At the Supreme Court Sitting as the High Court of Justice

HCJ 606/78
HCJ 610/78

Before:	**Deputy President M. Landau** **Honorable Justice A. Vitkon** **Honorable Justice S. Asher** **Honorable Justice M. Ben-Porat** **Honorable Justice D. Bechor**
The Petitioners in HCJ 606/78:	**Saliman Tawfiq Ayub and 11 others**
	v.
The Respondents:	**Minister of Defense and 2 others**
The Petitioners in HCJ 610/78	**Jamil Arsem Mutawe'a and 12 others**
	v.
The Respondents:	**Minister of Defense and 3 others**
Petitions for *Order Nisi* Objection to *Order Nisi*	2 Heshvan, 5738 (November 2, 1978)
Session dates:	November 23, 1978, December 1, 1978, March 18, 1979
Representing the Petitioners:	Adv. Khoury
Representing the Respondents:	Adv. G. Bach, State Attorney

Judgment

Justice Vitkon

The petitioners in the two petitions at bar are land owners in the Judea and Samaria Area. The land of the petitioners in HCJ 606/78 is located in the Al Bireh area in the Ramallah region, near the military camp "Beit El", and the land of the petitioners in HCJ 610/78 is located in the Tubas area, in the Nablus region, not far from the Jordan valley. Notwithstanding the difference between these two petitions it would be

appropriate to hear them jointly due to the fact that in both petitions the petitioners complain of the same things: (a) the fact that their lands were confiscated by the respondents; (b) the fact that they were denied of the right to enter their lands and use them; and (c) the fact that civilian Jewish settlements were established or are about to be established on their lands. In HCJ 606/78 – the Beit El case – the *order nisi* was limited to the use of petitioners' land for the establishment of Jewish settlements; whereas in HCJ 610/78 – the "Bekaot" case – the respondents were also ordered to justify the confiscation itself and the reason for denying the petitioners of their right to farm their lands. Mr. Elian Khoury on behalf of the petitioners and Mr. Bach, the State Attorney, enlightened us with their thorough arguments. They did well.

The ownership rights and standing of all petitioners hereof are not in dispute. In the Beit-El case there is no doubt that already in 1970 the military commander of the Area issued a confiscation order against the land (see Exhibit RS/1 of the response), and that according to said order the petitioners were offered, as compensation for the utilization of their property, annual leasehold fees, which some of them even agreed to accept. It should be emphasized that said petitioners did not reside on the land and have neither farmed it nor earned their livelihood from it, since it borders on a vast area that already at the time of the Jordanian regime served as a military camp, as it currently does as well. However, in the summer of 1978 the petitioners realized that dwellings of a Jewish civilian settlement were being erected on their lands. They even presented evidence which indicates that the agencies responsible for said settlement, its entrepreneurs and planners, are civilian-governmental agencies of the government of Israel rather than the military government itself which controls the Area, being an occupied territory. Meanwhile said settlement was established.

The circumstances of the "Bekaot" case are somewhat different. This case concerns agricultural land that had always been farmed by the petitioners. In their petition they argued that they were not at all aware of the confiscation order which was issued by the commander of the Area back in 1975 (see the Order regarding Closed Areas (Area 22)(Judea and Samaria)(No. 571) 5735-1975), and that only in the summer of 1978, when they entered the area for farming and sewing purposes the realized that the land had already been plowed by settlers, and the latter even drove them out of there. In fact – the response indicates that the petitioners knew of the confiscation and the prohibition to enter the area two years earlier, in 1976, and although they may have possibly continued to farm their land in the absence of any interruption, respondents' position is that said act was not lawful. However there is no need to dwell on this issue. The decision in petitioners' petition is based neither on any delay in its filing nor on any breach of the order by the petitioners.

The order which pertains to the Beit El case (Order for the confiscation of land (1/70) dated February 16, 1970) explicitly states that it was issued because in the opinion of the commander of the Area it was required "for necessary and exigent military needs." A similar declaration is not found in the order dated January 3, 1975, which pertains to the "Bekaot" case, but there is no doubt that due to the fact that said order is based on the "Order regarding Security Provisions (Judea and Samaria)(No. 378), 5730-1970", here too the consideration of military and security needs must apply. And indeed, the respondents claimed that the above justified their actions in both petitions.

