At the Supreme Court sitting as the High Court of Justice

HCJ 413/13
HCJ 1039/13

Before:	Honorable Justice I. Amit Honorable Justice D. Mintz Honorable Justice O. Grosskopf
Petitioners in HCJ 413/13:	1. Muhammad Musa Shihadah Abu 'Aram et 107 al. 2. The Association for Civil Rights in Israel
Petitioners in HCJ 1039/13:	1. Mahmoud Yunes et 42 al.
	V.
The Respondents:	1. Minister of Defense 2. IDF Commander in the Judea and Samaria Area
Applicant seeking to join:	Masafer Yatta Rural Council
	Objection to grant of Order Absolut
Session date:	12 Adar Bet 5782 15 March 2022
Counsel for Petitioners in HCJ 413/13:	Adv. Dan Yakir; Adv. Roni Pelli
Counsel for Petitioners in HCJ 1039/13:	Adv. Shlomo Lecker
Counsel for the Respondents:	Adv. Yitzhak Bart
Counsel for Applicant seeking to join:	Adv. Netta Amar-Shiff

Judgment

Justice D. Mintz

The petitions before us center on a declaration made in the 1980s of land spanning about 30,000 dunams southeast of the village of Yatta in the South Hebron Hills (in part of an area referred to as Masafer Yatta) as a closed military zone, known by the name Firing Zone 918 (hereinafter: 'the firing zone' or 'the zone').

1. Initially, the firing zone was declared in the northwestern section of the area, spanning about 15,000 dunams, in Closure Order 80/2/S dated 8 June 1980 (at the time it was named Firing Zone 4 or Firing Zone 924). It was classified as a "no-fire" training zone. On 12 November 1982, the declaration was amended, adding an additional area to the southeast, as part of Closure Order 82/5/S. In 1993, the firing zone was reclassified as a "training zone for flat trajectory fire up to 1,500 feet," and later that year as a "firing zone for high trajectory fire." In the context of the signing of the Interim Agreement between the State of Israel and the Palestinian Authority in 1995, a new firing zone declaration order was issued in 1999 (Area Closure Order 99/6/S), but no changes were made to the boundaries of the zone.

2. In brief, the crux of the dispute between the parties is the Petitioners' argument that traditional agrarian habitation had been practiced within the confines of the firing zone for many years, and that the public and residential structures built in the area despite the declaration of the firing zone as a closed military zone constitute a direct continuation of said traditional habitation. On the other hand, the Respondents argue the Petitioners failed to prove either they or their ancestors had maintained permanent habitation in the area prior to its declaration as a closed military zone. As shown below, the parties have been embroiled in this dispute for decades. Previous legal proceedings between the parties form the background for the proceeding at hand. Some of them will be addressed in brief below.

Factual background and previous proceedings

3. As noted, the firing zone was declared a closed military zone in 1980, and throughout the 1980s and 1990s was used for training by various IDF units, including the Air Force. As described in the Respondents' Affidavit of Response, from the 1980s, after the firing zone was declared, until 2000, the Civil Administration actively enforced the order declaring the area a closed military zone.

4. Alongside the said enforcement action to remove permanent structures from the firing zone, local representatives entered into negotiations with the military authorities over accessing the site for farming and grazing, but not permanent habitation. A compromise was ultimately reached with some of the persons who were within the confines of the zone, whereby farmers and shepherds would be permitted into the zone when no training was taking place, mostly on weekends and on Jewish holidays. The Respondents were even prepared to refrain from holding training twice a year, a month each time, to allow sowing and harvesting in the zone, as well as to meet grazing needs. This compromise was reached by counsel for the persons in the area, Adv. Elias Khoury (hereinafter: 'the Khoury Agreement'), and various sources supporting its existence were enclosed with the Respondents' submissions. It is noted that the Petitioners herein claim that inasmuch as an agreement was reached between the parties, they were not party to this agreement and are not bound by it.

5. At any rate, since the agreement between the parties was confined to access to the land for purposes of grazing and farming during set times in the year, the Respondents continued to take action to remove construction in the zone and invasions of it. In 1997, three petitions were filed with this Court with respect to removal orders issued for structures in the zone (HCJ 6754/97; HCJ 6798/97; HCJ 2356/98). Interim injunctions preventing the eviction of the Petitioners were issued in these petitions (decision dated 16 November 1997 in HCJ 6754/97; decision dated 18 November 1997 in HCJ 6798/97; decision dated 10 April 1998 in HCJ 2356/98). The petitioners in the above petitions (some of whom are petitioners in the matter at hand) argued, similarly to the Petitioners' arguments in the proceeding herein, that they live in the firing zone on a permanent basis and had lived in it prior to the issuance of the closure order.

6. Similar to the position taken by the Petitioners herein, in that case too, the respondents denied permanent habitation in the area prior to its declaration as a closed military zone. They clarified they had evidence showing some of the petitioners resided permanently in recognized villages in the area, and that if they had accessed the firing zone in the past, they had done so for grazing and farming purposes only. Nevertheless, the respondents were prepared to expand the petitioners' access to the firing zone beyond the parameters of the Khoury Agreement. As such, they proposed to allow the petitioners' access to the firing zone on days in which there was no operational activity in the area (about 120 days a year), subject to advance coordination and approval from military authorities; all of this without prejudice to any of the petitioners' rights and claims in case they were denied access to grazing or farming within the firing zone to a significant degree. Accordingly, on 5 August 1999, the petitions were struck out by consent.

   After the petitions were struck out, in October and November 1999, the Civil Administration Enforcement Unit (hereinafter: 'the Enforcement Unit') carried out removal and demolition operations. According to the Respondents, a field tour was conducted on 14 December 1999, and the firing zone was found to be empty of people.

7. This, however, did not bring matters to an end. In 2000, further orders for the removal of an invasion into the firing zone were issued. They were countered by two more petitions addressing both the firing zone closure order and the removal orders issued that year (HCJ 517/00 and HCJ 1199/00 (hereinafter: 'the previous petitions')). The petitioners therein argued that despite the agreements reached by the parties, the respondents were barred from removing them from the area, based on the provisions of Section 318 of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) – 2009 (hereinafter: 'Order regarding Security Provisions'. Note that at the time, the Order regarding Security Provisions (Judea and Samaria) (No. 378) – 970 was in place (hereinafter: 'the 1970 Order regarding Security Provisions'), Section 90 of which stipulated an identical arrangement to that currently stipulated under Section 318 of the Order regarding Security Provisions). The argument made by the petitioners therein, which lies at the core of the petitions herein as well, was that the provisions of the aforesaid section and the rules of international law prohibit the removal of a "permanent resident" from an area declared a closed zone. In the previous petitions, some of the petitioners claimed they live in the firing zone on a permanent basis and own private property there; others claimed they live in it only part of the year, on a seasonal basis; and the remaining petitioners claimed they mainly use it for farming purposes that do not include habitation.

   Responding to the previous petitions, the Respondents addressed the security need to use the firing zone for training, the agricultural and temporary use made of the area by any of the Petitioners, and the absence of permanent habitation within the firing zone.

