[Emblem]

In the Supreme Court as High Court of Justice

HCJ 390/79

Before: The Honorable Justice Landau – Deputy President
The Honorable Justice Witkon
The Honorable Justice Asher
The Honorable Justice Ben Porat
The Honorable Justice Bechor

The Petitioners:

'Izzat Muhamamad Mustafa Dweikat et al.

versus

The Respondent:

1. The State of Israel
2. The Minister of Defense
3. The Military Commander for Judea and Samaria
4. The Military Commander for Nablus Sub-District
5. Felix Menahem
6. Shvut Avraham

Objection to Order Nisi of date 25 Sivan 5740 (June 20, 1979)

Adv. E. Khouri
On behalf of Petitioners 1-16

Adv. A. Zichroni, Adv. A. Feldman
On behalf of Petitioner 17

Adv. G. Bach, State Attorney
On behalf of Respondents 1-4

Adv. R. Cohen, Adv. M. Simon
On behalf of the Respondents 5-6

Abstract

For this petition, we must consider the legality of establishing a civilian town (settlement) in Elon Moreh, on the outskirts of the city of Nablus, on land privately owned by Arab residents. On the morning of June 7, 1979, Israeli citizens, assisted by the IDF, began to settle on a hill east of the Jerusalem-Nablus road. The hill is entirely on rocky and undeveloped land. The land was privately owned by, and registered to, the petitioners in the Nablus registry. Two days before the settlers arrived on the land, the Commander of the Judea and Samaria area, signed an Order for the possession of land that declares the lands were possessed for military needs.

The petitioners approached this court on June 14, 1979, and on June 20, 1979, an order nisi was granted against the respondents, ordering them to show cause why the court should not declare the Orders of Possession invalid. An interim order was also issued to prohibit any additional digging, construction, or settlement of additional citizens on the relevant land.

In the responding affidavit, the Chief of the General Staff explained that a civilian settlement at that location was required for security purposes, because in a time of war, military forces may leave the base in order to execute mobile missions or attacks, whereas the civilian settlement remains in its place. Being properly armed, it controls its surroundings in observation and protection of nearby traffic arteries, in order to prevent the enemy from seizing control. Opposing the Chief of General Staff, the Minister of Defense believed that these security needs could have been met in ways other than a settlement at the relevant site. Additionally, according to Lieutenant General (Res.) Bar-Lev, during wartime, IDF forces would be grounded to secure the civilian settlement, instead of engaging in combat with enemy forces.

The main issue the court considered (in a majority opinion by Deputy President Landau), was whether it may be legally justifiable to build a civilian settlement on the relevant site, despite having taken possession of private property for such purposes. For each and every case it must be examined whether military needs – as this term must be interpreted – did indeed justify taking possession of private land.

The legal framework for deciding this petition is defined first and foremost by the Order of Possession issued by the area commander, an order that is directly rooted in the powers that international law grants a military commander in territories occupied by his forces during a time of war. Additionally, the discussion is framed by the tenets of the law that has been implemented by the Israeli military commander in the Judea and Samaria area – this too according to the laws of war under international law. Substantively, we must examine under domestic Israeli law whether the Order of Possession was issued lawfully according to the authorities granted to the Government and the military by Basic Law: The Government and by Basic Law: The Military. Customary international law is in any event part of Israeli law to the extent it does not conflict with domestic legislation.

The court discussed the *Beit El* case (HCJ 606/78), in which a civilian settlement was found to comply with Article 52 of the Hague Regulations, which allows taking possession of land “for the needs of the army of occupation”, and held that temporary use

of private land is permissible when it is necessary "for all kinds of purposes demanded by the necessities of war." Here, the Court interpreted military needs to include "ensur[ing] public order and safety" under Article 43 of the Hague Regulations, as well as – under Article 52 – what is necessary for the military in order to fulfill its role in protecting the occupied territory from hostile activity, which may come both from outside and from within. It must be demonstrated, according to the facts of the case, that military needs were those which effectively motivated the decision to build a civilian settlement at the relevant site. The court found that here, the professional opinion by the Chief of the General Staff, in itself, did not lead to the decision to build the settlement of Elon Moreh, but that the propelling force behind the decision of the Ministerial Committee for National Security Affairs and of the Government was actually the strong desire of the people of Gush Emunim to settle the heart of the Land of Israel, as closely as possible to the city of Nablus. Both the Ministerial Committee and the Government majority were determinatively influenced by reasons that are of a Zionist worldview as to the settling of the entire Land of Israel.

Military needs, under international law, cannot be construed, by any reasonable interpretation, as including national security needs in their broad sense. Where the needs of the military are concerned, one would expect military officials to initiate the settlement on that particular site, and that the Chief of the General Staff would be the one to bring, according to such initiative, the military's needs before the Government for approval of the settlement. Here, it is clear that the process was inverted: the initiative came from the political level and the political level reached out to the Chief of the General Staff for his professional opinion. The fact that those charged with assessing the military needs were not those who initiated the process to settle that particular site, but that, instead, their approval of that site was given only after the fact, in response to the initiative of the political level, demonstrates that there, in fact, was no military necessity to take private property in order to build a civilian settlement, as required by the terms of Article 52 of the Hague Regulations. It was not proven that in establishing this civilian settlement, the military preceded the act of settlement with thought and **military planning**. Instead, the pressure exerted by the people of Gush Emunim was what motivated the Ministerial Committee. Military considerations were subordinate to the political decision to build the settlement. As such, this does not meet the strict demands of the Hague Regulations as to preferring military needs over the individual's right to property.

The Court also addressed the issue of how a permanent settlement can be established on land that was possessed only for temporary use. The decision to establish a permanent settlement that is intentionally designed to stand in its location in perpetuity – and even beyond the duration of the military rule in Judea and Samaria – meets an insurmountable legal obstacle, because a military administration cannot create within its territory "facts on the ground" for the purposes of its military needs that were, in advance, intended to exist past the end of the military rule in that area, when the fate of the territory after the end of the military rule is yet unknown.

The concurring opinion by Justice Witkon reiterated that the legal framework is the state authorities' actions both in light of the domestic (or "municipal" as it is commonly termed in this context) law and in light of international law. There is no dispute that the

force of the orders, in terms of the domestic law and really also in terms of customary international law (Hague Convention), is contingent upon their being "for military needs." Here, however, even the experts charged with state security are divided as to the need for settlement in the relevant location

Basic Law: The Military addresses the order of the chain of command between three bodies – the Government, the Minister of Defense and the Chief of the General Staff. In terms of the hierarchy between them there is indeed no doubt that the Chief of the General Staff is below the Minister and they are both below the Government. But here the question is not whose order trumps, but rather whose opinion is more acceptable to the court.

In such a situation of a draw, when the opinion of the giver of the respondents' affidavit should not be presumed to be superior to the opinions of other experts, the court asks: who bears the burden of proof? Justice Witkon held that the burden is placed upon the respondents. The law does not give the commander's assertion that the taking of possession in required for military needs the force of a presumption – let alone that of conclusive evidence – that indeed it is so. Moreover, it is not sufficient that the commander sincerely and subjectively believes that the taking of possession was essential, in order to place the question beyond judicial review. The court need not be convinced of the sincerity of the consideration, but rather of its correctness.

The Court must not allow a serious infringement of property rights unless it is satisfied that it is necessary for security purposes. Here, as noted, the Minister of Defense himself was not persuaded this possession was necessary. It is not the court's business to engage in political or ideological debates; but it is the court's duty to examine, whether pure security considerations justify taking possession of land for the purposes of settling at that location. To determine this, Justice Witkon thought it important to know what the settlers' position was. If they were not motivated, primarily, by security purposes, the court struggled to accept that this indeed was the purpose of their settlement.

Included within customary international law are the rules of the Hague Convention, so this Court should examine the lawfulness of the taking of possession in light of Article 52 of the Hague Regulations. Here, too, the test is the military need, and when one is not persuaded such need exists under the criteria of municipal law, one would not be persuaded, in any event, that it exists under the criteria of the Hague Convention either.

The question whether voluntary settlement falls within the prohibition over "transfer[ring] parts" of a "population" for the purposes of Article 49(6) of the Geneva Convention is not easy, and, as far as we know, it has yet to be resolved in international case law.

In his concurring opinion, Justice Bechor found that, had the court reached the conclusion that the military commander operated in this case in order to ensure military needs, and that he initiated that action for the purposes of ensuring such needs, which were the

dominant factor in his decision, in light of all the circumstances and the timing as described in detail in the Deputy President's opinion, he would have endorsed his action. But, as the Deputy President demonstrated in his opinion, the action of the military commander exceeded in this case the limits of its power under international law.

Judgment

Deputy President Landau

For this petition, we must consider the legality of establishing a civilian town (settlement) in Elon Moreh, on the outskirts of the city of Nablus, on land that is privately owned by Arab residents. A similar issue was decided by this Court in HCJ 606/78, *Suleiman Taufic Ayuv et al. v. the Minister of Defense and 2 Others; Jamil Arsam Mataua and 12 Others v. the Minister of Defense and 3 Others*, IsrSC 33(2) 113, 127, 124-129, 128-129, 131, 132-133, 120, 126, 116, 118, 119 (hereinafter for brevity: the *Beit El* matter), on March 13 1979. We ruled there that the establishment of two civilian towns on private lands in Beit El near Ramallah and in the B Valleys by Tubas violated neither domestic Israeli law nor customary international law, which constitutes part of domestic law, as both towns were established for military purposes, as we interpreted the term.

