

B. The Factual Framework

I - The parties to the petition

12. Petitioner no. 1, Mr. Ahmad Abdallah Abdelqader Abdelqader is a resident of the village of Qadum, who with his family owns 30 dunams of land, known as bloc 10 section 36 of the land of the village of Qadum. This plot, which was cultivated for years by the Petitioner and his family, fell victim to trespassing on an area of 12 dunams out of the total area. The trespassing by Respondent no. 3 and/or people on his behalf, began in May 2007.

A copy of a property tax abstract in which the land is registered in the name of the father of Petitioner no. 1 is attached to this request and marked as appendix 4.

A copy of an inheritance order from the Sharia court in Nablus stating that Petitioner no. 1 and his family are the heirs of his father is attached to this request and marked as appendix 5.

13. Petitioner no. 2, Abdul Rahim Abdul Latif Mohammad Ali, is a resident of the village of Qadum, who with his family owns 40 dunams of land, known as bloc 10 section 28a.

A copy of a property tax abstract in which the land is registered in the name of the grandfather of the Petitioner, Mohammed Hajj Abdallah Abdul Jawwad, is attached to this request and marked as appendix 6.

A copy of an inheritance order from the Sharia court in Nablus stating that the father of the Petitioner, Abdul Latif Mohammad Hajj Abdallah Ali and his family are the heirs of his grandfather Mohammed Hajj Abdallah Abdul Jawwad is attached to this request and marked as appendix 7.

A copy of an inheritance order from the Sharia court in Nablus stating that the Petitioner and his family are the heirs of his late father, Abdul Latif Mohammad Hajj Abdallah Ali, is attached to this request and marked as appendix 8.

A copy of a sworn deposition given in the Sharia court in Nablus stating that the Petitioner, his father and his grandfather are members of the same family (the Ali family), issued the same day as the property tax abstract, which reconfirms the same, is attached to this request and marked as appendix 8.

14. Petitioner no. 3, Abdul Latif Ali Abdul Qader Barham, is a resident of the village of Qadum, who with his family owns 25 dunams of land, known as bloc 10 section 23.

A copy of a property tax abstract in which the land is registered in the name of the Petitioner's father is attached to this request and marked as appendix 10.

A copy of an inheritance order from the Sharia court in Nablus stating that the Petitioner and his family are the heirs of his father is attached to this request and marked as appendix 11.

15. An aerial photo mapping the Petitioners' plots, for which the order was issued, is hereby attached and marked as appendix 12.

16. Respondent no. 1 is the military committee of appeals, a committee established by the military commander of Judea and Samaria, by force of order no. 172 (order on appeals committees). The committee has the power to hear appeals on decisions given by law or the security legislation detailed in this order or in other orders. Among those orders are also the decisions by Respondent no. 2 based on order no. 1586.

17. Respondent no. 2 is the head of the Civil Administration in the West Bank, who has the powers delegated to him by the commander of IDF forces in the West Bank regarding management of civilian life in the Occupied Territories. Among other things Respondent no. 2 is in charge of enforcing the planning and building laws that apply to the area and maintaining public order.

18. Order no. 1586 (the empowering order) gives Respondent no. 2 the power to issue evacuation demands and orders against trespassers on private land. Following the trespassing onto the Petitioners' lands, and following complaints submitted by the Petitioners to the Israel Police and the Civil Administration in May 2007 because of that trespassing, Respondent no. 2 issued an evacuation order against Respondent no. 3, according to his aforementioned power set forth in order no. 1586.

The evacuation order issued by Respondent no. 2 is attached to the petition statement and marked as appendix no. 2.

19. Respondent no. 3, Mr. Michael Lesens, is an Israeli citizen, a resident of the settlement of Kedumim, who trespassed on the Petitioners' lands, with the backing, encouragement and planning of the Kedumim Local Council, out of an ideological motive whose purpose is to remove the Petitioners from their land and appropriate it to the Kedumim Local Council, to expand the area of the settlement. Respondent no. 2 issued the evacuation order against that Respondent, and Respondent no. 3 appealed against that evacuation order to Respondent no. 1, and following that appeal the decision that is the subject of this petition was handed down.

