**HCJ 390/79**

**'Izzat Muhammad Mustafa Duweikat et 16 al.**

v.

1. **Government of Israel**
2. **Minister of Defense**
3. **Military Commander for the Judea and Samaria Area**
4. **Nablus District Military Commander**
5. **Felix Menahem**
6. **Shvut Avraham**

**At the Supreme Court Sitting as the High Court of Justice**

(September 6, 1979, September 13, 1979, September 14, 1979, September 19, 1979, October 3, 1979, October 22, 1979)

Before Vice-President M. Landau and Justices A. Witkon, S. Asher, M. Ben-Porat, D. Bechor

Objection to the order nisi dated 25 Nissan 5739 (June 20, 1979)

A. Hury - on behalf of petitioners 1-16;

G. Bach, State Attorney – on behalf of respondents 1-4
A. Zichroni, A. Feldman – on behalf of petitioner 17
R. Cohen, M. Simon – on behalf of respondents 5-6

## Judgment

Vice-President (Landau)

In this petition we must review the question of the legality of establishing a civilian community (a settlement) in Elon Moreh, on the outskirts of the city of Nablus, on land privately owned by Arab residents. A similar issue was reviewed by this court in HCJ 606/78, 610/78 (HCJ 606/78 Suleiman Taufiq Ayub et 11 al. v. Minister of Defense et 2 al.; Jameel Arsam Matu'a et 12 al. v. Minister of Defense et 3 al, *Piskey Din* 33(2) 113, 127, 129, 124, 129--, 125, 131, 132-133, 130, 126, 116, 118, 119, 128.) (hereinafter for the sake of brevity: the Beit El case), in which judgment was rendered on March 13, 1979. We found there that the establishment of two civilian communities on private lands in Beit El near

Ramallah and in Beqa'ot B, near Tubas, did not constitute a breach of domestic Israeli law, nor of international customary law which forms part of domestic law, as the two communities were established for military purposes as we interpreted the term.

In the matter of Beit El (at the end of p. 128) it was stated, with regards to the justiciability of this matter, that the issue of the settlements was "disputed among the government of Israel and other governments and that it may come up in the crucial international negotiations in which the government of Israel is involved." In the interim, the intensity of the controversy has not subsided; it has rather intensified among the Israeli public internally and this time, it was also reflected in the very resolution to establish a civilian community in Elon Moreh which was passed by a majority of the government of Israel. This is thus a profound issue which is currently stirring up emotions among the public. In HCJ 58/68 (HCJ 58/68 Binyamin Shalit on behalf of himself and his children Oren and Galia Shalit v. Minister of the Interior and the Registration Official, Haifa District, *Piskey Din* 33 () 477, 521, 2, 530.) (the "Who is a Jew" issue) I spoke, at the end of page 521, about "… the grim result is that the court seemingly abandons its proper place, above the disputes which divide the public, and its justices descend themselves into the rink…" and on page 530, I explained, as one of the minority justices that the court must refrain from ruling on the dispute therein in the absence of an appropriate source for making a ruling. I added that even in a situation such as this "there may be cases in which the justice sees himself as one who has been compelled to provide their personal answer to a question relating to a worldview, even though it is controversial." In this instance, we have appropriate sources for ruling and we have no need to and indeed we must not, when sitting to pronounce judgment, bring into the mix our personal views as citizens of the country. Yet, there is still grave concern that the court would appear to be abandoning its proper place and descending into the arena of public debate and that its ruling will be applauded by some of the public and utterly, vehemently rejected by others. In this sense, I see myself here as one who's duty is to rule in accordance with the law on any matter lawfully brought before the court. It forces me, knowing full well in advance that the wider public will not notice the legal argumentation but only the final conclusion and the appropriate status of the court, as an institution, may be harmed, to rise above the disputes which divide the public. Alas, what are we to do when this is our role and duty as justices.

On the morning of June 7, 1979, Israeli civilians, assisted by the IDF, embarked on a settlement operation atop a hill some two kilometers east of the Jerusalem-Nablus road, and in a similar distance south-west of this road's intersection with the road descending from Nablus to the Jordan Valley. The action was carried out with the assistance of helicopters and heavy equipment. Earthworks began for a road from the Jerusalem-Nablus road to the hill. The entire hill is rocky terrain (with the exception of a small plot on the

north-western side of the site which had only recently been ploughed and planted and, according to an expert testifying for the respondents, this was done out of season, in a place which has no chance of yielding financial returns on the crops). However, earthworks on a 1.7 kilometer road necessitated damage to existing sorghum crops in an area 60 meters long and 8 meters wide and to about six four-year-old olive saplings.

The hill's lands are located within the area of the lands of the village of Rujeib which is close to its north-western side. The 17 petitioners, who are residents of the village, own plots of lands on the hill, which are registered in the Nablus registries after having gone through the land arrangement process. The total area of their lands is 125 dunum. The petitioners have no ownership rights on the lands where the road was built.

On June 5, 1979, two days before the settlers occupied the site, Brigadier General Binyamin Ben Eliezer, Commander of the Judea and Samaria Area, signed Land Seizure Order No. 16/79. The order's opening statement is: "By the power vested in me as commander of the Area and since I am of the opinion that the matter is required for military necessities, I hereby order as follows:" In the order, the signatory announces an area of some 700 dunum marked on a map appended to the order as "seized for military needs". The petitioners' plots are included in this area. Section 3 of the order states that any owner or lawful holder of lands located in the area shall be permitted to file a claim for periodic user fees due to the land seizure and for compensation for any substantive damage caused to him as a result of the seizure to the officer in charge of the claims division. According to section 5, "notice of the contents of the order shall be given to any owner or holder of lands located in the area". A similar order regarding the route of the road to the hill (no. 17/79) was signed only on June 10, 1979, three days after the settlers occupied the site. In regards to the provision of the required notice to the land owner, including the petitioners, it emerged that notice of the orders was given to the mukhtars [village heads] of Rujeib, who were summoned to the office of the military governor in Nablus, only at 8 o'clock on the morning of the actual day on which the settlers occupied the site, around the time earthworks began. Written notices were handed to the mukhtars to be given to the land owners only on June 10, 1979. In the affidavit of response in this petition, given by the Chief of the Genera Staff, Lieutenant General Refael Eitan, the chief of the general staff states that it would have been appropriate to provide the land owners with advance notice of the intent to carry out the seizure, as is usually done in similar cases and that he had instructed that in future, notice would be given to the relevant land owners on an appropriate date prior to the land seizure. It is unclear why the officials in charge deviated from existing practice in similar cases. The impression one gets is that the settlement was organized in this manner, as a military operation, while using the

element of surprise and in order to preempt the “danger” of this court’s intervention due to an appeal by landowners before earthworks begin.

The petitioners appealed to this court on June 14, 1979 and on June 20, 1979 an order nisi was issued against the respondents – the government of Israel, the minister of defense, the military commander of the Judea and Samaria Area and the military commander of the Nablus district – instructing them, *inter alia*, to show cause why the seizure orders that were issued would not be revoked and why the land would not be evacuated of the vehicles and structures erected thereupon and the establishment of a civilian settlement thereupon not be prevented. An interim order to prevent further excavation and construction in the area in question and the settlement of more civilians, additional to those already settled therein up to the issuance of the order, was also issued. This interim order is still valid today, with certain changes inserted thereto as per the request of the settlers during the hearings on the petition.

In the affidavit of response, the chief of the general staff explains that he had reached the conclusion that establishing a civilian community in that location was required for security reasons and that his position regarding the security significance of this area and the establishment of the community was brought to the attention of the ministerial committee for security affairs which decided in its sessions dated May 8 and 10, 1979, to approve the seizure of the territory via a seizure order for the purpose of establishing a community and that following these decisions which were approved at the government’s plenary session dated June 3, 1979, the commander of the Judea and Samaria Area issued the aforementioned seizure order. Lieutenant General Eitan thereafter elaborates on the important contribution civilian communities made to the defense of the Jewish settlement project in the country, dating back to the days prior to the state’s establishment and during the War of Independence and addresses the security purposes fulfilled by such communities, in regional defense and in relation to the IDF’s organization during calm and emergencies. The chief of the general staff puts great emphasis on expressing his decisive opinion regarding the importance of regional defense. His remarks imply severe criticism of the opinion of others who caused regional defense to reach “rock bottom”, as he puts it, leading up to 1973, when military thinking was resting on the laurels of the Six Day War. However, “following the 1973 War, regional defense was restored the glory of which it was robbed as a result of arrogance and fundamentally erroneous considerations of its contribution.” Today, regional defense communities are armed, fortified, and properly trained for their mission which is to protect the area in which the live. Their location on the ground is determined with consideration of their contribution to controlling the area and assisting the IDF in its various missions. The chief of the general staff explains the particular importance of civilian communities as opposed to an army base, as, during war, the unit stationed in the base leaves in order to

fulfill mobile and combative tasks, while the civilian community remains in place and, being properly armed and equipped, it controls its surroundings for the purpose of missions of observation and guarding nearby traffic routes in order to prevent the enemy from taking them over. This is particularly cogent at a time when reserve units are called in at the outbreak of a war – in this case, the outbreak of a war on the eastern front. At such a time, troops must arrive at their designated deployment locations and the importance of controlling traffic routes in order to ensure rapid and unhindered movement on them increases. Nablus and its surrounding area constitute an irreplaceable intersection, hence the particular importance of controlling the roads near it. Elon Moreh overlooks a number of such roads, namely, the Ramallah-Nablus road, the Nablus-Jordan Valley road, through the Jiftlik and another road to the Jordan Valley through Aqraba and Majdal which also runs nearby, to the south.