It was said in the *Beit El* case (bottom of page 128), in terms of the justiciability of this issue, that the problem of the settlements "is in dispute between the government of Israel and other governments, and that it is liable to be at issue at fateful international negotiations in which the Government of Israel is involved." Meanwhile, the intensity of the dispute has not since subsided in the international arena; moreover, it has intensified within the Israeli public discourse, as well, as reflected in the very decision to build a civilian settlement in Elon Moreh, which was adopted by a majority vote in the Israeli cabinet. This, therefore is a pressing issue that is hotly debated within the public. In HCJ 58/68, *Binyamin Shalit v. Minister of Interior* , IsrSC 23(2) 477, 521, 530 (the issue of "who is a Jew"), I wrote (at the bottom of page 521) of "… the grim result in which a court seemingly abandons its rightful place, above the disputes that divide the people, with its justices themselves entering the fray…", and on page 530, I explained – as one of the minority justices – that the Court must refrain from ruling on the dispute there, when it has no valid source for its ruling. I added that even in such case, "there may be instances where a justice sees himself as compelled to respond with his personal position on matters pertaining to his own worldview, though it is controversial." This time we have valid sources for our ruling and we need not, and further – must not, when adjudicating, involve our personal views as citizens. Still, there is great concern that the Court might be seen as having abandoned its rightful place in entering the fray of public controversy, and that its decision might be received by part of the public with applause and by the other part with complete and passionate rejection. In this sense, I see myself here as obligated to rule in accordance with the law, in any matter lawfully brought before this Court. That is what compels me, knowing full-well in advance that the public at large would pay no attention to the legal reasoning, but only to the ultimate conclusion, and that the Court, as an institution, could have its rightful stature compromised, beyond the disputes that divide the public. But what can we do? This is our role and this is our duty as justices.

On the morning of June 7, 1979, Israeli citizens, assisted by the Israel Defense Forces (IDF), began to settle on a hill, located about 2 kilometers east of the Jerusalem-Nablus road, and about the same distance south east of the intersection of that road with the road descending from Nablus toward the Jordan Valley. The operation was carried out with the assistance of helicopters and heavy machinery. A road was forged from the Jerusalem-Nablus road to the hill. The entire hill is rocky and undeveloped land (aside from a small plot on the site's north-west side, which was plowed and planted only recently, and in the opinion of the respondent's expert, this was done out of season, at a location where there is no prospect of any financial gains from the produce). However, forging the 1.7 kilometer road, required harming the existing sorghum crops, in a territory of about 60 meters long and 8 meters wide, as well as about six four-year-old olive plants.

The hill is located within the lands of the Rujeib village, which is located nearby to the northwest. The seventeen petitioners, who are residents of the village, hold plots registered to their names in the Nablus registry after having gone through a process of land regulation. The total area of their plots is about 125 Dunams. The petitioners hold no rights of ownership in the land of the forged road.

On June 5, 1979, two days before the settlers arrived on the land, Brigadier General Binyamin Ben Eliezer, the Commander of the Judea and Samaria area, signed an Order for the possession of land number 16/79 (hereinafter: "Order of Possession" or "Order of Possession n. 16/79" – ed. note). The heading of the Order of Possession reads: "Under my authority as area commander, and because I believe it to be required for military needs, I hereby order as follows:…". And in the body of the Order the signer declares a territory of about 700 dunams, defined by a map that was appended to the order, as "possessed for military needs." Petitioners' plots are included within this territory. Section 3 of the order stipulates that any lawful owner or holder of the land included in the territory would be permitted to submit, to a Claims Department Officer, a claim for periodical use fees, due to the possession of the land, and for compensation for any real damage caused in the course of the taking of possession. Under section 5, "notice of the contents of the order will be given to owners or holders of land located in the territory." A similar order pertaining to the terrain of the road to the hill (number 17/79) was signed only on June 10, 1979 – three days after the settlement on the land. As for giving required notice to the land owners, including the petitioners, it turns out that only on the actual day of the settlement on the land, at 8 am, around the time the works on the site began, a notification of the order was given to the leaders (mukhtars) of the Rujeib village, who were summoned to the office of the Nablus military ruler. Written notices were given to the leaders only on June 10, 1979, for delivery to the land owners. In the responding affidavit for this petition, Lieutenant General Raphael Eitan, the Chief of the General Staff, says that it would have been appropriate to give advance notice to the land owners of the intent to possess the land, as is customary as a general rule in similar cases, and that he has instructed that, in the future, such notices be given to the relevant land owners at an appropriate time before the possession of the land. It is unclear why those in charge deviated from the prevailing custom this time. It seems that the arrival on the land was organized, as if it were a military operation, exploiting the element of surprise, with the

intent of preempting the "risk" of this Court's intervention, as some the land owners had already approached the Court prior to the commencement of the work on the site.

The petitioners approached this Court on June 14, 1979, and on June 20, 1979 an order nisi was granted against the respondents – the Government of Israel, the Minister of Defense, the regional Military Commander of Judea and Samaria, and the Military Commander of Nablus – ordering them, i*nter alia*, to show cause why the Orders of Possession should not be invalidated and why the instruments and structures on the land should not be removed in order to prevent the building of a civilian settlement on the land. Additionally, an interim order was issued to prohibit any additional excavation or construction on the relevant land, as well as the settlement of any additional citizens on it, in addition to those who settled on it before the interim order was granted. This interim order is in effect until today, with certain changes made at the request of the settlers over the course of the hearing of the petition.

In the responding affidavit, the Chief of the General Staff explained that in his opinion establishing a civilian settlement at that location is required for security purposes, and that his position as to the security significance of the territory and the settlement on it was brought to the knowledge of the Ministerial Committee for National Security Affairs,. The Ministerial Committee resolved in its meetings on May 8, 1979 and May 10, 1979 to approve the possession of the land through an Order of Possession for the purposes of building the settlement, and, following these decisions, which were approved by the Cabinet in its meeting on June 3, 1979, the area Commander of Judea and Samaria issued the Order of Possession in question. Lieutenant General Eitan, in his affidavit, elaborated on the important contribution of civilian settlements to the protection of the Jewish population, dating back to before the establishment of the state, as well as during the War of Independence. He discussed the security purposes that these settlements fulfill in terms of regional defense and in terms of the IDF's organization, both in periods of calm and in times of emergency. With great emphasis, the Chief of the General Staff expressed his unequivocal opinion regarding the importance of regional defense, suggesting serious criticism of those who neglected regional defense, bringing it to an "all time low," in his words, by the 1973 Yom Kippur war, when the military's mindset still rested on the laurels of the victory in the Six Day War. However, "after the 1973 War, regional defense was restored to its greatness, which it was denied by hubris and fundamentally wrongful consideration as to its contribution." Today, the regional defense communities are armed, fortified, and properly trained for their mission to protect the area where they live, and their location on the ground is determined with consideration for their contribution to controlling the area and assisting the IDF in its various missions. The Chief of the General Staff explained the unique importance attributed to a civilian settlement, as opposed to a military base, because in war time, the military units may leave the base for the purposes of executing mobile missions or attacks, whereas the civilian settlement remains in its place. Being properly armed, it controls its surroundings, in observation and protection of nearby traffic arteries, in order to prevent the enemy from seizing control. This is particularly pertinent when reserves are recruited in a time of war – and in this case, in a time of war on the eastern front. At such a time, the military units must move toward their designated locations, which are spread out. The import of controlling traffic arteries in order to ensure quick and uninterrupted movement, therefore grows.

Nablus and its surroundings sit at an irreplaceable crossroad, rendering control of nearby roads especially important. Elon Moreh sits over a number of such roads; these are the Ramallah-Nablus road, the Nablus-Valley road through Jiftlik, and an additional road to the Valley through Aqraba and Majdal, which also runs close by to the south.

There is no doubt, and even the petitioners' attorneys – Mr. Elias Khouri on behalf of petitioners 1-16 and the respected sirs A. Zichroni and A. Feldman for petitioner 17 – do not dispute, that Lieutenant General Eitan is absolutely sincere and deeply convinced of his positions, which are a matter of his professional expertise as the highly experienced military man that he is. But he does not conceal that there is dispute over his conclusion as to the crucial importance of building a civilian settlement on the site chosen for Elon Moreh. In paragraph 23(d) of his affidavit he says as follows:

> "I am aware of the opinion of respondent no 2, who does not dispute the strategic significance of the relevant area, but believes that security needs may be met in ways other than a settlement at the relevant site."

Respondent no. 2 is the Minister of Defense. An usual circumstance has arisen in which the respondents themselves hold diverging opinions on the subject matter of the petition, such that the Chief of the General Staff's affidavit must be viewed as representing the opinions, both of the military authorities as well as of the Israeli Government, which decided this matter by a majority vote on an appeal submitted by the Deputy Prime Minister challenging a decision by a ministerial committee (the Deputy Prime Minister too, like the Minister of Defense, is a clear authority on military matters, having previously served as the second Chief of General Staff of the IDF). The petitioners were also permitted to submit additional expert opinions, one by Lieutenant General (Res.) Haim Bar-Lev, and the other by Major General (Res.) Mattityahu Peled. Lieutenant General (Res.) Bar-Lev expressed his professional assessment that Elon Moreh does not contribute to Israel's security as it is unhelpful, both in combatting acts of terror and sabotage in times of calm, as well as in times of war on the eastern front, because a civilian settlement located on a hill about 2 kilometers from the Nablus-Jerusalem road cannot facilitate securing this traffic artery, and in any event there is a large military base located close to the road itself, which controls central traffic arteries to the south and to the east. In fact, according to Lieutenant General (Res.) Bar-Lev, hostile activity against the settlement during wartime, would necessitate the deployment of forces to secure the settlement, at the expense of engaging those forces in combat with enemy forces. The apparent response to these misgivings in Lieutenant General Eitan's affidavit is that the primary significance of a civilian settlement on the relevant site is not for the purposes of combating hostile terrorist activity, and that this was not the Chief of the General Staff's reason for taking possession of the site, but that the main importance may be revealed specifically during wartime, because, in war, the very base that Lieutenant Bar-Lev speaks of would be vacated, and that there is no comparison between a civilian settlement that is currently integrated into the regional defense strategy and the civilian settlements of the past, in terms of the quality of its ammunition, equipment and level of training. The opinion of Major General (Res.) M. Peled is detailed and his conclusion is that "the argument as to the security value attributed to the 'Elon Moreh' settlement is made in the absence of good faith and for one purpose alone – to justify taking possession of land that

cannot be justified otherwise." I did not find in Peled's opinion any discussion of Lieutenant General Eitan's primary reason, that is the role of a settlement located in the relevant area to safeguard the freedom of movement on nearby roads as reserves forces are spread along the eastern front during wartime. As for the opinion of Lieutenant General Bar-Lev and other military experts who share his position, I have no intention to insert myself between experts. It will suffice for me to say here, too, as we said in HCJ 258/79 (unpublished) as follows:

> "In such a dispute regarding military-professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents, who speaks for those actually responsible for the preservation of security in the administered territories and within the Green Line, shall benefit from the assumption that his professional reasons are sincere reasons. Very convincing evidence is necessary in order to negate this assumption."