8. On 29 March 2000, a hearing was held before this Court in the previous petitions. At the conclusion of said hearing, the Court instructed the issuance of an interim injunction directing that the situation on the ground remain unchanged, as follows:

   > Pending a further decision in the matter, the status quo will be upheld as it was prior to the issuance of the orders. The Petitioners (in petition 1199/00) – inasmuch as they are outside the area – will be permitted to return to it for the purpose of grazing and of habitation for purposes of grazing, as has been done in the past. Petitioners 1-4 in petition 517/00 will be permitted the same.

9. The previous petitions were litigated for a decade, during which the parties were referred to mediation which did not succeed. Several hearings were held, and further attempts were made to reach an out-of-court settlement. On 20 July 2012, the Respondents filed an Updating Notice

stating that after Respondent 1 had considered the matter, a decision was reached to allow the Petitioners to stay permanently in the northwestern section of the firing zone, where only "dry" training would take place, but permanent stays would not be permitted in the remainder of the zone. At the same time, it was determined the Petitioners would be permitted to access the firing zone for agricultural cultivation when there is no training (on weekends and Jewish holidays). The Respondents were also prepared to give the Petitioners two additional periods a year, each a month long, for purposes of agricultural cultivation and grazing. Given the aforesaid, on 7 August 2012, the petitions were struck out without prejudice as they had become moot.

The petitions herein:

10. Shortly after the previous petitions were struck out, on 16 January 2013, the petition in HCJ 413/13 was filed, and on 7 February 2013, the petition in HCJ 1039/13 was filed. These are the petitions at bar. These two petitions argue that the Respondents must refrain from forcibly removing the Petitioners and their families from the firing zone, regularize the Petitioners' habitation therein in keeping with the Respondents' obligations under the laws of belligerent occupation, and explain why Firing Zone Closure Order No. 6/99/S should not be revoked. Additionally, on the day the petition in HCJ 413/13 was filed, a motion for an interim injunction was made, and a temporary interim injunction was issued the same day whereby the Respondents would refrain from forcibly removing the Petitioners and their families from their homes in the firing zone. On 14 March 2021, it was determined that the temporary interim injunction would also apply to the Petitioners in HCJ 1039/13.

11. The first hearing in the petitions was held on 2 September 2013, and the parties were advised to seek mediation. After the parties agreed, on 24 October 2013, the case was referred for mediation before Honorable Justice (ret.) I. Zamir. As noted in the Respondents' Affidavit of Response, during mediation, the parties agreed that construction and presence in the area would remain unchanged for the duration of mediation (which the Respondents claim was not honored by the persons present on the ground). On 1 February 2016, the parties stated that mediation had failed, and the case was returned to this Court. On 11 January 2017, an order nisi was issued in the petitions, clarifying it "does not evince any predilection on our part toward a binary solution" and noting that the parties should reach a consensual compromise. Years went by with no significant developments in the proceedings, until, on 24 February 2021, the Masafer Yatta Rural Council made a motion to join proceedings as amicus curiae. A hearing regarding the objection to the order absolut was held before us on 15 March 2022, during which the amicus curiae motion was heard as well.

12. To complete the picture, it is noted that several additional legal actions, parallel to the matter herein, have been launched over the years against eviction, demolition and confiscation orders issued over the years for various structures erected within the firing zone and for people present in it (see, e.g.: HCJ 1514/20 **'Awad v. IDF Commander in the Judea and Samaria Area** (30 June 2020); HCJ 7590/19 **Dabasa v. Military Commander in the West Bank** (17 November 2019); HCJ 5296/18 **Aldababseh v. Judea and Samaria Area Central Enforcement Unit** (19 July 2018); HCJ 805/05 **'Awad v. IDF Commander in the Judea and Samaria Area** (17 September 2013); as well as administrative petitions challenging decisions by the Civil Administration Planning Bureau not to approve plans regarding construction inside the firing zone: AP (Administrative Jerusalem) 57023-12-19 **Hushiyah v. IDF Commander in the West Bank** (15 March 2020); AP (Administrative Jerusalem) 53731-11-19 **Dababseh v. Military Commander in the West Bank** (26 January 2020)). Additionally, parallel to the proceeding herein, another petition was filed against stop-work orders issued for dozens of structures built in the firing zone by the petitioners therein (some of whom are Petitioners herein as well) (HCJ 5901/12; hereinafter: 'the demolition order petition'). This petition was struck out on 28

December 2020, given its possible impact on the decision in the proceeding herein, which pertains to the same subject matter. Meanwhile, in that same petition, an interim injunction was issued on 11 January 2017 ordering a "conditional suspension" of the stop-work orders issued, stressing this was subject to "no construction whatsoever being undertaken in the targets of the demolition orders or near them. Inasmuch as said condition is not fulfilled, the suspension will not remain, and the interim injunction will automatically expire." Subsequently, on 14 June 2020, the conditional interim injunction with respect to the structures listed in those petitions was reduced.

Parties' arguments

13. The main argument brought forth by the Petitioners in both petitions (hereinafter presented jointly) is that the declaration of the firing zone is unlawful and must be voided. Their position centers on the factual claim that members of the Petitioners' families had continuously resided in the area of the firing zone for decades **prior** to its declaration as a closed military zone. The Petitioners claim they have proven a clear connection to habitation in the firing zone as they reside there through most of the year.

14. According to the Petitioners, approximately 12,000 dunams of the firing zone, at least, are privately owned land, and only some 5,600 dunams are declared state land. Traditional agricultural habitation in the area was, initially, seasonal only. However, over the years, and prior to the declaration of the firing zone, habitation in the area became permanent. In this context, the Petitioners rely on a book entitled *Life in the South Hebron Caves* written by Mr. Yaacov Havakook (hereinafter: 'Havakook') in 1985; on an expert report by Ms. Shuli Hartman, a social anthropologist; on an expert opinion by Prof. Gideon Kressel, filed as part of the previous petitions; and on various aerial photographs.

15. The Petitioners take the position that the declaration of the firing zone is incongruent with the rules of international law, referring, *inter alia*, to the provisions of Article 49(1) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: 'the Fourth Geneva Convention'), which prohibits the forcible transfer of protected persons in an area held under belligerent occupation. The declaration also contravenes the provisions of Article 43 of the Regulations respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907, which requires the military commander to take the needs of the protected persons into consideration. Additionally, the condition enumerated in Section 318 of the Order regarding Security Provisions, which qualifies removal from a closed zone with respect to "permanent residents," does not exist in international law, since, under international law, suffice it that the closed zone constitutes the protected persons' "center of life" to prevent their removal. The Petitioners contend they were able to prove to a sufficient degree that they are title holders in some of the land to which the Firing Zone Order applies. They hold that as the declaration of the zone was not pursued by way of confiscation, expropriation or seizure, which are avenues that provide for the transfer of private property to the possession of a military body, this indicates the illegality of the declaration and the Respondents' disavowal of the obligations and restrictions applicable to them by law. It was also argued that the Respondents' actions have led to a disproportionate, unreasonable impingement on the Petitioners' rights to private property, freedom of movement, livelihood, dwelling and shelter. Additionally, the Respondents failed to prove a distinct military need to specifically use the firing zone. The overall dearth of training grounds for military needs does not, *per se*, justify the eviction of numerous residents from their homes in a manner that would cut them off from their source of income and from their social lives.