The petitioners, in contrast, challenge these actions for two reasons. They dispute respondents' arguments that the confiscation of their lands, their closure and mainly, their use for Jewish settlement purposes, serve any real military need, and in the alternative they argue that even if this was so, said actions were still unlawful according to the rules of international law, on which, according to them, they may rely in this court. It is appropriate to note here that these are two separate reasons which should not be mixed one with the other. An action taken by the military government in an occupied territory may be justified for military and security reasons, however, it is not inevitable that it will e flawed according to international law. Not any act which promotes security needs is necessarily permitted according to international law. The meaning of international law and its implementation by this "municipal" court will be broadly discussed by me

herein-below. It should only be noted here that according to the respondents their actions are impeccable according to international law as well.

And one more preliminary comment that the reader should bear in mind. The court's knowledge – unlike other institutions and bodies – is limited to the evidentiary material which appears in the affidavits of the parties. In such a sensitive case, like the case at bar, it must be emphasized that announcements, declarations and decisions of all sorts, whatever their source may be, do not enter the realm of our legal deliberation, unless they were agreed on or to the extent that they were proved by evidence. On behalf of the petitioners affidavits and documents were produced which indicate of settlement activities on their lands. On behalf of the respondents the affidavits of Major-General Orli, Coordinator of Government Activities in the Territories at the Ministry of Defense and Head of Operations Branch/MBT at the General Headquarters, and these affidavits, together with the words of the State Attorney constitute, as far as we are concerned, an authorized expression of the government's position. This and nothing more. Each one of us is obviously aware of recent political developments which took place in our region, of negotiations toward peace, of hopes and aspirations on the one hand and of concerns and objections on the other, but it must be understood that a judicial institution does not engage in what is at vision. This is the realm of the politicians. We examine the rights of the litigants before us according to the current situation as it exists at this time between Israel and the Arab states. This is a situation of belligerency and the status of the respondents relative to the occupied territory is the status of an occupying power.

Military needs and Security needs. We shall therefore commence with petitioners' argument that in fact there is no military or security need which requires that their lands be confiscated, closed and made available to the Israeli settlement authorities for the erection of civilian settlements thereon. Respondents' argument that it is required for exigent military needs is therefore, according to the petitioners, nothing but a futile argument which serves as a cover for the real reason. In this context Mr. Khoury requested to draw a distinction between military needs, in their strict meaning, namely, the needs of the army which is stationed in an occupied territory and its logistic requirements, and security needs in general. Mr. Khoury argues that only needs of the first kind fall within the scope of the authority granted by the above orders. We are of the opinion that there is no basis for this distinction. As I have just said, the current situation is a situation of belligerency and it is incumbent upon the occupying power to maintain order and security in the occupied territory. It must also take preventive steps against threats posed from such territory to the occupied territory itself as well as to the state. Nowadays fighting takes the form of terror attacks and even those who regard these actions (which injure innocent civilians) as a form of guerilla war must admit that the occupying power is authorized and even obligated to take all necessary measures for their prevention. The military aspect and the security aspect are therefore in fact the same aspect.

Settlements in an occupied territory. We have previously said that the petitioners complained of three things: of the confiscation of their lands, of their closure (namely, the denial of their right to use them) and of the erection of Jewish settlements thereon. In fact, the two first complaints may be briefly discussed. Had the military government satisfied itself by the confiscation of the lands and by the denial of petitioners' right (in the "Bekaot" case) to farm them, it is doubtful whether the petitioners would have turned to us. The petitioners in the Beit-El case were not deprived of their residences either, and it should already be emphasized here that seizure or requisition of land against consideration (as will be further specified below), is not confiscation. The petitioners were not at all deprived of their ownership. However, the thing which motivated the petitioners to turn to us at this late stage was the fact that their lands were now used for the purpose of erecting civil settlements for Jewish communities. Said use – they argue – completely contradicts respondents' argument that said areas are required for military and security purposes. This is, in fact, their main complaint. The respondents argued, *inter alia*, that if the confiscation and closure of the lands for petitioners' use was not flawed, there was no basis for their complaint against the use. And if so, where do they derive their standing from? This argument however is not acceptable to us. As the owners of proprietary rights the petitioners are entitled to inquire how their lands are used.

