of the criteria include: where the person sleeps at night, period of absence from the community, his place of work, location of the majority of his property, the center of his community life, where he spends the Sabbath and festivals, where his children are educated, his registration in the Population Registry, and where he purchases goods and services. The list is non-exhaustive and the complexity of the question requires close examination of each case.

The subjective aspect requires examination of the person's intention to live in the community in which he claims to be a permanent resident, the place with which the individual has the closest personal association in the sense of 'home'.

140-1. The facts in this Petition illustrate that the petitioners were not "permanent residents" of Firing Zone 918 at the time the Military Commander declared it a closed area. The Petitioners were essentially living in Yata, with a periodic presence in the closed area for short periods for farming and shepherding purposes. Their center of life was not in the closed area and their registration in the Population Registry indicates Yata as their residence. Moreover, at the time of the declaration of the closed area, not even the most basic elements essential to conducting daily life existed in this area, such as schools, medical

services, places for purchasing basic goods, cultural institutions and the infrastructure for water and electricity.

142. The attempts of the Petitioners "to establish facts on the ground" started after the declaration of the closed area, such that they cannot be considered "permanent residents" encompassed by Clause 318 of the Order concerning Security Provisions who merit protection from harm to their pre-existing daily existence.

In addition, despite the criteria used by this Court, prominent among them the domicile test, a person cannot establish permanent residence in a place in which presence is prohibited by law. The existence of this prohibition undermines a claimed intent to establish permanent residency given the ever-present possibility of eviction by the authorities.

Petitioners' Argument that Article 49 of the Fourth Geneva Convention Applies

144. The Petitioners claim that Article 49(1) of the Fourth Geneva Convention renders illegal the declaration of the firing zone as a closed area and the consequent eviction orders, a claim the Respondents argue should be denied by law.

145. As previously stated, Israel's consistent position is that it operates according to the humanitarian provisions of the Fourth Geneva Convention, and the Court has refrained from determining the question whether the Convention applies to Judea and Samaria. Regarding Article 49, in particular, this honorable Court ruled more than once that **this Article constitutes a contractual provision that does not reflect customary international law**.

147-9. The Court is not, in any case, required in this Petition to determine whether the Fourth Geneva Convention applies, or the status of Article 49, since the declaration of a closed area and the eviction orders that issued on this basis do not fall within the category of instances that Article 49 seeks to prevent.

Firstly, the purpose of Article 49 is not to prevent orders of the type that are the subject of this Petition. Its purpose is to prevent the type of atrocities carried out by the Germans in WW II, such as mass deportations for purposes of forced labor, mass killings or to achieve a policy objective. [Respondents cite analysis and quote from previous HCJ petitions – RZ].

In addition, the protection granted by Article 49(1) is against the forced transfer of a broad swath of protected residents from a location that constitutes their center of life, that is, a place that serves as their permanent dwelling. The Expert Opinion submitted by Petitioners is cited to show that Article 49(2) relates to a place of permanent dwelling, that is the actual 'home'.

151 and 154. Article 49 of the Fourth Geneva Convention is therefore intended to prevent the mass deportation of protected residents from their homes, from the place that constitutes their center of life, in which they lived prior to the onset of belligerent occupation. In the case at hand, the Petitioners did not dwell permanently in the firing zone, and definitely did not reside there permanently prior to the declaration of the firing zone.

The homes of the Petitioners are in the village of Yata, and their center of life is there: including their registered addresses, their community life, their houses of prayer, their children's schools, and the places where they purchase basic goods. Article 49 does not, therefore, relate to the closure order, and the Petitioners argument should be dismissed.

152. As an additional point, Article 49 is not intended to prevent the eviction of an individual from an area in which he resides illegally and in the face of a clear prohibition. Since the residence of the Petitioners started only following the declaration of the firing zone, it was illegal from the outset and Article 49 does not, therefore, prevent removal.

153. Moreover, the area was closed to actually prevent injury to the civilian population, since the exercises that took place through the year 2000 included use of live ammunition.

154. Article 49 of the Geneva Convention is not intended to prevent the Military Commander from enforcing local law, nor to impinge on his capacity to take steps to maintain public order, as required by Regulation 43 of the Hague Regulations, nor to limit his authority to remove intruders from a closed military area.

The Authority of the Army to Conduct Exercises in a Firing Zone

155. According to the Petitioners, declaration of Firing Zone 918 exceeds the authority of the Military Commander since it limits the access of Petitioners to their land, and the use made by the IDF of the firing zone does not serve their specific needs in the area of Judea and Samaria.

156. It is noted that the Petitioners do not dispute that the IDF is authorized to use private land in an area for military exercises for its forces. However, they maintain that these exercises "must serve particular needs of the occupying army in the occupied area," and that "routine military exercises" will not take place.