16. In addition to the aforesaid, there is no room to consider whether any permanent habitation occurred inside the boundaries of the firing zone beginning in 1980. It is only the most recent order, issued in 1999, that should be seen as the order pursuant to which the Respondents claim

competence to order the eviction of non-permanent residents. As a result, given the fact that even according to the Respondents' position, various inhabitants resided in the area on a permanent basis during the 1980s and 1990s, there is no doubt that permanent habitation within the confines of the firing zone predates the issuance of the Order.

17. Along with their petition, the Petitioners submitted aerial photographs they claim indicate, as do aerial photographs submitted by the Respondents, that continuous habitation in the villages predates 1967, and that the local inhabitants' transition from temporary habitation in caves to permanent habitation in "above-ground" communities can be observed. The Petitioners further argued that later aerial photographs from 1985 and 1999, submitted by the Respondents, cannot attest to the nature of habitation in the area, whether permanent or temporary, as at that time, the area was entirely deserted after the structures in it had been demolished and the inhabitants evicted. That situation remained until 2000, when the Court issued this interim injunction.

18. The Petitioners further claimed the Respondents had failed to take appropriate steps to clarify the issue of the former's residential ties to the firing zone, and had even acted in bad faith, as they had refrained from reviewing the status of the inhabitants' private property rights to the land and from considering less injurious alternatives.

19. On the other hand, the Respondents argued that the petitions should be dismissed both *in limine* and on their merits. The declaration of the firing zone in 1980 was preceded by lengthy, comprehensive staff work indicating there was no permanent habitation in the firing zone at the time. In the entire period beginning in 1980 and ending in 1997, no petition was filed with the Court with respect to the firing zone. This is a significant delay that caused highly significant evidentiary damage. Though concerted efforts by the Respondents did uncover many documents from that period, some relevant documents have been lost over time and cannot be retrieved. There is no doubt whatsoever that had the Petitioners lived permanently in the firing zone, they would have known of the declaration around the time it was made. In the circumstances, a two-decade delay provides sufficient grounds for the dismissal of the petitions *in limine*. Obviously, this claim is particularly true of the 192 Petitioners who were never party to the previous petitions. The petitions should also be dismissed *in limine* for failure to disclose relevant facts. There is positive information with respect to most of the Petitioners, refuting their claim that they permanently reside in the firing zone. Some of the Petitioners have permanent homes in the village of Yatta, and some declared in the previous petitions that they do not reside in the firing zone on a permanent basis. Additionally, some of the Petitioners were party to the previous petitions, which were struck out given the Court's remarks, a fact that was not mentioned in the petitions at bar. Given the fact that many of the Petitioners did not list all the relevant facts pertaining to their matter in the petitions, the petitions should be dismissed *in limine* for this reason as well.

20. The petitions should also be dismissed *in limine* due to bad faith on the part of the Petitioners. In the previous petitions, to which most of the Petitioners herein were party, an interim injunction was issued that remained valid for roughly a decade. According to the interim injunction, any further construction within the firing zone was prohibited. However, in the years following its issuance, the interim injunction was repeatedly violated by the Petitioners, many times over. The Petitioners built many permanent structures without permits, including water cisterns, lavatories, homes, schools, a mosque and other permanent structures. In addition, over the years, many individuals who were not party to the previous petitions entered the zone, exploiting the situation to establish "facts on the ground" by way of illegal construction. Comparing the aerial photographs from the relevant years indicates that until 2000, there were no permanent structures within the boundaries of the firing zone, and since 2000, construction of permanent structures without permits has become prevalent. The Petitioners' bad faith is exacerbated given their conduct since

the submission of the current petitions, as construction within the firing zone has increased and intensified since 2013.

21. On the petitions' merits, the Respondents claimed the Petitioners had failed to demonstrate a breach of the law with respect to the declaration of the firing zone as a closed military zone. The declaration of the firing zone is congruent with the laws of belligerent occupation in international law, as well as the law applicable in the Area and the rules of administrative law by which the military commander is bound. The Petitioners were not permanent residents in the firing zone prior to its closure. The declaration of the firing zone was meant to serve IDF training needs, with the need a highly crucial one and no other area of identical quality found. As noted, the Petitioners took up residence in the firing zone subsequent to its closure and in defiance of the law. Therefore, the legal provisions designed to protect a "permanent resident" likely to be harmed by the closure of a zone are inapplicable. Protections afforded by international law, too, are inapplicable in the circumstances. To substantiate the claim regarding the absence of permanent habitation in the firing zone prior to the declaration, the Respondents referred to aerial photographs of the firing zone taken between 1967 and 2000; to Havakook's book, which indicates only seasonal and not permanent habitation in the firing zone; and to an affidavit by Prof. Moshe Sharon from the Institute of Asian and African Studies in the Faculty of Humanities at the Hebrew University of Jerusalem, according to which habitation in the clusters of caves and Khirbe communities only took place for several months in winter. The Respondents also noted that some of the Khirbe communities mentioned in the petitions as places of dwelling have, in fact, served as archeological sites since the time of the British Mandate, and that using the land in which they are located is restricted under the 1966 Jordanian Law of Antiquities. The fact that until 1993, Air Force aircrafts trained within the firing zone, using live fire as well as constructing and paving targets, also indicates there was no permanent habitation in the zone.

22. It is noted that despite the aforesaid, as an aside, the Respondents included in their response an outline whereby the Petitioners would be permitted to access the firing zone for purposes of agricultural cultivation and animal grazing at times when no training is taking place, and to use the land for two additional months every year for agricultural cultivation. The Petitioners countered with a clarification that they would not accept any plan allowing for their occasional removal for the purpose of live-fire training, which would cause them immense suffering, and that no training whatsoever should be permitted in the firing zone.

23. During the hearing held before us on 15 March 2022, the Respondents reiterated that after further inspection and examination regarding the need to use the firing zone, staff work carried out found that the need to use the zone in question is indisputable. The Respondents further addressed the grounds for dismissal *in limine*, mainly the abuse of legal proceedings by continuing construction on the ground under cover of the interim injunctions issued in the various proceedings. On the other hand, during the hearing, the Petitioners argued, *inter alia*, that there is little room for doubt that the need for the firing zone is not absolute, partly given the many motions for extensions filed by the Respondents over the years; that the firing zone does not serve the military's needs in the area of Judea and Samaria but rather, at most, general military needs of the State of Israel; and that there is no room to make arguments regarding preliminary matters after an order nisi was issued in the petitions.

Deliberation and decision

24. Nine years have passed since the petitions at bar were filed. Over the years, argument briefs have been filed, various motions and documents have been submitted, and several hearings have been held, during which parties made oral arguments. In addition, attempts have been made at mediation between the parties that would obviate a decision in the petitions. However, as these have failed to yield results, and as the necessary evidence and arguments have been laid out before us in full,

the time has come to deliver a decision. I shall begin at the end and note that, in my opinion, the petitions should be dismissed both *in limine* and on their merits.

