Translation from the original Hebrew to English by Adalah

Amicus Curiae Opinion by Adalah

Submitted to the Israel Supreme Court

4 August 2013

Civil Appeal 2250/06, *Custodian of Absentees' Property et al. v. Daqaq Nuha et al*.

Case No. 2250/06
The appellants are: The Custodian of Absentees' Property, the Land registry clerk in Jerusalem.
The respondents are: 1. Daqaq Nuha
2. Dajani Mousa
3. Hala Dajani
(1-3 are represented by Adv. Mohannad Jabara)
4. Heirs of the deceased Naama Atiya Adawi Najjar
5. Yehya Abed Yousef
(4-5 2 are represented by Adv. Sami Arsheed)
6. Yasera Muhammad Ali Kayali Moakat (Not represented)

Case No. 5931/06
The appellants are: 1. Daoud Khattab Hussain
2. Alayan Eisa Ezzat
3. Saba Naji Suleiman El-'Arja
4. Jamal Naji Suleiman El-'Arja
5. Majed Naji Suleiman El-'Arja
(1-5 are represented by Adv. Avigdor Feldman)

The respondents are: Shaul Cohen, Adv. Ami Fulman as an official receiver, Dan Levit, Robert Fleischer, Yaron Meidan, Shlomo Ohana, Lilian Ohana, Moshe Ben Zion Mizrachi, the head of the Land Registration Office, the Custodian of Absentees' Property.

Case No. 6580/07
The appellant is the Custodian of Absentees' Property.

The respondents are: 1. The estate of the late Taleb Ali Abdullah Abu Zahria
2. Fatma Ismael Abu Zahria
3. Walid Taleb Ali Abu Zahria
4. Lutfia Taleb Ali Abu Zahria
5. Siham Taleb Ali Abu Zahria
6. Nuha Taleb Ali Abu Zahria
7. Yusra Taleb Ali Abu Zahria
8. Latifa Taleb Ali Abu Zahria
9. Taya Shawkat
(1-9 are represented by Adv. Yaakov Mazza)
10. Muhammad Abu Jihad
11. Saleh Ahmed Hashan
(10-11 are represented by Adv. Eli Toussia-Cohen)
12. Land Registry clerk.

Case No. 2038/09

The appellants are:
1. Dr. Walid Abdul Hadi ʻAyyad
2. Dr. Fatma ʻAyyad
3. Mahmood Abdul Hadi ʻAyyad
4. Khaled Abdul Hadi ʻAyyad
5. Heyam ʻAyyad
6. Ali Abdul Hadi ʻAyyad
7. Signe Breivik
8. Safaa Abdul Hadi ʻAyyad
9. Hamed Ahmad ʻAyyad
10. Fatma Abdul Hadi ʻAyyad
11. Hassan Salama ʻAyyad
12. Dr. Hind Abdul Hadi ʻAyyad
13. Dr. Fayez Ibrahim Abdul Majeed Hammad.

(1-13 are represented by Adv. Avigdor Feldman).

The respondents are: The Custodian of Absentees' Property, the Minister of Defense.

In accordance with the ruling of the honorable court on 21 May 2013, Adalah, which seeks to join as *amicus curiae* (a friend of the court), is honored to submit its opinion as follows:

The fundamental question to be decided

1. The question at the center of the discussion of the civic appeals grouped above pertains to the application of the Absentees' Property Law, 1950 [hereinafter: Absentees' Property Law or the law] on property in East Jerusalem and on territory subject to Israeli law under the Law and Administration Order (No. 1), 1967, property which is owned by residents of the West Bank who have been under Israeli military rule since the Israeli occupation of 1967.

2. As we explain below, the purposive interpretation of the definition of 'absentee', as relevant to our case, leads to the conclusion that the law does not apply to the residents of the West Bank in regard to their property in East Jerusalem. The interpretation we offer reflects the application of the rules of purposive interpretation that the Honorable Court adopted following the enactment of the Basic Laws; according to this interpretation, even legislation that preceded the Basic Laws must be interpreted in accordance with their fundamental principles, a requirement that includes giving serious weight to international humanitarian law. For this purpose, we will first address the views of previous Attorney Generals, which reinforce the position we set forth herein; the original and unique purpose of the law discussed herein; the official stance of the State of Israel at the time of the legislation's enactment; and the legal validity of an ethnic application that exempts part of the public while applying the law specifically to persons who are protected under international humanitarian law and who reside in that territory [the West Bank].

