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Judicial Review of Administrative Action in the Territories Occupied in 1967

EYAL BENVENISTI

6. Conclusion

In exercising its power of judicial review, the Court paid clear deference to security considerations. Most of its decisions overruled the petitioner's requests. Moreover, the military authorities, being the primary legislator in the territories according to international law, could at times effectively curtail the Court's supervision.[35] However, in assessing the Court's contribution, one should also keep in mind the petitioners' requests that were granted, and the cases in which the Court issued recommendations that were followed by the authorities.[36] There were also numerous other cases in which the Government contemplated and reconsidered its acts in view

[29] *Tourkman* v. *Minister of Defence* (1994) 48(1) PD 217; *Jabarin* v. *Commander of the IDF in Judea and Samaria* (1992) 46(1) PD 858. On the applicability of the regular tests for lawfulness of administrative acts to the acts of the occupation administration, see *Jamayat Askan*, n. 8 above.

[30] See *Al-Gazawi* v. *The Panel of the Military Court in Gaza* (1980) 34(4) PD 411.

[31] See *Shmalawi* v. *The Appeals Committee* (1985) 39(4) PD 598.

[32] See *Kawasme* v. *The Minister of Defence* (1981) 35(3) PD 113.

[33] See *The Civil Rights Association*, n. 15 above.

[34] *The Association for Civil Rights in Israel* v. *Commander of the Southern Command* (1990) 44(1) PD 626. The same consideration was approved in the case concerning the deportation of more than 400 residents of the West Bank and Gaza, suspected as members of Islamic terrorist groups, to Lebanon, without prior hearing: *The Association of Civil Rights in Israel et al.* v. *Minister of Defence et al.* (1993) 47(1) PD 267.

[35] Thus, e.g., following the *Elon Moreh* case (in which an order seizing land in order to erect a settlement was declared illegal) the Government changed its method of land acquisition, and the Court was effectively divested of supervisory powers in this crucial respect. When in another case, concerning a confiscation of private lands for 'public purposes', it was found out that notices to the owners had not been served according to the law, the authorities changed the law retroactively to legitimize the confiscation, and to prevent the Court from declaring the confiscation illegal: *Tabib* v. *The Minister of Defence* (1982) 36(2) PD 622.

[36] See e.g. for the recommendation to establish a military court of appeal: *Arjub et al.* v. *Commander of IDF Forces in Judea and Samaria* (1988) 42(1) PD 353.

of existing and potential petitions. One may assume that the possibility of judicial review was a key consideration for the administrative authorities. Thus, in retrospect, it may be concluded that the supervisory powers of the Court provided a meaningful check over the acts of the Israeli authorities in the territories.

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Izat Muhamed Mustafa Dwaikat and others

v.

The State of Israel and others (the 'Elon Moreh Case')

[H.C. 390/79]
[34(1) PD 1 (1980)]

Landau DP, Witkon J, Asher J, Ben-Porat J, and Bechor J

Israeli cases referred to:

[1] HC 58/68—*Shalit* v. *Minister of Interior*; 23(2) PD 477.
[2] HC 258/79—*Amirah* v. *Minister of Defence*; 34(1) PD 90.
[3] HC 606, 610/78—*Saliman Tufik Oyev* v. *The Minister of Defence (The 'Beit-El Case')*; 33(2) PD 113.
[4] HC 302, 306/72—*Abu Helou* v. *State of Israel (The 'Rafiah Salient Case')*; 27(2) PD 169.
[5] HC 392/72—*Berger* v. *Haifa District Planning Commission*; 27(2) PD 764, 773.
[6] *Kardosh* v. *Registrar of Companies*; 15 PD 1151.

English cases referred to:

[7] *Liversidge* v. *Anderson* [1942] A.C. 284.
[8] *Ridge* v. *Baldwin* [1964] A.C. 40.

JUDGMENT

LANDAU DP:

This is a petition regarding the legality of the establishment of a civilian settlement at Elon Moreh, situated on land approaching the city of Nablus. Arab residents own this land privately. . . .

The sharpness of this dispute continues to be of concern internationally; what is more, it has intensified its hold on domestic Israeli politics, and is presently reflected in the decision to establish a civilian settlement at Elon

Moreh. Adopted by a majority vote of the Israeli Government, this move has caused acute public agitation.