25. First, as to the arguments on preliminary issues, there is merit to the Respondents' arguments that the petitions should be dismissed for laches only. In this context, it shall first be noted that there is no basis for the Petitioners' claim that the prohibition on access to the zone applies only from the time the 1999 order was issued. As noted above, on 8 June 1980, Closure Order 80/2/S was issued, wherein the northwestern portion of the zone was defined as "closed for purposes of the Order regarding Security Provisions," and entry was prohibited to any person except a soldier or police officer in the line of duty, or persons in possession of a "permit certificate." The Petitioners' arguments, made entirely without basis, that in the period in question there was no prohibition on access to the declared zone, are irrelevant. Additionally, from the time of the initial declaration in 1980 and up to 1997 (when the first petitions were filed regarding the removal orders issued for structures in the firing zone), no legal action was taken with respect to the declaration of the firing zone. Add to that the fact that, as noted by the Respondents, 192 of the Petitioners herein **were never party** to the previous proceedings, meaning their first application to this Court was not made until 2013. As such, the petitions are afflicted by a clear, lengthy and significant delay. The delay has occurred both on the objective and the subjective planes – objective in terms of the significant amount of time that elapsed since [sic] any action was taken, certainly the action herein, whilst the Petitioners slept on their rights for many years; and subjective in reference to the significant evidentiary damage that could have been caused to the Respondents. The following remarks were made with regards to the risk of evidentiary damage, which is substantive and significant, in AAA 867/11 **Tel Aviv-Yafo Municipality v. ABC Management and Maintenance LTD** (28 December 2014):

> As time goes by, documents tend to disappear; memories grow dimmer, and officials who served during the relevant times are not available to testify. Given that public servants tend to many matters and cases, the passage of time increases the risk that the memory of the relevant official who tended to the matter discussed in the petition will grow dimmer and that they might forget the facts. Launching a legal proceeding as soon as possible after a cause of action has emerged informs the authority and its representatives that a legal proceeding has been launched and enables it to make factual inquiries with officials before their memory dulls [...]" (AAA 867/11, paragraph 25).

And subsequently:

> The need to set a time limit on launching a legal action is vital for the functioning of the authorities and the courts, as, without such limitation, any dispute that has ever arisen could be brought for review at any time. Such a result could paralyze the legal system and harms public interest in its broad sense. Such indirect damage accumulates, as in "the law of small numbers," to form considerable harm [...] leading to the conclusion that entertaining a petition long after the cause of action emerged **in itself** undermines the public interest. Note well: While the passage of time ***per se*** does not constitute objective delay justifying the dismissal of a petition [...], filing a petition at a considerable delay does **in itself** harm the public interest. It is clear, however, that this consideration alone cannot tip

> the balance and will forever be balanced against competing considerations (AAA 867/11, emphases in original).

Indeed, in circumstances such as those herein, and given the extreme delay, examining the claims made in the petitions, particularly regarding the main factual question – whether the Petitioners were permanent inhabitants at the relevant time, i.e. prior to 1980 – becomes extremely difficult (although, as observed below, the Respondents rose fully to the task despite their disadvantaged opening position). Furthermore, the Petitioners make no argument to justify this delay. It is superfluous to note that the time that has elapsed since the petitions were filed cannot remedy the delay in their filing. The delay is measured in relation to the time that elapses between the emergence of the cause of action and the filing of the petition for remedy, since it is after this time that the authority becomes aware of a legal proceeding such that it is able to make inquiries into the matter. The protracted period of time that elapsed between the filing of the petitions and the ruling therein, though inconvenient, does not mitigate the extreme delay in filing the petitions.

26. Furthermore, there is little room for doubt that the petitions should be dismissed due to absence of completely clean hands on the part of the Petitioners. Orders were issued for the eviction of the Petitioners, who provided no document whatsoever showing they have property rights to lands located in the firing zone. The Petitioners were shielded by the interim injunctions issued over the years forbidding their relocation from the zone, beginning in 1997, when the first petitions were filed with this Court by some of the Petitioners herein, and subsequently, more extensively, after the previous petitions were filed and additional interim injunctions were given in them. Some of the interim injunctions given in other proceedings were expressly predicated on the local residents (some of whom are Petitioners herein) refraining from continued illegal construction on the site (e.g.: interim injunction issued in HCJ 805/05 dated 17 February 2005; interim injunction issued in the demolition order petition dated 11 January 2017, and clarification dated 14 June 2020). Nevertheless, construction in the zone (which, needless to say, is unlawful and permit-less given the lack of planning feasibility inside the firing zone) has increased in recent years. This is not a matter of dispute between the parties. According to the Petitioners themselves, after the village residents were evicted in 1999, they returned to settle in the area in late 2000, "following the interim injunction issued by the Honorable Court in the first petitions" (paragraph 16 of the Main Argument Brief on behalf of the Petitioners in HCJ 413/13; Petitioners in HCJ 1039/13 cite these main arguments as well). Construction in the firing zone accelerated, all under cover of the interim injunctions that prohibited the Respondents from relocating the Petitioners, and despite the agreement between the parties as part of the mediation process, to preserve the status quo regarding construction and presence in the zone for the duration of the mediation. Taking the law into one's own hands and seeking equitable relief are incompatible (see also: HCJ 7013/21 **Abu Zeitun v. Head of the Civil Administration**, paragraph 7 (18 November 2021); HCJ 2652/21 **Moshkovitz. v. Minister of Defense**, paragraph 7 (1 June 2021); HCJ 3246/17 **Abu Teir v. IDF Commander**, paragraph 27 (11 June 2019)). It has long since been said on such matters that:

> A person must decide within their heart whether they are seeking relief from the Court or taking the law into their own hands. A person cannot do both at the same time, meaning: The Court will not grant relief to a person who, while turning to the Court, takes the law into their own hands and seeks to present their counterparts with faits accomplis.
> (HCJ 8898/04 **Jackson v. IDF Commander in the Judea and Samaria Area** (28 October 2004)).

27. Interim injunctions are meant to **preserve** the status quo and prevent any changes detrimental to any of the parties while a case is pending (see, e.g.: HCJ 1754/19 **'Hitorerut in Jerusalem' v. Government of Israel** (18 September 2019)). They are not intended to improve the position of the party seeking the injunction. Accordingly, the Petitioners' argument that life in the area cannot be expected to "grind to a halt," or in the words used by counsel for the Petitioners at the hearing before us, "life is stronger than any interim injunction," is nothing short of outrageous. The interim injunction was meant to prevent the Respondents from clearing the zone, and clearly cannot be used as a cover and an excuse for expanding and entrenching illegal construction that is under dispute. It would not be superfluous to note that, on the other side of the aisle, the Respondents obeyed the interim injunction to the letter and **abstained** from holding live fire training exercises in the firing zone over the years, partly in light of the many structures built inside it despite the interim injunctions granted.

28. In this context, it should also be stated that the claim made by the Petitioners, whereby any arguments on preliminary issues should not be accepted once an order nisi has been issued in the petitions, cannot be accepted. An order nisi means that relief against the Respondents is "conditional," in other words, is suspended pending receipt of a response (Daphne Barak-Erez, *Administrative Law*, Vol. D 436 (2017)). "An order nisi is no more than the court granting permission to begin litigation, in other words, forwarding the petition to the administrative authority and inviting it to respond to the arguments made in the petition" (Yitzhak Zamir, *Administrative Authority*, Vol. C 1646 (2014)). Therefore, there is no flaw in reviewing arguments on preliminary issues after an order nisi has been issued in the petition (see, e.g., some of many discussions regarding consideration of arguments on preliminary issues subsequent to issuance of an order nisi: HCJ 7957/04 **Mara'abe v. Prime Minister of Israel**, IsrSC 60(2) 477, 545-546 (2006); HCJ 2988/15 **'Awawdeh v. State of Israel** (18 December 2016); HCJ 4386/16 **Madio v. Israel Prison Service**, paragraphs 85-88 (13 June 2017) (where the petitioners also claimed arguments pertaining to preliminary issues had become moot)).