The views of the previous Attorney Generals

3. The fundamental question was first discussed in 1968, when Israeli law was applied to East Jerusalem, as the Attorney General at the time, Meir Shamgar, instructed the responsible authorities not to apply the law to property in East Jerusalem that was owned by residents of the West Bank. He explained at the time that:

> "…we did not see the justice in seizing property that became absentee property concurrent with the property's owner – who is a resident of Judea and Samaria [the West Bank] – becoming someone subject to the rule of the Israeli governmental authorities. In other words, since the property was not an absentee property prior to the day that IDF [Israeli military] troops entered East Jerusalem, and would not become an absentee property if East Jerusalem were to continue to be part of Judea and Samaria, we do not see justification for the fact that the annexation of East Jerusalem, and it alone, would lead to the expropriation of the property of someone who is not actually absent, but was present from the date his property came into our hands in the area under the rule of the IDF forces" (quoted in the opinion of Attorney General Mazuz, section A4 of Appendix 1/M).

4. In 2005, the issue returned to the legal arena when the Attorney General at the time, Mr. Menachem Mazuz, issued a directive consistent with the position of his predecessor Mr. Shamgar, while imposing legal restrictions on applying the law in exceptional cases only.

The opinion of then-Attorney General Mr. Menachem Mazuz, from 31 January 2005 is attached and marked as Appendix 1/M.

5. The [former] Attorney General, Mr. Mazuz, notes in Section 7 of his opinion that:

> "The exercise of the authorities of the Custodian of Absentees' Property vis-à-vis property in East Jerusalem owned by residents of Judea and Samaria raises many legal difficulties, including those pertaining to the application of the law and the reasonableness of applying it in these circumstances, as well as aspects of the State of Israel's obligations under the rules of customary international law, which are binding in Israeli law […]" (Section 7 of Appendix 1/M).

6. A summary of the legal position of then-Attorney General Menachem Mazuz can be found in his directives of 2005:

> "The absenteeism of the East Jerusalem properties of residents of Judea and Samaria is technical in nature, as they were turned into absentees through a unilateral decision made by the State of Israel, and, ostensibly, the purpose of the law does not apply here. In effect, the issue concerns 'present absentees', whose property rights were revoked due to the broad technical wording of the law" (Section 2 of Appendix 1/M).

7. At the end of his opinion, Mr. Mazuz unequivocally asks "to order an immediate halt to the application of the Absentees' Property Law on East Jerusalem properties owned by residents of Judea and Samaria" (Section 9 of Appendix 1/M).

8. Contrary to the opinion of his predecessors, the current Attorney General, Mr. Yehuda Weinstein, believes that the Absentees' Property Law does apply and should be implemented in East Jerusalem, but that the law should be applied with caution when deciding upon the release of property from its status as absentees' property. In the correspondence conducted between Adalah and Attorney Weinstein, the latter explicitly stated, as he has apparently explained to this Honorable Court, that "the caution that should be shown in applying the Absentees' Property Law should be expressed in the exercise of judgment when discussing the release of property from its status as absentees' property in the framework of the discussion at the special committee that deals with this question." That is, the Absentees' Property Law will apply and be implemented in practice to property in East Jerusalem that is owned by residents of the West

Bank. Mr. Weinstein's view in fact changes the legal status quo that had been maintained for decades by previous Attorneys General.

A letter sent on 24 August 2010 by Adalah to the Attorney General, Mr. Yehuda Weinstein, is attached and marked as Appendix 2/M.

The response of the Attorney General, Mr. Yehuda Weinstein, of 15 September 2010, to Adalah's letter is attached and marked as Appendix 3/M.

9. Mr. Weinstein's view is legally problematic, as we explain below, but is also problematic from a practical perspective. This is because, in practice, property assigned to the Custodian of Absentees' Property is transferred to the Development Authority and to third parties, which permanently revokes the property rights of the original owners. In response to Adalah's principle letter to the Attorney General of 27 May 2009 regarding the illegality of tenders for the sale of absentees' properties that were transferred to the Development Authority within the territory of the Green Line and with no connection to Jerusalem, he argued that absentees' property was transferred to the Development Authority by the Custodian of Absentees' Property under Section 19(A) of the law. Then-Attorney General Mazuz also explained that "in accordance with the law, the transfer of property from the Custodian to the Development Authority grants full ownership of the property to the buyer, and the right of the absentee applies to the value of the property, as stipulated in Section 28(C) of the law […] Therefore, we believe that from the moment the property passes from the hands of the Custodian to the full ownership of the Development Authority, and the absentee has the right to receive the value of the property only, subject to the conditions in the law, *the connection between him and the property has been severed*" (emphasis added).

Adalah's letter to the Attorney General of 27 May 2009 is attached as Appendix 4/M.

The response of the Attorney General to Adalah's letter of 27 May 2009 is attached as Appendix 5/M.