In *Shalit* v. *Minister of Interior* [1], I spoke of 'the depressing result . . . when the Court abandons its proper place, as it were, which is to remain above the disputes which divide the public; instead, the judges themselves descend into the arena'. Furthermore I went on to explain; as one of the minority judges, that without a valid basis for its decision the Court must refrain from adjudicating this dispute. I added that 'there may be cases where a judge could perforce have to decide a disputed issue with a personal answer to a question of general outlook on life'. This time we have valid sources for deciding and no need (we are, in fact, prohibited whilst sitting in judgment) to interpose our personal views as citizens of the State. It is, however, still necessary to be cautious in order that the Court not appear to be abandoning its proper place and descending into the arena of public debate; this is particularly important because its decision will be received by one part of the public with acclamation and by another part with utter emotional rejection. In light of this possibility I regard myself to be bound by the obligation to decide in accordance with the law in every matter duly brought before the Court, though I know well from the outset that the public at large will pay attention only to the final conclusion, not to the legal reasoning. Therefore, the institutional status of the Court is likely to be prejudiced in taking a stand appropriate to it, that is, beyond the disputes which divide the public. But what else can be done? This is our task and our duty as judges.

On 7 June 1979, Israeli citizens, with the assistance of the Israeli Defence Forces, began a settlement project at Elon Moreh.

* * *

In his affidavit, the Chief of the General Staff ('CGS') explained that he generally believed that the establishment of this particular civilian settlement at this particular place was required for security reasons. His position concerning the importance of the area regarding security and the establishment there of a settlement was brought to the attention of the Ministerial Defence Committee. The Committee decided at its sessions on 8 and 10 May 1979 to approve the requisitioning of the area with an Order for the establishment of the settlement. As a result of this decision, approved by the Government *in plenum* at a meeting on 3 June 1979, the Commander of the Judea and Samaria Region issued the said Requisition Order. Lt. Gen. Eitan further expanded upon the important contribution of civilian settlements to the defence of the country's Jewish population. He stressed that even before the State was set up, as well as during the War of Independence, such settlements fulfilled security purposes in regional

defence and in connection with IDF organization. This was the case in times of both tranquillity and emergency.

* * *

The CGS explained the special importance attaching to a civilian settlement, particularly in comparison to a military base. During fighting the force at a base goes out on mobile and offensive missions, while the civilian settlement remains where it is; properly armed and equipped, the settlement controls the surrounding area for assignments such as observation and protecting nearby lines of communication from the enemy's control. This is particularly true during a general mobilization of the reserves at the outbreak of war; in the case of Elon Moreh, the region of concern is the eastern front. At such time the forces must move to their fixed places of deployment, and control of the lines of movement to ensure speedy and uninterrupted passage increases in importance. Nablus and its surroundings form a junction that has no alternative route. Therefore it is especially important to control the adjacent roads. Elon Moreh commands a number of these roads, the Ramallah–Nablus Road, the Nablus–Jordan Valley Road via Jiftlik, and another road to the Jordan Valley via Akraba and Majdal which crosses nearby to the south.

There can be no doubt that Lt. Gen. Eitan holds these views with utter sincerity and profound inner conviction, for this is a matter falling within his great experience as a military professional. He does not conceal, however, the fact that others dispute his conclusion about the decisive importance of establishing a civilian settlement at the place chosen for Elon Moreh. In paragraph 23(d) of his affidavit he states:

> I am aware of the view of respondent No. 2 who, whilst not contesting the strategic importance of the said region, thinks that security needs can be realized by means other than establishing a settlement at the said place.

The second respondent is the Minister of Defence. Thus an extraordinary situation has been created in which the respondents have different views of the petition's subject matter.

* * *

I have no intention of involving myself in the debate. It is sufficient for me to reiterate here what we said in *Amirah* v. *Minister of Defence* [2] (the *Matityahu* case):

> In a dispute such as this on professional military questions, as to which the Court has no well-based knowledge of its own, we shall presume that the professional reasons set out in the affidavit made on behalf of the respondents and speaking for

those actually entrusted with preserving security in the Administered Territories and within the Green Line, are correct. Very convincing evidence is needed to rebut this presumption.

In the same case it was also said that:

In matters of professional military assessment, the Government will certainly be guided first and foremost by the advice tendered to it by the Chief of the General Staff.

* * *

At the commencement of the present hearing—unlike in *Beit El* [3]—two settlers at the Elon Moreh site, who are members of the secretariat of the settlers' nucleus, were given leave to be joined as respondents to this petition. Kahan J, who dealt with the application, found that they have a real interest therein. In their affidavit and submissions these additional respondents opened up a vista far wider than that of the original respondents. An affidavit by one of them, Mr Menachem Reuven Felix, explained that the members of the nucleus had settled at Elon Moreh because of the Divine commandment to inherit the land given to our forefathers and that 'the two elements of our sovereignty and our settlement are therefore intertwined'. Furthermore, 'the act of settling the People of Israel in the Land of Israel is an act of real security, the most effective and the most genuine. Settlement as such . . . does not, however, stem from security reasons or physical requirements but from the force of destiny and by virtue of the return of Israel to its land.' Mr Felix further declares:

Elon Moreh is the very heart of the Land of Israel in the profound sense of the word; geographically and strategically, to be sure, but before all else it is the place where the first acquisition was made by the father of the nation after whom this land is named—the Land of Israel. . . . Consequently, reasons of security have their proper place and their truth, there is no doubt, but we are indifferent to them.