29. The petitions should, therefore, be dismissed due to the aforesaid alone. However, having come this far, and given the history of the petitions up to this point, I have found it necessary to address the merits as well, particularly the main issue underlying the petitions.

30. The premise is that the Military Commander is competent to declare closed zones and prohibit entry into them without a permit. This power is enshrined in Section 125 of the Defence (Emergency) Regulations – 1945 and in the provisions of Section 318 of the Order regarding Security Provisions (note that, in the matter at hand, the provisions of Section 90 of the 1970 Order regarding Security Provisions is relevant as it was applicable at the relevant time, the provisions are identical, and, therefore, for the sake of convenience, we refer to the section applicable today). This is a broad power designed to serve military-security interests, including the assignment of training grounds for the purpose of training combatants and maintaining their fitness. The jurisprudence of this Court has clarified that anyone who owns or possesses land included in a closed zone order must ask the military commander for permits to enter the zone. Property rights in a closed zone do not, in and of themselves, give rise to a right of access (see: CA 2281/06 **Even Zohar v. State of Israel**, paragraph 40 (28 April 2010)).

31. There is no room to accept the arguments made by the Petitioners to the effect that the exercise of power pursuant to Section 318 of the Order regarding Security Provisions directly contradicts the provisions of international law, including the Fourth Geneva Convention (see, on the application of international human rights conventions in the Judea and Samaria Area: HCJ 1890/03 **Bethlehem Municipality v. State of Israel – Ministry of Defense** (3 February 2005); HCJ 9961/03 **HaMoked – Center for the Defence of the Individual Founded by Dr. Lotte Salzberger v. Government of Israel**, paragraph 20 (5 April 2011); HCJ 769/02 **The Public**

Committee against Torture in Israel v. Government of Israel, IsrSC 62(1) 507, 548 (2006-2007)). Therefore, even if we presume the actions of the Military Commander in the Area should be considered in light of the "customary" provisions of the convention, there is no dispute that when an express provision of Israeli law is at odds with international law, Israeli law supersedes (HCJ 785/87 **'Afu v. IDF Forces in the West Bank**, IsrSC 42(2) 4, 35 (1988); HCJ 253/88 **Sajdiya v. Minister of Defense**, IsrSC 42(3), 801, 815 (1988); HCJ 2690/09 **Yesh Din - Volunteers for Human Rights v. IDF Commander in the West Bank – Major General Gad Shamni**, paragraph 6 (28 March 2010)). This Court, too, has long since recognized the Military Commander's competence to instruct the closure of a zone, deriving from the rules of belligerent occupation – a power whose roots lie in part in the obligation to ensure the safety and security of the population in the area. For instance, in HCJ 9593/04 **Morar v. IDF Commander in Judea and Samaria**, IsrSC 61(1) 844 (2006), it is noted that:

> The territories of Judaea and Samaria are held by the State of Israel under belligerent occupation and there is no dispute that the military commander who is responsible for the territories on behalf of the state of Israel is competent to make an order to close the whole of the territories or any part thereof, and thereby to prevent anyone entering or leaving the closed area. This power of the military commander is derived from the rules of belligerent occupation under public international law; the military commander has the duty of ensuring the safety and security of the residents of the territories and he is responsible for public order in the territories (see art. 23(g) and art. 52 of the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 [...] art. 53 of the Convention relative to the Protection of Civilian Persons in Times of War, 1949 [...] This power of the military commander is also enshrined in security legislation in section 90 of the [Order regarding Security Provisions] [...] (HCJ 9593/04. pp. 860-861).

32. It is not superfluous to note that there is no place for the Petitioners' argument focusing on the provisions of Article 49(1) of the Fourth Geneva Convention, as not only has it been determined that this is a treaty law provision that does not reflect customary international law (see, e.g.: HCJ 698/80 **Kawasme v. Minister of Defense**, IsrSC 38(1), 617 (1981); HCJ 253/88 **Sajdiya v. Minister of Defense**, IsrSC 42(3), 801, 815 (1988); HCJ 814/88 **Nasralla v. IDF Commander in the Judea and Samaria Area** IsrSC 43(2), 265, 268-269, (1989)). Additionally, this provision, which is designed to prevent mass expulsions in an occupied territory for purposes of extermination, forced labor or for various political ends, has nothing whatsoever to do with the case at hand.

33. Having found that the Petitioners' arguments regarding the impact of the rules of international law do not aid them, attention should now turn to consideration of the main question on which this review centers, namely whether the Petitioners resided in the firing zone on a permanent basis prior to its declaration. This argument is based on the provision of Section 318 of the Order regarding Security Provisions, which qualifies removal from a closed zone with respect to "permanent residents" therein. On this matter, too, I shall begin at the end and note that the clear conclusion arising from the overall materials brought before us is that in the time leading up to the declaration of the firing zone, there was **no** permanent habitation within its boundaries. Before elaborating on the matter, I shall note that while a High Court petition is generally not the appropriate venue for a thorough examination of complex factual questions (see, e.g.: HCJ 884/86 **Neve Zohar Local Committee v. Minister of Interior**, IsrSC 42(4), 441, 449 (1988); HCJ

2196/00 **Israeli Camerata Jerusalem Orchestra v. Minister of Science, Culture and Sports**, IsrSC 58(4) 807, 815 (2004); HCJ 3354/12 **Sanlakol Ltd. v. Government of Israel**, paragraph 17 (18 August 2014)), the matter at hand, as detailed below, does not concern a complex factual question, but rather one in which a decision, particularly for purposes of the petitions at bar, is not complex in any way.

