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At the Supreme Court
Sitting as the High Court of Justice

H CJ 8092/20

In the matter of:

1. **Anonymous**
2. **Anonymous**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**
All represented by counsel, Adv. Nadia Daqqa
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The Petitioners

v.

1. **Military Commander in the Occupied Territories**
2. **Military Advocate General**
3. **Israel Police**
Represented by the State Attorney's Office,
Ministry of Justice
29 Salah a-Din Street, Jerusalem
Tel: 073-3925590; Fax: 02-6467011

The Respondents

Response on behalf of the Respondents to the Amended Petition

1. According to the decision of the honorable court (the Honorable President E. Hayut) dated March 9, 2022 and the extensions which were granted, a preliminary response is hereby submitted on behalf of the Respondents (hereinafter also: the "**State**") to the amended petition.
2. In a nutshell, as recalled, the original petition which was filed by the Petitioners concerned Petitioners' demand that the honorable court order the Military Commander in the Judea and Samaria Area to regulate the practice of arresting Palestinian minors, such that the primary method for arresting them shall be by summoning them for an interrogation through their parents or legal guardian in charge of them, *in lieu* of arresting them by night arrests. The following were the remedies which were requested towards the Respondents in the original petition:

- a. Why should they not arrange the practice of arresting Palestinian minors in the occupied territories such that the summoning of minors through their parents or legal guardian in charge of them shall be the primary method, while night arrests shall be reserved for particularly exceptional and severe cases.
 - b. Why shouldn't detention practices and procedures of minors in the occupied territories be changed according to the principle of the child's best interest and in the spirit of the Youth Law (Trial, Punishment and Modes of Treatment) (Amendment No. 14), 5768-2008 (hereinafter: the **Youth Law**).
3. Now, in their amended petition, the Petitioners wish to add another remedy (leaving the two remedies which were requested in the original petition in place), whereby an order nisi shall be issued, directed at the Respondents ordering to appear and show cause:
 - b. Why the procedure which entered into force as of August 1, 2021, of which notice was given in the Petition at hand, should not be amended in a manner which shall change the reality on the ground causing the summoning of minors through their parents or legal guardians in charge of them to be the primary method.
4. It is the position of the State that the amended petition should be dismissed in the absence of justification for judicial intervention. In its response dated May 2, 2021 to the original petition the State expressed its position that the original petition should be dismissed, and the above applies even more forcefully after the Procedure entered into force on August 1, 2021, allowing the summoning of minors for an interrogation when possible, all as specified in the pleadings submitted on behalf of the State in the framework of the above-captioned proceeding. According to the State there is nothing in the amended petition which changes the position of the State.

We shall briefly describe the chain of events which followed the submission of the original petition in the framework of the above captioned proceeding.

5. As aforesaid, on May 2, 2021, the state submitted its response to the original petition, in which it was stated, *inter alia*, that there was no obligation under the local law which applied to Judea and Samaria, under the general provisions of the law or pursuant to the rules of international customary law relevant to the case at hand, to summon minors suspected of arrestable severe criminal offenses, *in lieu* of arresting them and bringing them for an interrogation while under arrest. In addition, it was argued that there was no obligation under the law as aforesaid, to refrain from arresting minors at night.

It was further noted in the preliminary response that despite the fact that there was no obligation under the law, the Respondents have commenced in 2014 to implement a pilot whose purpose was to try summoning for interrogation minors suspected of certain offenses, *in lieu* of their pre-planned arrest, the above for operational reasons, for the purpose of minimizing friction with the civilian population and for reasons concerning the child's best interest; and subject to different considerations including the needs of the interrogation, operational necessity and the security of the Area.

See, *inter alia*, the response dated May 2, 2021, which stated in pertinent part as follows:

4. [...] These days the relevant IDF bodies, together with Israel Police and the security bodies are working on formulating a procedure which shall permanently regulate the matter. It should be noted that the administrative work on the matter is expected to be concluded within the next few months.

82. [...] In conclusion, as described above: the Petition should be dismissed since the different laws which apply to the area impose no obligation to accept the demands raised in the Petition, and anyway the Petition shows no cause for judicial intervention. Without derogating from the aforesaid, different arguments raised in the Petition are premature arguments, considering Respondent's decision to formulate an operational procedure defining the circumstances and method whereby minors can be summoned by phone in advance, *in lieu* of their pre-planned arrest without warning. As aforesaid, these days the relevant IDF bodies, together with Israel Police and the security bodies are working on formulating a procedure; and the administrative work on the matter is expected to be concluded within the next few months. However, it should be reminded and emphasized that Respondents' position is that notwithstanding the above administrative work, there is no justification in the case at hand for judicial intervention, in the absence of a positive obligation under the law which applies to the area as requested in the Petition, and the Petition should therefore be dismissed as aforesaid."