157. The Respondents state that **the exercises in the firing zone have great importance for the training of IDF fighters for the range of tasks they are likely to be required to perform, also in the area held under belligerent occupation**. The Respondents' position is that it is not possible to separate the skills the IDF instills in its fighters in the framework of exercises that take place in the firing zone from those that will be required in the framework of military activity in the Judea and Samaria region.

159. As a consequence of the Second Lebanon War, the need to intensify field unit exercises became more acute. These exercises are deeply and substantively connected to IDF missions in Judea and Samaria. The exercises conducted in the firing zones, and particularly in Firing Zone 918, contribute significantly to the training of IDF soldiers for activities that they carry out in, among other place, Judea and Samaria, and to the IDF's readiness for a variety of operational scenarios that are likely to impact the security of the area.

160. The laws of belligerent occupation establish clear rules regarding the status of public and private property in an occupied area, and concerning the possibility that the occupying power will make use of said property.

Regulation 55 of the Hague Regulations establishes that non-moveable public property shifts to the administration of the occupying power at the start of the belligerent occupation for any purpose said power deems suitable. As long as it is not proven a given area is under private ownership, the assumption under international law is that the land is public and subject to the administration of the occupying power.

161. Private property is governed by a different arrangement, and the rule enshrined in Regulation 46 of the Hague Regulations states that the occupying power must respect an individual's private property and refrain from the requisition thereof. Despite this, Regulation 52 of the Hague Regulations grants the Military Commander the authority to "seize" private property, including land, for the needs of the occupying army.

162. This provision provided sufficient basis to enable the Respondents to seize parcels of land under private ownership in the area of the firing zone (land parcels, as stated, that constituted a minor part of the area) in a manner that shifted the parcels to the possession of the Military Commander and prevent access thereto. **However, the Respondents chose a less harmful option: closing the area in a way that prevents interruption of the exercises taking place therein, and preventing danger to civilians from this activity, while providing the rights owners of these places with the possibility of accessing their lands for agricultural work during defined seasons**.

163. The Respondents do not consider that the use of the firing zone for exercises constitutes "confiscation" or "ruin" of private property, and proof thereof lies in the fact that in the three decades during which exercises have taken place, damage of the nature articulated by the Petitioners has not occurred.

164. The Respondents permit the Petitioners to enter the firing zone area to work their land on the Sabbath and Israeli festivals. The Respondents are even prepared to allow the Petitioners to enter the area during two month-long periods each year for agricultural work. Although this arrangement limits access to the land, the restriction is a reasonable one that does not negate the possibility of cultivating crops. It is certainly not "confiscation" of the property as the Petitioners allege.

165-6. **In the matter of *Ibn Zohar***, which addressed the claim for compensation made by property owners whose 145 dunams in the west of Rishon L'zion were declared a closed military exercise area, this Honorable Court determined that **use of the closure authority regarding private parcels located in IDF firing zones in Israel does not rise to the level of "expropriation" or "confiscation"**. In this same matter, the court cited the public interest in maintaining public order that this authority serves.

167. **The restrictions imposed on Petitioners' access to land in Firing Zone 918 that is *prima facie* under their ownership does not constitute seizure, confiscation or expropriation**.

168. Furthermore, even if the Military Commander were to confiscate private land located in Firing Zone 918 on the basis of his authority set forth in Regulation 52 of the Hague Regulations, this would accord with the Regulation requirements as interpreted by this Court. As stated, Regulation 52 grants the Military Commander broad power to seize private property necessary for a military purpose. This authority can be used relative to a broad range of property for an array of objectives. [various foreign military manuals that delineate the broad scope of military requisitioning permissible are cited as authority– RZ]

169. The carrying out of military exercises constitutes, beyond a doubt, an absolute military necessity, including for the IDF. Firing Zone 918 currently serves the IDF for a range of exercises and primary among them basic training for the fighters of the *Nahal* brigade, exercises that are vital to training the fighters and maintaining their skills.

170. The complex security reality requires that the IDF prepare for a range of security scenarios in a variety of arenas, including training for missions in Judea and Samaria, **which constitutes a central arena of IDF military activity**. Most IDF fighters engage in military activity in Judea and Samaria at some point during their military service or reserve duty. The last decade has shown the extent to which actual combat can occur in any arena, including Judea and Samaria.

171. The extent to which the exercises in Firing Zone 918 contribute not only to the security of Judea and Samaria, but to the IDF's capacity to defend Israel as a whole, is likely to justify the seizure of areas in accordance with Regulation 52 of the Hague Regulations. [here citing HCJ opinion on seizure of land to build the Separation Barrier to strengthen argument that the security of Israel as a whole is one consideration the Military Commander may take into account – RZ]

172. Regulation 52 requires that the area seized shall be in proportion to the resources of the occupied country.

173. In contrast to the argument made in the expert Opinion submitted on behalf of the Petitioners, proportionality as set forth in Regulation 52 **is assessed in a collective manner in relation to the resources of the entire area, and not in an individual manner in respect to the individual whose property was seized**.