10. This assertion by the Attorney General regarding the sale of property and the severing of the connection between the 'absentee' and the 'absentee's property' contradicts his stance of exercising caution when discussing the release of property because, in practice, the transfer of ownership of the absentees' property to the Development Authority and to third parties is tantamount to expropriating all vested rights of the owners of these properties. Moreover, these transfers generally enjoy protection of market regulation under Section 17(A) of the law (see Civil Appeal 5658/94, *Elad – City of David NGO v. The Estate of the late Ahmad Hussein al-*

Abbasi, PD 53(4) 730, 744 (1999)), with the exception of extraordinary cases in which a lack of good faith in the Custodian's conduct can be definitively proven (see, for example, Civil Appeal 5658/94, *Elad – City of David NGO v. The Estate of the late Ahmad Hussein al-Abbasi*, PD 53(4) 730 (1999)).

11. Indeed, in the "Report of the Committee to Study Buildings in East Jerusalem", known as the Klugman Committee, which was appointed by the Minister of Justice and Minister of Finance in August 1992 as an inter-ministerial committee "to study and coordinate all data pertaining to the homes that were leased, rented or purchased in East Jerusalem for private entities, associations or individuals, from state funds or any other assistance by the state and its agencies" it was noted that "the Custodian of Absentees' Property did not provide any data [to the committee], contending that the property in question had been sold to the Development Authority." The committee goes on to note that "a substantial part of the properties to be examined result from the Custodian's declaration of their original owners as absentees. Based on this declaration, they were sold to the Development Authority" (Report of the Committee to Study Buildings in Jerusalem, 2, 1992).

    The report of the Committee to Study Buildings in Jerusalem (Klugman Committee, 1992) is attached as Appendix 6/M.

12. Thus, we believe that the current Attorney General's position is not consistent with the stance of his predecessors. As explained below, the position of his predecessors is more in line with constitutional principles than the current position, which sweepingly revokes property rights and is at odds with the purposive interpretation of the law under discussion, which is reinforced by the enactment of Basic Laws, the changed circumstances of annexing East Jerusalem, and the special status of the West Bank.

The proper interpretation of an 'absentee' in the Absentees' Property Law

A. About the criteria for interpretation

13. Before discussing the purposive interpretation of the law, it is important to note that the parties apparently agree that if the Absentees' Property Law had been enacted after the Basic Laws, it generally would not have met the limitation clause in the Basic Law: Human Dignity and Liberty because it is an arbitrary law that excessively violates basic rights.

14. Over the years, and with the development of the doctrine of interpretation in Israeli law, the court has turned to additional sources, besides the letter of the law, in its pursuit of a purposive interpretation of the law that is consistent with the fundamental principles [of the judicial system] and future [legislative] changes. This Honorable Court has ruled that the interpretation of laws enacted prior to the Basic Laws must also be as consistent as possible with these fundamental principles. Thus, it was ruled that upon the enactment of the Basic Law: Human Dignity and Liberty, existing and valid laws should be interpreted in its light (on the purposive interpretation of laws after the enactment of the Basic Laws, see Additional Criminal Hearing 2316/95, *Ganimat v. The State of Israel*, PD 49(4) 589; Criminal Appeal 5121/98 *Issacharov v. The Military Advocate General* (ruling delivered on 4 May 2006)).

15. Moreover, even prior to the enactment of the Basic Laws, it was ruled that when the language of the law tolerates two meanings – the first one being derived from the regular reading but accompanied by 'absurd discomfort', and the second one being tolerable but nullifying the injustice that is liable to be created from the usual meaning of the language – then the latter interpretation should be chosen, and this is the case even if the choice requires adopting some flexibility. In this context, the words of the honorable Justice Z. Berenson in a ruling issued some fifty years ago are apt:

> "Certainly, the definitions in the Tenant's Protection Law should be interpreted literally, but what happens if a literal reading leads to an outcome that is unacceptable and it is clear that the legislators could not have intended it? You are forced to deviate from such an interpretation and are permitted to interpret based on the regular meaning of the word, as a practical and realistic approach dictates" (Civil Appeal 444/61, *Bloc 6374 Plot 127 Ltd. v. The Estate of the late Yosef Elias*, PD 16 284 (1962); see also the majority opinion in HCJ 328/60, *Mousa v. The Minister of the Interior*, PD 16 69 (1962) and Additional Hearing HCJ 3/62, *The Minister of the Interior v. Mousa*, PD 16 2467 (1962)).

B. <u>The purpose of the Absentees' Property Law</u>

16. The Absentees' Property Law was enacted in order to transfer to the State of Israel the property of Palestinians who became refugees as a result of the war of 1948. The directives of the law were very broadly worded, which led them to be considered as sweeping and draconian. The purpose of the law, as reflected in speeches made in the Knesset prior to its enactment and in extensive rulings on this matter, is intrinsically connected to the war and to the situated created in its wake: the existence of a considerable amount of property after the war belonging to Palestinian refugees who were at that time residing in states defined as enemy states.