And it was also said there that:

> "In matters of professional military assessment, the Government would surely guide itself primarily by the counsel it receives from the Chief of the General Staff."

Indeed, we mentioned there the "giver of the respondents' affidavit," whereas here the respondents are divided in their opinions. But as we have heard from Mr. Bach, the learned State Attorney, who argued on behalf of respondents 1-4, that despite his difference in opinion, the Minister of Defense accepted the decisions of the cabinet majority and – complying with his constitutional duties as the government-appointed supervisor of the military under section 2 of Basic Law: The Military – passed the Government's decision on to the Chief of the General Staff for its implementation.

At the core of the discussion in this petition must stand a factual analysis, insofar as these facts have been uncovered by the evidence before us, in light of the law, and particularly in light of our ruling in the *Beit El* case. But before I turn to that, I must first complete the presentation of the facts themselves, as we have received additional factual material in the Chief of the General Staff's written response to a questionnaire we drafted, after hearing the main oral arguments by the parties' attorneys, in order that he respond to it, instead of to an oral cross examination that petitioners' attorneys sought. The responses to the questionnaire and other documents that the learned State Attorney was permitted to submit shed additional light on the facts of the case, expanding and deepening our understanding and evaluation of these facts, beyond what was included in Lieutenant General Eitan's affidavit and the first affidavit by Mr. Aryeh Naor, the Government Secretary, which mentioned decisions by the Ministerial Committee for National Security Affairs and by the Government in the Ministers' Committee's appeal. The following is the picture that is ultimately revealed:

1. On January 7, 1979, following an unlawful protest ("an unauthorized protest" as the Government secretary puts it in his affidavit) of people from "Gush

Emunim" on a road in the Nablus area, the Ministerial Committee for National Security Affairs convened, resolving the following:

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 determined by the Government in accordance with appropriate considerations.

c. When determining the site for the Elon Moreh settlement the Government will take into considerations, to the extent possible, the group's wishes.

d. The people of "Elon Moreh" must now return to the camp from which they came.

2. Following this resolution of the Ministerial Committee for National Security Affairs, representatives of the Ministerial Committee **on Settlement Affairs** conducted a preliminary tour of the area, in order to find a proper site for the "Elon Moreh" group to settle. Five alternative locations in the area were suggested, each submitted for examination by the IDF. The entities charged with the matter in the Judea and Samaria Area command and at the General Staff examined each of the proposed locations and decided, based on IDF considerations, that two of the suggested locations should be thoroughly explored. One of these locations was a site recommended by the Minister of Agriculture, who is the Chair of the Ministerial Committee on Settlement Affairs and a member of the Ministerial Committee for National Security Affairs. The second site is the site that was ultimately chosen by the IDF and is the subject of this petition (para. 2(d) of the Chief of the General Staff's answers to the questionnaire.)

   The Judea and Samaria Area command examined the possibility of finding some territory in the area that is not privately owned, but no such location was found (Ibid., para. 2(e)).

3. On April 11, 1979 (likely after the abovementioned preliminary tour and as a result thereof) the Chief of General Staff gave his approval that General Staff authorities charged with the matter take possession of the area for military purposes (Ibid, para. 2(b)).

4. In anticipation of a hearing that was to be held by the Ministerial Committee for National Security Affairs, the Chief of the General Staff was asked as to his opinion, and on May 3, 1979 he once more notified the above authorities at the General Staff, through his bureau chief, that in his view there is a military need for taking possession of the territory. (Ibid., loc. cit..)

5. The opinion of the Chief of the General staff was brought to the attention of the Ministerial Committee for National Security Affairs while it discussed the settlement in its session on May 8, 1979 (Ibid., loc. cit., and the first affidavit

by the Government Secretary, para. 4.) In that session, the Ministerial Committee for National Security Affairs decided to support the Order of Possession for military necessities (first affidavit by the Government Secretary, para. 3(a)).

6. On May 30, 1979, the Ministerial Committee for National Security Affairs reaffirmed its decision from May 8, 1979 (Ibid, para. 3(b)).

7. The Deputy Prime Minister appealed the decision by the Ministerial Committee for National Security Affairs before the Government Cabinet and on June 3, 1979 the Cabinet rejected his appeal by a majority vote and upheld the decision of the Ministerial Committee.

8. On June 5, 1979 Brigadier General Ben Eliezer signed the Order of Possession, and on June 7, 1979 the settlers arrived on the site, assisted by the military, as recounted above.

Here, I will discuss two arguments by Mr. Zichroni on behalf of petitioner no. 17, in order to dispose of them before delving into the core matters of this petition. He argues that there was a constitutional flaw in the decision-making process in regards to the settlement, because under Basic Law: The Military, the Minister of Defense is the Chief of the General Staff's superior, so his opinion on military matters is prioritized over the opinion of the Chief of the General Staff, as well as over the opinion of the Ministerial Committee for National Security Affairs and that of the Government itself, both of which operate under Basic Law: The Government. Consequently, the Government (or the Ministerial Committee for National Security Affairs) was unauthorized to decide contrary to the position of the Minister of Defense. This argument must be rejected. Indeed, the Minister of Defense is the supervisor of the military on behalf of the Government under section 2(b) of Basic Law: The Government, but the military is subordinate to the Government as a body, according to section 2(a) of that same Basic Law, and so the Chief of the General Staff is subject to the authority of the Government under section 3(b), though he directly answers to the Minister of Defense, as that same section provides. Therefore, as long as the Government has not decided on a particular matter, the Chief of the General Staff must follow the instructions of the Minister of Defense. However, once a matter was brought before the Government, a decision by the Government binds the Chief of the General Staff, as the Minister of Defense is but one of the members of the Government. As long as he remains a member of the Government he bears, together with his fellow ministers, joint responsibility for its decisions, including decisions made by a majority against his own opinion. Such is also the case for decisions by ministerial committees appointed by the Government, either as a permanent committee or for a certain issue according to section 27 of Basic Law: The Government, because in the absence of an appeal to the Government, even were an appeal submitted and rejected, the fate of a decision by a ministerial committee is as the fate of a decision by the Government in its meeting, as provided by section 32(c) of the Government Operations Regulations.

The road is now open to discussing the main issue: whether it may be legally justifiable to build a civilian settlement on the relevant site, despite the taking of possession of private property for such purposes. In the *Beit El* case, we resolved a similar question in the affirmative, both under domestic, municipal Israeli law, as well as under customary international law, because we were persuaded that military needs required building the two civilian settlements in question, on the very sites where they were built. It is self-evident, and Mr. Bach also notified us that this was well explained during the meetings of the government, that this ruling does not constitute the Court's endorsement of **all** takings of possession of private land for the purposes of civil settlement in Judea and Samaria, but that for each and every case it must be examined whether military needs – as this term must be interpreted – did indeed justify taking possession of private land.

At the outset of this discussion stands now – unlike in the *Beit El* case – the argument by two settlers of the "Elon Moreh" site who are the members of the settlers' council and who were permitted (Motion 568/79) to join this petition as respondents, since Justice Y. Cohen who decided the motion found them to have a material interest in the petition. In their affidavits and pleadings, these additional petitioners painted a broad picture, far beyond what was argued by the original respondents. In the affidavit given by Mr. Menachem Reuven Felix, it was explained that the members of the group settled in Elon Moreh because of the divine commandment to inherit the land given to our forefathers and that "the two elements therefore of our sovereignty and settlement are interlinked" and that "the act of settling the people of Israel in the land of Israel is the act of security that is most real, most efficient, and most true. But the settlement itself… does not stem from security purposes or physical needs but from the force of a calling and from the force of Israel's return to its homeland." And he later declares:

> "Elon Moreh is located in the heart of hearts of the Land of Israel in the deepest sense of the word, indeed both geographically and strategically, but first and foremost it is the place where this land was first promised to our first forefather and it is the place where the first property of the father of our nation, which this Land – the Land of Israel – is his namesake, was acquired.
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> …
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> Therefore, with all due respect to security considerations, and though its sincerity is not doubted, in our view it neither adds nor detracts."

And after citing Numbers, 33, 53: "And you shall take possession of the land and settle in it, for I have given you the land to possess", he adds as follows:

> "Whether some of the settlers of Elon Moreh will be incorporated into regional defense according to IDF plans, or not, settling the Land of Israel , which is the calling of the People of Israel and the State of Israel, is in any event in the safety, wellbeing, and in the best interest of the People and of the state."