34. In their response, the Respondents state that image interpretation of aerial photographs of the firing zone from the relevant years reveals no signs of permanent presence of inhabitants prior to 1980. On the other hand, the Petitioners argue that aerial photographs in their possession reveal "contiguous settlement in the villages" over 45 years. Though there is no dispute that the interpretation of aerial photographs is a matter of expertise, a review of the aerial photographs filed by both the Respondents and the Petitioners reveals, even to the unprofessional, untrained, layman's eye, the clear, unequivocal conclusion that the law is on the side of the Respondents. The aerial photographs provided by the Respondents relate to significant time periods – some dating from 1967 and to late 2012. Further photographs were added documenting Khirbet Tuba from 1985, 1990, 1999, 2003, 2006, 2008, 2010 and 2012; Khirbet al-Maq'urah from 1985, 1990, 1999, 2004, 2006, 2008, 2010 and 2012; Khirbet Safai from 1985, 1990, 2000, 2003, 2006, 2008, 2010 and 2012; Khirbet al-Taban from 1967, 1979, 1984, 1990, 1999, 2002, 2005, 2007, 2008, 2009, 2011 and 2012; Khirbet al-Fakhut from 1967, 1981, 1990, 1991, 1999, 2001, 2003, 2005, 2007, 2009, 2011 and 2012; Khirbet Hilwah from 1967, 1979, 1981, 1991, 1999, 2001, 2003, 2005, 2007, 2009, 2011 and 2012; Khirbet Jenbah from 1999, 2001, 2003, 2004, 2005, 2007, 2010 and 2012; Khirbet Markez from 1967, 1979, 1981, 1991, 1999, 2001, 2002, 2005, 2008, 2009, 2011 and 2012; Khirbet Ma'z from 1985, 1990, 1999, 2000, 2003, 2007, 2010 and 2012; and Bir al-'Eid from 1967, 1969, 1974, 1980, 1989, 1992 and 1995. This is a significant cache of aerial photographs that reveals a clear, unquestionable situation. While no signs of habitation can be observed in the area prior to 1980, certainly not permanent habitation in the entire area, the photographs clearly show a construction boom in the Khirbe communities throughout the 1990s, and particularly since 2000. This remains true even 'discounting' the aerial photographs from 1985, 1999 and 2000, which the Petitioners argue may be misleading as, in those years, the Respondents demolished structures on the ground.

35. This picture emerges on its own not only from the aerial photographs submitted by the Respondents, but also from those submitted by the Petitioners in HCJ 413/13. Although these aerial photographs date from fewer years than those submitted by the Respondents, they, too, unequivocally demonstrate a lack of construction in the earlier years compared to the many structures added over the years. As a matter of fact, many of the photographs provided relate to the same Khirbe communities photos of which were provided by the Respondents. For example, the Petitioners provided aerial photographs of Khirbet Majaz (Ma'z in the Respondents' photographs) from 1972, 1981, 1993, 2001 and 2011; Khirbet a-Safai a-Tahta (partly overlapping the photo of Khirbet Safai provided by the Respondents) from 1967, 1972, 1981, 1993 and 2001; Khirbet a-Taban (al-Taban in the Respondents' photographs) from 1972, 1981, 1993 and 2011; Khirbet al-Fakhit (al-Fakhut in the Respondents' photographs) from 1972, 1981, 1993 and 2011; Khirbet al-Markez (Markez in the Respondents' photographs) from 1967, 1972, 1981, 1993 and 2011; Khirbet al-Halawah (Hilwah in the Respondents' photos) from 1981, 1993, 1972 and 2011; and Khirbet Jinbah (Jenbah in the Respondents' photographs) from 1967, 1972, 1981, 1993 and 2011. Further aerial photographs provided were of Khirbet a-Safai al-Fuqa from 1967, 1972, 1981, 1993, 2001 and 2011, and Khirbet a-Dabe' from 1972, 1981, 1993 and 2011. The obvious conclusion from examining these aerial photographs is entirely identical to the obvious conclusion from the Respondents' photographs.

36. For example, let us look at the aerial photographs of Khirbet al-Fakhut (al-Fakhit in the Petitioners' submissions) presented by the Respondents. In 1967 and 1981, the area was entirely

free of structures. Some development can be observed in 1990 and 1991. In 2001, it is apparent that several structures were built in the Khirbe community, and more were built in 2007, 2009, 2011 and 2012. The aerial photographs provided by the Petitioners reveal an identical picture, and even more clearly so. No evidence of structures on the ground is observable in 1972 and 1981, contrary to 2011, when extensive construction in the area can be observed. This is also the case with respect to Khirbet Hilwah (al-Halawah in the Petitioners' submissions). There is little room for doubt that in the early years (1967, 1979, 1981 and even 1991), there is no evidence of construction at the site. On the other hand, in 2007, 2009, 2011 and 2012, an increasing number of houses and structures were built. Here too, the aerial photographs submitted by the Petitioners reveal a similar picture. There is a stark difference between the photographs from the early period (1972, 1981 and even 1993) and the photograph from 2011, in which construction can clearly be observed. The claim the Petitioners make in response to the Respondents' contentions, whereby they do not deny the number of structures in the area increased over the years as a result of natural population growth and an expression of the gradual transition from the caves to the surface, fails to support their claim that permanent habitation existed in the firing zone in the past.

37. The Respondents also rightly argue that the fact that the Air Force conducted airstrike exercises prior to the declaration of the firing zone and up until 1993 (which was undisputed by the Petitioners) also bolsters the aforesaid conclusion that there was no permanent habitation in the area at the time. The Respondents provided support for this claim in the form of a report by the Enforcement Unit's "Judea Officer" dated 21 September 1989, relating to work carried out on the ground for purposes of this training. The same report notes that the firing zone contains two Khirbe communities where shepherds reside with their flocks in caves **in winter**, and that the caves were sealed after being verified as vacant.

38. Moreover, the description provided by the Respondents, whereby construction of residential structures and other infrastructure in the firing zone was first undertaken after 1980 and even after 1990, and more extensively after 2000, is compatible with other evidence. Despite the inherent difficulty in finding records of events and actions that occurred decades ago, the Respondents did present an assortment of documents recording the actions of various officials, through which it is possible to trace developments that have occurred in the area since the declaration. Thus, activity reports of the Enforcement Unit and other officials between 1980 and 2000 paint a clear picture whereby there was no permanent habitation in the firing zone prior to its declaration. The various reports also indicate that Enforcement Unit officers took action to eradicate and remove various invaders and construction subsequent to the declaration in 1980, through various enforcement measures. For instance, a Hebron Enforcement Coordinator report from 2 March 1984 mentions shepherding, antiquity looting and repeated attempts at construction in the zone. A Nature Authority Enforcement Officer report from 2 May 1984 addresses invaders taking over Khirbet Jinbah and Khirbet Markez after 1980. The same emerges from a Hebron Enforcement Coordinator report of 1 February 1985, regarding a complaint filed with the Hebron police against residents of the village of Yatta who had invaded the firing zone and settled in Khirbet Markez (a report about another complaint regarding more invaders was filed on 7 February 1985).

    More dealings with invaders are reflected in a Hebron Enforcement Coordinator report from 15 April 1985, detailing a patrol of the firing zone conducted on 14 April 1985, as well as another report from 5 May 1985 about the seizure of flocks inside the firing zone, in addition to a police complaint in the matter, and more. It can be said, therefore, that despite the inherent evidentiary difficulty in locating documents containing real-time records of activities due to the passage of time, the Respondents did provide a clear evidentiary picture whereby there was no permanent habitation prior to the declaration.

39. On the other side of the aisle, the expert opinions on which the Petitioners rely do not aid them. As for the opinion provided by Prof. Shuli Hartman, a social anthropologist, according to the opinion's "introduction," it is based on her visits and tours of the South Hebron Hills "beginning in 2006," during which the author spoke to local residents and observed their daily routines. Moreover, the opinion focuses, as evinced by the title, on "Lifestyles of Farming-Shepherding Communities inside Firing Zone 918." Thus, it mostly lists patterns of behavior exhibited in domestic and agricultural spaces by persons living inside the firing zone. Yet the "historical" background provided is no more than her impression of what she was told by local residents at a later date, beginning in 2006 according to her own statement. In these circumstances, it is difficult to draw a conclusion from this opinion on the matter disputed by the parties, given that the opinion does not rely on any sort of objective data or "real-time" visits to the area. The Petitioners provided another expert opinion by Prof. Gideon M. Kressel, Head of the Social Studies Unit at the Ben Gurion University of the Negev. It is difficult to describe this opinion as convincing. The opinion contains no more than a general finding, based, as the opinion itself states, on a visit to the area in 1984 and on Havakook (more on this follows), whereby "over the years," some of the families living in the caves resided in them permanently. Nor did I find that the transcripts of the "Meeting of the Joint Government WZO Settlement Committee" of 12 July 1981 presented by the Petitioners did anything to alter the aforesaid conclusion, given, in part, the generality of the statements and their removal from a clear context.