After citing *Numbers* 33:53—'And you shall take possession of the land and dwell therein, for unto you I have given the land to inherit it'—he goes on to say:

Whether or not the Elon Moreh settlers will be integrated into the regional defence system according to IDF plans, it is settlement in the Land of Israel—which is the mission of the Jewish people and of the State of Israel—that forms the security, the peace and the well-being of the nation and the State.

As regards the petitioner's arguments based on international law, including various international treaties, the deponent adopts the explanation given by his counsel. According to them, international law is totally irrelevant, since the dispute is an internal one between the Jewish people returning to its land and the Arab residents of the land of Israel. Furthermore, says Felix, what is involved is neither 'conquered territory' nor 'occupied territory', but the very heart of the Land of Israel, our right to which is beyond doubt. Additionally, in historical fact Judea and Samaria were part of the British Mandate and conquered with the force of arms by our eastern neighbour—a conquest and annexation which were never recognized by anyone (other than England and Pakistan). This is the substance of the affidavit.

Even those who do not share the views of the deponent and his group will respect the profound religious belief and self-sacrifice spurring them on. We, however, are judges of law in a state where the *Halakha* (religious law) is applied only in so far as secular law allows it. In this case, we must apply the secular law of the State. As to the deponent's view concerning title to land in the Land of Israel, I assume that he does not mean to say that according to the *Halakha* one may forthwith deprive non-Jews of their private property. The Bible says explicitly: '[t]he stranger that sojourneth with you shall be unto you as the home-born among you, and thou shalt love him as thyself for ye were strangers in the land of Egypt' (*Leviticus* 19:34). I find in the collection of literature submitted by counsel for the additional respondents that Chief Rabbi Y. Z. Hertz, of blessed memory, mentioned this verse when the British Government requested his opinion on the Balfour Declaration draft text. In reply he said that mention of the civil and religious rights of the non-Jewish communities in the draft declaration were simply a translation of this basic principle from the Torah (D. Ingrams, *Palestine Papers 1917–22 Seeds of Conflict* (John Murray, London, 1972), 13). The authentic voice of Zionism insists on the Jewish people's right of return to its land, a right recognized also by the other nations, as stated in the preamble to the Mandate on Palestine. The right to return, however, has never sought to deprive the residents of the country of their civil rights.

* * *

Here one should recall earlier petitions to this Court, where the important argument which Israel has voiced in the international arena was enunciated. The argument is based on the fact that when the IDF entered Judea and Samaria, this area was not occupied by any sovereign whose occupation was generally and internationally recognized. Mr Rahamim Cohen powerfully reiterated this argument. In *Beit-El* [3], I said that, '[w]e have not been asked to deal with this problem in this petition. We are therefore reserved in judging it, in combination with the group of reservations which I spoke of in *Abu Helou* v. *State of Israel* [4] and which remain open in this Court.' I think the previous situation is similar to that of the petition

before us since the present petition can only be decided in accordance with the presumptions underlying the Requisition Order. These presumptions demarcate the boundaries of this hearing for the additional respondents as well.

We must therefore inquire into the legal force of the said Requisition Order according to international law, from which the Military Commander who issued it derives his powers. We must also inquire as to the legality of the Order's issue under municipal Israeli law since—as in the *Rafiah Salient* case [4] (at 176)—we assume here as well that the warrant for this inquiry exists against office holders in the Military Government personally, as individuals who exercise any public functions by virtue of law and are subject to the supervision of this Court, under section 7(b)(2) of the Courts Law 1957. Substantively, we must inquire whether according to Israeli domestic law the Requisition Order was lawfully issued according to the powers given to the Government and the military authorities under Basic Law: The Government and Basic Law: The Army.

* * *

I excluded Article 49(6) of the Geneva Convention altogether from consideration because it belongs to conventional international law, which does not legally bind an Israeli court, but I joined in the view of my distinguished colleagues regarding the justiciability of the question within the bounds of the Hague Rules, which bind the Military Government in Judea and Samaria as customary international law. Here also I shall proceed in similar fashion and refrain from dealing with the issue before us, as prescribed by the boundaries of Article 49(6) of the Geneva Convention. However, in so far as private property rights are concerned, the matter cannot be resolved by arguing the 'relativity' of the right, for in our legal system the right to private property is an important value protected under both civil and criminal law. Furthermore, it is immaterial whether land is cultivated or barren when contemplating the legal protection of property awarded the land-owner.