There is no doubt, and counsels for the petitioners – Mr Elias Hury on behalf of petitioners 1-16 and distinguished counsels A. Zichroni and A. Feldman on behalf of petitioner 17 – do not dispute this, that Lieutenant General Eitan is entirely sincere and deeply convinced of these opinions on a matter which is in the realm of the professional knowledge of an experienced military man such as him. However, he does not conceal the fact that there are those who challenge his conclusion regarding the crucial importance of establishing a civilian community on the site chosen for the community of Elon Moreh. In section 23(d) of his affidavit, he states the following:

> "I am aware of the opinion of respondent 2 who does not dispute the strategic importance of the area in question, but believes that security needs can be met by means other than establishing a community in the location in question."

The second respondent is the minister of defense. An extraordinary situation has thus been created whereby the respondents themselves are of different minds regarding the subject matter of the petition. The chief of the general staff must be viewed as declaring his opinions on behalf of the military authorities as well as on behalf of the government of Israel which decided on the matter through majority vote in objection to the decision of the ministerial committee which was submitted by the deputy prime minister (who is, like the minister of defense, clearly an authority on military issues as someone who was the IDF's second chief of the general staff). The petitioners were also permitted to submit additional opinions, one by Lieutenant General (reserves) Hayim Bar Lev and another by Major General (reserves) Matityahu Peled. Lieutenant General (reserves) Bar Lev expresses his professional assessement that Elon Moreh does not contribute to the security of Israel, neither in combating hostile terrorist activities during calm nor in case of war on the eastern front, as a civilian community located atop a hill some two

kilometers from the Jerusalem-Nablus road cannot facilitate securing this traffic route, particularly as a large military camp is located close to the road itself and dominates traffic routes to the north and east. On the contrary, states Lieutenant General (reserves) Bar Lev, due to hostile terrorist activities during war, IDF forces would be assigned to guarding the civilian community rather than fighting the enemy army. In response to these objections, it appears from Lieutenant General Eitan's affidavit that the main importance of a civilian community on the site in question is not for the purpose of combating hostile terrorist activity and that this was not the chief of the general staff's consideration in seizing the site, but, that its major importance might rather be revealed during a time of war, as the base to which Lieutenant General Bar Lev refers would then become vacant and a civilian community which is incorporated into the array of regional defense today is unlike a civilian community in previous years as far as the quality of its armament, equipment and level of training are concerned. The opinion of Lieutenant General (reserves) M. Peled is detailed and his conclusion is that "the argument regarding the security value of the settlement of 'Elon Moreh' was not made in good faith and was intended for one purpose only: to provide justification for a land seizure which cannot be justified in any other way". However, I did not find reference therein to Lieutenant General Eitan's main argument, namely, the role of a community on the site as a post for safeguarding freedom of movement on nearby routes at a time reserve forces deploy on the eastern front during war. As for the opinion of Lieutenant General Bar Lev and other like minded military experts, I do not intend to interfere in the discussion of experts and I am satisfied with stating here too, as we stated in HCJ 258/79 (HCJ 258/70 (unpublished) (not yet published):

> "In a dispute such as this on a professional military question in which the court has no substantiated knowledge of its own, we shall hold the presumption that the professional reasons provided by the party giving an affidavit on behalf of the respondents, speaking on behalf of those effectively entrusted with overseeing security in the held territories and inside the Green Line are sincere reasons. Very persuasive evidence is required in order to contradict this presumption."

It was further stated therein that:

> "On matters of professional military evaluations, the government will surely guide itself primarily by the counsel presented to it by the chief of the general staff".

Indeed, we spoke there of the "party giving an affidavit on behalf of the respondents", whereas in this case, the respondents are divided in their opinions. However, we did hear from Mr. Bach, the learned state attorney, who argued on behalf of the first four respondents that despite his difference of opinion, the minister of defense accepted the majority opinion of the government and while fulfilling his legal duty as

the person appointed by the government to oversee the military under Art. 2(b) Basic Law: The Army, he delivered the government's decision to the chief of the general staff for execution.

The focus of the review in this petition must revolve around an analysis of the facts inasmuch as these were revealed by the evidence before us, according to the law and particularly in light of our ruling in the Beit El case. Yet, before I come to this, I must first complete the description of the facts themselves, as we have received additional factual material in the written response of chief of the general staff to a questionnaire we formulated for him after hearing the main oral arguments by parties' counsels, in lieu of the oral cross examination sought by petitioners' counsels. The responses to the questionnaire and additional documents the learned state attorney was permitted to submit in order to compliment the responses to the questionnaire, shed further light on the facts of the case and expanded and deepened our understanding and appreciation thereof beyond what was included in Lieutenant General Eitan's affidavit and in the first affidavit given by Government Secretary, Mr. Aryeh Naor which mentions resolutions of the ministerial committee for security affairs and the government's objection to the ministerial committee. This is the picture as it is ultimately revealed:

1. On January 7, 1979, following an illegal demonstration ("unauthorized demonstration" in the words of the government secretary in his affidavit) of people from "Gush Emunim" on the road in the Nablus Area, the ministerial committee for security affairs held a discussion in which the following "resolution was reached:

    a) The government sees the "Elon Moreh" group as a candidate for settlement in the near future.

    b) The date and location of the settlement will be decided by the government in accordance with appropriate considerations.

    c) In determining the area of the Elon Moreh settlement, the government shall consider, to the extent possible, the wishes of this group.

    d) The members of 'Elon Moreh' are now to return to the camp which they had left."

2. Following this resolution by the ministerial committee for security affairs, a preliminary tour was held by representative of the ministerial committee for settlement. The purpose of the tour was to identify a suitable area for the settlement of the "Elon Moreh" group. Five alternative locations in the area were suggested and transferred for examination by the IDF. The officials in charge of the issue in the Judea and Samaria Area command and in the general staff examined all the suggested locations and decided, according to IDF considerations, that two of the suggested localities were worthy of detailed

examination. One of these sites was recommended by the minister of agriculture who is the chair of the ministerial committee for settlement and a member of the ministerial committee for security affairs and the other was the location ultimately selected by the IDF and which is the subject matter of the petition (chief of the general staff response to the questionnaire, section 2(d)).

The Judea and Samaria Area command examined the possibility of finding a location in the Area that was not privately owned, but no such locality was found (*ibid*, section 2(e)).

3. On April 11, 1979 (apparently following the aforementioned preliminary tour and as a result thereof) the chief of the general staff authorized general staff officials in charge of the matter to seize the area for military needs (*ibid*, section 2(b)).

4. Ahead of a session due to take place at the ministerial committee for security affairs, the chief of the general staff was asked to give his opinion and on May 3, 1979, his bureau chief informed once again to the aforementioned general staff officials that it was his opinion that the seizure of the area was militarily required (*ibid*, *ibid*).

5. The chief of the general staff's opinion was also brought to the attention of the ministerial committee for security affairs when it reviewed the establishment of the community in its session dated May 8, 1979 (*ibid*, *ibid*, and the first affidavit of by the government secretary, section 4). In the same session, the ministerial committee for security affairs decided to support the order of seizure for military needs (first affidavit by the government secretary, section 3(a)).

6. On May 30, 1979, the ministerial committee for security affairs reaffirmed its resolution dated May 8, 1979, (*ibid*, section 3(b)).

7. The deputy prime minister objected to the decision of the ministerial committee for security affairs before the government's plenum and on June 3, 1979, the government rejected his objection by a majority vote and approved the decisions of the ministerial committee.

8. On June 5, 1979, Brigadier General Ben Eliezer signed the seizure order and on June 7, 1979, the settlers occupied the site with the assistance of the military as recounted above.