17. Therefore, the unique circumstances surrounding the enactment of the Absentees' Property Law and the goals for which it was enacted require us to read it through the prism of history, in an effort to interpret it in accordance with the reality that prevailed at the time of its enactment. In our view, as long as the Absentees' Property Law remains in effect, it should not be viewed, or at least its definitions should not be viewed, as evolving legislation the application of which alters in accordance with regional geo-political shifts, but rather as applying to a frozen reality.

18. We note that the law is actually based on a conception of an emergency situation, because it anchored the Emergency Regulations Pertaining to Absentees' Property – 1948 (No. 37, Supplement B, 12 December 1948) in primary Knesset legislation. These emergency regulations included identical categories as those of the law, according to which the property of the Palestinian refugees are enemy properties. The language of the law was also connected to the emergency situation that was declared in accordance with Section 9(D) of the Law and Administration Order – 1948 on 19 May 1948 (see the definition of 'absentee' in Section 1(b)(1) of the law). In this situation, the law should be interpreted narrowly both with regard to the circumstances of its enactment and the time period in which it was enacted, which are the 1948 War and its consequences, as relevant to the case in hand. That is, the terms in the law should be interpreted in a way that is consistent with the contemporary reality. Thus, 'area of Israel' in Section 1 of the law should be interpreted in accordance with the situation as it existed at the time of the law's enactment (1950). If it is not interpreted as such, we would find ourselves facing a reality that defies even common sense.

19. It is very important to note that the official stance of the State of Israel following the enactment of the law was that it was an emergency law that directly resulted from the war, that it was intended to be exceptional, and that it was not intended for expropriating the property indefinitely. This stance sought to respond to the development of international law following World War II, when it became clear that the expropriation of the property of enemy nationals after the conclusion of the war constituted a blatant violation of the rules of war. Thus, the State of Israel made it clear that the law was exceptional, would be applied literally and pertain only to the 1948 War (on this question see the comprehensive article written by the expert Michael Kagan on the historical development of the law, and the views of international law and the State of Israel at the time: Michael Kagan, "Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East" (2007), *Scholarly Works*, Paper 635, http://scholars.law.unlv.edu/facpub/635).

20. Therefore, any interpretation of the law should be the most literal interpretation, pertaining to the 1948 War, and there is no scope to turn it into a regular piece of legislation or to treat it like any other property law. As noted, from Attorney General Weinstein's perspective, the law applies to residents of the West Bank – which is considered part of the 'Land of Israel' (and now under the effective control of the Israeli army) – who own property in East Jerusalem, whose territory was annexed [in 1967] and became part of the territory of Israel. With regard to the circumstances of the case, the Attorney General applies the alternative in Section 1(b)(1)(ii)_of the law, according to which an absentee is "a person who, at any time during the period between 29th November 1947 and the day on which on which a declaration is published, under section 9(d) of the Law and Administration Ordinance – 1948, that the state of emergency declared by the Provisional Council of State on 19th May 1948 has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period […] was in one of these countries *or in any part Palestine outside the area of Israel* […]" (emphasis added).

21. According to this interpretation, a person who is a citizen or resident of Israel and lives in the West Bank, whether permanently or otherwise, including in an Israeli settlement, and holds properties that are located in the State of Israel (that is, "in the area of Israel"), should be included in the definition of 'absentee' according to the law. This, we emphasize, is due to the fact that in the relevant sections, the definition in the law does not distinguish between citizens of the state and non-citizens, and uses the word 'person'; that is, any person who owns a property in the area of Israel, from the day the United Nations approved the Partition Plan until today, [and] is present in any part of the 'Land of Israel' that is not part of its territory. We also note that the term 'property' in the law is a collection of rights that is not limited to the ownership of real estate, but "includes land and personal belongings, money, rights in an asset, held or deserved, reputation, and any right in an association or in its administration." According to the language of the law, one could argue that money held in a bank in Israeli territory by an Israeli whose permanent residence is in a settlement is considered absentee property. It could also be argued that whenever an Israeli citizen living in the territory of the West Bank enters the territory of the state [of Israel] in their vehicle (personal property), their vehicle can be declared absentee property due to the owner's 'absenteeism' and may therefore be transferred to the Custodian. There is no need to elaborate on the absurd results that could ensue from a standard, literal interpretation of the definition 'absentee', as anchored in Section 1 of the law.-In this context, we reemphasize that, as noted above, it is not enough merely to point to the change in a 'person's'

civil status, as referred to in the definition of an absentee, in order to resolve the predicaments that arise therefrom. In other words, the distinction between an Israeli citizen and a resident of the West Bank as regard the application of the law is irrelevant. This is because, *inter alia*, this distinction was not used in the past with regard to Arab citizens on whom the law was applied, despite their civil status. Without expressing a position towards the legitimacy of applying the law in past cases, it is clear that differences in civil status have never constituted an issue in the question of the law's application, because Arab citizens of the state have felt the long arm of the law when entangled in its broad definitions.