The Hilu case. (**Sheikh Suleiman Hsein 'Odeh Abu Hilu and 3 others v. Government of Israel and 2 others**; **Sheikh Sabah Abid al-'Eid al-Salaimeh and 4 others v. Government of Israel and 2 others**, IsrSC 27(2) 169, 181, 182, 177, 180 179, 184, 176, 170, 178). We have thus reached the main problem, and hence, this court has already discussed the same problem in 1973 in the matter of the matter of **Sheikh Suleiman Hsein 'Odeh Abu Hilu and 3 others v. Government of Israel**, HCJ 302/72, where land was confiscated in the Rafah area according to an order issued by the GOC Southern Command and the military commander of the occupied territory. The right of the Bedouins who possessed the land to enter it was denied or limited and Jewish settlements were erected, inter alia, on said land. The petition of the Bedouins (or their representatives) was denied after all Justices of the panel accepted respondents' argument that the steps taken by the military government in said matter were required for the protection of the area against terror attacks. In that matter each Justice has his own reasons, but we all agreed that the military was vested with the authority to evaluate the security situation in a certain area and to take such measures as he may deem necessary, at his discretion, to prevent any possible danger. Said authority, we said, was vested with the military, and the court will not intervene in the manner by which the military commanders exercise their discretion unless it is convinced that the authority was abused and was exercised in a bid to achieve other goals. Mr. Khoury, on behalf of the petitioners, argued that in the Rafah matter the area was dangerous whereas in the case at bar, the Tubas district as well as the Ramallah district were calm and peaceful and there was no reason for concern. The President of the court has already commented in that regard at the hearing that prevention at an early stage was the best cure and that it was better to reveal and thwart a terror attack prior to its execution. In any event, the affidavits of Major-General Orli leave no doubt that both districts in which lands belonging to the petitioners were seized, consist of sensitive strategic areas. The first is located on the route leading from the Jordan area to the center of Samaria and the other, on the main road near a military camp. It is implausible that an occupying power will leave the control over such areas in the hands of potentially hostile parties.

The issue of the Jewish settlement was also raised in the Rafah matter but I was the only one who referred to said issue in my opinion. I said (*Ibid*., page 181 near the letter D): "Clearly, the fact that said land was designated, in whole or in part, for Jewish settlement, does not negate the security nature of the action, as a whole. The security considerations which were argued and examined as specified in the judgment of my honorable colleague, were neither refuted nor proved to be fictitious, serving as a camouflage for other considerations, and we learnt from Major-General Tal himself that the area (or a certain part thereof) was designated for Jewish settlement, since the latter also constituted, in this case, a "security measure". And by the end of my judgment (at the bottom of page 182) I concluded that the considerations were sincere security considerations and stated: "They were such even if we take into consideration the un-denied fact that Jewish settlement involves acts taken in a bid to safeguard the security of the territories and of the state." Since then several years have elapsed, and like any opinion it should also be revisited from time to time. However, notwithstanding the thorough arguments of Mr. Khoury I did not find reason to change my opinion.

Firstly, it should be remembered that where the law grants the authority power to take an action for a specific purpose and the action was indeed taken, really and truly, for this purpose, the action does not become unlawful only because the purpose which was specifically designated by law was accompanied by another purpose. The additional purpose may raise doubts as to whether the action was indeed taken for the purpose which was established by law, but it does not necessarily mean that the authority used its power solely in a bid to attain the additional purpose and that the purpose which was prescribed by law was argued only as a camouflage. Every once in while we encounter a situation in which the authority – a local council, for instance – grants (or refuses to grant) a license to a citizen for two reasons, one of which falls within the boundaries of the empowering law, whereas the other veers therefrom. If the reason which justifies the action according to the empowering law is argued sincerely and is entrenched in the evidentiary material, the other, irrelevant argument should not constitute a cause for the revocation of the action.

But the main thing is that as far as the pure security consideration is concerned there is no doubt that the fact that settlements – even "civilian" settlements – of citizens of the occupying power, are located in the territories, makes a significant contribution to the security of that area and helps the military to fulfill its duties. It is not necessary to be an expert on military and security matters to understand that it is easier for terrorist elements to act against the enemy in an area inhabited only by indifferent or supportive population, as opposed to an area which is also inhabited by people who may follow them and inform the authorities of any suspicious act. They will not provide perpetrators refuge, assistance and equipment. This is clear and there is no need to elaborate. It should only be reminded that according to respondents' affidavits, the settlers are subordinated to the military authority, either formally or due to the circumstances. Their presence over there is made possible and facilitated by the military. Therefore I still hold the opinion, which I held in the Rafah case, that Jewish settlement in an occupied territory – for as long as there is a belligerent situation – serves genuine military needs.