II - The invasion of the Petitioners' land

20. The Petitioners, whose plots are adjacent and close to each other, cultivated the plots for all the years themselves and/or with their families. The cultivation included cultivating the olive grove on the land and planting and cultivating seasonal crops, which was done in the places where trees were not planted in the plots. It should be noted that cultivating the plot and accessing it, especially in the days of harvest when it was necessary to use heavy machinery, was often met by harassment by the residents of the

nearby settlement of Kedumim, requiring coordination with various parties in the Civil Administration.

21. In May 2007 the Petitioners noticed that the plots had fallen victim to trespassing into the area by Respondent no. 3 and parties on his behalf. At first the trespassing consisted of threats and eventually became more aggressive and included fencing in the land, planting hundreds of new plants, and installing drip irrigation pipes and water installations. As usual in such cases, once Respondent no. 3 sets foot on the ground, the ability of the Petitioners to access and cultivate their land was severely restricted, to the point of almost complete prevention. An aerial photo on which the plots of the Petitioners are marked is attached as appendix no. 12.

22. When the trespassing was discovered, the Petitioners went to the Kedumim police and the Civil Administration DCO and asked them to remove the trespassers and return the land to its legal owners, namely the Petitioners.

A copy of the Petitioners' complaint to the Israel Police is attached and marked as appendix no. 13.

III - The order on disruptive use of land issued against Respondent no. 3 (the trespasser)

23. Following these complaints, Respondent no. 2 issued a demand to stop using the land, by virtue of the Respondent's authority based on section 2(a) of order 1586. That demand, signed on August 13, 2007, was posted on the land, referring to sections 23, 28 and 36 in bloc 10 (the Petitioners' section), and the trespasser was required to present within 15 days a deposition supported by documents explaining why his use of the land should not be considered a disruptive use in its sense in the order.

24. On September 3, 2007 Respondent no. 3 reacted to the demands with a letter from his counsel, in which he claimed he had been cultivating the land himself for more than 10 years. In his deposition attached to the request he claimed that the Respondent was performing that cultivation with the backing of the Kedumim Local Council. He claims further that the cultivation could be learned about from a financial statement attached to his deposition, a statement referring to a 30-dunam area.

A copy of the demand as issued for Respondent no. 3 is attached to this petition and marked as appendix no. 14.

It should be noted that this statement does not refer to a specific area and even regarding that area it says it is not cultivated, but the Petitioners will have more to say about that later in the petition.

25. It should further be noted that on August 13, 2007 a similar demand was made to the deputy head of the Kedumim Local Council, Ms. Esther Karish, following information

given by the council that the possession of the land was done by the local council and/or on its behalf, without any legal right.

A copy of the demand as issued to the Kedumim Local Council is attached and marked as appendix no. 15.

26. On September 17, 2007 Respondent no. 2 rejected the contents of the deposition of Respondent no. 3 and decided that the deposition and the documents submitted by him did not constitute sufficient proof that his use of the private lands that are the subject of the demand enjoy any defense as claimed in the Respondent's appeal. The decision also argued that it emerged from the findings of Respondent no. 2 that the use by the Petitioner because of which the order was issued -- namely planting trees, placing irrigation pipes and building a fence in the area -- occurred during the previous year or thereabouts.

A copy of the decision by Respondent no. 2 from September 17, 2007 is attached to this petition and marked as appendix no. 16.

IV -- Submission of appeal by Respondent no. 3 and the hearings that followed

27. Following that decision Respondent no. 3 submitted an appeal against Respondent no. 2, which was heard before Respondent no. 1. In that appeal Respondent no. 3 assailed the decision to reject his case and claimed there were no grounds to do so. Along with the appeal Respondent no. 3 made a request to issue a temporary injunction, which would be valid until another decision was made by Respondent no. 3.

A copy of the appeal submitted by the appellant on October 11, 2007 is attached to this petition and marked as appendix no. 17.