I will now address two arguments made by Mr. Zichroni on behalf of petitioner 17 in order to remove them before I delve deeply into this petition. He claimed that there was a constitutional flaw in the process of making the decision to establish the community, since, under Basic Law: The Army, the minister of defense is in charge of the chief of the general staff and therefore, his opinion on military issues is preferable to that of the chief of the general staff's and also preferable to the opinion of the

ministerial committee for security and affairs and the government itself, both of which operate under Basic Law: The Government. The result is that the government (or the ministerial committee for security affairs) was not authorized to make a decision contrary to the opinion of the minister of defense. This argument does not stand. The minister of defense is indeed in charge of the military on behalf of the government under Article 2(b) of Basic Law: The Government, yet the military is subject to the authority of the government as a body under Article 2(a) of the same basic law, and the chief of the general staff is subject to the authority of the government under Article 3(b), although he is directly subject to the minister of defense as stated in the same article. It follows that as long as the government has not yet spoken on a certain matter, the chief of the general staff must follow the orders of the minister of defense. However, once the issue had been brought before the government, the decision of the government is the one that binds the chief of the general staff and the minister of defense is merely one of the members of the government, and so long as he continues to be a member of the government he, along with his peers the ministers, he bears shared responsibility for its decisions including decisions accepted by a majority against his contrary opinion. The same holds true for decisions made by ministerial committees appointed by the government as permanent committees or committees for the purpose of a single issue, based on Article 27 of Basic Law: The Government, as, in the absence of an objection to the plenum, or if an objection was submitted and denied, a decision by a ministerial committee is equal to a government decision made in session, as stated in Article 32(c) of the Government Operation Regulations.

The road is now clear for addressing the main question: whether it is possible to legally justify the establishment of a civilian community on the site in question, if for this purpose privately owned land had been seized. In the Beit El case we responded to a similar question affirmatively, both according to domestic, municipal Israeli law and according to customary international law since we were persuaded that military needs necessitated the establishment of the two civilian communities under review therein, in the places where they were established. It is self evident – and Mr. Bach has also notified us that the matter was well explained in government debates – that in this ruling, this court did not provide a legal seal of approval in advance to any seizure of private land for the purpose of civilian settlement in Judea and Samaria, but rather that in each case one must examine whether military needs, as this term must be interpreted, indeed justified the seizure of private land.

At the opening of this review, unlike in the Beit El case, lies the argument on behalf of two settlers in the "Elon Moreh" site who are members of the secretariat of the settler group who were permitted (Originating Motion 568/79) to join this petition as respondents, as Judge Y. Cohen who reviewed the motion found that they had real interest in the petition. These additional respondents provided in their affidavit and statement a broad review, far beyond what was argued on behalf of the original respondents.

In their affidavit, given by one of them, Mr. Menahem Reuven Felix, it was explained that the members of the group settled in Elon Moreh due to the divine command to inherit the earth which was given to our forefathers and that "the two elements, therefore, of our sovereignty and settlement are bound with each other"; and that "the settlement deed of the People of Israel in the Land of Israel is the real, most effective and truest security deed. However, settlement itself… does not stem from security reasons and physical needs but from the power of mission, the power of Israel returning to its land". Below he declares, and these are his words:

> "Elon Moreh is the very heart of the Land of Israel in the deep sense of the word, indeed from a geographic, strategic aspect, but first of all, it is the place where this land was first promised to our first father and it is the place where the father of the nation, after whom this country is named – the Land of Israel – made his first purchase.
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> …..
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> Therefore, with all due respect to the security consideration and although the degree of its sincerity is undoubted in our case, to our mind, it makes no difference".

After recalling the verse from Numbers 33, 53 (Numbers 33, 53): "Take possession of the land and settle in it, for I have given you the land to possess", he goes on to say:

> "Whether the Elon Moreh settlers are incorporated in regional defense as per the IDF's plans or not, settlement in the Land of Israel which is the destiny of the People of Israel and the Land of Israel, is the safety and well being of the people and the state."

In regards to the petitioners' arguments which are based on international law, including various international conventions, he adopts an explanation provided by his counsel, that the latter have no relevance as the conflict is an internal conflict between the People of Israel returning to its land and the Arab residents of the Land of Israel and that it is neither an "occupied territory" nor a "held territory", but rather the very heart of the Land of Israel, our right to which is beyond doubt. Secondly, factually and historically this is Judea and Samaria which were part of the British Mandate and were taken by force by our neighbor to the east – an occupation and annexation never recognized by anyone (except England and Pakistan). Thus far the main part of the affidavit.

Even those who do not share the views of the person who gave the affidavit will respect the deep religious faith and the devotion motivating him. However, when we sit to pronounce judgment in a law abiding state where Jewish law is applied only inasmuch as secular law allows for it, we must apply the law of the

state. As for the views of the person who gave the affidavit regarding ownership of the Land of Israel, I presume that he does not mean to state that Jewish law allows *per se*, to deny the private property of those who are not allies. Indeed, it is an explicit biblical verse: "The alien living with you must be treated as one of your native-born. Love him as yourself, for you were aliens in Egypt" (Leviticus, 19, 34 (Leviticus 19 34)). In an anthology of literature submitted to us by counsels for the additional respondents I found that Chief Rabbi Y. Z. Hertz, of blessed memory, mentioned this verse when the British government requested his opinion of a draft of the Balfour declaration. In response, he said that the reference to the civilian and religious rights of the non-Jewish communities in the draft declaration was merely a translation of that same fundamental principle in the Torah. Palestinian Papers 1917-1922, Seeds of Conflict (John Murray) p. 13.

This was the authentic voice of Zionism which insisted on the People of Israel's right of return to its land, which was also recognized by the nations, for instance, in the introduction to the document instating the mandate over the Land of Israel, but never sought to strip the residents of the land, members of other nations, of their civilian rights.

This petition provides a definitive answer to the argument which seeks to interpret the historic right promised to the People of Israel in the book of books as harming property rights under private property law. Indeed, the framework of the review in the petition is delineated, first and foremost, by the seizure order issued by the commander of the Area and this order's direct source – it is agreed – is the power international law bestows upon the military commander in an area occupied by his forces during war. The framework for review is also delineated by the foundations of the law enacted by the Israeli military commander in the Judea and Samaria Area – this too according to the laws of war in international law. These foundations are found in Proclamation No. 1, published by the military commander on June 7, 1967 according to which the IDF entered the Area on that day and took over control and maintenance of order and security in the Area, as well as in Proclamation No. 2 of the same day, which sets forth in Article 2 that:

> "The law in existence in the Area on June 7, 1967 shall remain intact inasmuch as it does not contravene this Proclamation or any other Proclamation or Order issued by me and with the changes stemming from the establishment of IDF rule in the Area".

Also to be mentioned is Article 4 of the same Proclamation in which the commander of the Judea and Samaria Area declared:

> "Real estate and chattel… which was owned or registered under the Hashemite Jordanian State or Government or a unit of its units or a branch of its branches or a part of all these, located in the Area, shall be transferred to my sole possession and shall be administered by me".

These proclamations are the legal foundation for the military administration in Judea and Samaria which is in existence to this day, without being replaced by a different form of government. Mr. Rahamim Cohen, on behalf of the additional respondents (members of the Gush Emunim group) directed us to the Order regarding Jurisdiction and Powers, 5708-1948, which sets forth, in Article 1 that: "Any Law applying to the entire State of Israel shall be seen as applying to the territory which includes both the State of Israel and any part of the Land of Israel which the minister of defense defines in a proclamation as held by the IDF". Indeed, the minister of defense has not issued a proclamation defining Judea and Samaria as held by the IDF for the purpose of this section. However, says Mr. R. Cohen, the main point is that the Provisional State Council as the sovereign legislature of the State of Israel empowered the minister of defense to issue orders regarding any part of the Land of Israel: the very fact of this empowerment attests to the fact that the Provisional State Council, as legislature, saw the State of Israel as sovereign over the entire Land of Israel.

This is a strong argument, but it must be rejected. It is a matter of fact that the minister of defense did not issue an order based on his power under section 1 of that order regarding the Judea and Samaria Area (nor has the government of Israel applied the laws of the State of Israel to that area as it did regarding Jerusalem in an order based on section 11B of the Order regarding Legal and Governmental Procedures, 5708-1948). When addressing the legal foundations of Israeli rule in Judea and Samaria, we are dealing with legal norms which exist in practice rather than merely in theory and the basic norm upon which the structure of Israeli rule in Judea and Samaria was built in practice, is, as stated, to this day a norm of military administration and not application of Israeli law which carries with it Israeli sovereignty.

One must here again note and recall, as in previous petitions before the court, an important argument made by Israel in the international arena. The argument is based on the fact that when the IDF entered Judea and Samaria, this territory had not been held by any sovereign whose holding thereof received general international recognition. Mr. Rahamaim Cohen vehemently repeated this argument. In the Beit El case (p. 127c) I stated that:

> "We were not required to address this issue in this petition and this reservation thus joins the collection of reservations of which I spoke in HCJ 302/72, (HCJ 302/72, 306/72 Sheikh Suleiman Hussein 'Odeh Abu Hilu et 3 al. v. Government of Israel, 1-2 al.; Sabah

> ‘Abud ‘Ala ‘Ud al Salaimeh et 4 al. v. Government of Israel, 1-2 al., *Piskey Din* 27 (179 2), 169, 176, 177, 184). *Ibid*, at p. 179 and they remain open before this court.”

I believe that the same applies to the petition at bar, as this petition may be resolved only according to the presumptions which underlie the seizure order. These presumptions mark the framework for deliberation for the other respondents as well.