The situation under international law. Up till now we have discussed the lawfulness of respondents' actions according to the "municipal" law, namely, the military law which applies to the occupied territory. However, as aforesaid, the petitioners also (and perhaps even mainly) based their petitions on international law which pertains to the rights and obligations of the occupying power which exercises control over the occupied territory, on the one hand, and to the rights and obligations of inhabitants of the territory, on the other. Reference is made to two international conventions: the first, The Hague Convention Respecting the Laws and Customs of War on Land (the Fourth Convention) of 1907, Articles 23(7) and 46, and the other, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, Articles 49 and 53. There is no dispute that the petitioners are protected persons within the meaning of this term under international law.

However, the first question which we must consider is: can the petitioners, as protected persons, claim, in person, their rights under said conventions – in a "municipal" (local) court of the occupying power – or whether only the states themselves, as parties to said conventions, are authorized to claim the rights of the protected persons – and that, obviously, only on the international level. As is known, the answer to this question depends on an answer to another question, namely, whether the provision of the international convention the enforcement of which is sought, became part of the municipal (domestic) law of the state whose court is requested to consider the issue, or whether the provision constitutes a mere agreement between states and was not absorbed into the domestic municipal law. In the first case reference is made to international "customary" law which is recognized by the municipal court provided the municipal law itself does not consist of a provision to the contrary, whereas in the second case reference is made to international "consensual" law which obligates, as aforesaid, only the states among themselves.

These questions were also raised in **Hilu**, and what I explained in the above paragraph was well explained in the opinion of my honorable colleague, the Deputy President, in page 177 and in my judgment in page 180 onwards. The position of my colleague differed from my opinion in one point only. In his opinion, in view of the fact that the state's representative agreed that the military actions would also be examined according to international law, he did not have to decide whether we had the authority to do so even in the absence of said consent, and he examined the actions and they satisfied said test too. I, on the other hand, was of the opinion that if the conventions were not made part of the municipal law, it was neither warranted nor desired that we consider them even with the consent of the litigants. In my opinion, we cannot assume upon ourselves the role of an arbitrator or – as I would now add – of a law professor who expresses an opinion the value of which is, in fact, purely academic.

However, before I refrained from considering the military actions from the aspect of the provisions of the Hague and Geneva conventions, I had to be convinced that they were not international customary law, but rather international consensual law only, and indeed, this was my opinion (*Ibid*., at the bottom of page 180) based on three judgments of this court: **Steinberg v. Attorney General**, CrimApp 5/51 (2), page 1066, **Al-jamaya Al-masihiye L'alararchi Elmakdasa v. Minister of Defense**, HCJ 337/71 (Al-jamaya Al-

masihiye L'alararchi Elmakdasa **(**The Christian Society for the Holy Places)} v. Minister of Defense et al., IsrSC 26(1) 574, 580), page 580, and **Abu al-Tin v. Minister of Defense**, HCJ 500/72 (Mirian Halil Salem Abu al-Tin v. Minister of Defense and 2 others, IsrSC 27(1) 481, 485) page 485. The first authority mentioned above discussed the provisions of international law in general, but the two other authorities discussed specifically the Hague Convention and the Geneva Convention. The Justices who gave said judgments were of the opinion that the above two conventions constituted part of international consensual law and therefore could not be based upon in an Israeli municipal court.

Meanwhile, the illuminating article of Prof. Yoram Dinstein "The Rafah Judgment" was published in Law Studies (*Iyunei Mishpat*) 3, 93, in which he explained that there was a difference between these two conventions. While the Geneva Convention still remains in the realm of international consensual law (and therefore was not made part of the municipal law), the status of the provisions of the Hague Convention is different. They are merely declaratory of existing law acceptable by all developed countries and are therefore regarded as constituting part of international customary law. Following this article I have revisited the matter and I am now satisfied that the Hague Convention constitutes part of international customary law based on which claims may submitted to a municipal court. The above arises from the book of Schwarzenberger, International Law, Second Volume (1968) page 164 and onwards; and see also Von-Glahn, Occupation of Enemy Territory, 1957, page 11, as distinct from the Geneva Convention. Schwarzenberger states as follows (in page 164):

> As in relation to other codifications of the laws and custom of land warfare, so in relation to the law of belligerent occupation, the question arises whether these treaty provisions are merely declaratory of international customary law or constitute a development of such rules and, thus, are binding only on parties to these conventions.