It was also stated by the Respondents in their response to the original petition that "they are always guided by the need to provide increased protection to the rights of minors in criminal proceedings conducted in the area. In this context it was noted that the military commander and all relevant enforcement bodies have acted in recent years on many levels, including by amending the security legislation which applies to the area, to increase the protection afforded to the rights of minors in criminal proceedings in the area from beginning to end – commencing from the provisions of the law concerning detention, interrogation, indictment and ending with the sentencing of the minors; balancing all of the above against the unique security needs which exist in Judea and Samaria" (Paragraph 9 of the response to the original petition).

6. Following the above response dated May 2, 2021, Respondents' notice dated July 29, 2021 was submitted in which the Respondents notified that a procedure for the summoning of suspected minors before a pre-planned arrest in the Judea and Samaria area had been approved by the IDF Central Command and Israel Police Shai District (hereinafter: the "**Procedure**"). An open paraphrase of the above Procedure was attached to Respondents' notice dated July 29, 2021. Subsequently, in the hearing which was held before the honorable court (the Honorable President Hayut, and the Honorable Justices

A, Baron and G. Karra) on August 2, 2021, it was noted that the Procedure had been signed and entered into force on August 1, 2021.

7. After the hearing in the Petition which was held on August 2, 2021, the honorable court gave the following decision:

At this stage and in view of the new procedure which entered into force as of yesterday, August 1, 2021, the Petitioners request to reserve their arguments with respect to said procedure and to be allowed to raise them in the framework of an amended petition which they shall consider filing after experience is accumulated on the ground regarding the manner by which the above procedure is implemented and after an updating notice in that regard is submitted by the Respondents. Respondents' counsel does not object thereto. Therefore, we direct that the Respondents file by February 1, 2022 an updating notice concerning the implementation of the new procedure and the data concerning the numerical relation between the summoning of minors for interrogation in ways other than by night arrest and night arrests in circumstances which are permitted according to the procedure. After the updating notice is submitted the Petitioners shall be entitled, if they deem proper, to file an amended and updated petition within 30 additional days, and thereafter a decision shall be made as to the manner by which the petition shall be handled."

8. Accordingly, on February 1, 2022 an updating notice was submitted on behalf of the Respondents specifying data which were collected regarding the implementation of the Procedure as of the commencement of September 2021 until the end of December 2021. It was accordingly stated that 34 Palestinian minors in the area were brought in the above period to Israel Police for interrogation, of whom – six minors were summoned by phone for interrogation with Israel Police according to the provisions of the Procedure which was signed on August 1, 2021, and 28 minors were brought to Israel Police for interrogation following a pre-planned arrest, after a positive decision was made to use a pre-planned arrest for the purpose of bringing them to Israel Police for interrogation, according to one or more of the criteria which were specified in the open part of the Procedure. In this context, see section 8 of the "Unclassified Core Procedure" which was attached to the State's notice dated July 29, 2021:

- (1) Where the minor's house should be search for the purpose of locating physical evidence;
- (2) Where there is an actual concern that the suspected minor may escape;
- (3) Where there is a concern that the prior summons may lead to obstruction of investigation;
- (4) Where several suspects are involved and it can be estimated that summoning one of the involved suspects shall jeopardize the possibility to arrest the others;
- (5) Where the minor poses an immediate threat.

The State noted in its notice dated February 1, 2022 that the data which were brought **did not include** cases of Palestinian minors who were arrested "red handed" in Judea and Samaria by the security forces – namely – minors who had committed arrestable offenses at the presence of the security forces or "shortly" before their arrest, since these cases deviate from the subject matter of the Procedure and from the subject matter of this Petition, dealing with **pre-planned arrests**. In view of all of the above, the State noted in its notice dated February 1, 2022 that in its opinion the petition was exhausted. The State added that its above position was reinforced by the data on the ground showing that the Procedure was properly implemented as pre-planned arrests of minors in the appropriate cases were carried out **only after an individual and positive decision had been made**, taking into consideration the criteria specified in the Procedure justifying such an action. It was also noted that in view of the serious offenses committed by minors in Judea and Samaria, the investigative and operational need requires, in the vast majority of the cases, the suspect's pre-planned arrest without prior notice and that in these circumstances, the relation between the number of minors who were arrested by pre-planned arrests and the number of minors who were summoned for interrogation does not indicate an ostensibly deficient implementation of the Procedure.