We must, therefore, examine the legal validity of the seizure order in question according to international law of which the military commander, who issued the same, imbibes his authority. In addition, one must examine whether the order was issued lawfully also in accordance with municipal Israeli law, since – as in the Pithat Rafiah case (HCJ 302/72, p. 169, at p. 176) – we presume that here too there is authority to hold a personal review is-à-vis officials in the military administration which belongs to the state’s executive branch as “persons who lawfully fulfill public functions” and who are subject to the scrutiny of this court under section 7(b)(2) to the Law of the Courts 5717-1957. As for the merits; we must examine in accordance to Israeli domestic law whether the seizure order was issued lawfully under the powers vested in the government in Basic Law: The Government and Basic Law: The Army. In the Beit El case we performed these two examinations – the one according to domestic Israeli law and the one according to international law – each separately. In this case, I have already deliberated above according to the basic laws cited in the argument about the decision making process regarding the land seizure held at the governmental level. I can now incorporate the main deliberation regarding these two examinations together, as customary international law in any case forms part of Israeli law, inasmuch as it does not contradict existing local law (see the Beit El case, p. 129 D).

Counsels for all parties have consolidated their arguments in the comparison of the case at bar with the facts in the Beit El case and the ruling therein, with one side wishing to reveal the similarity between the two and the other emphasizing the difference between them. Mr. Bach has added to this and repeated the non-justiciability argument he had already raised in the Beit El and which was unequivocally rejected. Thus spoke of it my esteemed colleague Justice Witkon (top of p. 124):

> I was entirely unimpressed by this argument… upon the assumption – which was not verified in the case at bar – that a person’s property had been damaged or denied him unlawfully, it is difficult to believe that this court would withhold from this person because his right might come under dispute in political negotiations. This argument has not added weight to the rest of the respondents’ arguments…”

On my part, I added and stated (pp. 128-129) that indeed, one must view the special aspect of the case which would have compelled an interpretation of Article 49(6) of the Geneva Convention as non-justiciable, however, the petitioners' complaint is generally justiciable before this court since it involves individual property rights. Mr. Bach claims that his argument was not properly understood and that what he meant to say was that the justiciability issue is a function of the issue under review, and the issue is on one hand extremely controversial politically and on the other, it does not relate to cultivated land but rather rocky terrain which is far from the village of Rujeib itself. He repeats a quote from an essay by Professor Jaffe published in the Harvard Law Review, 1265 74 1302-1304.

The argument was well understood at the time and its repetition adds no validity thereto. I excluded Article 49(6) from the deliberation at the time as it forms part of treaty international law which does not constitute binding law in Israeli courts, yet, I did concur with the opinion of my esteemed colleague regarding the justiciability of the issue under the Hague Regulations which are binding on the military administration in Judea and Samaria, being customary international law. I shall act similarly in this case and refrain from deliberating on the matter at hand under the terms of Article 49(6) of the Geneva Convention. However, when individual property rights are at issue, one cannot dismiss the issue on the argument of the "relativity" of the right. In our legal system, individual property rights are an important legal value which is protected by both civil and criminal law and it makes no difference, as regards the right of the land owner for legal protection of his property, whether the land is cultivated or simply rocky terrain.

The principle of protecting individual property applies also in the laws of war which, on this matter, are expressed in Article 46 of the Hague Regulations. A military administration which seeks to infringe upon individual property rights must present a legal source thereto and cannot exempt itself from judicial review of its actions on the claim of non-justiciability.

On his part, Mr. Zichroni attempted to make a distinction regarding our ruling on the Beit El case. Since in that case, the court justified the establishment of the civilian community for military necessities which were connected to fighting hostile terrorist activity in times of calm, whereas here, the chief of the general staff mostly emphasizes the military need for having a civilian community on the site in question in case of actual war on the eastern front. Yet there is no basis for this distinction. The Beit El case too revolved around regional defense which was to be part of the general defense of the country particularly in times of war – and see the citation from statements made by Major General Orly there, p. 125 and below at p. 125 (e); and so I commented at the top of p. 131 there that "one must not make a sharp distinction between the

powers vested in the military in times of war and times of calm. Even if the area near Beit El is currently calm, it is best to take preventative measures."

My esteemed colleague Justice Ben Porat stressed this in her remarks (*ibid* p. 132-133). And again, in the Matityahu case (HCJ 258/79, not yet published) at p. 4 of the judgment, we stated that one cannot view the matters statically in a manner ignoring what might transpire in the future, whether as a result of hostile activities from outside or from within the held territory and proper military planning must take into account not just existing dangers but also dangers which may arise as a result of dynamic developments on the ground.

The question returns therefore to its place: have the respondents demonstrated satisfactory legal sources for seizing the petitioners' lands? The seizure order was issued by the military commander and opens with the statement "By the power vested in me as commander of the Area and since I am of the opinion that the matter is required for military necessities." It shall be recalled here that the military commander chose to use in this order language which is vaguer than that of the order issued in the Beit El case. That order stated that the seizure of the area on which the Beit El camp stands and in whose periphery building of a civilian community commenced 8 years later was "required for imperative and urgent military necessities." We justified the building of a civilian community there based on Article 52 of the Hague Regulations which allows seizure of lands "for the needs of the army of occupation." At p. 130 I quoted from Openheim who believes that temporary use of private land is permissible if it is required for "all sorts of purposes demanded by the necessities of war" and I have also mentioned the British manual on martial law according to which temporary use for "military movements, quartering and the construction of defence positions" is justified. We have also rejected (p. 130 c) Mr. Hury's argument that the term "the needs of the army of occupation" must be interpreted as including only the immediate needs of the army itself and noted (end of p. 130) that "a major role of the military in the held area is to 'ensure… public order and safety' as stated in Article 43 of the Hague Regulations. What is necessary in order to fulfill this purpose is in any case needed for the necessities of the holding army in the sense of Article 52." Similarly, we can say in this case that what the military requires in order to fulfill its role of protecting the held area against hostile actions which may come from the outside is also needed for the military's necessities in the sense of Article 52.

Thus far I agree with Mr. Bach that the seizure of private land could be justified for the purpose of building a civilian community under the terms of Article 52 of the Hague Regulations in this case too – we have not found a different legal source for this in international law. Yet, what does this concern when it has been proven, according to the facts of the case, that military necessities are what led in practice to

the decision to establish a civilian community on the site in question? I shall reiterate here that that there is no room to doubt that according to the professional viewpoint of Lieutenant General Eitan, the establishment of a civilian community on that site fits the necessities of regional defense which is of particular importance for securing traffic routes when reserve units deploy during a time of war. However, I have come to the opinion that this professional viewpoint of the chief of the general staff would not, in and of itself, have led to the decision to establish the Elon Moreh community if it were not for another reason which was the driving force for the making of this decision in the ministerial committee for security affairs and the government plenum, namely, the fervent desire of Gush Emunim members to settle in the heart of the Land of Israel, as close as possible to the city of Nablus. As for deliberations in the ministerial committee and the government plenum, we can only follow these by reading the session protocols, yet, even without these, we have sufficient clues in the evidence before us that both the ministerial committee and the majority of the government were decidedly influenced by reasons relating to a Zionist worldview regarding the settlement of the entire Land of Israel. This worldview is clearly reflected in the notice Mr. Bach delivered on behalf of the prime minister in the court session on September 14, 1979, in response to statements by the person giving the affidavit on behalf of the additional respondents in section 6 of his affidavit to which I referred in the court session the previous day. And so I noted Mr. Bach's statement verbatim, due to its importance and the stature of the person on whose behalf Mr. Bach spoke:

> "I have spoken with the Prime Minister and he empowered me to notify, after the issue was raised in the session yesterday – that in many instances, both at home and abroad, the prime minister emphasizes the right of the People of Israel to settle in Judea and Samaria and this does not necessarily relate to the debate taking place in the ministerial committee for security affairs regarding concern for national and state security when the question of seizing one site or another for security purposes is up for debate and decision. In the prime minister's opinion, these matters are not contradictory, yet they are distinct. As for comments made regarding the prime minister's intervention. Indeed, this came in the form of bringing the issue before the ministerial committee for security affairs for debate, when the prime minister is the committee chair and when Art. 37(a) of the Government Operation Regulations concerning deliberations at the ministerial committee for security affairs state that the prime minister (he) will determine the topics for discussion according to his own initiative or as per a request by a member of the committee. He took part in the discussion in the committee and expressed his clear and unequivocal opinion

> in favor of issuing a seizure order for the purpose of establishing that community. This, as stated, considering, *inter alia*, the opinion of the chief of the general staff."

This worldview regarding the right of the People of Israel, which is expressed in these comments, is based on the foundations of the doctrine of Zionism. Yet the question that again stands before the court in this petition is whether this worldview justifies taking the property of an individual in an area under the control of a military administration, and as I have attempted to elucidate, the answer to this relies on the correct interpretation of Article 52 of the Hague Regulations. I believe that the military necessities to which the Article refers cannot include, by any reasonable interpretation, the needs of national security in their broader sense, as I have just mentioned. I shall again refer to Openheim's remarks. *Ibid.*, in section 147, p. 410:

> "According to Article 52 of the Hague Regulations requisitions may be made from municipalities as well as from the inhabitants, but so far only as they are really necessary for the army of occupation. They must not be made in order to supply the belligerent's general needs."