The principle of protecting private property applies also in the law of war, as expressed in Article 46 of the Hague Rules. A military government wishing to affect the individual's property rights must show legal warrant therefore and cannot exempt itself from judicial review of its act by pleading non-justiciability.

* * *

The question therefore remains as follows: have the respondents shown sufficient legal warrant to seize the petitioners' lands? The Requisition

Order was issued by the Military Commander who began by stating, as will be recalled, that the Order is being issued 'by virtue of my authority as Commander of the Region and my being of the opinion that the Order is required for military needs'. It should be mentioned here that in this Order the Regional Commander chose from the outset a more vague formula than that of the *Beit-El* matter. In that case, the Requisition Order stated that the area where the Beit-El camp stands as well as its environs would be seized only after eight years via the establishment of a civilian settlement 'required for essential and urgent military needs'. There, we justified the establishment of a civilian settlement based upon Article 52 of the Hague Regulations, which enables possession of land to be taken 'for the needs of the occupying forces'. At that time I cited Oppenheim who maintains that temporary use of private land is permissible if it is essential to 'all kinds of purposes demanded by the necessities of war'. I mentioned also the British *Manual of Military Law*, according to which the temporary use of land and buildings in private ownership is justified for 'military movements, quartering *and the construction of defence positions*'. We rejected Mr Khoury's contention that the notion of 'the needs of the occupying forces' must be understood as including only the immediate needs of the forces themselves, and we pointed out that 'the main function assigned to the army in occupied territory is "to safeguard public order and security", as provided in Article 43 of the Hague Regulations. What is required for achieving this purpose is *ipso facto* required for the needs of the army in occupation, within the meaning of Article 52'.

Up to this point I am at one with Mr Bach [the State Attorney] that the seizure of private land for the establishment of a civilian settlement can also be justified under Article 52 of the Hague Regulations. We have found no contrary precedent in international law. This, however, holds true only when it is proved on the facts of the case that it was army needs which actually led to the decision to establish a civilian settlement at the site in question. I emphasize once again that there should be no doubt in relation to the fact that according to Lt. Gen. Eitan's professional opinion, the establishment of the civilian settlement at the site is compatible with the needs of regional defence, the special importance thereof being to ensure the lines of movement during the deployment of the reserve forces in time of war. But generally I have come to hold that a professional assessment by the CGS would not in itself have led to the taking of the decision to establish the Elon Moreh settlement. The additional reason which impelled the Ministerial Defence Committee and the Government *in plenum* to do so was the strong desire of the members of Gush Emunim to settle in the heart of Eretz-Israel as close as possible to the town of Nablus. We were unable to go into the deliberations of the Ministerial Committee and the Government by inspecting the minutes. Regardless, we have sufficient

indications in the evidence before us that both the Ministerial Committee and the Government majority were decisively influenced by Zionist views on the settlement of the whole of Eretz-Israel. That view emerges clearly from the statement made by Mr Bach on behalf of the Prime Minister during the court hearing on 14 September 1979 in reply to paragraph 6 of the affidavit of the additional respondents, to which I had drawn attention at the hearing of the previous day. I took down Mr Bach's statement verbatim because of its importance and the standing of the person in whose name Mr Bach was speaking:

> I spoke with the Prime Minister and he authorized me to state, after the subject came up in yesterday's session, that on many occasions both at home and abroad the Prime Minister has stressed the Jewish people's right to settle in Judea and Samaria but this is not necessarily connected with discussions in the Ministerial Defence Committee about concern over national defence and state security, when a specific question of requisitioning one or the other side for security needs comes up for discussion and decision. In the Prime Minister's view there is no inconsistency here, because in actuality two separate matters are involved. Regarding what was said about the Prime Minister's intervention, this took the form of bringing up the matter for discussion by the Ministerial Defence Committee, the Prime Minister being the Committee's chairman and paragraph 27(a) of the Rules of Government Procedure providing that, as regards the Committee's deliberations, the Prime Minister fixes the agenda on his own initiative or by application of a member of the Committee. He took part in the Committee's discussion and expressed his clear and unequivocal opinion in favour of issuing the Requisition Order for the establishment of that settlement. This, as I have said, was having regard *inter alia* to the opinion of the CGS.