Regarding petitioners' arguments, which are based on international law, including various international treaties, he has adopted an explanation received from his attorney, that international law bears no relevance because the conflict is an internal dispute between the People of Israel returning to their homeland and the Arab residents of the Land of Israel and that this is not an "occupied territory" or "held territory" but the heart of the Land of Israel, our right over which is undisputed, and second – because even factually and historically we are concerned with Judea and Samaria which were part of the British Mandate and were conquered by physical force by our neighbor to the east – an act of conquest and annexure never recognized by anyone (except for England and Pakistan.) This is the crux of the affidavit.

Even those who do not share the views of the giver of the affidavit and his cohort must respect their profound religious faith and the spirit of devotion that motivates them. But we who preside in a state committed to the rule of law, where religious law is applied only to the extent permitted by secular law, must apply the laws of the state. As to the giver of the affidavit's views regarding property rights in the land of Israel, I assume he does not mean to say that under Jewish law it is permissible to void the private property, for any reason, of anyone who is not of our religion. After all, our scriptures state explicitly that "the foreigner living among you will be as a citizen and you shall treat him as your own as you were foreigners in the land of Egypt" (Leviticus 19:34.) In the literature submitted to us by the other respondents, I found that the Chief Rabbi, I.Z. Hertz, of blessed memory, mentioned this verse when the British Government solicited his opinion on the draft of the language of the Balfour Declaration. In his response, he said that referencing the civil and religious rights of the non-Jewish communities in the Declaration's draft was but a translation of that same fundamental principle from the Torah (Palestine Papers 1917-1922, Seeds of Conflicts (John Murray) p. 13). This was the authentic voice of Zionism, which insists upon the Jewish people's right of return to its homeland that was also recognized by other nations, for instance in the preamble to the Mandate for Palestine, but never sought to strip the residents of the land, members of different peoples, of their civil rights.

This petition includes a compelling response to the argument which seeks to interpret the historical right guaranteed to the People of Israel in the Torah as violating property rights under private property law. After all, the legal framework for deciding this petition is defined first and foremost by the Order of Possession issued by the area commander and this order is, by all accounts, directly grounded in the powers that international law grants a military commander in territories occupied by its forces during a time of war. Additionally, the discussion is framed by the tenets of the law that has been implemented by the Israeli military commander in the Judea and Samaria area – this too according to international humanitarian law. These tenets are found in Proclamation No. 1 published by the military commander on June 7, 1967 whereby on that day the IDF entered the area and assumed control and the establishment of security and order, as well as in Proclamation No. 2 from that day that establishes in its section 2 that:

> "The law that applied in the area on June 6, 1967 will remain in effect, to the extent it does not conflict with this Proclamation or any other

> proclamation or order issued by me and with appropriate changes resulting from establishing the rule of the IDF in the area."

Also, section 4 of that same proclamation should be mentioned, where the commander of the Judea and Samaria area declared:

> "Movable and immovable property… that was owned or registered to the Jordanian Hashemite state or government or a department or agent thereof or any part thereof, located in the area, will be passed into my exclusive possession and will be managed by me."

These proclamations are the legal basis for the military rule in Judea and Samaria, which still exists there to this day, without having been replaced by another form of rule. Mr. Rahamim Cohen, on behalf of the additional respondents (the people of the Gush Emunim group) directed our attention to the Jurisdiction and Powers Ordinance, 1948, which establishes in section 1 that "any law that applies to the State of Israel in its entirety will be considered to apply to the entire territory which includes the territory of the State of Israel and over the Land of Israel which the Minister of Defense defined by proclamation as being held by the IDF." Although the **Minister of Defense** did not issue a proclamation defining Judea and Samaria as occupied by the IDF for the purposes of this section, but – as Mr. R. Cohen says – the main point is that the Provisional State Council, as the sovereign legislature of the State of Israel, authorized the Minister of Defense to issue orders as to any part of the Land of Israel: this mere authorization is testament to the fact that the Provisional State Council as the legislature, saw the State of Israel as sovereign over the entire Land of Israel.

This is a forceful point, but it must be rejected. The fact of the matter is that the Minister of Defense did not issue an order based on his authority under section 1 of the above Ordinance in terms of the area of Judea and Samaria (and the Government of Israel did not even extend the law of the State of Israel onto that area, as it did in terms of East Jerusalem, in a decree based on section 11 of the Law and Administration Ordinance, 1948.) When addressing the legal foundations of Israeli rule over Judea and Samaria, we are concerned with the legal norms actually, and not merely potentially, in effect. The fundamental norms upon which Israeli rule in Judea and Samaria were in fact enacted were and are, as said, to this day, norms of military rule rather than the application of Israeli law, which involves Israeli sovereignty.

Here we must command again to memory, like in previous petitions that came before this court, an important argument that Israel expresses in the international arena. This argument is based on the fact that at the time that the IDF entered Judea and Samaria this area was not held by any sovereign whose possession of it received general international recognition. Mr. Rahamim Cohen reiterated this argument with much force. In the *Beit El* case I said (on page 127) the following:

> "This petition does not require our consideration of this problem, and we therefore join this dispute here to that bundle of disputes which I discussed in HCJ 302/72, 306/72, *Sheik Suleman Hsain Udah Abu Hilo v. the*

> *Government of Israel; Sheik Sabah Abud Ala Oud Al Salima v. the Government of Israel*, IsrSC 27(2) 169, 179, 176, 177, 184, there on page 179 which remain open in this Court."

I believe that in the petition before us, as well, that it can be resolved only according to the presumption at the basis of the Order of Possession. These presumptions indicate the bounds of the discussion for the additional respondents as well.

We therefore must examine the legal force of the relevant Order of Possession under international law from which the military commander who issued it derives his authority. In addition, we must examine whether the order was issued lawfully under Israeli law, because – as was in the *Rafah Approach* case (HCJ 302/72, p. 169 on p. 176) – we must assume here, too, that the authority for such review exists personally in regards to officials in a military administration who belong to the state's executive branch as "people who fulfill public functions under law" and who are subject to the review of this Court under section 7(b)(2) of the CourtsLaw-1957. On the merits, we must examine under domestic Israeli law whether the Order of Possession was issued lawfully according to the powers granted to the Government and the military by Basic Law: The Government and by Basic Law: The Military. In the *Beit El* case, we conducted each examination – that according to domestic Israeli law and that according to international law –separately. I have already discussed above, according to the mentioned Basic Laws, the argument about the decision making process regarding the possession of the land, taken on the Governmental level. I can now conduct the primary discussion combining the two examinations together, as customary international law is, in any event, part of Israeli law to the extent it does not contradict domestic law (see, the *Beit El* case, at 129.).

Counsel for all the parties focused their arguments on comparing the matter before us to the facts of the *Beit El* case and to the ruling there, with one side seeking to reveal the similarities between the two, and the other side emphasizing the distinctions. Mr. Bach added to this and reiterated the non-justiciability claim that he made already in the *Beit El* case and that was already rejected there in no uncertain terms, in the words of my honorable colleague Justice Witkon (at the top of page 124):

> "I was not impressed by this argument whatsoever… assuming – an assumption that indeed was not confirmed in this case – that one's property was harmed or was completely denied to them, it is hard to believe that a court will wash its hands from that person because their rights may be subject to dispute in a political negotiation. This argument did not add weight to the respondents' other arguments…"

For my part, I added that (on p. 128-29) although the special aspect of the case requiring interpreting section 49(6) of the Geneva Convention must be seen as non-justiciable, petitioners' claim is generally justiciable before this court, as it involves property rights. Mr. Bach maintained his argument was misunderstood, because, in this opinion, the matter of justiciability is merely a function of the matter at hand, and the matter is on one hand bitterly controversial politically and on the other hand concerns undeveloped and

rocky land at some distance from the Rujeib village itself. And he again quotes an article by Professor Jaffe published in in 74 Harvard Law Review, 1265, pp. 1302-1304.

The argument was well understood even at the time; repeating it does not add to its force. At the time, I excluded section 49(6) of the Geneva Convention from the discussion entirely, because as part of treaty-based international law, it is not binding law in an Israeli Court, but I joined the opinion of my honorable colleague as to the matter's justiciability in terms of the Hague Regulations, because, as customary international law, they do indeed bind the military administration in Judea and Samaria. I will act similarly here and refrain from discussing the matter before us in terms of section 49(6) of the Geneva Convention. But concerning an individuals' property rights, we cannot dismiss the matter with a claim of the right's "relativity." Under our legal system, the individual's property right is of significant legal value which is protected by both civil and criminal law, and it does not matter, as far as a land owner's entitlement to protect their property under law is concerned, whether the land is cultivated or rocky.

The principle of the protection of private property applies also in the laws of armed conflict, as expressed in Article 46 of the Hague Regulations. A military administration that wishes to infringe upon private property rights must demonstrate legal authority and cannot exempt itself from judicial oversite on the grounds of non-justiciability.

For his part, Mr. Zichroni attempted to distinguish our ruling in the *Beit El* case, because there the court justified the civilian settlement with military needs tied to combating hostile terrorist activity in times of calm, whereas, here, the Chief of the General Staff emphasizes in this affidavit primarily the military need in a civilian settlement on the relevant site in case of actual war on the eastern front. But there is no basis for this distinction. The *Beit El* case, too, concerned the needs of regional defense designed to be integrated into the general system of defending the country specifically in times of war – and see the quote from Major General Orly there, at 125, as well as my comment at the top of page 131, that "the military's powers at times of active war and at times of calm cannot be strictly distinguished. Even if today there is quiet in the area near Beit El, it is best to take preventative measures." My honorable colleague, Justice Ben Porat, said this with additional emphasis (Id, at 132-33.) And again in the *Matityahu* case, HCJ 258/79 (unpublished) on p. 4 of the opinion, we said that such matters cannot be viewed from a static perspective, ignoring what might happen in the future, whether as a result of hostile activity from outside or from within the occupied territory, and proper military planning must account, not just for existing dangers, but also for dangers that might be created as a result of dynamic developments in the area.