Military necessities in the sense of Article 52 may thus include the necessities of which the chief of the general staff spoke in his affidavit of response, namely, the necessities of regional defense and of the defense of traffic routes for unhindered deployment of reserve forces in a time of war. During the discussions of the ministerial committee the following resolution was reached: "Considering, *inter alia*, the opinion of the chief of the general staff," as stated in the notice by Mr. Bach (my emphasis, M.L.) in the resolution of the ministerial committee dated January 7, 1979, which I have already quoted above, Gush Emunim was promised that the government would decide on the time and location of the settlement "in accordance with proper considerations" and that at the time of determining the area of the settlement the government would consider, as much as possible, the wishes of the Elon Moreh group. I shall not be amiss to presume that the statements uttered by Mr. Bach on behalf of the prime minister reflect the spirit of deliberations in the ministerial committee. I do not doubt that the opinion of the chief of the general staff was indeed considered among the committee's other considerations. However, in my opinion, this is not sufficient to uphold the decision under the terms of Article 52 and these are my reasons:

(a). When it comes to military necessities, I would have expected the army authorities to initiate the establishment of the community on the same site and the chief of the general staff to be the one to bring the army's demand under this initiative before the political echelon in order for the latter to authorize the establishment of the community, if it finds that there are no political arguments preventing the same. The chief of the general staff's affidavit of response implies that this was the

decision making process. If that were so, I would have said that the very order of events attests to the fact that the professional military consideration was the dominant consideration in the deliberations of the political echelon too. However, the fuller picture which emerged after the chief of the general staff answered the questionnaire presented to him and from the additional documents Mr. Bach presented to us, indicates that the process was reversed: the initiative came from the political echelon and the political echelon asked the chief of the general staff to provide his professional opinion, and then, the chief of the general staff provided a positive opinion in accordance with the concept to which he has always subscribed. The matter is entirely clear from the chief of the general staff's response to the questionnaire in sec. 2:

> (a). To the best of my knowledge, the entity which initiated the establishment of the community in the Nablus area was the ministerial committee for security affairs.
>
> "(b). I did not contact the political echelon with a suggestion to establish the community in Elon Moreh…
>
> ….
>
> (c). There was no existing plan to establish a civilian settlement on the site in question approved by a competent military official…"

One of the additional documents submitted illustrates that on September 20, 1973, GOC Central Command at the time, Major General Rehavam Zeevi, submitted a detailed proposal for settlement in the held territories to the chief of the general staff at the time. With regards to the establishment of agricultural communities in Samaria, the document states: "it is difficult due to lack of available land." We deduce from this that the prevalent viewpoint at the time was that privately owned land should not be seized for the purpose of establishing communities. So was argued in July 1978 by Major General Orly in HCJ 321/78 (HCJ 321/78, (unpublished)) (the Nabi Saleh case):

> 7. In scouting a location designated for settlement near the village of Nabi Saleh, those acting on behalf of the respondents were guided by the principle outlined in the government's policy not to seize privately owned land for the purpose of settlement."

In the petition at bar we find a slight departure from this position, since the first affidavit by the government secretary, in sec. 5, notes in regards to this issue:

> "In response to the petitioners' arguments… regarding the government's policy on land seizure:

(a). I hereby clarify that the intention of the government of Israel not to seize private lands insofar as this is possible and inasmuch as this is in line with security needs, remains intact.

(b). When the government maintains that security necessity so requires, it authorizes the seizure of private land, but instructs IDF officials to exclude cultivated land from the seized territory insofar as this is possible."

As for Major General Zeevi's plan, one must note that his suggestions were never approved by any competent military or civilian official. This plan included a proposal to establish a Jewish city in the vicinity of Nablus, not on the site now chosen for the establishment of the community of Elon Moreh, but not far from it.

In sec. 4 of his responses to the questionnaire, the chief of the general staff answers the question: "Did you authorize the establishment of a civilian settlement on the site in question because you were *ab initio* of the opinion that the same was required there for the purposes of regional defense or because you found, retrospectively, that if a civilian settlement were to be established on this site, it could be incorporated into the regional defense array?":

> "I authorized the land seizure which is the subject matter of the petition for the purpose of establishing the community because this fits military needs in this area as I perceived them *ab initio* and corresponds to my security viewpoint regarding the requirements of the defense and security of the state of Israel as explained in secs. 9-20 of the main affidavit."

Yet, when this perception of security needs did not initially bring about an initiative to establish a community on the same site, but rather, authorization was only given retroactively, in response to the initiative of the political echelon – I do not believe that this passive approach attests to the fact that that there had been a military necessity to seize private land for the purpose of establishing the civilian community, under the terms of Article 52 of the Hague Regulations. In this case, therefore, it was not proven that in establishing a civilian community, military thinking and planning by military authorities preceded the act of settlement, as we stated in the Beit El case (p. 126 c).

(b). Further on the question of military necessity: I have presented above the wording of the decision of the ministerial committee for security matters in its meeting of January 7 1979 as cited in the second affidavit by the government secretary. As recalled, the deliberation in that session took place following a protest by Gush Emunim members on the road in the Nablus area. The resolution stated

that “In determining the area of the Elon Moreh settlement, the government shall consider, to the extent possible, the wishes of this group.”, and, as if in return for this promise, the Elon Moreh people were to return to the camp which they left, that is, to cease their illegal protest. I see this as clear proof that pressure by Gush Emunim members is what motivated the ministerial committee to address the issue of a civilian settlement in the Nablus area in that session. The issue was transferred thereafter to the ministerial committee for settlement affairs so that it would send its representatives for a preliminary tour in order to select possible sites for establishing a community for the “Elon Moreh” group in the Nablus area. They chose five sites and of the five the IDF supported the site in question. It follows that the IDF did not take part in determining the five sites, but was rather presented with the choice of selecting one of the five sites determined by the political echelon. This process does not conform with the language of Article 52 which, in my opinion, requires preselecting a certain tract of land because this particular land is required for military necessities; and, as stated, it is natural that the initiative for this comes from the military echelon which is versed in the military’s needs and plans them ahead of time with military foresight.

On this issue, Mr. Bach argued that if there are candidates for civilian settlement willing to go where their settlement is required for military needs, the military must take this into consideration. I agree with this, yet, still, this is so on condition that military planning sanctioned by a competent military official precedes the search for candidates for settlement in a specific site. Here, the opposite was the case: first came the wish of the “Elon Moreh” group to settle as close as possible to the city of Nablus and only thereafter and as a result of the pressure they exerted came the approval of the political echelon and finally also the approval of the military echelon. The political consideration was, therefore, the dominant factor in the decision of the ministerial committee for security affairs to establish the community on that site, although I presume that the committee and the majority of the government were convinced that its establishment also fulfills military needs. I also accept the statement of the chief of the general staff that he, on his part, did not take political considerations, including the pressure by Gush Emunim members, into account when serving his professional opinion to the political echelon. Yet, turning subordinate reasoning into the main reasoning, like the military reasoning in the decision of the political echelon which initiated the establishment of the community, does not fulfill the literal demands set by the Hague Regulations for preferring military necessity over individual property rights. In other words: would the decision of the political echelon to establish a community on that site have been made without the pressure of Gush Emunim and the political ideological reasons guiding the political echelon? I am convinced that without these, the decision would not have been made in the circumstances which existed at the time.

I wish to add a few words on the issue of dominant versus subordinate reasoning in decision making by a state authority. In HCJ 392/72 (HCJ 392/72 Emma Berger v. District Planning and Building Committee, Haifa District et 3 al. *Piskey Din* 29 (2) 764, 773). At p. 773 Justice, Y. Cohen mentions the deliberation on the question of the "plurality of purposes" which appears in the third edition of the book by De Smith, Judicial Review of Administrative Action from p. 287 and thereafter and chose, of the five tests suggested by the author, the test whether the unacceptable consideration or unacceptable goal had a substantial influence over the decision of the authority. On my part, I am willing to adopt a test which is more lenient with the authority as suggested by De Smith at the top of p. 289, namely:

> "What was the decisive (dominant) objective for which the authority was exercised? If the authority desires to achieve two or more objectives when only one is legitimate, explicitly or implicitly, the legitimacy of the action is determined by relating to the dominant objective."

(and the author therein cites, in footnote 74 under the line, examples from English case law where this principle had been applied). What I have explained at length above indicates to what result the implementation of this test must lead in the circumstances of the matter at hand, when the initiative for establishing the community did not come from the military echelon. I will also cite from the author's remarks therein, at p. 291, which to me seem relevant for this matter too:

> "… it is sometimes said that the law is concerned with purposes but not with motives. This view is untenable in so far as motive and purpose share a common area of meaning. Both are capable of meaning a conscious desire to attain a specified end, or the end that is desired. In these senses, an improper motive or purpose may, if it affects the quality of the act, have the effect of rendering invalid what is done".