22. The cases in which requests are now being made to be apply the law clearly illustrate the all-inclusiveness of the aforementioned definition and the lack of a rational connection between the purpose for which the law was enacted, as explained above, and the means anchored in it to achieve this purpose. Against this background, and in light of the harmful consequences that result from the broad interpretation of the definition of 'absentee' in the Absentees' Property Law, it should be interpreted with consideration for the fundamental principles of the [legal] system, as anchored in the Basic Laws, international humanitarian law and international human rights law, and with an effort to create a firmer connection between the purpose of the law and the range of cases in which it is applied. Therefore, we should seek a limited interpretation instead of the one advocated by the current Attorney General.

C. <u>The extent of the violation of the right to property</u>:

23. No one disputes that the application of the law in the cases addressed in this opinion constitutes a severe violation of the property rights of the owners, who are residents of the West Bank. Indeed, the issue at hand is the transfer of ownership of these properties from their owners to the Custodian of Absentees' Property. In most cases, this is a one-way transfer, and there is no possibility of restoring the *status quo ante*, especially following the transfer of these properties to the Development Authority. Therefore, it would not be an exaggeration to say that the application and implementation of the law as advocated today by Attorney General Weinstein would lead to the large-scale expropriation of property belonging to residents of the West Bank and the transfer of this property to the Custodian for Absentees' Property.

24. According to the language of the Absentees' Property Law and the courts' interpretation thereof, the law's application is automatic; that is, if the conditions of absenteeism exist as defined in the law, the property automatically becomes an 'absentee property' and is assigned to the Custodian, without the need for any legal action on the Custodian's part. According to the accepted practice,

the issuance of a document of absenteeism by the Custodian constitutes a declarative act only. "When these conditions are met [the conditions of Section 1(F) of the law], the absentee property is assigned to the Custodian under Section 4 of the law." (Civil Appeal, 415/89 *Darwish v. The Custodian of Absentees' Property*, PD 47(5) 521, 526 (1993). See also, HCJ 4713/93, *Golan v. Special Committee According to Section 29*, PD 48(2), 638, Para. 9 of the ruling of Justice Mazza (1994); Civil Case (Jerusalem) 6497-04, *Ajaaj Ali v. The Custodian of Absentees' Property*, Para. 10 of the ruling of Judge Miriam Mizrahi (9 January 2008)). Attorney General Weinstein also noted this in his opinionof January 2010, where he explains that "the law applies from the time it was enacted, and according to the law a person becomes an absentee and his property becomes absentee property assigned to the Custodian from the moment the factual conditions stipulated in Section 1 of the law exist" (Section 20 of the opinion). However, the Attorney General explains that the application of the law pertains only to the exercise of the Custodian's authorities under the law (Section 20). At the same time, the Attorney General argues that these authorities should not be exercised in the case of citizens or residents of the state, even when they fall within the purview of its definitions (Section 20, Para. 33).

25. In practice, according to the approach of Attorney General [Weinstein], the automatic transfer of property to the Custodian when the conditions of the law are met is not always exercised because it is inconsistent with the purpose of the law. For example, the Attorney General explains why property owned by citizens of Israel living in settlements is not assigned to the Custodian in accordance with the law. Thus, in the test of results, the automatic transfer [of property] is not carried out in practice; rather, it is subject to judgment based on a range of considerations, discussed below. We further note that if this approach was applied consistently, then property expropriated from Arab citizens of the state would need to be returned [to its owners].

26. In addition, this stance has direct repercussions stemming from the legal, geographic and political changes followed the construction of the separation wall. Many of West Bank residents who own property in East Jerusalem were declared absentees according to the law and were, in practice, stripped of their right to use their property. This is because sections of the fence separated landowners who reside in the West Bank from their land that falls within the territory that was annexed to the Jerusalem Municipality [East Jerusalem]. As former Attorney General Menachem Mazuz explained, the application and implementation of the law are "also likely to have severe international repercussions with regard to the separation fence [wall], in various respects, for which the State of Israel has been harshly criticized by the International Criminal Court in The Hague […] I note that parts of the separation fence are located on these properties, and its

construction separates and will continue to separate these properties from residents of Judea and Samaria ('the absentees') who held and worked the land. Inquiries received by our office indicate that there were recent cases in which requests for entry permits into the seam line area for the purpose of working the lands and harvesting olives in these territories were denied, on the ground that the land no longer belonged to the 'absentee'" (see Section 8 of Appendix 1/M).