The view about the right of the Jewish people, mentioned at the outset of the above statement, rests firmly on Zionist doctrine. But the question still remains for this Court in this petition whether that view justified the taking of private property situation in an area subject to rule by military government—and, as I have tried to explain, the answer to that depends upon the correct interpretation of Article 52 of the Hague Regulations. I strongly suggest that the military needs referred to in that Article cannot, in any reasonable interpretation, include national-security needs in the broad sense I have just mentioned. Allow me to quote Oppenheim, *ibid*, paragraph 147, 410:

> According to Article 52 of the Hague Regulations, requisitions may be made from municipalities as well as from their 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 within the meaning of Article 52 can therefore include the needs of which the CGS spoke in his affidavit of reply. These are the needs of regional defence and of the defence of the lines of movement facilitating the uninterrupted deployment of reserve forces in time of war. In its discussions the Ministerial Defence Committee decided in a manner 'having regard *inter alia* to the opinion of the CGS', as Mr Bach put it. The Ministerial Committee's decision on 7 January 1979, cited above, assured Gush Emunim that the Government would decide on the time and place of the settlement 'in accordance with the appropriate considerations', and that when determining the area of settlement the Government would take into account the wishes of the Elon Moreh settlement nucleus as much as possible. I shall not err if I assume that what Mr Bach stated in the name of the Prime Minister reflects the spirit of the discussions in the Ministerial Committee. I do not doubt that the opinion of the CGS indeed figured among the Committee's various considerations, but in my view that is not sufficient to bring the decision within the bounds of Article 52. The following are my reasons:

(a) When military needs are involved, I would have expected the Army authorities to initiate the establishment of the settlement precisely at that site. Therefore, it would be a CGS initiative to put the Army's request to the political echelon so that the settlement's establishment could be approved if no political reasons to prevent it were found. The affidavit of the CGS does indeed indicate that this was the standard decision-making process. Had the settlement's establishment been pursued in this manner, I would say that the very course of the events attests to the fact that professional military consideration was dominant in the discussions at the political level. But the bigger picture obtained after the CGS replied to interrogation and the additional documents submitted by Mr Bach show clearly that the process was otherwise. The initiative came at the political level which asked the CGS to give his professional opinion, and then the CGS expressed a positive view in accordance with the belief he has always held. These points are clearly expressed by the CGS, in response to the interrogation, paragraph 2:

> (a) To the best of my knowledge the body that initiated the establishment of the settlement in Nablus area was the Ministerial Defence Committee.
> (b) I did not approach the political echelon with a proposal to establish a settlement at Elon Moreh. . . .
> (c) No plan existed, approved by an authorized military element, for the establishment of a civilian settlement at the given site.

(b) Further as to military necessity, I cited above the text of the Ministerial Defence Committee's decision at its meeting of 7 January 1979, as set out in the Government Secretary's second affidavit. The discussion at that meeting, it will be recalled, took place as a result of a demonstration by Gush Emunim members on a road near Nablus. The decision stated that '[w]hen determining the area of settlement for Elon Moreh the

Government will as far as possible take into consideration the wishes of this nucleus', and, as if in consideration of this assurance, the Elon Moreh members were required to return to the camp they had come from (that is, to desist from unlawful demonstration). This I regard as clear proof that it was pressure by the Gush Emunim that impelled the Ministerial Committee at that meeting to deal with the subject of civilian settlement in the Nablus area. Subsequently, the matter went to the Ministerial Settlement Committee. That committee sent its representatives on a preliminary survey for selecting feasible sites for the establishment of a settlement for the Elon Moreh nucleus in the vicinity of Nablus. The representatives chose five sites, from which the IDF approved the site presently at issue. It follows that the IDF had no part in determining these five sites but faced the choice of selecting one of five sites determined at the political level. This procedure is inconsistent with the language of Article 52 which, in my view, calls for demarcation of certain lands precisely because they are required for military needs; and, as I have said, it is natural that the initiative for this should come from military experts in Army needs and advance planning.

On this matter, Mr Bach submitted that the Army must consider whether there are candidates for civilian settlement prepared to go to the place where their settlement is militarily required. I agree, but again provided that military planning approved by competent authority precedes the search for candidates for settlement on the given site. Here the reverse occurred. The wish of the members of the Elon Moreh nucleus to settle as close as possible to the town of Nablus instigated the plan; then, as a result of the pressure they exerted, approval came at the political level and eventually at the military level. Political considerations were therefore the dominant factor in the Ministerial Defence Committee's decision to establish the settlement on that site, although I assume that the Committee and a majority of the Government were convinced that its establishment *also* serves military needs. I accept the declaration of the CGS that on his part he did not take into account political considerations, including the pressure of the Gush Emunim people, when he came to submit his professional opinion at the political level. But a secondary reason, such as the military reason supporting the decisions of the political level that initiated the settlement's establishment, does not comply with the precise requirements laid down by the Hague Regulations in giving priority to military necessity over private property rights. In other words: would the decision at the political level to establish the settlement at that site have been adopted, had it not been for the Gush Emunim pressure and the ideological-political reasons contemplated at the political level? I have been convinced that were it not for the latter the decision would not have been adopted in the circumstances then prevailing.