And in page 165 the learned scholar states further:

> The question whether Geneva Red Cross Convention IV is declaratory or constitutive is not settled conclusively in the Convention. It is merely stated that the Convention is "supplementary" to the corresponding Sections of the Regulations of 1899 and 1907. Some of its provisions are no more than attempts to clarify existing rules of international customary law. This is probably true in particular of those Articles in Section I of Part III of the 1949 Convention in which a number of requirements of the standard of Civilization, such as the prohibition of the taking of hostages, are codified. The same applies to the prohibition of the deportation of inhabitants of occupied territories. To the extent, however to which existing legal duties of Occupying Powers are not merely elaborated, but enlarged, the Convention must be treated as constitutive and applicable only between the parties."

Petitioners' counsel drew our attention to a commentary published by Dr. Pictet, together with other experts, regarding the Geneva Convention; Mr. Khoury also relied on an article published in 1975 by the same author entitled *'Humanitarian Law and the Protection of War Victims'*. I did not find in said commentary an opinion, in either direction, on the issue of whether said convention, like the Hague Convention, was regarded as international customary law. The things stated there at the bottom of page 279 regarding the Geneva Convention – which is the corner stone of petitioners' argument that Jewish settlement in an occupied territory runs contrary to international law – refer to deportation of population from an occupied territory rather than to the transfer of other residents to such territory. If we keep in mind the test established by Schwarzenberger at the end of the above citation, it patently seems that the provisions of the Geneva

Convention regarding the transfer of population out of or into an occupied territory do not constitute already existing law: they come to enlarge, and not only to clarify or elaborate on the duties of the occupying power.

We have also reviewed the article of Dr. Pictet which was published as aforesaid at a much later stage. There is no doubt that the purpose of the author was to regard the provisions of the Geneva Convention as constituting part of international customary law, or else, as we have already seen, the enforcement of the protected rights under the Geneva Convention involved considerably difficult procedural problems. However, while the author raises the question in his article (page 22) in so many words:

> Here we must consider a major problem, even though lack of time prevents us from dealing with it as it deserves; does humanitarian law confer rights on individuals direct or only on the States of which they are nationals?...

the article does not provide an answer to the question of whether the convention granted rights directly to the protected persons.

The interim conclusion which arises from the above indicates that we should consider petitioners' arguments to the extent they are based on the provisions of the Hague Convention which is regarded as international customary law, and that this court will not discuss arguments which are premised on Article 49 of the Geneva Convention. Thus, the discussion is limited to the question of whether the respondents breached international law by seizing petitioners' lands and by denying them of their use. Their complaint concerning the establishment of Jewish settlements on their lands is not based, as far as international law is concerned, on the Hague Convention, but rather on the Geneva Convention, the last part of Article 49, which states as follows:

> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

It should be noted here that the respondents adamantly deny petitioners' argument that the above provision applies to the case at bar, but as I noted above, this issue is not be resolved by us and I therefore refrain from expressing any opinion in that regard.

Seizure of petitioners' lands according to the Hague Convention.

The provisions of the Hague Convention which according to the petitioners were breached by the respondents are as follows:

Article 23:	In addition to the prohibitions provided by special Conventions, it is especially forbidden: ---
	(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.
Article 46:	Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Respondents' answer is that petitioners' property was not confiscated but that the use thereof was seized in consideration for an offer of leasehold fees. They argue that this seizure constitutes requisition and that it

is lawful pursuant to Article 52 of the Hague Convention. It is appropriate to cite at this point a passage from Schwarzenberger's book (*Ibid*., in page 269) which clarifies the difference between *seizure* and *requisition*.

> The scope and character of requisition becomes further apparent from its juxtaposition with seizure under Article 53 of the Hague Regulations. *Ratione personae*, seizure extends to the property of the State and that of private persons. Requisition, however, is limited to the property of private persons and local authorities in occupied territories. *Rationae materiae*, the emphasis in seizure and requisition is on movables but in the case of requisition, the wording of Article 52 is sufficiently wide to include immovables.

Hence, we see that there is a clear distinction between *confiscation* (without consideration for an unlawful purpose) and *requisition*, which, in the case of immovable property requires the owner to surrender the use of his property against payment of consideration, but does not deprive him of his ownership. The state representative argues that the act of the military government should be regarded as such, and hence, I am satisfied that nothing in this action runs contrary to Regulations 23(g) and 46 of the Hague Convention. On the contrary, Article 52 of said convention explicitly allows the occupying power to demand requisition in kind (and services) from the inhabitants for the needs of the army. Von Glahn says (in page 186) says in this context:

> Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity…

And if a question arises as to what should be done with land which is not required to satisfy the needs of the army, but, on the other hand should not be left in the hands of its owner lest it would be used for enemy purposes, it would be appropriate to bring another citation from Von Glahn's book (in page 186) as follows:

> The Hague Regulations fail to cover a rather important aspect of private property; the problem of what to do about private property owned by legal or real persons and used against the interests, and possibly even against the safety, of the occupant, Common sense would appear to dictate the need for preventive measures by the occupant against such use of private property by its owners.