27. Therefore, the relevant question today is whether the law is applicable in light of the enactment of the Basic Laws and given the unique circumstances surrounding the fundamental question facing the Honorable Court. This question comes against the backdrop of international humanitarian law, which also has repercussions for the case at hand, and the purpose of the law, as discussed below, which is not fulfilled in the case under discussion.

D. <u>Humanitarian law and distinction based on ethnic background</u>:

28. The question of the application of the law on property in East Jerusalem owned by residents of the West Bank requires reference to international humanitarian law. In this context, and in accordance with Supreme Court case law, the interpretation of the law must be consistent with the principles of international law. Here two arguments arise. The residents of the West Bank are subject to international humanitarian law, which obliges the occupying power to refrain from harming the property of the civilian population, except in cases of immediate military necessity, which, indisputably, does not exist in this case. Therefore, the confiscation of the private property of West Bank residents in East Jerusalem under Israeli law constitutes a blatant violation of the international duties incumbent upon the State of Israel. This is due to the status of the residents of the West Bank under international humanitarian law, and also in light of international law's view of the status of East Jerusalem as occupied territory, subject to the provisions of international humanitarian law.

29. Therefore, as explained below, the implementation of the Absentees' Property Law in East Jerusalem and/or on the East Jerusalem properties of residents of the West Bank is not only inconsistent with the Basic Laws, but also with the purposive interpretation that gives weight to the principles of international humanitarian law.

30. Therefore, the rules of interpretation require that interpretation of the term 'absenteeism' in the law should not include cases such as those under discussion, and these rules impose special obligations on the State of Israel.

31. The duty to protect private property in occupied territory is anchored in international humanitarian law, *inter alia*, in Article 46 of the Hague Regulations [of 1907], which stipulates

an obligation to respect private property in occupied territory and prohibits its confiscation. In addition, according to Article 53 of the Fourth Geneva Convention [of 1949], the occupying power is prohibited from destroying real or personal property except when rendered absolutely necessary by military operations. No one contests the fact that the transfer of the ownership of property in East Jerusalem belonging to residents of the West Bank does not fall within the exception of military necessity.

32. In addition, Article 147 of the Fourth Geneva Convention states that extensive appropriation of the property of the protected population constitutes a grave breach of the Convention. As noted, there is no doubt that implementing the Absentees' Property Law in East Jerusalem entails the confiscation of many properties from Palestinian residents of the West Bank, with the declaration of their absenteeism directly resulting from unilateral actions taken by the State of Israel and in the most arbitrary manner.

33. In this [legal] context, and given the geo-political reality in the West Bank, questions arise regarding the application of the law in the case of Palestinian residents of the West Bank as opposed to its non-application in the case of residents of Jewish settlements in the West Bank with respect to their property in East Jerusalem or within the territory of Israel. In this matter, the position of Attorney General [Weinstein] is that the law is not applicable to residents of the settlements regarding their property in the territory of the State of Israel, despite his contradictory arguments regarding the automatic application of the legal mechanisms stipulated in the law, which seem to be relevant only to the Palestinian residents of the West Bank. This view, as explained below, constitutes a violation of human rights norms of international law, which prohibit this type of discrimination. The different policy adopted towards the Palestinian residents of the West Bank as opposed to the residents of settlements is illegal, constituting a grave breach of the principles of equality as anchored in the International Convention on the Elimination of All Forms of Racial Discrimination. As explained below, this distinction does not derive from the purpose of the law and is inconsistent with it.

34. In this context, it is appropriate to discuss the Advisory Opinion of the International Court of Justice of 9 July 2004 regarding the separation wall constructed by the Government of Israel. The court referred in its opinion, *inter alia,* to the status of East Jerusalem in international law. It stated unequivocally that the status of East Jerusalem, like the status of the West Bank and the Gaza Strip, is that of occupied territory; that is, it is an area in which the Israeli army exercises real and effective control (see Para. 78, 89 and 101 of the Advisory Opinion) and human rights

law (see Para. 106, 111-113 of the Advisory Opinion).[1] It should be noted in this context that this Honorable Court stated that "the Advisory Opinion of the International Court [of Justice] constitutes an interpretation of international law, undertaken by the supreme judicial entity in international law," and thus "the interpretation the International Court [of Justice] provides should be accorded the full appropriate weight" (HCJ 7957/04, *Mara'abeh v. The Prime Minister of Israel* (ruling delivered on 15 September 2005, section 56 of President Barak's ruling; see also sections 73 and 74 of the ruling.)