(c). And I have not yet addressed another reason which must lead to striking down the decision to seize the petitioners' land – a reason which stands on its own, even without considering the other reasons I have thus far outlined: in the Beit El case a grave question was raised before us, namely, how can a permanent settlement be established on land which was seized for temporary use? There, we accepted Mr. Bach's reply:

> "That the civilian community could remain in that place only so long as the IDF holds the area under the seizure order. This hold itself could come to an end some day as a result of international negotiations which may end with a new arrangement which would be valid

> under international law and would determine the fate of this community like that of other communities in the held territories (*ibid.* p. 131 b-c).

In that case, the settlers did not stake their claim as they had not been added to the hearing as litigants. In this case, this excuse cannot be accepted as a solution for the contradiction. Here, the person giving the affidavit on behalf of the settlers fully states in sec. 6 of his affidavit:

> "Resting the seizure order on security grounds in their narrow technical sense rather than their basic comprehensive sense as explained above means one thing: the temporariness of the settlement and it being fleeting. We vehemently reject this appalling conclusion. It also does not conform to the government resolution regarding our settlement in this location. In all the contacts and the many promises we were made by government ministers and above all by the prime minister himself - and the seizure order in question was issued as per the prime minister's personal intervention – everyone sees the Elon Moreh community as a permanent community of Jewish settlement, no less than Degania or Netanya."

Note that this paragraph contains two segments: the first segment refers to the opinion of the settlers and the other to comments they heard from ministers. We were not requested to allow submission of a counter affidavit on behalf of the government or any of its ministers to contradict what was attributed to them in the second part of this paragraph and one therefore must accept this as true. Yet, if this is so, the decision to establish a permanent community which was designated, in advance, to stand permanently, even beyond the period of the military administration established in Judea and Samaria – comes up against an insurmountable legal obstacle, as a military administration cannot create facts on the ground for its military needs which are predestined to exist even after the end of military rule in that area, when the fate of the territory following termination of military rule is unknown. This is an apparent contradiction which also demonstrates, according to the evidence before us in this petition, that the decisive consideration motivating the political echelon to decide on establishing the community in question was not the military consideration. Under these circumstances, even the legal declaration of seizure rather than expropriation of the property cannot change matters, namely, taking possession, which is the crux of ownership, of property permanently.

On the basis of all the aforesaid, in my opinion the interim order must be rendered absolute in relation to the petitioners' lands seized under order 16/79.

Justice Asher

I concur.

Justice Ben Porat

I concur.

Justice Witkon

I am also of the opinion that the law is on the side of the petitioners. As in the Beit El case (HCJ 606, 610/78), here too we must examine the actions of the authorities both with respect to "domestic" ("municipal" according to accepted terminology in this context) and with respect to international law. These are two separate issues and as has been stated in the Beit El case (*ibid.* p. 116 e): "the action of a military administration in a held territory may be justified from a military, security aspect and yet, it may be flawed in terms of international law". The domestic law which is under review here is the law included in two orders issued by the commander of the Judea and Samaria Area and under his authority as commander of a held territory (order 16/79 and order 17/79). In these orders, the commander declared that he "is of the opinion that this is required for military needs…", and he declared that the territories are seized "for military needs". Indeed, there is no dispute that the validity of the orders, in terms of domestic law, and essentially, also in terms of customary international law (the Hague Convention) depends on their being issued for "military needs".

We have spoken at length about the substance of "military need" and about the degree of our intervention in the discretion of military officials in the Pithat Rafiah case (Abu Hilu v. Government of Israel) HCJ 302/72 and in the Beit El case. We emphasized and reemphasized that the bounds of our intervention are limited. In the Beit El case I stated (*ibid.*, p. 118 b) that the power "is vested in the military officials and for the court to intervene in the exercise of their power, it must be persuaded that such will be abusive and a pretext for other purposes." Likewise, the comments of my esteemed colleague, the Vice-President, *ibid.*, (p. 126 d):

> "It has been emphasized more than once, also in HCJ 302/72 (p. 177 e, p. 179 b and p. 184 e) that the bounds of this court's intervention in the military considerations of the military administration are very narrow, and a justice would certainly refrain, as an individual, from replacing his views of political matters with the military considerations of those who are charged with the defense of the state and the safeguarding of public order in the held territory."

We have also clarified in the Beit El case that a military, security necessity and the establishment of a civilian community are not necessarily contradictory. As stated (*ibid.* p. 119 b-c):

> "Yet the main point is that as regards the pure security consideration, it is indubitable that the presence of communities – even civilian communities – of citizens of the holding power in a held territory contributes greatly to the security situation in that area and helps the military in the exercise of its duty. One does not have to be an expert on matters of military and security to understand that terrorist elements operate with greater ease in a populated area only if the population is indifferent or sympathetic to the enemy than in a territory where there are also individuals who may survey them and inform the authorities of every suspect move. Terrorists will not find shelter, aid and equipment in their midst. The matter is simple and there is no need to elaborate. We shall just recall that according to the respondents' affidavits, the settlers are subject to the authority of the military, whether formally or as a result of circumstances. They are there because of and with the permission of the military. Therefore, I am still of the opinion, which I held in the Pithat Rafiah case, that Jewish settlement in the held territory – as long as a situation of belligerence exists – serves real security needs."

It is superfluous to note that in all the statements we made in these two judgments (and in others like them), we did not rule that from that point on any civilian settlement inside a held territory serves military purposes. We ruled that we must examine each and every case according to its circumstances. There, we were satisfied that indeed the seizure for the purpose of establishing a civilian community served a security purpose. Here, I am not satisfied that this was the purpose.

How does the case at bar differ from the previous cases? The most important difference is that here, even the experts who are charged with state security are divided regarding the necessity of settlement in the area in question. In this case, as in the others, security authorities presented us with affidavits the purpose of which is to convince us of the military security need for seizing the lands and erecting a civilian community upon them. However, whereas in those cases the testimony was uniform and unequivocal, here, regarding Elon Moreh, the evidence before us indicates that the very military need is disputed among the experts. The petitioners presented an affidavit by Major General (reserves) Matityahu Peled and a letter by Lieutenant General (reserves) Haim Bar Lev which should be duly quoted in full:

> "Elon Moreh, to the best of my professional assessment, does not contribute to the security of the State of Israel, for the following reasons:

1. A civilian community located on a hill top, far from major traffic routes is meaningless in the war against hostile terrorist activity.

   Its very presence in an isolated location in the heart of an area densely populated by Arab residents may assist terroristic attempts. Securing traffic to and from Elon Moreh and guarding the community will remove forces from vital tasks.

2. In case of war on the eastern front, a civilian community located on a hill some two kilometers east of the Nablus-Jerusalem road cannot facilitate securing said traffic route, particularly considering the fact that close to the road itself, there is a military base which overlooks traffic routes to the south and east. On the contrary, in time of war, IDF forces would be grounded to the defense of the civilian community due to hostile terroristic activity rather than engaged in fighting enemy armies."

Moreover, in their petition, the petitioners declared that "from what they have learned from the media, indeed, respondent 2 (the minister of defense) has declared that there is no military or security need for the land." We do not generally consider information provided to us through rumor, but here, there is confirmation of the defense minister's differing opinion from the person giving the affidavit on his own behalf, that is the Chief of the General Staff, Mr. Refael Eitan, who says in section 23(d) of his affidavit:

> "I am aware of the opinion of respondent 2 who does not dispute the strategic importance of the area in question, but believes that security needs can be met by means other than establishing a community in the location in question."

This situation of disagreement between a defense minister and a chief of the general staff regarding the very need for seizure is unparalleled in Israeli case law and it is also difficult to find an example from other countries of a case in which a justice was required to choose between the opinions of two experts, one the minister in charge of the issue and the other the person who heads the executive mechanism. The state attorney sought to overcome this difficulty by relying on Basic Law: The Army, Article 3(b) which states: "The Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defence." It is true, claimed the state attorney, the chief of the general staff is subject to the minister, but the matter at hand reached a government decision and the minister of defense is in the minority. It follows that the minister's differing view is cancelled by the view of the majority which accepted the chief of the general staff's view. I am afraid that the state attorney's answer is irrelevant to the question. Basic Law: The Army relates to the chain

of command among the three elements – the government, the minister of defense and the chief of the general staff. In terms of the hierarchy among them, there is indeed no doubt that the chief of the general staff is subject to the minister and both are subject to the government. Were the chief of the general staff to receive an order from the minister which contradicted another order he received from the government, it may be – and I do not wish to pronounce on the subject – that it would have been his duty to do as the government commands rather than the minister. Yet here the question is not whose command supersedes but rather whose opinion is more acceptable to the court. A person (such as a justice) may forgo his opinion faced with that of his colleagues, but one is not to deduce that the minister forwent his differing opinion from the fact that he accepted the majority's rule. On the contrary, we must presume that he maintains his view and has left us with the role to state which of the two opinions, his or the chief of the general staff's should be duly accepted by us.