I wish to add a few words about the dominant as against the subordinate reason for the decisions taken by government authority. In *Berger* v. *Haifa District Planning Commission* [5] Kahan J mentioned the discussion of 'plurality of purposes' in the third edition of de Smith's *Judicial Review of Administrative Action*, 287 ff., and of the five tests proposed there he chose one: did the invalid consideration or invalid purpose really effect the authority's decision? For my part I am prepared to adopt the more lenient test proposed by de Smith at 289:

> What was the dominant purpose for which the power was exercised? If the authority is seeking to achieve two or more purposes when one is permitted, expressly or impliedly: the legality of the act is judged according to the dominant purpose.

(c) I have still not dwelt upon an additional ground impelling the invalidation of the decision to seize possession of the petitioners' land—a reason which can stand without regard to the others I have already specified. Previously, in *Beit-El* [3] the serious question arose how it is possible to establish a permanent settlement on land seized only for temporary use. There we accepted Mr Bach's answer that the civilian settlement can only exist in that place so long as the IDF occupy the area by virtue of a Requisition Order. This occupation can itself come to an end eventually, as a result of international negotiations, leading to a new arrangement that will take effect under international law and will determine the fate of this settlement and of other settlements existing in the occupied territories.

In that case, the settlers themselves made no submissions because they were not joined as parties. In the case at bar, the solution is not acceptable. The affidavit on behalf of the settlers states openly in paragraph 6:

> To base the Requisition Order on security grounds in the narrow technical sense and not on the basic and embracing sense, as explained above, means one thing—the temporary nature of the settlement and its transitoriness. This frightening conclusion we reject altogether. Nor is it consistent with the Government's decision concerning our settling in the place. In all our contacts with the Government Ministers and the many assurances we received from them and above all from the Prime Minister himself—and the said Requisition Order was issued on the intervention of the Prime Minister himself—all regard the Elon Moreh settlement as a permanent Jewish settlement, no less than Deganya or Netanya.

It should be noted that this passage is comprised of two parts. The first relates to the view of the settlers; the second to what they heard from Ministers. We were not asked to permit an affidavit in reply to be submitted on behalf of the Government or any of its Ministers to refute the statements attributed to them in the second part of this passage. They may, therefore, be taken to be wholly true. Since that is so, the decision to establish a permanent settlement destined from the outset to remain indefinitely—even beyond the duration of the military government established in

Judea and Samaria—comes up against an insurmountable legal obstacle. No military government can express military need which is designed *ab initio* to persist even after the end of the military rule, which is an unascertainable period of time. It is a patent contradiction, apparent also on the evidence before us in this petition, that the decisive consideration which moved the political level to allow the establishment of this settlement was not military. In these circumstances the legal form of only taking possession and not expropriating ownership cannot change the substantive situation, namely, the indefinite ownership implied in taking possession.

In view of the foregoing, the order *nisi* should in my opinion be made absolute in respect of the petitioners' land seized under Order No. 16/79.

Asher J: I concur.

Ben-Porat J: I concur.

Witkon J:

I am also of the opinion that the law is with the petitioners. As in *Beit-El* [3], here we must also examine the acts of the authorities both from the aspect of 'internal' law ('municipal' law according to the accepted terminology in this context) and from the aspect of international law. These are two separate matters, and as I said in *Beit-El*: '[t]he act of a military government in occupied territory may be justified from the military-security aspect and yet possibly be defective from the international law aspect.' The internal law to be dealt with is the law contained in two Orders, which the Commander of the Judea and Samaria Region issued by virtue of his powers as Commander of occupied territory (Orders 16/79 and 17/79). In these Orders the Commander stated that he 'is of the opinion that the matter is required for military needs', and declared that the areas were requisitioned 'for military needs'. There is indeed no dispute in point of internal law and in fact also of customary international law (the Hague Convention) that the validity of the Orders depends upon their being made for 'military needs'.

We have already expanded upon the nature of 'military necessity' and the extent to which we may interfere with the discretion of the military elements: *Abu Helou* v. *The Government* [4] and *Beit El* [3]. Repeatedly we have emphasized that the bounds of our interference are limited. . . . In those cases, we were satisfied that the requisitioning for establishing a civilian settlement did in fact serve a security purpose. Here I am not satisfied that this was the purpose.

How does the present case differ from the previous cases? The most important difference is that in the present case, even the experts entrusted with the security of the State disagree on the necessity of settlement at the

site. The security authorities similarly submitted affidavits for the purpose of persuading the Court of the military-security need for requisitioning land and establishing thereon civilian settlement, but previously the evidence was uniform and unequivocal. With regard to Elon Moreh, however, it emerges from the evidence before us that the main issue, military need, is disputed by experts.