The question then circles back: Have respondents demonstrated sufficient legal authority to take possession of the petitioners' lands? The Order of Possession was issued by a military commander and states at the outset that the Order was issued "under my authority as commander of the area and because I believe it to be required for military needs." It should be recalled here that in this Order the area commander chose at the outset language that was less determinate than that used in the order given in the *Beit El* case. The Order of Possession stated that possession of the land where the Beit El base stands, and on whose outskirts the construction of a civilian settlement commenced only

eight years later – was "imperatively and overwhelmingly demanded by military needs." There, we justified the civilian settlement on the basis of Article 52 of the Hague Regulations, which allows taking possession of land "for the needs of the army of occupation." **On page 130** I also referenced the words of Oppenheim who believes that temporary use of private land is permissible when it is necessary "for all kinds of purposes demanded by the necessities of war." I mentioned the British Manual of Military Law, which supports the temporary use of the privately owned land and buildings for the purposes of "military movements, quartering and the **construction of defence positions**."

We also rejected (on page 130) the argument by Mr. Khouri that the phrase "for the needs of the army of occupation" includes only the immediate needs of the military itself, and noted (at the bottom of page 130) that the "primary role of the military in an occupied territory is to 'ensure…public order and safety,' as provided by Article 43 of the Hague Regulations. What is necessary for this end, is in any event necessary for the needs of the occupying military in terms of Article 52." In a similar fashion. we might say here, too, that what is necessary for the military in order to fulfill its role in protecting the occupied territory from hostile activity. which may come from outside and from within, this, too, is necessary for military needs in terms of Article 52.

Thus far I concur with Mr. Bach that possession of privately owned land for the purposes of a civilian settlement is potentially justified under Article 52 of the Hague Regulations – and we found no other source for this in international law. Under what circumstances? When it is proved, according to the facts of the case, that military needs were those which in practice brought upon the decision to build a civilian settlement at the relevant site. I reiterate that there can be no doubt that according to the professional view of Lieutenant General Eitan, building a civilian settlement at this location accords with the needs of regional defense, which has particular significance in ensuring the safety of the traffic arteries when military forces must disperse at times of war, but I have concluded that the Chief of the General Staff's professional opinion would not, in itself, have led to the decision to build the settlement of Elon Moreh, but for further reason that was the propelling force behind the decision of the Ministerial Committee for National Security Affairs and of the government cabinet, that is – the strong desire of the people of Gush Emunim to settle the heart of the Land of Israel, as closely as possible to the city of Nablus. As for the discussions in the Ministerial Committee and the cabinet, we could not investigate them through reviewing their minutes, but even without them we have sufficient indication in the evidence before us, that both the Ministerial Committee and the cabinet majority were determinatively influenced by reasons stemming from a Zionist worldview as to the settling of the entire Land of Israel. This worldview is clearly revealed from a notice by Mr. Bach on behalf of the Prime Minister during the Court's hearing on September 14, 1979, in response to additional respondents' affidavit in paragraph 6 of his affidavit, to which I called attention during the Court's hearing on the previous day. I recorded Mr. Bach's words verbatim, for their significance and the status of the person on whose behalf Mr. Bach spoke, as following:

> "I spoke to the Prime Minister yesterday and he authorized me to state, after the matter was raised during yesterday's session – that on many

> occasions, in Israel and abroad, the Prime Minister emphasizes the right of the People of Israel to settle in Judea and Samaria and this is not necessarily related to discussions taking place in the Ministerial Committee for National Security Affairs concerning national and state security , when what is up for discussion is a specific matter of taking possession of some site or another for security purposes. In the Prime Minister's view, these matters are not in conflict, but they are still distinct. As for what was said about the Prime Minister's intervention, this was in the form of raising the issue for discussion before the Ministerial Committee for National Security Affairs, of which the Prime Minister is the chair and where section 37(a) of the Government Operations Regulations, concerning deliberations of the Ministerial Committee for National Security Affairs, mandates that the Prime Minister determines the topics on the agenda, by his initiative or at the request of Committee members. He took part of the discussion in the Committee and expressed his clear and unequivocal opinion there in favor of issuing an Order of Possession for the purposes of building that settlement. This, as noted, considering, *inter alia*, the opinion of the Chief of the General Staff."

The view as to the People of Israel's right, which is expressed in these words is based on the tenets of Zionist theory. But the question again before this court in this petition is whether this worldview does indeed justify the taking of private property in a territory that is subject to military administration. As I attempted to clarify, the answer depends on the correct interpretation of Article 52 of the Hague Regulations. I believe that the military needs discussed in this article cannot be construed to include, by any reasonable interpretation, national security needs in their broad sense, as I have just described them. I shall again bring the words of Oppenheim, *id.*, in section 147, at 410:

> "According to Article 52 of the Hague Regulations, requisitions may be made from municipalities as well as from 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 needs for the purposes of Article 52 may therefore include the needs that the Chief of the General Staff discussed in his responding affidavit, that is the needs of regional defense and of securing traffic arteries to allow reserves forces to disperse uninterruptedly at time of war. At the meetings of the Ministerial Committee the resolution was undertaken "considering *inter alia* the opinion of the Chief of the General Staff," in the language of Mr. Bach's notice (emphasis added – M. L.). The decision of the Ministerial Committee from January 7, 1979 guarantees Gush Emunim that the time and location of the settlement would be decided by the cabinet "in accordance with appropriate considerations," and that while determining the location for the settlement the government would consider, as much as possible, the wishes of the Elon Moreh group. I would not be mistaken were I to assume that what Mr. Bach said on behalf of the Prime Minister reflects the spirit of the discussion in the Ministerial Committee. I do not doubt that indeed the Chief of the General Staff's position was among the other factors that the

Committee considered. But I believe this to be insufficient in order uphold the decision under Article 52, and these are my reasons:

I. When it comes to military needs, I would expect that military officials initiate the establishment of a settlement on a particular site, and that the Chief of the General Staff would be the one to bring, according to such initiative, the military's needs before the political echelon for approval , should it find no political reasons barring it. The Chief of the General Staff's affidavit of response does seem to indicate that this was the decision-making process. But from the more complete picture that emerged after the Chief of the General Staff responded to the questionnaire presented to him, as well as from the additional documents submitted by Mr. Bach, it was made clear that the process was inverted: the initiative came from the political echelons, which then reached out to the Chief of the General Staff for his professional opinion. The Chief of the General Staff then expressed a positive opinion, in accordance with the conception he has always held. This is entirely clear from the responses of the Chief of the General Staff to the questionnaire, in paragraph 2:

> "1. To the best of my knowledge, the body that initiated the settlement in the Nablus area was the Ministerial Committee for National Security Affairs.
>
> 2. I did not approach the political echelons with a proposal to build the settlement in Elon Moreh.
>
> …
>
> 3. There was no preexisting plan to build a civilian settlement on the relevant site approved by a competent military authority."

It also became evident from one of the additional documents that on September 20, 1973 then GOC of the Central Command, Major General Rehavam Ze'evi submitted to the then Chief of the General Staff a detailed proposal for settlement in the occupied territories. The proposal said, in regard to agricultural settlements in Samaria, that it would be "difficult, because of a shortage of available land." This teaches us that the prevailing view at the time was still that private property ought not be taken for the purposes of settlements. And indeed, Major General Orly argued in July 1978 in HCJ 321/78 (unpublished) (the *Nabi Salah* case) as follows:

> "7. When identifying the location that would be settled near the village of Nabi Salah, those acting on respondents' behalf were guided by the principle laid out by government policy not to take possession of private property for the purposes of settlement."

In the petition before us we find something of a change in this position, as the first affidavit by the Government Secretary, in paragraph 5, addresses this matter as follows:

> "In response to the petitioners' claims… as to the Government policy in regard to taking possession of the lands:

1. I hereby clarify that the policy of the Government of Israel not to seize private lands, to the extent possible and consistent with security needs, still stands.

2. When the government believes that the security needs requires as such, it approves requisition of private land but instructs the military to exclude from the taken property, to the extent possible, cultivated land."

As for Major Commander Ze'evi's plan, it should be noted that his proposals did not gain the approval of any authorized military or civilian body. The plan did include a suggestion to establish a Jewish town in the Nablus area, but not on the site now chosen for the Elon Moreh settlement, though not far from it.

In paragraph 4 of his questionnaire answers, the Chief of the General Staff replies to the question:

> "Did you approve a civilian settlement on the relevant site because you believed to begin with that it was necessary there for the purposes of regional defense or because you *post facto* found that, were a civilian settlement to be established on this site, it would integrate into the system of regional defense?"
>
> With:
>
> "I approved taking possession of the land in question in this petition for purposes of the settlement because this fit the military needs in this area, as I saw them to begin with, and it is consistent with my security approach as to the needs of security and protection of the State of Israel as explained in sections 9-20 of the main affidavit."

But when the perception of the security needs did not initially bring upon the initiative to settle that same site, but, rather, approval only came retroactively, in response to the initiative of the political echelon – I do not believe that this passive approach indicates that from the beginning there was a military necessity to take private property in order to build a civilian settlement, under the terms of Article 52 of the Hague Regulations. This time, therefore, it was not proven that in building the civilian settlement the military preceded the act of settlement with thought and **military planning**, as we have said in the *Beit El* case (on page 126.)