As is known, it is a rare occurrence that courts are called to rule on questions requiring particular expertise – expertise which are generally beyond the reach of judges. We are presented with opinions by distinguished experts and these utterly contradict one another. This sometimes occurs in cases which raise medical questions and, for instance, also in any case regarding a violation of patent registration which raises issues relating to chemistry, physics and other natural sciences. In matters of security, when the petitioner relies on the opinion of a security expert and the respondent relies on the opinion a the person who is both an expert and the person in charge of the state of security in the state, it is natural that special weight is given to the opinion of latter. As Vice-President (Landau) remarked in the Ni'lin case (HCJ 258/79, not yet published): "In such a dispute on a professional-military question in which the court has no substantiated knowledge of its own, we shall presume the persons giving the affidavit on behalf of the respondent, who speak on behalf of those effectively charged with maintaining security in the held territories and inside the Green Line, to be persons whose professional reasons are genuine." According to this rule, I might have seen myself forced to favor the opinion of Lieutenant General Eitan over that of Lieutenant General (reserves) Bar-Lev, although I do not know which of them is preferable in terms of their proficiency. However, when the choice is between the chief of the general staff and the minister of defense, it seems to me that this rule is not to be used. One cannot say, in any way, that one is charged with maintaining security and the other is not. Both are.

In this situation of stalemate, when there is no room to presume that the opinion of the person giving the affidavit on behalf of the respondents is preferable to the opinion of other experts, we must ask ourselves: Who bears the burden of proof? Must the petitioners convince us that the land was not seized for military and security needs or shall we request the respondents, the security authorities, to

convince us that the seizure is required for this purpose? I believe the onus is on the respondents. The law does not bestow the force of presumption on the military commander's assertion that the seizure is required for military needs and all the more so does it not bestow upon it the force of conclusive proof that this is indeed so. It must also be noted that the subjective, sincere, belief of the commander in the necessity of the seizure is insufficient to remove the question from the bounds of judicial review. We need not be convinced of the sincerity of the consideration but rather of its correctness (See the well known dispute Liversidge v. Anderson (1942) A.C. 284 , and the essay by R.F.V. Heuston v . Anderson (1942) A.C. 206: (1941) 3 All E.R. 338; (1942)) Liversidge (10 L.J.K.B 724, 116 L.T. 1 ; 58 T.L.R. 35; 85 S.J. 439 (H.L) ב-p. 33 L.Q.R. 86. See also Ridge v. Baldwin (1964) A.C 40, v. Baldwin (1964) A.C. 40; (1963) 2 W.L.R. 935: 127J.D. 295; 107) Ridge 313; (1963) 2 All E.R. 66; 61 L.G.R 396; 79 L.Q.R 487: 80 L.Q.R.S.J 105; 127 J.P.J. 251: 234 L.T 423: 37 A.L.J 140; 113 L.J 716; (1964) (C.L.J. 83 H.L.), and locally the Kardoush case, HCJ 241/60 (HCJ 241/60 Mansur Taufiq Kardoush v. Registrar of Companies, *Piskey Din* 15 1151.) and AH 16/61 (AH 16/61 Registrar of Companies v. Mansur Taufiq Kardoush, *Piskey Din* 16 1209). The law I cited in the beginning of my remarks subjects the legality of the seizure to the existence of a military need; obviously, the court does not support severe harm to an individual's property unless it is satisfied that it is a security necessity. The state attorney too did not claim that he was exempt from the duty to convince us and took the trouble to present the entire material to us. As stated, where we have evidence only on the part of the respondents or where the respondents' experts dispute the petitioners' experts, I might have given the respondents the "benefit of the doubt" which may remain in my heart. Here, however, as stated, we have been told that the minister of defense himself is not convinced of the necessity of the seizure. It is true, the minister of defense's position is a political one and there is no necessity that he himself be an expert on the matters of his office. However, here we have a differing opinion by a minister of defense who, as former head of the operations division and former commander of the air force is himself a clear expert on matters of security. The state has also not doubted this. If such a minister has not been convinced, how can one demand us, the justices to be convinced? If he does not see a military necessity in establishing a community in that particular location, who am I to dispute him?

This is the main reason which brings me to distinguish this case from all previous cases and reach a different conclusion from the one reached in those other cases. To this, one must add two more issues, although of lesser importance. The one is that in the Pithat Rafiah and Beit El cases, my premise was that the Israeli communities being established on lands seized from their Arab owners were necessary for the security forces in their daily struggle against terrorists. "One does not have to be an expert on

matters of military and security" – I remarked in the Beit El case at p. 119 b – "to understand that terrorist elements operate with greater ease in a populated area only if the population is indifferent or sympathetic to the enemy than in a territory where there are also individuals who may survey them and inform the authorities of every suspect move. Terrorists will not find shelter, aid and equipment in their midst". This time, the Chief of the General Staff, Lieutenant General Eitan, explained to us that the main security value of establishing the community at this location is its incorporation into the regional defense mechanism in case of a "total" war. I have reexamined the affidavit presented to us at the time by Major General Yisrael Tal in the Pithat Rafiah case and it speaks of nothing more than preventing terrorist actions in times of calm. I have drawn the same impression from the opinion of Major General Orly in the Beit El case, although I did find - upon further examination of his affidavit – that he did also speak of the needs of regional defense. These considerations were reflected in the judgment of my colleague Justice Landau (*ibid.* p. 124 a). In any case, the issue in question there was two territories which were seized, one right on the would-be terrorists' path and the other adjacent to an important military camp (Beit El). There could not be any serious doubt that in terms of the immense strategic value of these two sites, they and only they could fulfill the security function and that there was no alternative thereto, whereas here, I cannot say that the matter is beyond doubt.

The third issue on which the case at bar differs from the previous cases stems from the settlers' affidavit. As recalled, in the Beit El case the settlers did not join the petition as respondents and were not given the chance to make their claims heard, and we worked under the presumption that their presence in the area was entirely dedicated to military needs and defense of the homeland. As remarked by my esteemed colleague the vice-president (*ibid.* p. 127 a) "… Seeing as most of the IDF is the reserves, it is common knowledge that in time of need the residents of civilian frontier communities become subject to the authority of the army whether formally or as a result of circumstances. They are there because of and with the permission of the military. Therefore, I am still of the opinion, which I held in the Pithat Rafiah case, that Jewish settlement in the held territory – as long as a situation of belligerence exists – serves real security needs."

This time, we have heard the representatives of the settlers themselves and it seems to me that we must not ignore their main argument. I do emphasize: I do not wish to refer to events which occurred recently in which the members of Gush Emunim (among whom the settlers before us are counted) were exposed as people who do not accept the rule of the army and even do not hesitate to express their objection violently. I do not wish to refer to these events, as we do not have certified knowledge regarding the degree to which the settlers before us sympathize with the actions of others in other places. Therefore, I do not seek to doubt that if the settlers are called for reserve duty they would be

subject to the authority of the IDF, as any soldiers. However, the statements of the person giving the affidavit on behalf of the settlers raise another question; he says in no uncertain terms that:

> "My colleagues in the Elon Moreh group and myself settled in Elon Moreh because we were 'commanded to inherit the land which Almighty God gave to our forefathers, Abraham, Yitzhak and Yaacov, and we shall not abandon it to other nations or to desolation' (Maimonides, Book of Commandments (Maimonides, Book of Commandments.)) Thus, the two elements of our sovereignty and settlement are bound in one another."

And he adds in the same affidavit:

> "Although from a superficial point of view, it seems that there is allegedly no connection between the settlers' motives and the seizure orders – indeed the truth is that the action of the settlement of the People of Israel in the Land of Israel is the real, most effective and truest security deed. Yet, the settlement itself as emerges from the previous section, does not stem from security reasons and physical needs, but rather from the force of destiny and of the return of Israel to its land."

Indeed it is true, the settlers do not deny the security consideration, but, according to them, it is merely secondary and subordinate, of which they say in their affidavit:

> "Therefore, with all due respect to the security consideration and although the degree of its sincerity is undoubted in our case, to our mind, it makes no difference".

Powerful words indeed, and needless to say, the settlers are worthy of praise for their honesty which did not allow them to pretend and conceal their true motives. Yet the question does bother me: these settlers who openly declare that they did not come to settle in Elon Moreh because of security considerations and that their contribution to security – inasmuch as it is beneficial – is nothing more than a side effect: can one still say, as I did in the Beit El case, that they are there because of and with the permission of the army? Indeed, one is bestowed a benefit without one's knowledge, but a right or a permission which the beneficiary fully rejects with disdain, can we impose it on him? Let this be clear, without any reservations regarding the remarks of my esteemed colleague Justice Landau, I myself have no need to argue with the settlers over their religious or national viewpoint. It is not for us to enter into a political or ideological argument, but it is our duty to examine whether pure security considerations justify the seizure of the lands in order to settle these settlers in that location. In this context, it seems to me that it is important to know the position of the settlers. If they have not come

primarily for security purposes, I find it difficult to accept that this is indeed the purpose of their settlement.