28. The appeal raised the following arguments against the use of the order on disruptive use issued against the appellant:

- a. That for more than 10 years "different Jews" from the settlement of Kedumim and nearby settlements have been cultivating the land that is the subject of the evacuation order (section 1 of the appeal);
- b. That Respondent no. 2 was not authorized to issue the order against Respondent no. 3, because the plot that is the subject of the evacuation demand has been cultivated by the appellant for more than 10 years (section 4 of the appeal);
- c. Therefore, and since according to section 2(e) of the authorizing order Respondent no. 2 is not allowed to issue an evacuation order in cases when he learns that more than three years went by since the beginning of the disruptive use of the private land -- the evacuation order is not valid (section 5 of the appeal).

29. On November 7, 2007 Respondent no. 2 submitted his answer to the appeal and to the request for temporary remedy. Among other things Respondent no. 2 raised the following arguments in his response to the appeal:

- a. That the agricultural activity that is the subject of the evacuation order was conducted in the last year before the order was issued or thereabouts, namely in 2007 (section 4 of the response);
- b. That some of the planting, the fencing activities and the installation of an irrigation system were carried out after the complaints were made to the police by the Petitioners because of the trespassing (sections 6-7 of the response);
- c. That the appellant's arguments of cultivating the land for more than 10 years are full of contradictions and in no way substantiate an argument based on self-reporting, and cannot constitute a contradiction of the reason the order was issued, namely intensive cultivation of the land that is the subject of the procedure, performed in the last year. Likewise, the Petitioner refrained from attaching any document that attests to a source of a right to the land (sections 8-12 of the response);
- d. That activating an order on disruptive use of private land is in proportion to each and every "use" of the land, and it is irrelevant whether in the past there was a different use of the same land by the same claimant (beyond a general denial that such use was indeed made) (section 17 of the response).

A copy of the response by Respondent no. 2 from November 7, 2007 is attached to this petition and marked as appendix no. 18.

30. When they learned of the existence of the appeal, the Petitioners submitted on November 22, 2007 a request to join the appeal as Respondents, both because of their deep connection to the land that is the subject of the order and because of the fact that the order was issued following their complaints of trespassing on the land. It should be noted that the Petitioners attached to that request all of the papers that prove their proprietary rights to the land (appendixes 4-11 above).

A copy of the request to join the appeal on behalf of the Petitioners as submitted on November 22, 2007 is attached to this petition and marked as appendix no. 19.

31. During the preliminary hearing on the appeal on November 26, 2007 the Petitioners were added to the preceding. It was also decided that as part of the temporary remedy given at the request of Respondent no. 3, that Respondent could enter the area that is the subject of the appeal only for vital tending to the saplings and the fence and nothing beyond that.

A copy of the minutes of the hearing and the decision issued in its wake on November 26, 2007 is attached to this petition and marked as appendix no. 20.

V -- The hearings and testimonies in the appeal

32. The appeal included three days of hearings in which witnesses were heard for both sides, in addition to a tour by the appeals committee on the land that is the subject of the order.

33. The first hearing took place on February 28, 2008, in which Respondent no. 2 and witnesses on his behalf testified. It should be noted that at the beginning of the hearing counsel for Respondent no. 3, Adv. Doron Nir Zvi, announced "**we** [namely, Respondent no. 3., MS, SZ] **admit it is private land**" [p. 1, line 50], but later repeated his claim that the entry to the land took place more than three years ago.

A copy of the protocol from February 28, 2008 is attached to this petition and marked as appendix no. 21.

34. Therefore, Respondent no. 3 admits he invaded land that was not his and his defense argument is procedural limitation set forth in the empowering order. That is all.

35. In the course of his testimony to the committee Respondent no. 3 confirmed that he planted the trees on the land for which the order was issued in 2007 [p. 3, line 4]. Likewise he confirmed that he lied in the capital statement submitted along with the objection to the demand as well as the one attached to the appeal [p. 3, lines 42-44].

36. As for the "use" of the land before the trees were planted, Respondent no. 3 claimed that over the years he performed two acts on the land:

a. Tours with students from the Samaria College and nearby schools in Kedumim, in which he said he illustrated different agricultural methods (protocol from February 28, 2006, p. 3, line 12-24);

b. Planting alfalfa on the slopes from the Mitzpe Yishai neighborhood of Kedumim and plowing the land. The Respondent did not bring a single piece of evidence of those crops except for his own testimony. He also claimed that he sporadically planted pomegranate, vine and olive trees (see protocol from February 28, 2008, p. 5, lines 7-13).