40. As noted, both parties sought to rely on Havakook's book. The Petitioners referred to passages from the book indicating that according to Havakook's research, residents of the South Hebron Hills have been practicing a unique cave-dwelling culture and lifestyle for generations (pp. 31 and 53). The Petitioners also referred to pages stating that the climate and the availability of land in the South Hebron Hills encouraged settlement in the area and drove a process of exiting the parent towns (Yatta and Dura) to their environs, which began in the early 19th century and continued until the later years of the British Mandate and the beginning of Jordanian rule (pp. 26). However, the reference to these pages, and the fact that Havakook does describe a general "spreading" of Yatta and Dura residents beyond the original borders of their villages and taking up residence in abandoned sites in the vicinity (pp. 26), do not support the Petitioners' contention that their center-of-life prior to 1980 was in caves within the firing zone. In fact, inasmuch as this book is instructive on habitation in the firing zone during the relevant period, the pages cited by the Respondents are more relevant. Thus, according to Havakook's description, residents of the new Khirbe communities "remained heavily tied to the parent villages" (pp. 27). Havakook also lists two types of cave dwellings in the area: caves used as permanent residences and caves used as seasonal residences (pp. 35). Referring to Khirbe communities that "over the years, became bona fide villages" compared to those that "remained temporary settlements serving residents of the parent villages," Havakook lists four Khirbe communities that became permanent: al-Baraj; Beit Mirsam; Deir Samet; and Khirbet Karmil (pp. 34, note 8). None of the Khirbe communities where the Petitioners claim permanent residency appear on this list. On the other hand, when Havakook does mention a Khirbe community used by some of the Petitioners herein (Petitioners 110-169), Khirbet Jinbah, it is mentioned as an abandoned ruin that served as a seasonal residence and remains so (pp. 34, note 9).

41. Additionally, the map in Havakook's book indicates there were 11 Khirbe communities in the firing zone, all of them seasonal: Khirbet al-Mufaqarah; Khirbet Sarurah; Khirbet al-Qawawis; Khirbet al-Fakhit; Khirbet Markez; and Khirbet Jinbah. With respect to these Khirbe communities, to which the Petitioners refer as their alleged homes (Khirbet al-Fakhit for Petitioners 103-106 and Petitioners 177-186; Khirbet Markez for Petitioners 107, 108 and 233-252; and Khirbet Jinbah with respect to Petitioners 110-169), Havakook notes they are "seasonal dwellings for the grazing season," while "all these families have permanent dwellings in their parent villages and the caves

prevalent in the Khirbe communities in the area serve the shepherds' families as temporary housing and places to keep flocks at night during the grazing season" (pp. 35-36). Havakook reiterates that at the time of writing (1984), it was possible to observe that every year, shepherds from the nearby villages remained in these Khirbe communities and, "at winter's end, the shepherding families once again abandon the caves used during the grazing months and relocate to their parent villages or to other, more promising grazing areas" (pp. 56). Therefore, reference to Havakook's book does not aid the Petitioners.

Amicus curiae motion

42. With respect to the amicus curiae motion filed by the Masafer Yatta Rural Council, when considering an amicus curiae motion, some of the factors to be weighed are the essence of the entity wishing to join the proceedings, its expertise, and its potential contribution to the deliberation. Other matters to consider are the essence of the issue being adjudicated, the essence of the proceeding, the stage of the proceeding, and whether granting the motion would undermine the efficacy of the deliberation (Retrial 7929/96 **Kozali v. State of Israel**, IsrSC 53(1) 529, 555 (1999)). In view of the aforesaid considerations, there is no doubt that in the matter at hand, the motion should be denied, not only due to the **extremely** advanced stage of the proceedings at which the motion was made (after all parties had made written and oral arguments in a proceeding that has been taking place for nearly a decade), but also because this is not a motion by a third party without representation or without connection to any of the Petitioners (compare: HCJ 769/02 **The Public Committee against Torture in Israel v. Government of Israel**, IsrSC 57(6) 285 (2003)). Though this is not stated in the motion, Mr. Abu 'Aram, Head of the Masafer Yatta Rural Council, is Petitioner 17 in HCJ 1039/13. Moreover, this "rural council" is not a formally-recognized institution and is certainly not an expert entity. Substantively, as well, the Applicant represents interests identical to the Petitioners'. Therefore, these are not circumstances that can justify granting the motion.

43. Furthermore, the Respondents quite rightly argue that the motion appears to be an attempt to "improve positions" at a very late stage of the proceedings, with the Applicant wishing to add a significant mass of documents and evidence thus far not submitted by the Petitioners. A motion to join as amicus curiae does not give license to add evidence not submitted earlier as a type of "do-over." This is particularly glaring as the evidence in question **was submitted** by the Petitioners some time ago, and the Applicant is seeking to "revamp" it or highlight different aspects of it. For instance, with respect to the Applicant's reference to further pages from Havakook's book and to "aerial photograph analysis" by Bimkom – Planners for Planning Rights, it is not superfluous to note that the aerial photographs submitted with the petition bear Bimkom's stamp, and the Petitioners could surely have added the aerial photograph analysis. An amicus curiae motion is not the proper vehicle for this pursuit. In any event, there is no need to address the Applicant's reference to more pages in Havakook's book, which the Petitioners cite.

44. Well beyond requirement, it is noted that a review of the additional documents the Applicant seeks to submit fails to reveal they make a substantial contribution, or indeed any, to ascertaining the legal and factual situation in the matter at hand. In brief, the opinions submitted do not focus on the matter under dispute – the issue of permanent habitation in the firing zone prior to and around the time of the declaration. An "expert opinion" by Prof. Rassem Khamaisi dated 12 December 2020 notes that the question underlying the opinion is "whether it is possible to advance civilian planning in Firing Zone 918 in order to sustain the Palestinian villages in this area and avert their destruction and forcible transfer." The opinion presumes that "the declaration of Military Zone 918 is wrongful and rooted in territorial/geopolitical needs that are couched in practical terms of military needs." The opinion also states that "the communities living in the area lived in it in the past, live in it now and will continue to live in the area..." These premises, which form the basis

for the opinion, are the points of dispute in the matter at hand and as such, this opinion could be afforded no weight whatsoever. The same holds true for the "Expert Opinion on the Obligation to Protect and Maintain the Archeological, Material and Cultural Jeritage in the Village of Jenbah..." by archeologist Gideon Suleimani dated 11 December 2020. The opinion, which focuses on the importance and value of archeological remains in the area, neither adds to, nor detracts from, the matter at hand. This is also true of the historical expert opinion provided by Dr. Michael Fischbach concerning the state of habitation in the firing zone **up to 1967**, referring to records indicating these Khirbe communities existed in the past. Since there is no dispute that the Khirbe communities in the firing zone existed in the past (although the Respondents maintain they were used as seasonal rather than permanent dwellings), this opinion makes no contribution to resolving the issue at hand. A document enclosed with the motion sought to present various testimonies and physical evidence (described in Annex B/8 of the motion), but their potential contribution to the resolution is also unclear.