E. <u>The proposed interpretation</u>

35. The interpretation of 'absentee' according to the principles of the [legal] system cannot apply today to a situation of absenteeism in territory that was not part of the State of Israel when the law was enacted in 1950, and also cannot apply to 'absenteeism' that results from unilateral action over which the 'absentee' has no control and when the 'absentee' has not changed anything in his [or her] status or location. The separation wall, for example, demonstrates that people are liable to be declared as absentees when they have no control over the geo-legal changes that occur around them, even as they remain in the same place. Similarly, the fact that residents of the West Bank are not allowed to enter territories that were annexed to the municipal territory of Jerusalem (East Jerusalem) is out of their control. In these two examples, events are under the exclusive control of the State of Israel and not the residents themselves.

36. The declaration of a person's absenteeism today, in the circumstances outlined in this amicus briefing, is not similar to the declaration of absenteeism at the time of the law's enactment. A purposive and restrictive interpretation that is consistent with the principles of the legal system dictates that absenteeism is not applicable to territory that fell under Israeli control more than 27 years after its enactment, which according to the official position of the State of Israel was 'emergency legislation'. This is reinforced by the fact that the absenteeism of residents of the

[1] The question of applying human rights law in occupied territory was also addressed in General Comment No. 31 of the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights; according to General Comment No. 31, Member States are also obliged to respect and ensure the rights set forth in the aforementioned covenant in territories under its authority or control, even if they are not located within the territory of the Member State (Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, Para. 10). The Committee for Economic, Social and Cultural Rights, which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, reached the same conclusion in its "Concluding Observations on Israel" of 2003 (Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 23 May 2003, Para. 31). In addition, the Committee on the Elimination of Racial Discrimination, in its March 2007 session, emphasized that the International Convention on the Elimination of All Forms of Racial Discrimination applied to the occupied territories under the control of the State of Israel.

West Bank is not similar in its circumstances or essence to the 'absenteeism' intended by the law, and the fact that these residents remained on their properties.

37. From the Attorney General's perspective, the term 'Land of Israel' in the law includes the areas of the West Bank and Gaza Strip (section 4 of the main arguments by the Custodian of Absentees' Property of January 2010). Therefore, and according to the alternative in Section 1(B)II of the law, residents of the West Bank fall under the definition of 'absentee' due to their presence "[in] any part of Palestine outside of the area of Israel."

38. In our view, the term 'Land of Israel' in the law constitutes, in practice, the territory of the State of Israel in its borders after the 1948 War. The inclusion of this term in the alternative in Section 1(b)(1)(ii) of the definition of absentee in the law was intended to encompass the internal refugees who, during and in the wake of the war, left their homes and moved to other areas that had yet to be captured in the war and were considered to be held "by forces which sought to prevent the establishment of the State of Israel" and which became part of the State of Israel at the end of the war. Section 30(C) of the law states:

> "A document from the Minister of Defense [stating] that a place in the Land of Israel was held during a certain time by forces that sought to prevent the establishment of the State of Israel or fought against it after its establishment, will serve as decisive evidence of its content."

39. Moreover, Section 1 of the Law and Administration Order (No. 1), 1967 defines "the territory of the Land of Israel" as "territory subject to the law, judgment and administration of the state" (her we do not imply that we agree with the status of East Jerusalem according to the order). That is, in any case, territory that is not subject to the law, judgment and administration of the State of Israel cannot be considered the 'Land of Israel' for the purposes of the definitions of the law. The conclusion is that, in any case, the West Bank cannot be considered part of the 'Land of Israel' and its residents cannot be considered absentees according to the alternative in Section 1(b)(1)(ii) in the law. This interpretation of the term also resolves the contradiction in the Attorney General's position regarding the non-application or the policy of not 'implementing' the law in the case of residents of Jewish settlements in the West Bank.

40. This proposed interpretation will harmonize the various sections of the law and the various laws and regulations in the state, and bring the policy into conformity with international humanitarian law and international human rights law with respect to the residents of the West Bank, and necessitate the protection of the private property of residents of an occupied territory and the constitutional rights of these residents.

41. Alternatively, and in the event of a decision that denies our aforementioned fundamental position and determines that the term 'Land of Israel' in the law includes the territories captured in 1967, including the West Bank, we suggest that the definition of 'absentee' be given a narrow meaning, in a way that limits it to the situation that prevailed at the time the law was enacted, and that the terms 'area of Israel' and 'Land of Israel' be interpreted accordingly. We will note that according to Section 1 of the Absentees' Property Law, in the alternative relevant to our case, an absentee is, *inter alia*, "a person who, at any time during the period between 29th November, 1947 and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 1948, that the state of emergency declared by the Provisional Council of State on 19th May 1948 has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period – […] was in one of the these countries [Lebanon, Egypt, Syria, SaudiArabia, Trans-Jordan, Iraq or the Yemen] or in any part of Palestine outside the area of Israel".