In view of the location of the seized areas in territories which are considered sensitive security-wise, as explained above, it seems that for this reason also respondents' action is justified.

Conclusion and the "political issue". Hence, I reached the conclusion that according to international customary law too, which is manifested in the provisions of the Hague Convention, the petitioners are not entitled to receive the remedy sought by them. But before I conclude, I would like to comment on respondents' additional argument that the issue at hand is not "within the court's jurisdiction" since it is about to be discussed in the context of peace negotiations and that the court does not discuss political issues which are to be decided by the government. I am not at all impressed by this argument. This is not the place to renew the ever-lasting debate about judicial limits with respect to political issues. Clearly, in foreign affairs matters – as in several similar matters – the power to decide is vested with the political authorities rather than with the judicial authority. But given the assumption – which was not substantiated in the case at bar - that a person's property had been damaged or taken from him unlawfully, it is hard to believe that the court will avoid helping that person in view of the fact that the latter's right may be the subject of

political negotiations. This argument did not add any weight to the other arguments of the respondents, which as aforesaid consisted of a decisive answer to petitioners' arguments.

In view of the above I propose to revoke the *orders nisi* and the interim orders.

Deputy President (Landau)

I agree, in general, with the opinion of my honorable colleague, Justice Vitkon. Without derogating therefrom I would like to add to it a few things which, in my opinion, should be noted and emphasized, although some of them have already been referred to in the opinion of my colleague:

I shall commence with HCJ 606/78 (the Beit-El case) in which the petitioners did not receive an *order nisi* for the revocation of the seizure order which was issued back in 1970, be it only for the reason that after the elapse of eight years the order may no longer be challenged before this court. The hearing was therefore narrowed down only to the remedy sought against the establishment of a civilian settlement on the seized land and against the population of the settlement's buildings by Israeli citizens or residents. As my honorable colleague explained, this petition should be discussed on two levels. On the first level, Mr. Elias Khoury requested to revoke respondents' action on the grounds that it was required for military needs; as a matter of fact, the mere establishment of a civilian settlement proves that the army does not need the area on which the settlement was established. It was also noted that until the civilian settlement was established that part of the entire seized area was not included within the boundaries of the military camp. On the other level, which concerns international law, Mr. Khoury argues that the establishment of civilian settlements in an occupied territory and the transfer of civilian population of the occupying power into the occupied territory are prohibited, and that there is no other authorization under international law for the use made by the respondents in that part of the seized area. I shall make my comments with respect to these two levels in an orderly manner.

There is no dispute that if the establishment of a settlement is not required for military needs it cannot be justified according to Israeli municipal law, in view of the fact that the seizure order itself was issued because the military commander was of the opinion that the seizure of the entire area which consists of the Beit-El camp and the adjacent civilian settlement which was recently established, was necessary for requisite and exigent military needs, as stated in the beginning of the seizure order. To this end I shall cite excerpts from the response affidavit of Major-General Avraham Orli, *verbatim*. And so he says in paragraph 16:

> (a) … the respondents argue that the establishment of a settlement in the Beit-El camp area, does not run contrary to military needs, and even more so, it serves these needs, as it constitutes part of the security concept of the government, which bases the security system, *inter alia*, on Jewish settlements. According to this concept, all Israeli settlements in the territories occupied by the IDF constitute part of the IDF regional defense system. Moreover. These settlements received the highest classification in the above IDF regional defense system, which is manifested in the allocation of human resources standards and means. In times of calm these settlements mainly serve the purpose of presence and control over vital areas, maintaining observations and the like. The importance of these settlements increases particularly in times of war when the regular military forces are usually transferred from their bases for operational purposes and the above settlements constitute the main component of presence and security control in the areas in which they are located.

(b) The Beit-E camp is located in an area of great security importance and the fact that a Jordanian camp was located in the same place also attests to that.