37. To the committee's question, Respondent no. 3 admitted -- as he did throughout his testimony -- that the entire purpose of his presence on the land was a service to the Kedumim Local Council, and if the council asked him to move off the land for its needs, he would do so in exchange for a mere financial compensation for his agricultural investment [p. 7, lines 7-13; and see also p. 5, lines 14-25].

38. The committee was given a copy of an agreement between the Kedumim Local Council and Respondent no. 3, "permitting" that Respondent to cultivate the land (which is owned by the Petitioners), until the time the council wanted to build on the land.

A copy of a letter from the former head of the Kedumim council, Ms. Daniela Weiss, to Respondent no. 3 from December 2006, is attached to this petition and marked as appendix no. 22.

39. Another witness who testified on behalf of Respondent no. 3 is Mr. Ze'ev Moshinsky, who named himself land coordinator of the Kedumim Local Council. This witness, who is an employee of the Kedumim Local Council and receives his salary from it, admitted in his investigation that he instructed local Israeli residents to try to invade nearby land as agents of the council [p. 9, lines 52-58; p. 11, lines 42-50].

40. The other witness on behalf of Respondent no. 3, Mr. Michael Bar Neder, who had served as the security coordinator for the settlement of Kedumim in the past, went even further and said openly, in response to the question of what the local council was looking for outside of its jurisdiction, that **"most of the jurisdiction of today did not belong to the council as it was in the past. This is the pre-state Hanita method"** [p. 12, lines 35-37].

41. The second day of testimony took place about a month later on March 27, 2008, in which the witnesses of Respondent no. 2, employees of the Judea and Samaria Civil Administration, testified. Another witness at that hearing was Mr. Yigal Tzofi, coordinator of the Tulkarm and Qalqiliya district in the Civil Administration, who said in his testimony among other things that the purpose of the plantings by Respondent no. 3 is **"an attempt to take over land, plain and simple,"** and that that was not the only case in which such a trespassing took place [p. 7, lines 24-27].

A copy of the protocol of the hearing and the testimonies from March 27, 2008 is attached and marked as appendix no. 23.

42. The last day of testimony took place on April 17, 2008, in which the Petitioners and parties on their behalf testified. In the testimony on their behalf, which was not refuted, it emerged that from 2007, and especially May 2007, intensive invasions by Respondent no. 3 and/or parties on his behalf on to their land began, as well as the denial of their access to that land [see: p. 3, lines 2-5; p. 6, lines 36-37; p. 8, lines 8-10; p. 8, lines 35-39].

A copy of the protocol of the hearing and the testimonies from April 17, 2008 is attached and marked as appendix no. 24.

43. On the last day of testimonies Respondent no. 3 also testified, following refutation depositions submitted on his behalf, including his own deposition and another one by Ze'ev Moshinsky. Those depositions focused on attempts to find refutability in the testimony of Mr. Yigal Tzofi, one of the witnesses of Respondent no. 2 in his testimony.

44. In any case, after the testimony stage came, as usual, the summary stage. In the summaries on behalf of Respondent no. 3, submitted on May 21, 2009, the following claims were made among others:

- a. That the use of the disruptive use of private land order constituted interference by Respondent no. 2 in matters that did not concern him (section no. 4 of Respondent no. 3's summaries);
- b. That the land that is the subject of the appeal has been cultivated by the Petitioner or other parties for more than 10 years and at least three years, and thereby Respondent no. 2 is prevented from issuing the order against Respondent no. 3, because of section 2(e) of the order (section 12 of Respondent no. 3's summaries);
- c. That the fitting interpretation that should be given to the term "use" is that from the moment one kind of use is made by the trespasser on the land, that use dominates any other use by him over the years, all in order to create a continuity of use by him, regardless of the kind of use made by him (section 12 of the Respondent's summaries).

A copy of Respondent no. 3's summary is attached to this petition and marked as appendix no. 25.

45. It should be mentioned that the focus of the dispute during the hearings on the appeal, as alluded to by Respondent no. 1 as well, was the correct interpretation of the order, and that was the focus of the sides' summaries.