9. On March 2, 2022, the Petitioners filed an amended petition, which is practically identical in the vast majority of its allegations, remedies and content to the original petition, including the legal analysis proposed by the Petitioners in their amended petition, providing no response whatsoever to the comprehensive and detailed legal analysis which had been presented by the State in its response to the petition. Moreover, in large parts of the amended petition the Petitioners continue to refer to the old "Pilot" which as aforesaid, was replaced by the new Procedure.

In fact, in the few parts of the amended petition which were changed compared to the original petition, the Petitioners raise the argument whereby over the last six months as of the beginning of the implementation of the Procedure, no change has occurred in the arrest practice applied by the security forces in Judea and Samaria and that the criteria set forth in the Procedure apply to a limited group of minors. The above allegations are made by the Petitioners without making any individual allegation focusing on any specific criterion established in the Procedure, but they are rather satisfied with the general allegation whereby "the Procedure did not change the reality". It should be emphasized that the Petitioners did not base their allegations on concrete legal grounds referring to the criteria which were specified in the State's response and in the Procedure, but have rather repeated their principled argument concerning the obligation to refrain from night arrests of minors – the above, as aforesaid, without replying to the State's response which had made it clear that no such obligation existed, and that the entire Procedure had been formulated as an outline whose purpose was to expand the protection of minors' rights, beyond that which may be required pursuant to applicable law.

It was further argued in the amended petition that the data which were presented by the Respondents "initially, seem partial and fail to reflect the real scopes as they actually are on the ground" (see paragraph 90 of the amended petition; for a broader discussion – see paragraph 88-96 of the amended petition).

10. In view of the fact that the amended petition is not substantially different from the original petition, and to avoid repeating what has already been said, reference is made by the State to its comprehensive legal analysis broadly specified by it in the State's response dated May 2, 2021 and in the updating notice dated February 1, 2022.
11. It should be briefly noted that it is the State's position that IDF's practice of arrests of Palestinian minors in Judea and Samaria **is consistent with the provisions of the applicable law**, for the following cumulative reasons:
 - a. As specified broadly and in great detail by the State in its response dated May 2, 2021, neither the local law which applies to Judea and Samaria, nor Israeli law or the rules of international customary law relevant to the case at hand, include any prohibition against night arrests of minors, as argued by the Petitioners.
 - b. The severe offenses that the arrested minor Palestinians are involved in, alongside the operational difficulty to act in the Palestinian cities and villages in Judea and Samaria at day time, require IDF forces to make most arrests at night. Accordingly, there is an operational need, in appropriate cases, to continue making night arrests of minors.
 - c. Although there is no legal obligation, and following its statements before the honorable court, as well as for operational reasons and the desire to reduce the harm inflicted on the civil population, the IDF acted towards establishing a procedure providing that the possibility of summoning minors for interrogation should be examined when possible, **from the investigative and operational perspectives as well as from the perspective of the security of the area**.
 - d. Considering the aforesaid and the Procedure which was established, it is the State's position that there is no room for interfering with the operational discretion of military commander on the method of arrests in the area, and for ordering that other arrangements be established which would change the practice of arrests in the area.
12. Concretely, the Petitioners allege that in fact the vast majority of the minors who are arrested are still arrested by pre-planned night arrests, presenting data whereby the average number of night arrests out of the total number of pre-planned arrests of minors in the months of September – December 2021, amounts to 52.6% (compared to 56.8% in the previous months) (see paragraph 96 of the petition). According to the Petitioners, the above shows that the new Procedure did not cause any change in the practice of arrests in Judea and Samaria. The Petitioners also allege that the circumstance justifying a night arrest *in lieu* of summoning for interrogation according to the Procedure, shall cause a situation, regardless of the data which were presented, whereby in the vast majority of the cases, minors shall be arrested by night arrests and shall not be summoned for interrogation.
13. In this context, it is not clear what Petitioners' concrete allegation is. The Respondents did not argue that the Procedure shall apply to all arrests of minors in Judea and Samaria, neither was it argued that it shall have a wide effect on the scope of minors' arrests. As stated in the response dated May 2, 2021, in the notice dated July 29, 2021 and in the notice dated February 1, 2022, **the Procedure entrenched the need to examine the possibility of summoning minors for interrogation in lieu of their pre-planned arrest**

and established criteria for the implementation of the above (while an individual examination should be made **in each case on its merits**). The above, as was explained in the State's response, while in principle, the balancing in the framework of this policy does not differ from the balancing made in Israel with respect to the arrest of minors. However, the policy concerning the arrest of minors in the area was established against the backdrop of the security situation in the area, the investigative and operational needs and therefore, things are naturally implemented in Judea and Samaria in view of the complex security situation therein, which is completely different from that which exists in Israel (See paragraph 64 of the State's response dated May 2, 2021).