> The settlement itself is located in an elevated spot which controls a vital and very important intersection: the vertical Jerusalem-Nablus route and the horizontal route which leads from the coastal plain to Jericho and the Jordan Valley. In addition, the place in which the settlement was established controls infrastructure systems (water, electricity, communication) which are important for vast areas. For these reasons the above place was chosen for the establishment of the Beit-El settlement. Furthermore, for these reasons and in view of the fact that the Beit El settlement constitutes part of the IDF regional defense system – it is the intention of the defense forces to build in the settlement an array of fortifications.

Mr. Khoury did not try to refute the facts specified in the above excerpt. Against the professional military concept embedded therein, that the establishment of a civilian settlement in that place carried great military importance and that the settlement formed part of IDF's regional defense plans, Mr. Khoury argued that the above statements were not sincere and that their sole purpose was to camouflage the real objective which was to settle Jews in the Judea and Samaria area for the attainment of national and political goals. Mr. Khoury also argued that the military authorities did not act in this matter at their own discretion but that they were only carrying out a policy which was adopted by the government of Israel, or more precisely, by the ministerial committee which made decision with respect to settlement affairs in Judea and Samaria.

I join the opinion of my honorable colleague that said arguments should be denied. In HCJ 306, 302/72 **Rafah** (1) (Ibid., page 176) I expressed my opinion as to the source of the authority of this court to scrutinize the acts of the military government and the source of power of the military government itself under Israeli municipal law, and I also expressed my opinion (Ibid., in page 177) about the scope of intervention of this court in such acts under international customary law. In that case I refrained from considering the legal aspects of settlement for security purposes beyond the jurisdiction of the state (see *Ibid*., in the beginning of page 176), due to the fact that in that case Jewish settlements have not yet been erected in the area which was seized. But my honorable colleague did consider said issue in that judgment and reiterated the observations made by him in that case in his above opinion. In this case the question arises directly and I shall therefore say that I agree with my colleague's words in **HCJ 302/72** and in light of his analysis I accept the detailed explanation given by Major-General Orli in paragraph 16 of his affidavit, quoted above. Indeed, as noted by the State Attorney, Mr. Bach, in his response, it is well known that different circles of the residents of Israel hold different view as to the importance of Jewish settlement in Judea and Samaria: some totally object to it while others approve of it as an expression of a political view which holds that no part of the land of Israel (*Eretz Yisrael*) will be closed for Jewish settlement; some emphasize the military aspect of the exercise of Israeli control over places which are strategically important in Judea and Samaria for the purpose of providing effective defense to state territory, and those who hold this view are divided between some who are satisfied with the exercise of control over the Jordan valley and the lower parts of mountains above it, while others think that effective control over the mountain ridge is required as well.

The explanations specified in the affidavit of Major-General Orli reflect the latter approach and I have no reason to doubt that he presents this approach sincerely and not as a camouflage for other views. I also have no reason to think that these explanations are nothing but an attempt to justify in retrospect acts which were taken in the first place for other reasons. I give those who are represented before us by Major-General Orli the credit that the establishment of the civilian settlement in Beit-El was preceded by deliberation and military planning. It has already been emphasized more than once

and also in **HCJ 302/72** (1) (in page 177E, page 179B and page 84E) that the scope of intervention of this court in the military considerations of the military government is very narrow and obviously, a judge as an individual will not replace the military considerations of those who are responsible for defending the state and for maintaining public order in the occupied territory with his own views on political and security matters.

I am also of the opinion that Mr. Khoury's argument that the military commanders who exercise the powers of the military government do not act at their discretion but rather execute the policy of the government – should be denied. In **HCJ 302/72** I said (*Ibid*., in page 176D) that "the source of the domestic law pursuant to which the military government acts derives from the general powers vested in the government and its ministers according to sections 29 and 31 of the Basic Law: the Government." This should be coupled now with section 2(a) of the Basic Law: the Military, according to which the military is subject to the authority of the government. In page 170A, *ibid*., I noted that the office holders of the military government belong to the executive branch of the state and hence the authority of this court to scrutinize their actions according to section 7(b)(2) of the Courts Law, 5717-1957. I therefore see no fault in the fact that the (military) government is not independent, but rather carries out policies outlined by the government. In any event, I did not find in the evidentiary material before us anything which may suggest that the views of the military government officials do not reconcile with the policy of the government to which they are subordinated.