II. And more on the question of the military necessity: I cited above the language of the decision by the Ministerial Committee for National Security Affairs from its meeting on January 7, 1979, as it was quoted in the Government Secretary's second affidavit. Recall that those deliberations followed a protest by Gush Emunim on a road in the Nablus area. The resolution stated that "when determining a site for the Elon Moreh settlement, the Government will consider, as much as possible, the wishes of the group," and, as if as in exchange for this promise, the people of Elon More were required to return to the camp from which they came, that is to end their unlawful demonstration. I

see this as clear proof that the pressure by Gush Emunim was what motivated the Ministerial Committee to address the matter of a civilian settlement in the Nablus area in that meeting. Afterwards, the matter was passed to the Ministerial Committee for Settlement Affairs, in order that it send its representatives on a preliminary tour for the purposes of selecting potential locations for settlement by the "Elon Moreh" group in the Nablus area. These representatives selected five locations and, from among the five, the IDF approved the relevant site. It follows, that the IDF did not take part in selecting those five sites, but was given the opportunity to choose among five sites selected by the political level. This process does not comply with the language of Article 52, which in my opinion requires the advance identification of a particular tract of land, because that specific location is necessary for military needs. And as said, it is natural that the initiative for this would come from the military level that is familiar with military needs and plans them in advance with military forethought.

In this regard, Mr. Bach argued that the military must first consider whether there are candidates for a possible civilian settlement willing to go to the location where their settlement is required for military needs. I agree, but again, this is contingent upon military planning that was approved by a competent military authority that would first search for candidates to settle a particular site. Here the opposite occurred: first came the desire of the Elon Moreh people to settle as closely as possible to the city of Nablus, and only then, due to the pressure they exerted, came the approval by the political level to build the settlement on that site. The political consideration was, therefore, the dominant factor in the Ministerial Committee's decision to establish a settlement on that location, though I believe that the Committee and the Government majority were persuaded that the settlement fulfills military needs **as well**, and I therefore accept the Chief of the General Staff's statement that for his part he did not consider governmental or political factors, including the pressure by the people of Gush Emunim, when he prepared to submit his professional opinion to the political level. But the military consideration was subordinate to the primary, political decision to build the settlement. As such, it does not meet the strict demands of the Hague Regulations for preferring military needs over individual property rights. In other words, would the Government's decision to build the settlement on that site have been made in the absence of pressure from the Gush Emunim people and ideological and political considerations? I have been persuaded that but for these, the decision would not have been made in the circumstances that existed when it was made.

I wish to add several words regarding dominant and subordinate reasons in state authority decision making. In HCJ 392/72, *Emma Berger v. Haifa District Planning and Building Committee*, IsrSC 29(2) 764, Justice I. Cohen mentioned the debate around the matter of plurality of purposes as it appears in the third edition of De Smith's book, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, on page 287 onward. Of the five tests proposed there, Justice Cohen opted for the test of whether the wrongful consideration or purpose had a real impact on the authority's decision. For my part, I am willing to adopt a test more lenient with the authority, as proposed there by De Smith (top of page 289), which is:

> "What was the dominant purpose for which the power was exercised? If the actor pursues two or more purposes where only one is expressly or impliedly permitted, the legality of the act is determined by reference to the dominant purpose."

(In footnote 74, below the line, the author presents examples from English case law where this principle has been applied).

What I explained at length above reveals which outcome this test's application must bring in the circumstances of the case before us, when the initiative for the settlement did not come from the military level. Thus. I will quote the words of the author there, on page 291, which seem apt to our matter as well:

> "… 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 specific 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."

III. And I have yet to address and additional reason that must bring the reversal of the decision to take possession of the petitioners' land – a reason that stands independently, even without regard to the other reasons I have so far detailed. In the *Beit El* case a serious question was raised: how could a permanent settlement be founded on land that was possessed only for temporary use? There we accepted Mr. Bach's reply:

> "The civilian settlement may exist in that same location only so long as the IDF still holds the territory under the Order of Possession. This possession itself may end someday as a result of international negotiations that may be culminate in a new agreement that would be valid according to international law which will determine the fate of this settlement, as it would the fate of other settlements located in the occupied territories" (*Id*, p. 131.)

The settlers themselves did not express their own position in that case, as they were not joined as parties. This time we cannot accept this excuse. Here, the submitter of the affidavit on behalf of the settlers explicitly says in paragraph 6 of this affidavit:

> "Supporting an Order for Possession with security considerations in their narrow technical sense, rather than their basic and comprehensive sense, as explained above, has but one meaning: the temporary nature of the settlement and the possibility of its being replaceable. We absolutely reject this terrifying conclusion. It also is inconsistent with the Government's decision in regard to our settlement in this location. In all the discussions, and many assurances we have received from the ministers of the Government, and above all the Prime Minister himself – and the Order of Possession at hand was issued as a result of the Prime Minister's personal

> intervention – they all see the settlement of Elon Moreh a Jewish settlement as permanent as Degania or Netanya."

It should be noted that this paragraph includes two parts. Its first part considers the position of the settlers; the other part what they have heard from ministers. We were not asked to permit the submission of a countering affidavit by the Government or by any minister to rebut the words attributed to them in the second part of this paragraph and thus we must accept them as truthful. This indeed being the case, the decision to establish a permanent settlement that is intentionally designed to stand in its location for all time – and even beyond the duration of the military rule in Judea and Samaria – meets an insurmountable legal obstacle, because a military administration cannot create within its territory "facts on the ground" for the purposes of its military needs that were in advance intended to exist past the end of the military rule in that area, when the fate of the territory after the end of the military rule is yet unknown. This is seemingly a contradiction that joins the other evidence before us in this petition to reveal that the decisive consideration that motivated the government to decide upon the relevant settlement was not the military consideration. In these circumstances, even a legal declaration as to the taking of possession alone, rather than expropriation of the property, cannot change the face of things – that is taking possession that is the core content of property, in perpetuity.

On the basis of all this, I believe the order nisi must be made absolute, in regard to the petitioners' lands that were taken under Order n. 16/79.

Justice Asher

I agree.

Justice Ben Porat:

I agree.

Justice Witkon:

I too believe that the law is with the petitioners.

Like in the *Beit El* case (HCJ 606, 610/78,) here, too, we must examine the state authorities' actions both in light of the "domestic" (or "municipal" as it is commonly termed in this context) law and in light of international law. These are two different issues, and as said in the *Beit El* case (id, p. 116): "The activity of a military rule in an occupied territory may be justified for military, security purposes and yet it is not out of the question that it is flawed under international law." The domestic law which is subject to discussion here is the law that is relevant to two orders issued by the commander of the Judea and Samaria area under his powers as a commander in an occupied territory (Order n. 16/79 and Order n. 17/79.) In these Orders the commander stated that he "believes it necessary for military needs…" and he declared that taking possession of the lands is "for military needs." And indeed, there is no dispute that the force of the orders, in terms of domestic law and really also in terms of customary international law (Hague

Convention), is contingent upon their being "for military needs." We elaborated on the content of "the military need" and the extent of our intervention in the discretion of military authorities in *Rafah Approach* (HCJ 302/72, *Abu Hilo v. The Government of Israel*) and in the *Beit El* case. We emphasized and reiterated that the scope of our intervention is limited. In the *Beit El* case I said (ibid., page 118) that the authority "is vested in the hands of the military officials, and for the Court to intervene in the exercise of their authority, it must be satisfied that this exercise was an abuse of power and a pretext for other purposes." Similarly, my honorable colleague the Deputy President wrote as follows, ibid., (p. 126):

> "We have repeatedly emphasized before, including in HCJ 302/72 (pp. 177, 179, 184) that the scope of this Court's intervention in the military considerations of the military administration are very narrow, and a Justice would certainly refrain from substituting his personal beliefs in terms of political and security matters for the military considerations of those charged with securing the State and public order in the occupied territory."

We additionally clarified in the *Beit El* case that a military, security need and the establishment of a civilian settlement do not necessarily contradict one another. As we said there (p. 119):

> "The main point is that in terms of the pure security consideration it is undisputed that the presence of settlements – even 'civilian' settlements – of citizens of the occupying power in the occupied territory significantly contributes to the security in that area and facilitates the military's ability to perform its duty. One need not be an expert in military and security affairs to understand that hostile elements operate more easily in an area that is only populated by a population that is indifferent or sympathetic to the enemy rather than an area where there are also people who may monitor them and notify the authorities of any suspect activity. Terrorists may not find refuge, assistance or supplies with them. This is simple and needs no elaboration. We will only mention that according to the respondents' affidavits, the settlers are subject to the military authority, whether officially or due to the circumstances. They are there thanks to the military and its permission. Therefore, I still hold the opinion, that seemed to me correct in the *Rafah Approach*, case that Jewish settlement in an occupied territory – and as long as a state of belligerency continues to exist – fulfills real security needs."

It need not be emphasized that with everything we said in these two decisions (and in others like them) we did rule that from that point onwards, any civilian settlement in an occupied territory serves a military purpose. We held that each case must be examined according to its particular circumstances. There, we were persuaded that indeed the taking of possession in order to build a civilian settlement served a security purpose. Here I am not persuaded that such was the purpose.

How is this case different from those that came before? The most important difference, is that here, even the experts charged with state security are divided as to the need for settlement in the relevant location. As they did there, here too security authorities presented us with affidavits meant to persuade us as to the security and military needs for taking possession of the land and building a civilian settlement on it. But whereas there the evidence was consistent and unequivocal, here, in terms of Elon Moreh, the evidence reveals that the experts disagree amongst themselves on the military need. On behalf of the Petitioners, we received the affidavit by Major General (Res.) Mattityahu Peled, as well as the letter by Lieutenant General (Res.) Haim Bar Lev, which ought to be quoted in full:

> "To the best of my professional estimation, Elon Moreh does not contribute to the security of the State of Israel, and this for the following reasons:
>
> 1. A civilian settlement located on a hill far removed from main traffic arteries has no significance in combating hostile terrorist activity. The mere location as an isolated island in the heart of an area densely populated by Arab residents may facilitate attempts to attack. Securing travel to and from Elon Moreh and securing the settlement itself would divert security forces from essential missions.
>
> 2. In a case of war on the eastern front, a civilian settlement located on a hill about two kilometers east of the Nablus--Jerusalem road would be unable to ease safeguarding this traffic artery. Moreover, there is a large military base located near the road itself, and it controls the traffic arteries to the south and to the east. Indeed, should there be terrorist activity at time of war, the IDF forces would need to stay in place in order to protect the civilian settlement, rather than focus on combating enemy armies."