It should be reminded, for instance, that the Procedure states that "In any case involving a minor who is wanted for interrogation by Israel Police, the officer handling the case should ask themselves whether the pre-planned arrest of the minor is required or whether they can be summoned for the interrogation" (See paragraph 7 of the Procedure which was attached to the State's Notice dated July 29, 2021).

14. With respect to Petitioners' arguments in paragraphs 88-96 of the amended petition, whereby the data which were presented by the Respondents "initially seem partial and fail to reflect the real scopes as they actually are on the ground" and "... despite their partiality it can be unequivocally identified that the Respondents continue to apply the practice of pre-planned night arrests of minors which is implemented in the vast majority of the cases" – these arguments should be dismissed. It should be noted that reference is made by the Petitioners in their arguments to data which are not relevant to the case at hand, and that the ratio between the number of minors who were arrested by a pre-planned arrest and the number of minors who were summoned for interrogation does not indicate that the provisions of the Procedure are ostensibly implemented in an inappropriate manner. We shall specify.
15. First, the data which were presented by the Respondents and which were provided by Israel Police on February 17, 2022 in a response to a freedom of information request (Exhibit P/25 of the amended petition) do not distinguish between pre-planned arrests and "real time" arrests where "red handed" arrests were made, as specified above. In this context it should be noted that the segmentation of the arrests according to "red handed" arrests and "pre-planned" arrests is not routinely made by Israel Police, and that the collection of the data which were presented in Respondents' notice dated February 1, 2022 was made especially and manually and required the investment of considerable resources by Israel Police, all as stated in Respondents' notice dated February 1, 2022 (See paragraph 8 of the Notice).

Second, the data which were provided by Israel Police in the response dated February 17, 2022 do not distinguish between arrests which were required by Israel Police and arrests which were required by the other security bodies and do not distinguish between Palestinians residents of Judea and Samaria and Palestinians residents of the Gaza Strip who were arrested (a matter which was referred to by Israel Police in paragraph 6 of its above response); and do not distinguish between Palestinians who were arrested in the territory of the State of Israel and those who were arrested in the territories of the area.

Third, it should be noted that the data which were provided in the response on behalf of Israel Police on February 17, 2022 in which the time of the arrest is noted, refer to the

detainee's placement in the facility and not necessarily to the actual time of the arrest. Therefore, it is possible that some of the data whereby the detainee was placed in detention at night actually refer to arrests which were made during the day.

Hence, the data which were provided in the response on behalf of Israel Police on February 17, 2022 refer to arrests in multiple circumstances which are not relevant to the Procedure – such as arrests of Palestinian minors within the territory of the State of Israel; arrests of Palestinian minors residents of the Gaza Strip; arrests of Palestinians who were arrested "red handed" as specified above and arrests of Palestinians who were arrested during the day and were placed in the detention facility at night.

Therefore, the data presented by the Petitioners, in an attempt to show that pre-planned night arrests are used widely without an individual and positive examination – are not at all relevant to the case at hand.

16. To the crux of the matter, notwithstanding the aforesaid – Petitioners' arguments do not lead to the conclusion that the Procedure is erroneously implemented; In this context, paragraph 10 of Respondents' notice dated February 1, 2022 should be reiterated whereby "... in view of the serious offenses committed by minors in Judea and Samaria, the investigative and operational need requires, in the vast majority of cases, the suspect's pre-planned arrest without prior notice. In these circumstances, the relation between the number of minors who were arrested by pre-planned arrests and the number of minors who were summoned for interrogation does not lead to the conclusion that the Procedure is implemented in an ostensibly deficient manner".
17. Against the backdrop of all of the aforesaid, the State is of the position that the petition should be dismissed for the above mentioned reasons and for the reasons which were specified in detail in the response dated May 2, 2021 and in the Notices dated July 29, 2021 and February 1, 2022.
18. The facts specified in paragraph 15 were confirmed by Asaf Shahor, Chief Superintendent (retired), Head of data production unit/Planning and Organization Department/Strategy Israel Police, and an affidavit on his behalf shall be submitted as soon as possible.

Today, 7 Av 5782
August 4, 2022

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Avi Milikovski, Adv.
High Court Affairs Commissioner
State Attorney's Office