45. The additional motion to submit a document filed by the Applicant on 29 April 2021 also fails to support the Petitioners' arguments or impact the disputed issues. In this motion, the Applicant sought to submit a report from **January 1968** referring to IDF activities in the firing zone (Khirbet Jenbah) and residents living there at the time. There is little room to doubt that the presence of stone structures in Khirbet Jenbah in 1966 is not indicative of the state of affairs in 1980, particularly considering that given the changes that occurred in the area following the war that broke out in the interim, even if the purported permanent habitation in 1966 had been substantiated, it would not have sufficed to decide whether permanent habitation existed in the area more than a decade later.

Conclusion

46. The conclusion is, therefore, that the petitions are to be dismissed both *in limine* and on their merits. Not only are the petitions afflicted by extreme delay and bad faith, but the Petitioners have also failed to prove their claim of permanent habitation leading up to the declaration of the firing zone declaration, even in view of the new evidence they attempted to submit by way of an amicus curiae motion. It is not superfluous to note that the vague argument put forward by the Petitioners during the hearing before us, regarding discrimination compared to the settlement of Susiya that lies near the firing zone, is irrelevant. The argument was made in a vague and general manner, without any supporting evidence and need not be addressed. Additionally, the issue of the need for the declaration was once again raised during the hearing before us, when the Respondents notified the Court that a current review revealed the firing zone was, in fact, essential for military and security needs. Nor have I found merit in the Petitioners' general arguments about extraneous considerations underlying the declaration, or in the doubt they set out to cast on the degree to which this particular firing zone is needed.

47. It would not be superfluous to note, as well, that during the litigation, the Petitioners were offered an outline based on their departure from the firing zone during training sessions within it. Moreover, the Respondents clarified that regardless of the outline's implementation, the Petitioners would be permitted to access the firing zone for agricultural and grazing purposes on Fridays, Saturdays and Jewish holidays, and would be able to coordinate access to the firing zone at other times. It was also clarified, as noted, that the Respondents are even prepared to allow the Petitioners to access the firing zone for two months every year for purposes of farming and grazing. Not only have the Petitioners failed to provide a substantiated factual basis to prove their claims, but it can also be said that the Respondents certainly have taken the needs of the farmers in the area into account and, in no small measure, beyond legal requirement.

Should my opinion be heard, therefore, the petitions would be dismissed. Petitioners in HCJ 413/13, jointly and severally, will pay 20,000 ILS for Respondents' costs. Petitioners in HCJ 1039/13, jointly and severally, will pay the same amount for Respondents' costs.

Justice

Justice I. Amit

1. The fact that the firing zone was used in 1989 and 1990 for Air Force training speaks for itself, negating the Petitioners' contention regarding permanent habitation in the firing zone. Add to that the many further indications listed in the judgment of my colleague, Justice **D. Mintz**. In fact, the Petitioners themselves admit a practice of "relocating to the surface of the ground" in recent years, i.e., building on top of caves that for years, served a small portion of residents of nearby Yatta seasonally, in winter.

2. In CA 2281/06 **Even Zohar v. State of Israel** (28 April 2010), the Court dismissed a claim for damages brought by landowners following the closure of land for IDF training, despite the impingement on their property. In the ordinary state of affairs, which is also prevalent within the Green Line, persons who own or are in possession of land located inside firing zones are required to ask the military commander for permits to access the land they own or control (see paper by Captain (res.) Daphne Barak (as was her title then), "Firing Zones and Training Grounds – the Legal Aspect", *Law and the Military*, Vol. 11-12, 159 (5752)). In the case at hand, genuine attempts to reach an arrangement that would reduce the harm to Petitioners' livelihoods have been made repeatedly, beginning with the compromise in the 1980s, wherein farmers and shepherds were allowed entry into the firing zone during every weekend and Jewish holiday, as well as during two month-long periods every year. During the mediation undertaken before Supreme Court Justice (ret.) Prof. Yitzhak Zamir, various practical proposals were made, to the best of our knowledge, and the Respondents repeatedly made practical suggestions that would enable the Petitioners to continue accessing the firing zone at various times and under various conditions. However, the compromises were repeatedly rejected by the Petitioners, and one wonders whether the Petitioners are guided by practical considerations aimed at minimizing the damage or by an "all or nothing" approach. All of this while, in the meantime, in breach of the interim injunctions issued in the petitions herein, construction continued on the ground.

3. At any rate, and most importantly for the matter at hand, the path to compromise and dialogue remains open. The Respondents are still willing to allow the Petitioners to access the firing zone for agricultural and grazing purposes on weekends and on Jewish holidays, when no training takes place in the firing zone, and to access the firing zone for two month-long periods a year during the sowing and harvesting seasons. The Respondents have even "opened the door" to another practical proposition which could see use of the firing zone further decreased as part of a six-month training program (paragraph 10 of Respondents' Statement of Response). Inasmuch as the Petitioners seek to advance their agricultural-economic-cultural interests, they would do wisely to choose the path of dialogue with the Respondents.

Justice

Justice O. Grosskopf

I concur with the judgment of my colleague, Justice **David Mintz**, and join the statements made by my colleague, Justice **Isaac Amit**.

The deliberation in the petitions herein was undertaken on two parallel tracks. The first track, the legal one, focused on the validity of the closure orders issued with respect to Firing Zone 918, i.e., on whether it was permissible at the time (beginning in 1980) to prohibit exit and entry into the zone in order to dedicate it to military use. The second track, the practical one, centered on attempts to reach a compromise that would allow civilian use alongside military use. The reason proceedings lasted nearly a decade stemmed from the approach taken by various benches of this Court, whereby the path of practical compromise was preferable to a judicial decision, predicated on the understanding that a judicial decision for either party might not advance a solution to the dispute. Unfortunately, at the present time, after attempts at compromise have been exhausted according to all parties involved, there is no choice but to return to the legal track. As my colleague, Justice **Mintz**, has demonstrated, once that path is taken, the resulting conclusion is that the petitions should be dismissed.

This brings the deliberation in these petitions to an end, yet the dispute remains. Over the years, many structures have been erected in Firing Zone 918, and it has been used for civilian needs by persons claiming title to the land. These must be reconciled with the military uses for which the area was declared a firing zone. The military authorities in charge of planning the use of firing zones will, naturally, consider both the needs of the military and the constraints on the ground prior to instructing renewed training in Firing Zone 918, and will determine their nature and scope. In so doing, these authorities will, presumably, consider all alternatives through the prism of military needs and take into account the needs and interests of the civilian population claiming title.

Justice

Decided as stated in the opinion of Justice **D. Mintz**.

Delivered today, 3 Iyar 5782 (4 May 2022).

Justice **Justice** **Justice**

Translated by B'Tselem.