More than this, the petitioners stated in their petition that "according to what they learned from the media, respondent 2 (the Minister of Defense) stated there was no security or military need for the land." Generally, we do not consider information given to us by rumor, but here is confirmation for the disputing position of the Minister of Defense from the giver of the affidavit himself – the Chief of the General Staff, Mr. Raphael Eitan – who said in section 23(d) of this affidavit:

> "I am aware of the opinion of the respondent 2, who does not dispute the strategic importance of the relevant area, but believes that it is possible to realize these security needs by means other than building a settlement on the relevant site."

This situation, of a dispute between the Minister of Defense and the Chief of the General Staff on the mere need of taking possession, is unprecedented in Israeli jurisprudence, and it is also difficult to find examples in foreign countries for where a judge was

required to choose between the opinions of two experts – one being the minister charged with the relevant matter and the other being the person heading the executive mechanism. The State Attorney attempted to overcome this difficulty by relying on section 3(b) of Basic Law: The Military, which reads: "The Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defense." It is true, argued the State Attorney, that the Chief of the General Staff answers to the Minister, but here the matter was subject to the Government's decision, where the Minister of Defense was among the minority, and thus his disputing position is overruled by the majority, which accepted the opinion of the Chief of the General Staff. I fear this response by the State Attorney is beside the point. Basic Law: The Military addresses the order of the chain of command between three bodies – the Government, the Minister of Defense, and the Chief of the General Staff. In terms of the hierarchy between them, there is indeed no doubt that the Chief of the General Staff is below the Minister and they are both below the Government. When the Chief of the General Staff receives an order from the Minister that conflicts with other orders he receives from the Government, it is possible – and I do not wish to express my opinion in this regard – that he would be obligated to follow the order of the Government over the orders of the Minister. But here the question is not whose order trumps, but rather whose opinion is more acceptable to the Court. It is possible one (for instance, a judge) may withdraw his opinion in light of that of his peers, but the fact that the Minister accepted the decision of the majority does not lead to a conclusion that he withdrew his opinion. On the contrary, we must assume that he stands by his opinion and has left to us the duty to say which of the opinions – his or that of the Chief of the General Staff – should be accepted.

It is well known that courts are asked to determine matters that require special expertise – expertise that is generally beyond the judges' grasp. We are presented with opinions by respected experts and these completely contradict one another. This happens frequently in trials concerning medical issues, as well as, for example, in cases involving patent infringements, which raise problems in chemistry, physics or other natural sciences. In security affairs, when the petitioner relies on the opinion of a security expert, while the respondent relies on the opinion of someone who is both an expert and responsible for the state of security in the country, it is only natural that we attribute special weight to the opinion of the latter. As the Deputy President Landau said in the *Naalin* case, HCJ 258/79 (unpublished): "In such a dispute regarding military-professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents, who speaks for those actually responsible for the preservation of security in the administered territories and within the Green Line, shall benefit from the assumption that his professional reasons are sincere reasons." According to this rule, I could possibly have seen myself obligated to prefer the opinion of Lieutenant General Eitan over the opinion of Lieutenant General (Ret.) Bar-Lev, though in terms of their expertise, I do not know who is preferable. But when the choice is between the Chief of the General Staff and the Minister of Defense, I believe this rule should not be applied. There is no way to say that one is charged with ensuring safety whereas the other is not. They are both responsible.

In such a situation of a draw, when the opinion of the giver of the respondents' affidavit should not be presumed to be superior to the opinions of other experts, we must ask

ourselves: who bears the burden of proof? Must the petitioners satisfy us that the land was taken for non-military or security purposes, or shall we demand that the respondents – the military authorities – persuade us that this taking of possession was necessary for this purpose? I believe that the burden is upon the respondents. The law does not give the commander's assertion that the taking of possession is required for military needs the force of a presumption – let alone that of conclusive evidence – that indeed it is so. Moreover, it is not sufficient that the commander sincerely and subjectively believes that the taking of possession was essential, in order to place the question beyond 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. 206; (1941) 3 All E.R. 338; (1942) 110 L.J.K.B. 724; 116 L.T. 1; 58 T.L.R. 35; 85 S.J. 439 (H.L.), and the article by R.F.V. Heuston, L.Q.R. 86, p. 22. And see also: *Ridge v. Baldwin* (1964) A.C. 40; (1963) 2 W.L.R. 935; 127 J.D. 295; 107 S.J. 313; (1963) 2 All E.R. 66; 61 L.G.R. 396; 79 L.Q.R. 487; 80 L.Q.R. 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 in our law, the *Kardush* case, HCJ 241/60, *Mansur Taufik Kardush v. The Registrar of Companies*, IsrSC 15, 1151; and FH 16/61, *Registrar of Companies v. Mansur Taufik Kardush*, IsrSC 16, 1209. The law I presented at the outset conditions the legality of the possession on the existence of a military need. Obviously, the Court must not allow a serious infringement of property rights unless it is satisfied that this is necessary for security purposes. The State Attorney himself did not claim he is exempt from the burden of persuasion and labored to present us with all of the materials. As said, had we only had before us the evidence on behalf of the respondents, or had the respondents' experts disputed the petitioners' experts, I may very well have given the respondents the benefit of the doubt. But here, as noted, we were told that the Minster of Defense, himself, is not persuaded that this possession was necessary. It is true that the office of a minister is a political office and there is no requirement that the minister himself be an expert in military matters. But here we have the dissenting opinion of a Minister of Defense, who, as a former head of the IDF Operations Directorate and former commander of the air force, himself is a prominent security expert. The State Attorney did not dispute this, either. Where such a minister is not persuaded, how can we – the judges – be expected to be persuaded? When he does not see a military need for building a settlement in this particular location, who am I to question him?

This is also the primary reason that brings me to distinguish this case from all the previous cases and to reach a conclusion different from that reached in those cases. This should be coupled with two more things, though of lesser importance. First, in the cases of *Rafah Approach* and *Beit El*, my point of departure was that the Israeli settlements, located on lands taken from their Arab owners, were necessary for the security forces in their daily combat against terrorists. "One need not be an expert in military and security matters," I said in the *Beit El* case at 119, "in order to understand that terrorist elements operate more easily in a territory populated only by a population that is indifferent or sympathetic to the enemy, than in a territory where there are also people who may monitor them and notify the authorities of any suspect activity. There, terrorists shall not find refuge, assistance and supplies." This time the Chief of the General Staff, Lieutenant General Eitan, explained to us that the main security benefit in building the settlement on this site is its integration into the system of regional defense in case of a "total" war. I

went back to review the affidavit that Major General Tal submitted to us at the time for the *Rafah Approach* case, and indeed, there, only prevention of terrorist activity at times of calm was discussed. I similarly reviewed the affidavit of Major General Orly in the *Beti El* case, although I did find – after additional review of the affidavit – that he also spoke of regional defense needs. These considerations were expressed in the opinion of my colleague Justice Landau (there, p. 124). In any event, in that case, two possessed territories were discussed: one actually on potential terrorists' path, and the other bordering an important military base (Beit El.) There can be no serious doubt that, in terms of their immense strategic value, these sites – and only they – could have fulfilled the designated security role and that they were irreplaceable. Here, on the other hand, I cannot say the matter is free of any doubt.

The third aspect in which the case before us is different than the previous cases is a result of the settlers' affidavit. Recall that in the *Beit El* case the settlers were not joined as petitioners and that they were not given the opportunity to voice their arguments. We presumed that their presence in the area was wholly for the purposes of security and defending the homeland. In the words of my honorable colleague the Deputy President (id., p. 127): "… given that the majority of the military is reserves forces, it is well known that at the time of need the residents of peripheral civilian residential areas become, even in personal matters, subject to military command." And I said (id., at 119): "… the settlers are subject to the military's authority, whether officially or by virtue of the circumstances. They are there thanks to the military and by its permission. Therefore, I still hold the opinion, that seemed to me correct in the *Rafah Approach*, case that Jewish settlement in an occupied territory – and as long as a state of belligerency continues to exist – fulfills real security needs."

This time we heard from the representatives of the settlers themselves, and it seems we must not ignore the heart of their argument. Let me emphasize: I do not wish to address recent events, which revealed the people of "Gush Emunim" (among which the settlers before us are counted) as people who do not accept the authority of the military and do not hesitate to express their resistance through violence. I do not wish to address these events because we do not have certified knowledge as to the level of the support for the actions of others in other locations by the settlers before us. Therefore, I did not come to question that were the settlers to be called upon for reserve duty, they would be subjected to the military's authority, as would any soldier. Indeed, the words of the giver of the settlers' affidavit raise a different question. He says, explicitly, that:

> "Members of the Elon Moreh group and myself settled in Elon Moreh because we were 'commanded to inherit the land given by God to our forefathers, Abraham, Isaac and Jacob and we shall not leave it to other nations or in desolation' (the Rambam, Book of Commandments.) The two elements, therefore, of our forefathers and our settlement are interwoven with each other."

He adds and says in that same affidavit:

> "Though superficially it seems that there is no link between the motivations of the settlers and the Order of Possession, the truth is that the act of settling the Land of Israel by the People of Israel is actually the real and most efficient security activity. But settlement itself, as inferred from the previous section, is not the product of security reasons and physical needs, but of destiny and of the return of Israel to its homeland."