174. Most significantly, the carrying out of exercises in the firing zone constitutes a military necessity in the area held under belligerent occupation. Therefore, nothing under international law prevents the requisition of private lands for the purpose of conducting these exercises. Nevertheless, the IDF decided to take an even more proportional approach and instead of requisitioning the land, chose only to close it, and impose limitations on entry thereto. These restrictions are reasonable, and do not rise to the level of requisitioning or confiscating private land, and allow the Petitioners to use the area for agricultural and shepherding needs.

The Decision of the Minister of Defence

175. In addition to the arguments made thus far, the Petitioners make several arguments against the decision of the Minister of Defence to allow the Petitioners to stay in the north-west portion of the firing zone.

176. For example, the Petitioners argue that the Respondent [the Minister of Defence] did not consider the severe harm to them, did not conduct a process of examination to assess the significance of the closure for residents of the area, and did not provide the residents with the opportunity to challenge the Closure Order. The Respondents claim that these arguments should be dismissed due to the delay associated therewith. As stated, the previous petitions were submitted in 2000 – twenty years after the declaration of the firing zone. Raising the argument of the failure to uphold the obligation for a hearing on the Closure Order 20 years after the order issued is unacceptable.

177. Moreover, as set forth above, at the time of the declaration of the closure of the area the Petitioners were not permanently dwelling in the area, and therefore it is not at all clear that it was necessary to conduct a hearing for them at that time.

178. Not only this, but at the end of the year 2002, in the framework of the previous petitions, the parties agreed to enter mediation, which in the end did not succeed. Over the course of this mediation, which lasted two years, the Petitioners made arguments and the State proposed compromises. In light of this, the Petitioners' claim that they were not provided the opportunity to raise arguments and that alternatives were not considered should be rejected.

Application under the Contempt of Court Ordinance

179. Regarding the Petitioners' application under the Contempt of Court Ordinance, the Respondents request to refer to their arguments in the response dated 2 February 2013.

180. In relation to the pictures that were attached to the Petitioners' response, it is not clear exactly how the pictures were taken and at what points in time. In any event, as noted in the Respondent's response to the application, no complaint was ever submitted to the security forces alleging damage to property as a result of the exercises that took place on the dates relevant to the application. Should a specific complaint be submitted to the security forces through the proper channels, it will be reviewed carefully.

181. It is noted that due to the application and the Petitioners' response, the procedures have been refined for instructing forces in the area regarding restrictions applied to exercises, and among them a prohibition on live ammunition and a prohibition on harming cultivated parcels of land and additional private property. It is noted that for years the forces that prepared for exercises in Firing Zone 918 were instructed to operate in accordance with the Interim Order restrictions, and with the agreements made by the Respondents. The relatively small number of submissions regarding alleged violations indicates that said instructions were appropriately followed.

Summation

182. In summation, the Respondents' position is that the Petition should be denied by law.

183. Every matter concerning remedies related to illegal building should be summarily dismissed, since it is not fitting to deliberate on these remedies in a comprehensive and general petition that lacks factual detail.

184. Every matter concerning remedies related to evicting Petitioners from the firing zone should be summarily dismissed, due to the excessive delay, failure to cite relevant facts in regard to a significant number of the Petitioners, and the lack of integrity [in raising these claims at this stage – RZ].

185. Furthermore, the Petitions should be substantively denied. The declaration of the firing zone as a closed military area was intended for the purposes of IDF exercises and was not defective in any way. Firing Zone 918 constitutes a very important area for IDF exercises and has no substitute identical in nature. At the time of the declaration of the area as a firing zone, there were no permanent dwellings in the area of the firing zone, and the Petitioners cannot therefore be considered permanent residents of this area. The Petitioners clearly are not considered "permanent residents" according to the Order regarding Security Provisions, and therefore the Closure Order also applies to them. The Petitioners are present illegally in the firing zone, and have been involved for years in extensive illegal building, violating the Interim Order, and taking advantage of the pending legal proceedings concerning the firing zone.

186. We repeat and note that the restrictions the IDF imposes on the Petitioners are not absolute, and they are clearly due to the need to carry out exercises in the firing zone. The Petitioners will be able to enter the firing zone area for agricultural and shepherding purposes on Fridays and Saturday, and on Israeli festivals. In addition, they have an open channel for coordinating entry to the firing zone at additional times. The Respondents are also willing to allow the Petitioners to enter the firing zone area two months per year, during the periods that intensive presence is required for farming and shepherding. In the Respondents' opinion, **this position properly and proportionally balances the essential military necessity of the firing zone with the possible harm that may be caused to residents present in the area due to the exercises**.

187. For all of the above reasons, the Respondents believe the Petition should be denied, and the Petitioners assessed costs.