46. The Petitioners submitted their summaries on June 10, 2008. In those summaries the Petitioners presented their position on the factual issues raised in the case (sections 28-66 in their summaries); both regarding the correct interpretation of the order on disruptive use of private land and the rationale at the basis of issuing the order, with a reference to the burden of proof required in the circumstances of the case (sections 12-22 of their summaries) as well as other issues. These arguments by the Petitioners will be presented in detail in the legal part of the petition, and therefore the Petitioners will not elaborate on that point.

A copy of the Respondents' summaries as submitted on June 10, 2008 is attached to this petition and marked as appendix no. 26.

47. Respondent no. 2 (against whom the appeal was filed) submitted his summaries on June 15, 2008. In those summaries the Respondent made the following arguments:

- a. That the land that is the subject of the appeal is privately owned Palestinian land, which was intensively cultivated by Respondent no. 3 during the year prior to issuing the order against him. Legally, activation of the order is in

relation to each and every “use” of the land, and it is irrelevant whether a different use of the land was made by the same litigant in the past (sections 14-15 of Respondent no. 2’s summaries);

- b. That the demand to evacuate by force of the order was issued because of actions committed by Respondent no. 3, which are new actions that are not connected to actions in the year prior to issuing the order, if there were any. Likewise, whereas in the past the trespasser claims that his actions were for security reasons, the actions for which the order was issued were classified even by the trespasser himself as agricultural cultivation (see sections 23-27 of Respondent no. 2's summaries);
- c. That the trespasser is actually an agent of the Kedumim Local Council, which itself cannot possess land by the law of the area, and therefore tried to use the trespasser to expand its territory (see sections 28-39 of the Respondent's summaries);
- d. That the Kedumim Local Council cannot acquire rights to the land as it tried to do or as was presented during the hearings on the appeal (sections 29-38);
- e. That the trespasser did not factually prove that he performed agricultural actions on the land before the new actions that are the subject of the evacuation demand (sections 62-77);
- f. That the correct interpretation of the order on disruptive use of private land includes both new use and continued use, as well as transition from one use to another, the identity of the user and so on. The Respondent added in his summaries in this part that the purpose of the order is to defend the private property of the residents of the area, Palestinians under an occupation regime, according to the binding norms as they appear in regulations 43 and 46 of the regulations annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907). That purpose is reinforced where there is a real problem of access by the local farmers to their land (sections 112-119 of Respondent no. 2's summaries);

A copy of Respondent no. 2’ summaries as submitted on June 15, 2008 is attached to this petition and marked as appendix no. 27.

48. To fill out the picture it should be noted that on July 17, 2008 Respondent no. 1 toured the area that is the subject of the order along with all of the parties to the appeal. **Eight months** later, on March 10, 2009, Respondent no. 1 gave its decision (which was provided to the Petitioners' counsel only on May 27, 2009, a month and a half after it was given and after countless efforts to receive it as required by law). That decision is attached to this petition and marked as appendix no. 1.

VI - The decision on appeal 27/07

49. In the decision by Respondent no. 1, which extends over 45 pages and hundreds of sections, members of the **panel [?]** were divided: **the majority opinion** (mostly written by committee member reserve Captain Eyal Nun, who added his comments) opined that Respondent no. 2 was not allowed to issue the order on disruptive use of land against Respondent no. 3, because the Respondent-trespasser is protected by the defense of more than three years' use, as it appears in section 2(e) of the order.

50. The majority opinion also stated the following in its decision:

- That even though there was a change in the cultivation by Respondent no. 3, including a transition from **sporadic** cultivation to **intensive** cultivation (as defined by the majority in the committee), the Respondent still enjoys the defense set forth in section 2(e) of the order (sections 90-92, and section 129-131 of the opinion of committee member Ben David; section 15-16 up the opinion of committee member Nun);
- That the committee has the authority to interpret the order on disruptive use as legislation issued by the military commander rather than as an administrative act (section 101 of the opinion of committee member Ben David); the purpose of the order is not necessarily defense of a specific landowner but to prevent someone who is not the owner of the land from taking possession of the land (ibid., section 109);
- That the Petitioners did not provide real evidence of their ownership of the land that is the subject of the appeal or part of it (section 37 of the opinion of committee member Ben David; sections 26-27 up the opinion of committee member Nun);
- That the trespasser acquired proprietary rights to the land, even if they are negative proprietary rights that negate his evacuation, and that issuing the order amounts to government interference in the private property of Respondent no. 3 (sections 24 and 5 of the opinion of committee member Nun).