* * *

The petitioners averred in their petition that 'as far as they know from the news media, respondent No. 2 (the Defence Minister) has declared that there is no military or security need for the area of land'. Generally we do not take account of hearsay but here confirmation of the differing opinion of the Defence Minister is provided by the deponent on his behalf, the CGS, Mr Raphael Eitan, who says in paragraph 23(d) on his affidavit: 'I am aware of the opinion of the second respondent who does not contest the strategic importance of the region under discussion but thinks that security needs can be effectuated by means other than establishing a settlement at the said place.'

This inconsistency between the Minister of Defence and the CGS on the very need for requisition has no parallel in all the case law of Israel; and it is also difficult to cite an example from other countries where a judge is required to choose between the opinions of two experts, one, the Minister responsible and the other, the head of the executive establishment.

* * *

As is widely known, courts can be asked to decide questions requiring special expertise, which is usually not in the judges' field. The opinions of reputable experts, submitted to us, can contradict each other completely. This may occur, for example, in trials raising medical issues or in cases of breach of patent touching on chemistry, physics, or other natural science. In matters of security, where the petitioner relies upon the opinion of a security expert and the respondent on that of another person who is both an expert and the one responsible for the security of the State, special weight is naturally given to the opinion of the latter.

* * *

At such an impasse, without reason to find the deponent on behalf of the respondents preferable to the opinions of other experts, we must ask ourselves: who bears the burden of proof? Must the petitioners convince us that the land was not requisitioned for the needs of the Army and

security or should we perhaps require the respondents, the security authorities, to convince us that the requisition was needed for this purpose? I think that the burden rests upon the respondents. The confirmation by the Commander that the requisition was required for military needs does not automatically accord the presumption and certainly not the force of decisive evidence that this is definitely the case. Furthermore, we must bear in mind that the sincere subjective belief of the Commander as to the necessity of the requisition is not sufficient to exclude the question from judicial review. It is not the sincerity of his judgment but its accuracy that must convince us (see the well-known debate on *Liversidge* v. *Anderson* [7] and the article by R. F. V. Heuston in 86 *LQR* 33. See also *Ridge* v. *Baldwin* [8] and the *Kardosh* cases [6]). The law I cited at the opening of my remarks makes legal requisition conditional upon the existence of military necessity; obviously, then, the court will not sanction serious prejudice to a person's property unless it is satisfied that security needs are involved. Nor did the State Attorney argue that he is free of the obligation of persuasion and he went to great lengths to present to us all of the material. As I have said, where we have only evidence on the part of the respondents or the respondents' experts differ from the petitioners' experts, when harbouring concerns about the issue I might possibly give the respondents 'the benefit of the doubt'. Here, however, as I said, we have been told that the Defence Minister himself is not convinced of the necessity of this requisition. True, the post of Minister is political and he himself need not necessarily be an expert in the affairs of his Ministry. But today we have the conflicting opinion of a Minister of Defence who—as former Chief of Staff and Commander of the Air Force—is himself a distinguished expert on security matters, a fact which the State Attorney did not put into question. If such a Minister is not convinced, how can it be asked of us, the judges, that we should be convinced? If he sees no military necessity for establishing a settlement precisely at this place, who am I to differ from him?

This is the principal reason that leads me to distinguish this case from all the preceding cases and to arrive at a conclusion differing from that reached in those cases. There are two further, albeit less important, additions to be made to this conclusion. One is that in the *Rafiah Salient* case [4] and in *Beit-El* [3], I proceeded on the assumption that the Israeli settlements established on lands requisitioned from their Arab owners are essential for the security forces in their daily struggle against terrorists. 'One does not have to be a military and security expert', I said in *Beit-El*, 'to realize that terrorist elements operate more easily in an area inhabited only by a population that is indifferent or is sympathetic towards the enemy than in an area where there are also persons likely to guard against them and to report any suspicious movement to the authorities. Among the latter, terrorists will find no hide-out, assistance or supplies.'

The CGS, Lieut. Gen. Raphael Eitan, explained to us that at Elon Moreh the main security value in establishing a settlement on this site lies in its integration into the regional defence system in the event of 'total' war. I have perused again the affidavit submitted to us by Maj. Gen. Yisrael Tal in the matter of *Rafiah Salient* [4] and found that it only refers to terrorist operations in times of quiet. That was also my impression of Maj. Gen. Orli's opinion in *Beit-El* [3]. On looking at this affidavit again, however, I found that he also spoke about the needs of regional defence. These considerations were reflected in the judgment of my colleague, Landau J. In any event two requisitioned areas were there involved, one on the specific route of potential terrorists and the other bordering an important military camp (Beit-El). In this situation there could not have been any serious doubt regarding the enormous strategic value of these two sites. They and only they could fulfil a defence role, with no alternative available. At Elon Moreh, however, I cannot say that there doubtless exists a defence necessity.