There remains a brief reference to another argument by the settlers. In their view, Judea and Samaria must not be viewed as a "held territory" under the rule of the IDF, but as part of the State of Israel. They rely, first and foremost, on the historic destiny of the Land of Israel. In addition, and from the legal aspect, they claim that at the time the territory was seized in the Six Day War, there was no other sovereign lawfully holding this territory. This argument is recognized from the writings of Professor Bloom (3 Isr. I.R. 279, 293) and Professor Y. Stone has also referred to it favorably (see No Peace No war in the Middle East, published in Australia in 1969). Counsel for the settlers also recalled the fact that the Israeli legislature never defined the borders of the state and merely determined in the Order regarding Jurisdiction and Powers, 5708-1948, that "Any Law applying to the entire State of Israel shall be seen as applying to the territory which includes both the State of Israel and any part of the land of Israel which the minister of defense defines in a proclamation as held by the IDF". He also recalls the amendment to the Order regarding Rule and Law 5727-1967 (see on this issue Prof. A. Rubinstein, Constitutional Law of the State of Israel, 5729, p. 46).The aim of this argument is twofold: if this is an act which takes place inside the territory of the state, clearly international law does not apply thereto. Yet, in effect, military legislation and orders issued pursuant thereto have no existence in a territory which is part of the state. The state attorney rightly responded that if the settlers settled the territory in a manner other than pursuant to the seizure order issued by the commander of the Area, their entire presence there hangs by a thread. Indeed, no seizure under Israeli law took place here. This response is anchored in law. Moreover, had serious doubt regarding the status of the territory in question been raised, we would have had to turn to the ministry of foreign affairs and request an official document defining the status of the territory. This question is not "justiciable" and in matters such as this, the court shall conduct itself with accordance to the decision of the government.

Thus far with respect domestic, municipal law. Since according to the material before us I am not satisfied that the seizure was justified in terms of municipal law, I have, in fact, no need to examine the legality of the seizure also with respect to international law. However, lest my refraining from reviewing this aspect be misconstrued, I shall add a number of comments. The matter is legally complex and requires explanation. As we have said in the Beit El case, there is a distinction between international customary law and international treaty law. The former is part of municipal law, whereas the latter is not, unless it was passed through national legislation. The regulations of the Hague Convention form part of customary international law and therefore, there is room to examine,

in this court, the lawfulness of the seizure with respect to Article 52 of Hague Regulations, as my esteemed colleague, the vice president has done. Here too, the test is military necessity and anyone who was not convinced of the existence of this need under municipal law, has, in any case, not been convinced under the Hague Regulations. The Geneva Convention must be seen as part of international treaty law and therefore, according to the accepted view in common law countries, and here – a victim cannot turn to the court of the state against which he has claims and claim his rights therein. This standing is granted only to states which are parties to such a treaty and even this litigation cannot be conducted in the courts of the state but only in an international forum. For this reason, I have stated in the Pithat Rafiah case and repeated in the Beit El case, that any opinion voiced on our part regarding the legality of civilian settlement with respect to the Geneva Convention is nothing more than a non-binding opinion and a justice had best to refrain from so doing.

Despite this, this time too, the state attorney has invited us to confirm to the authorities that there is nothing wrong with handing the land over to the settlers for their settlement in terms of the Geneva Convention as well. According to his argument, there is nothing which contradicts the humanitarian provisions of this Convention, which is also acceptable to the State of Israel. As recalled, the issue is Article 49(6) of the Geneva Convention which prohibits the holding power to deport or transfer parts of its own civilian population into the held territory. It is an error to think (as I have recently read in one of the newspapers) that the Geneva Convention does not apply to Judea and Samaria. It applies, although, as stated above, it is not "justiciable" in this court. Nor would I say that the "humanitarian" provisions of this Convention relate only to the protection of human life, health, liberty or dignity and not to the protection of property. Who knows the value of land as well as we do? Yet the question whether voluntary settlement comes under the terms of the prohibition to "transfer parts of a population" as per Article 49(6) of the Geneva Convention, is not an easy question and as far as we know, it has yet to be answered in international case law. Therefore, I prefer, this time too, not to answer this question, particularly considering the fact that in light of the conclusion which I have reached on this issue both under domestic law and under customary international law (Hague Regulations, Article 52), it need not be decided. Yet my refraining from so doing must not be construed as agreement with the position of either party.

For these reasons – in addition to those detailed by my esteemed colleague the vice president – I am of the opinion that the order must be rendered absolute.

Justice Bechor

I concur with the extensive judgment of my esteemed colleague the vice president (Landau) which provides a balanced and convincing response to some hesitations I had in this matter.

Both the military commander and the government have acted in this matter pursuant to powers bestowed under international law upon a military which, as a result of hostilities holds a territory which is not part of the territory of the county to which state law (municipal law) applies. As my esteemed colleague has demonstrated, we must adjudicate on this issue in accordance with the law applicable thereto and according to which both the military commander and the government have acted. It is not within our power to address political questions or questions stemming from religious faith or national, historical worldviews. This is the limitation whose boundaries we may not and cannot exceed, whatever our personal opinions and worldviews. The very wording of the order issued by the military commander is founded upon the powers international law bestows upon an army which holds a territory which is not legally part of the territory of the state. Therefore, it is on this foundation that the ruling must be made.

In the judgment of my esteemed colleague Justice Witkon, the issue of the difference of opinion between the chief of the general staff and the minister of defense was discussed at length. In my opinion, this question is also answered in the vice-president's (Landau) judgment. In this matter, a distinction must be made between review of the military commander's decision in the framework of his power under international law and the powers of the defense minister and the government in the framework of municipal law. When the discussion revolves around international law, the acid test is whether the military commander acted out of military considerations and for the purpose of securing a military goal: this is for the military commander to know and on this level, the opinion of the ministerial echelon has no importance, as the power vested under international law is exclusively the power of the military commander and not that of the defense minister or the government. If the military commander acted within the bounds of his powers, no flaw is to be found in the exercise of this power, even if the ministerial echelon, in this case the defense minister, has a different opinion. The situation is different when the broader question arises on the level of municipal law. At this level, the military commander's opinion is a preliminary concept, but it is not the final word. At this level, as my colleagues have said: "[t]he Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defence." It is true that the defense minister has a different opinion on this matter from that of the chief of the general staff, but at the political level, the opinion of the defense minister is not the final word either, and as concluded from the remarks of the vice-president, the government has the final word.

Had the conclusion been that the military commander acted in this matter in order to secure military needs and that he initiated the action for the purpose of securing these needs, which were the dominant element of his decision, in light of all the circumstances and the timing, as presented in detail in the vice-president's judgment, I would not have difficulty approving his action, despite the existence of other and even contradicting opinions, and despite the fact that the defense minister's opinion is different. Yet, as the vice-president has illustrated in his judgment, the actions of the military commander in this case, exceeded his powers under international law.

The vice-president also addressed the question stemming from the contradiction between seizure of the land for military needs, which is a temporary seizure, and the establishment of a civilian community as a permanent community. It is well known that civilian settlement has always been part and parcel to the system of regional defense in the more general framework of the entire array of the defense of civilian communities, and remarks to that effect have also been made in HCJ 606+610/78 in the Beit El case and in HCJ 258/79 in the Matityahu case. Here, one must distinguish between two issues, incorporating civilian communities into regional defense, which began many years before the state was established and continued after the state was established, within its territory. Throughout these periods of time, the basis always was that the civilian communities were permanent, and there was no flaw therein also from the legal aspect, because the settlement took place in the period after the state was established in areas within the territory to which state law applies. In addition, in the pre-state period, the intention was always for this settlement to be a permanent settlement on land owned by the settling institutions, whereas here, we are discussing a temporary seizure, hence the contradiction between the same and the creation of permanent settlements. This question became more poignant in this petition for the first time, perhaps mainly following the addition of respondents 5 and 6 and their clear position.

As stated, I concur with the judgment of the vice-president (Landau).

It has been decided to render the order nisi absolute and declare seizure order no. 16/79 null and void regarding the lands owned by the petitioners, the registration details of which were mentioned in sec. 2 of the petition and order respondents 1 to 4 to evacuate the civilian settlers from the lands of the petitioners as well as any building built thereupon and any item brought thereto. There is no room to issue any order regarding the road lands seized under seizure order no. 17/79, as none of the petitioners has ownership rights on the road land. We grant respondents 1 to 4 leave for 30 days as of today for the execution of the order absolute.

Respondents 1 to 4 shall pay petitioners 1 to 16 for expenses in these petitions to a total sum of 5,000 Israeli pounds, and the same amount to respondent 17. There is no order regarding expenses in relation to respondents 5 and 6.

Rendered today, 1 Cheshvan 5740 (October 22, 1979).