51. On the other hand, the **minority opinion** in Respondent no. 1's decision, by committee member reserve Captain Uri Keidar, said that the evacuation order was issued lawfully and that Respondent no. 3 can not enjoy the defense of limitation as argued by him. Committee member Keidar based his opinion on several foundations:

52. **First**, the committee member examined the involvement of the Kedumim Local Council in the trespassing process and the agency relationship between the council and Respondent no. 3, the de facto trespasser (section 8, sections 23-27 of his opinion).

53. **Secondly**, after the committee member examined the provisions of international humanitarian law that apply to the area, he asserted that no arm of government of the state of Israel, including the Kedumim Local Council, may violate the personal property of a protected population in an occupied territory (including the property of the Petitioners), unless it is needed for security needs (see sections 84-97 of committee

member Keidar's opinion). Among other things the committee member asserts that it is not within the power of the Kedumim Local Council to determine what security needs are, especially where the military commander absolutely negates such needs (sections 95-97 of the opinion).

54. **Third**, since, as revealed in the appeal by the testimonies of Respondent no. 3 and the testimonies of past and present officers of the Kedumim Local Council, the purpose of the council activating Respondent no. 3 was part of a broad and sophisticated system to expand the settlement at the expense of the land of the Petitioners and other Palestinian residents ("the Hanita method," as one of Respondent no. 3's witnesses called it), the Kedumim Local Council – flesh of the flesh of the state of Israel's government agencies – acted illegally while violating its obligations towards the protected population (sections 97-101 of the opinion).

55. It should also be noted that the committee member concluded in his opinion that by its improper actions the Kedumim Local Council also violated its obligations towards the Petitioners to the extent that they derived from Israel's constitutional and administrative regime, including and especially Basic Law: Human Dignity and Freedom (sections 102-125 of the opinion).

56. Therefore, the position of the committee member is that since the local council was the party behind the trespassing, as proven and declared both by Respondent no. 3 and by its officers, it cannot accrue obsolescence for a three-year period (nor for a 10 year period according to section 78 of the Ottoman land law of 1858). Obviously, its agents cannot accrue such a period of obsolescence either, since after all at the basis of those actions, as far as there were any, Respondent no. 3 relied on the appeal he submitted (sections 120-127 of his opinion).

57. **Fourth**, and maybe most importantly for our matter, committee member Keidar opined in his opinion, as do the Petitioners, that the essential change in the form of cultivation by the trespasser on the Petitioners' land does not allow him to take refuge in the period of obsolescence as set forth in the order. Therefore, says committee member Keidar, once Respondent no. 3 decided to make commercial use of the land he became a trespasser himself and his disruptive use of the land began, regardless of the local council and in addition to it (sections 128-134).

58. Fifth, in addition to all of the aforementioned, committee member Keidar asserts that even if all of the facts presented by Respondent no. 3 in the appeal are proved true, not all minor and fleeting uses of the land are equal to massive and continuous use of the land, actions against which the order was issued.

59. Specifically, the committee member asserts that the interpretation of the order as given by the majority opinion and by Respondent no. 3 is not reasonable and leads to the conclusion that every one-time action by anybody on land may create a claim of obsolescence out of nowhere and undermine any attempt to enforce the law according to the provisions of the order (see sections 135-156 of his opinion).

60. Therefore, asserts the committee member, since the disruptive use of the land as defined by the order issued for this matter began only in 2007, he cannot take refuge in the obsolescence defense that exists in order.

61. As stated, the opinion of committee member Keidar was given as a minority opinion. The majority opinion chose an opposite course of interpretation which, according to the Petitioners and Respondent no. 2, is the opposite of the language of the order, its specific purpose and the general purpose that was the background for issuing it.

62. That is the reason for this petition.