It is true that the settlers do not rule out the security considerations but that these are, as they maintain, secondary and completely insignificant. They state in their affidavit:

> "Therefore, with all due respect to security considerations, and though its sincerity is not doubted, in our view it neither adds nor detracts."

Very strong words indeed. Needless to say, the settlers deserve praise for their candor that did not allow them to pretend or to conceal their true motives. But the question plagues me: these settlers, who openly declare that they came to settle Elon Moreh not out of security considerations, and whose contribution to security – to the extent it is positive – is but a byproduct, could it still be said of them, as I said in the *Beit El* case, that they are there thanks to the military and by its permission? Of course, one can act to benefit another without the latter's knowledge or involvement, but a privilege or benefit that the beneficiary rejects wholeheartedly, can we enforce it upon him? And let it be clear: without any dispute over the words of my honorable colleague Justice Landau, for my part, I need not argue with the settlers over their religious or nationalist ideology. It is not our business to engage in political or ideological debates. But it is our duty to examine whether pure security considerations justify taking possession of land for the purposes of settling these settlers at that location, and it seems to me that in this context, it is important to know what the settlers' position is. If they did not come, primarily, for security purposes, I am hard pressed to accept that this indeed is the purpose of their settlement.

It remains for me to briefly address another argument by the settlers. In their view, Judea and Samaria should not be considered to be an "occupied territory" subject to IDF rule, but as part of the State of Israel. They rely, first and foremost, on the historical destiny of the Land of Israel, and in addition, in terms of the law, they claim that when the land was conquered during the Six Day War there was no other sovereign that lawfully held this area. The claim is familiar from the writings of Professor Blum (3 ISR. L. REV. 279, 293) and was also positively considered by Professor J. Stone (see NO PEACE NO WAR IN THE MIDDLE EAST, published in Australia in 1969). The settlers' attorney also mentioned the fact that the Israeli legislature never defined the state's borders and only stipulated in section 1 of the Jurisdiction and Powers Ordinance, 1948, that "any law that applies to the State of Israel in its entirety will be considered to apply to the entire territory which includes the territory of the State of Israel and over the Land of Israel which the Minister of Defense defined by proclamation as being held by the IDF." He also referenced the amendment to the Law and Administration Ordinance, 1967 (and see in this regard Professor A. Rubinstein, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, 1969, p. 46). The implication of this claim is twofold. If it concerns an act that occurs within the territories of the state, surely international law does not apply to it, but then military

regulations and orders issued under such regulations are invalid in the area that is part of the state. The State Attorney replied correctly that if the settlers arrived at the site other than by force of the Order of Possession issued by the area commander, their entire presence there is without basis. After all, there was no dispossession under Israeli law here. This response is rooted in good law. Additionally, were there serious doubt as to the status of the relevant area, we would have been compelled to approach the Minister of Foreign Affairs and request an official document that defines the area's status. This question is not "justiciable" and in such matters the Court must follow Government decisions.

This settles the issues of domestic, municipal law. Because in light of the material before us I am not persuaded that the taking of possession was justified under municipal law, I need not actually examine the legality of the taking of possession under international law as well. But lest my refraining from discussing this aspect be misunderstood, I shall add several comments. The issue is legally complex and warrants clarification. As said in the *Beit El* case, there is a distinction between customary international law and treaty-based international law. The former is part of the municipal law, whereas the latter is not, unless it has been ratified through national legislation. Included within customary international law are the rules of the Hague Convention, so this Court should examine the lawfulness of the taking of possession in light of Article 52 of the Hague Regulations, as did my honorable colleague, the Deputy President. Here, too, the test is the military need. If one is not persuaded such need exists under the criteria of municipal law, one would not be persuaded, in any event, that it exists under the criteria of the Hague Convention either. On the other hand, the Geneva Convention must be seen as part of treaty-based international law and therefore – under the approach common in common law countries as well as in our system – the injured party has no standing to approach the court of the country against whose government he wishes to raise claims and assert his rights. Such standing is given only to states that are parties to the Convention. Such litigation cannot be conducted in a state court but only in an international forum. Therefore, I said in the *Rafah Approach* case and reiterated in the *Beit El* case, any expression of opinion on our part as to the lawfulness of the civilian settlement under the Geneva Convention is merely a non-binding opinion, from which a judge would do well to refrain.

Any yet, here too, the State Attorney invites us to affirm to the authorities that under the Geneva Convention, as well, there is nothing wrong in granting the settlers possession of the land for the purposes of their settlement. As his argument goes, this is not inconsistent with the humanitarian provisions of this Convention that are acceptable to the State of Israel. Recall, we are concerned with Article 49(6) of the Geneva Convention, which prohibits the occupying nation from deporting or transferring parts of its civilian population into the occupied territory. It is a mistake to think (as I have recently read in one of the newspapers) that the Geneva Convention does not apply to Judea and Samaria. It does apply, though, as noted above, it is not "justiciable" in this Court. Nor would I say that the "humanitarian" provisions of the Convention address only protecting human life, health, liberty, or dignity, and not property. No one knows the value of land as we do. But the question whether voluntary settlement falls within the prohibition over "transfer[ring] parts" of a "population" for the purposes of section 49(6) of the Geneva Convention is not easy, and as far as we know, it has yet to be resolved in international case law.

Therefore, I prefer, here too, not to settle this matter; moreover, in light of the conclusion I reached on the matter, both under domestic law and under customary international law (Article 52 of the Hague Convention), it requires no determination. But my refraining from determination must not be interpreted as support for either of the parties.

For these reasons – in addition to those detailed by my honorable colleague the Deputy President – I believe the order must be made absolute.

Justice Bechor:

I concur with the comprehensive opinion of my honorable colleague the Deputy President (Landau), which contains a thoughtful and persuasive response to some hesitations I had in the matter.

Both the military commander and the Government acted in this case by virtue of the powers international law grants to a military which, as a result of hostilities, occupies a territory that is not part of the state to which the law of the land applies (the municipal law). As my honorable colleague demonstrated, we must adjudicate this case according to the law that applies to the issue and that governed the actions of both the government and the military commander. It is not within our authority to consider policy questions or questions rooted in religious belief or a national and historical worldview. And this is a limit that we must not, and may not, exceed, whatever our personal beliefs and worldviews. The actual language of the Order issued by the military commander is rooted in the powers that international law grants a military that occupies a territory that is not – legally – part of the state's territory. On this basis then the decision must be made.

My honorable colleague, Justice Witkon, in his opinion, extensively discussed the matter of the disagreement between the Chief of the General Staff and the Minister of Defense. In my opinion, this question, too, has been answered in the opinion of the Deputy President (Landau). In this matter, we must distinguish between the military commander's decision, within his power under international law, and the power of the Minister of Defense and of the Government, under municipal law. When the discussion revolves around international law, the test is whether the military commander operated out of military reasons in order to ensure the military goal. This is a matter for the military commander, and, in this regard, the opinion of the ministerial level is insignificant, as the power under international law is granted to the military commander alone and not to the minister of defense or to the government. Where the military commander acted within his power, there is no flaw in the exercise of this power, even if the ministerial level, in this case the Minister of Defense, is of a different opinion. It is another situation entirely, when the broader question of the municipal law level arises. On this level, the opinion of the military command is the first port of call but is not the end all be all. On this level, as my colleagues said, the Chief of the General Staff is "subject to the authority of the Government and subordinate to the Minister of Defense". It is true that the Minister of Defense holds a different opinion than the Chief of the General Staff in this matter, but on the policy level, even the opinion of the Minister of

Defense is not the end all be all either, and – as reflected by the words of the Deputy President – the final word is that of the Government.

Had we reached the conclusion that the military commander operated in this case in order to ensure military needs, and that he initiated that action for the purposes of ensuring such needs which were the dominant factor in his decision, in light of all the circumstances and the timing as described in detail in the Deputy President's opinion, I would not be hard pressed to approve his action, though other opinions – even contradictory ones – exist and though even the opinion of the Minister of Defense differs. But, as the Deputy President demonstrated in his opinion, the action of the military commander in this case exceeded the limits of his powers under international law.

The Deputy President also addressed the question arising from the contradiction between taking possession of the land for military needs, which is temporary, and building a civilian settlement as a permanent settlement. It is well known that civilian settlement has always constituted an integral part of the system of regional defense, within a broader system of regional civil defense, and things to this effect were said also in HCJ 606+610/78, *Beit El*, and HCJ 258/79, *Matityahu*. We must distinguish here between two things. Integrating the civilian settlements in the system of regional defense began many years ago, even before the founding of the state, and continued after the state was founded within the state's territory. In all this time, there has always been the premise that the civilian settlements were permanent settlements and this was of no legal flaw because the settlement followed the founding of the state in territory that was within the territory to which state law applied. Even in the time before the founding of the state the intention was always that such settlement would be permanent settlement on land owned by the settling institutions. Here, we are concerned with temporary possession, and thus the contradiction between it and creating permanent settlements. This question was made more poignant in this petition for the first time, perhaps primarily because respondents 5 and 6 were joined, and because of their clear position.

As noted, I join the opinion of the Deputy President (Landau).

It was decided to render the order nisi absolute and declare the Order of Possession n. 16/79 invalid in terms of the lands owned by the petitioners, whose registration details were brought in paragraph 2 of the petition, and to order the respondents 1-4 to vacate from the petitioners' lands the civilian settlers who settled on them as well as any structure built upon them and any object brought to them. There is no place to issue any order in terms of the road lands taken under Order n. 17/79, as none of the petitioners hold any ownership rights for the road lands.

We grant respondents 1-4 30 days from today in order to comply with the permanent order.

Respondents 1-4 will pay petitioners 1-16 their expenses in this petition, at a total sum of 5,000 Israeli Pounds, and that same amount to petitioner 17. There is no order as to costs for respondents 5 and 6.

Given today, 1 Cheshvan 5740, (October 10, 1979).