42. The Custodian of Absentees' Property seeks to apply this definition to residents of the West Bank who own properties in East Jerusalem, and this, according to the Custodian, is because the law stipulates an automatic mechanism of implementation. Yet in the same breath, the Custodian goes on to argue that the law is not implemented in all cases in which it should ostensibly be exercised in accordance with an expansive interpretation of it. As noted above, according to the letter of the law, it is also supposed to apply to a person who is a citizen or resident of Israel who is present in the West Bank. The choice not to apply it in such cases is clear evidence that the mechanisms stipulated in the law, even according to its implementers, are inadequately defined, and that their 'automatic' application is not an inexorable decree. Thus, in cases that would have created absurd results that deviate from the law's intended purpose, it was not applied.

43. In this context, the absurd results of applying and implementing the law in cases residents of the West Bank with regard to their property in East Jerusalem (see the view of the previous Attorney Generals Shamgar and Mazuz, as set forth above) are not restricted to how they reflect Attorney General Weinstein's attitude toward the civil status of the 'absentees', because many of the state's citizens are 'absentees' according to the law by virtue of the fact that, during a particular period of time during the war, they were present in territories that had yet to be captured but that became part of the territory of Israel at the end of the war in 1948. In our view, there is, in any case, no justification for accepting the alleged automaticity, even based on the distinction – which is irrelevant to our case – between the civil statuses of those to whom the law ostensibly applies. The declaration as an absentee of a West Bank resident who owns property in the

territory of East Jerusalem annexed after 1967 in itself constitutes an absurd result of the exercise of the law, which is irrational and inconsistent with the purpose of the law and the meaning of 'absenteeism'. It is a passive and fictitious absenteeism that was created by the arbitrary expansion of borders, and was not intended by the legislators when formulating the definition, which is problematic in itself, of an 'absentee' prior to the law's enactment. It cannot be presumed that the legislators formulating the law anticipated the change in the geo-legal reality that followed the conquest of the West Bank, and there is room for flexibility – in the spirit of the aforementioned rules of interpretation – in defining 'absenteeism' so as to prevent the injustice engendered by the regular meaning. This is particularly so given the fact that the injustice could be prevented by choosing a limited and literal interpretation based, *inter alia*, on consideration of the owners' right to property, the right to equality, international humanitarian law and the purpose of the law.

44. In light of all of the above, and in our pursuit of an appropriate interpretation, the aforementioned considerations lead to the conclusion that the definition of 'absentee' should be afforded a limited meaning, which confined it to the prevailing situation at the time of the law's enactment. In other words, the law should be interpreted with a 'frozen image' of the geo-political reality in which it was enacted, and the terms 'area of Israel' and 'Land of Israel' should be interpreted accordingly; that is, as they were understood when the Absentees' Property Law was enacted (see and compare: Civil Case (Jerusalem) 1532/99, *The Estate of the late Taleb Ali Abdullah v. Berta Hamdan*, at 15 (28 May 2007)). In addition, there is much logic in the interpretative approach adopted by Judge B. Okun in Motion (Jerusalem) 3080/04, *Daqaq v. The Heirs of the late Naama Atiya Adawi Najar* (23 January 2006). In his ruling, Judge Okun determined that due to both the purpose of the law and the impact of the Basic Laws on the legislation that preceded them, Section 1(b)(1)(ii) of the Absentees' Property Law (the relevant alternative for our case in defining an absentee), one of the foundations of which is the presence of a property owner "in any part of the Land of Israel outside the territory of Israel", should be read as inapplicable to a resident of territories that are under Israeli military control. That is, the honorable Judge Okun interprets the phrase 'outside the area of Israel' as applying territories under the military control, but not necessarily part of the territory, of states that appear in the previous sub-section; i.e., Lebanon, Egypt, Syria, Saudi Arabia, Transjordan, Iraq and Yemen. In our view, limiting the application of this definition, according to the meaning of the terms it contains, to the time and place at which it was formulated, and, at the same time, as a cumulative requirement, interpreting the phrase 'outside the area of Israel' based on the approach of the honorable Judge Okun, offers

at least a partial and feasible solution to the problems the broad interpretation [of an 'absentee'] creates. It is clear that [such a solution] is insufficient to remedy all the injustices that arise from the draconian, expansive definition of an 'absentee', because any visit by a person who owns property in the area of Israel to one of the countries listed in the definition, including a person who is a citizen of Israel, regardless of the purpose of the visit, would place the person within the purview of the definition. However, this restrictive approach would substantially mitigate the injustice caused by a literal and expansive interpretation. Given the circumstance of the case and the language of the law, we are not seeking an ideal interpretation, but rather a feasible interpretation that is the lesser of the evils.

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