The third manner in which the present case differs from the preceding cases stems from the affidavit of the settlers. It will be recalled that in the *Beit-El* affair [3], the settlers were joined as respondents to the petition and were not allowed to make any submissions; we assumed that their presence on the site was wholly dedicated to security needs and the defence of the homeland. In the words of my learned colleague, the Deputy President, '[s]ince the IDF is for the most part a reservists' army, the inhabitants of a civilian settlement are under military command even individually.' At that time I said, 'the settlers are subject to army control, either formally or by the force of circumstances. They are there by virtue and with the permission of the Army. I therefore still adhere to the view I held in the *Rafiah* case [4] that, as long as a state of belligerency exists, Jewish settlement in occupied territory serves actual security purposes.'

In the case at bar, we have heard the representatives of the settlers and it seems to me that we may not ignore the substance of their argument. . . . The settlers, it is very true, do not deny the security consideration, but in their opinion it is entirely secondary and incidental. As they state in their affidavit: '[a]ccordingly, with all due deference to the security point and although its correctness is not doubted by us, it is immaterial.'

These are trenchant remarks and it goes without saying that the settlers deserve praise for their candour in not masking their true motives. But I am left with a nagging question: these settlers one and all protest that they have come to settle in Elon Moreh not out of security considerations, and therefore their contribution to security—for all its benefit—is only incidental. Can it then be said of these settlers, as I expressed it in *Beit-El*, that they are at the location due to the permission of the Army? Although 'a person may be benefited in his absence', can a right or permission which

the beneficiary positively rejects as loathsome be forced upon him? Let one thing be clear: without disassociating myself from the observations of my learned colleague, Landau J, I myself have no need to dispute with the settlers their religious or ideological debate. But it is our duty to inquire whether it is purely considerations of security which prompted the requisition of the land for the purpose of settling people at this location. It appears to me, then, that it is important to know what the attitude of the settlers is; if they did not come principally for security purposes, it is difficult for me to accept that this in fact is the purpose of their settlement.

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Furthermore, in the case at bar, the State Attorney invited us to confirm with the authorities that the Geneva Convention is not contravened by the transfer of land to settlers for settlement needs. In his submission, land transfer does not contradict the humanitarian provisions of the Convention which are accepted by the State of Israel. It will be recalled that what is involved here is Article 49(b) of the Geneva Convention which prohibits an occupying power from deporting or transferring sections of its civilian population to the occupied territory. It is a mistake to think (as I read recently in a newspaper) that the Geneva Convention does not apply to Judea and Samaria. It applies, even though, as I said above, it is not 'justifiable' in this Court. Nor would I say that the 'humanitarian' provisions of the Convention are intended solely to protect the life, health, freedom, or honour of a person and not property. Who like us knows the value of possession? But the question whether voluntary settlement falls under the prohibition of 'transferring sections of the population' within the meaning of Article 49(b) of the Geneva Convention is not an easy one and, as far as we know, no answer has yet been found in international jurisprudence. Therefore now as well, I prefer not to answer this question, especially in view of the conclusion I have reached in this case; under both internal law and customary international law (Hague Convention, Article 52), a decision is not called for. Refraining from doing so, however, is not to be interpreted as agreement with the attitude of one or other of the parties.

For these reasons, in addition to those elucidated by my learned colleague, the Deputy President, I am of the opinion that the Order should be made absolute.

Bechor J:

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The Deputy President also dealt with the question arising from the contradiction between requisitioning land for military needs, which is a temporary requisition, and establishing civilian settlements permanently. It is common knowledge that settlements have always constituted an inseparable part of the regional defence system. In the more general framework of the whole defence system of the Yishuv [the Jewish community], their role is also noted in *Beit-El* [3] and in *Matityahu* [2]. A distinction must, however, be drawn: the integration of civilian settlements into regional defence began many years before Israel achieved statehood, and continued within the State's territory after the statehood was attained. During these years the basis was always that the civilian settlements are permanent. This was not incorrect even from a legal point of view, since the post-statehood settlements were established in areas within the boundaries of the State where the law of the State applied. In the pre-State period as well, the intent was always to establish permanent settlements on land owned by the settling bodies. In the case at bar we are dealing with temporary requisition, and hence the contradiction between Elon Moreh and the creation of permanent settlements. This question has come sharply into focus for the first time in this petition, perhaps mainly as a result of the joinder of respondents 5 and 6 and the clear position they have adopted.

As I have said I concur with the judgment of Landau DP.

Order *nisi* made absolute.
Judgment given 22 October 1979.