It was also argued before us that the inhabitants of a civilian settlement are not subject to military command and therefore, the establishment of a civilian settlement cannot be justified by military reasons. However, Major-General Orli's affidavit indicates that a civilian settlement like Beit-El is designed to integrate in the regional defense which forms part of IDF's military deployment and in view of the fact that the majority of IDF's forces are reservists it is well known that when necessary, the inhabitants of a civilian border settlement are subject to military command. It was further explained in the affidavit of Major-General Orli that precisely in an emergency, when the standing forces move to the battlefront, a civilian settlement of this sort assumes a clear military role of control over the area surrounding it.

These were my comments concerning the examination of the issue at hand according to Israeli municipal law, and I shall now turn to examine the validity of respondents' action according to international law, or more precisely, according to the regulations annexed to the Fourth Hague Convention of 1907 and according to the Geneva Convention of 1949. In this context reference is firstly made to respondents' reservation made in paragraph 12(a) and again in paragraph 14 of the affidavit of Major-General Orli which commences with the following words: "Without regard to the legal question concerning the mere applicability of the rules of international law to the territory occupied by the IDF since 1967". These words are suggestive of the Israeli argument which is based on the fact that when the IDF entered Judea and Samaria said territory was not held by any sovereign whose possession thereof received general international recognition. We were not requested to consider this issue in the petition at bar and said reservation is therefore added to the collection of reservations which were mentioned by me in **HCJ 302/72** (*ibid*., in page 177D) and which remain open in this court.

With respect to Article 49(6) of the Geneva Convention which prohibits the deportation or transfer of civilian population of the occupying power into the occupied territory, I agree with my honorable colleague that this is a consensual provision and therefore the petitioners cannot rely thereon in this court. To the authorities brought by my colleague in this regard I shall add that the commentary to said convention which was published by the Red Cross and edited by Dr. Pictet (Geneva, 1985), states with respect to Article 49(6) (*ibid*., page 283) as follows:

> This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference.

The fact that hesitations existed certainly indicates that said provision did not constitute an obvious part of international customary law. In fact it is clear that said provision was a novelty following the bitter experience accumulated in World War II. About the nature of this entire convention I shall bring an excerpt from the preface to said commentary (*ibid*., page 5), which describes the work done in preparation toward the drafting of the convention:

> The undertaking was an arduous one, however. The legal field in question was completely new. Until then the Geneva Convention had only applied to the armed forces, a well-defined category of persons, placed under the authority of responsible officers and subject to strict discipline; it was now necessary to include an unorganized mass of civilians scattered over the whole of the countries concerned.

And I also refer to page 614, *ibid.*, of the comparison between the Fourth Hague Convention which was patently aimed at expressing international custom and the above Geneva convention which was different.

Mr. Khoury quoted from the interpretations to Article 8 of the Convention stating that:

> Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention…

The following was said about this in page 79:

> … Article 8 is of the greatest assistance to all protected persons. It allows them to claim the protection of the Convention, not as a favour, but as of right, and in case of violation, it enables them to employ any procedure available, however rudimentary, to demand respect for the Convention's term.

But from what is said beyond need in page 78 it is clear that the intention is not to give effect to the provisions of the convention in a municipal court but rather the various remedies that a protected person can receive on the international level, and no opinion is thereby expressed that the convention has already become customary law. With respect to the article of Dr. Pictet of 1975 which was referred to by my honorable colleague, it seems to me that it also does not support the contention that the specific provision being the subject matter of our discussion has already become customary law.

In respondents' response affidavits it was argued that the respondents fulfilled the humanitarian provisions of the Geneva Convention and that Article 49(6) did not apply to a voluntary transfer of citizens of the occupying power to an occupied territory. I do not intend to go into this matter since, as aforesaid, the entire convention, and all the more so, the above specific provision thereof, constitutes international consensual law that according to the English rule which we follow is not implemented by our courts but should rather be enforced by the states parties to the convention as such (see CA 25/55 [5] et al., CrimApp 336/61 [6] in page 2040, 2041B).

I have more willingly reached the conclusion that this court should refrain from considering this issue of civilian settlement in an occupied territory under international law, knowing that this issue is in dispute between the government of Israel and other governments and that it may be debated in the context of a crucial international negotiation of which the government of Israel is a party. Any opinion expressed by this court on such a sensitive issue which cannot be said other than as an *obiter*

dictum, will neither add nor derogate, and issues which by their nature belong to the realm of international politics should better be discussed n that realm only. In other words, although I agree that petitioners' complaint is generally within the court's jurisdiction, in view of the fact that it involves proprietary rights of individuals, this special aspect of the matter should be regarded as not within the jurisdiction of the court when the petition is submitted to this court by an individual. The words of Prof. Jaffe in his book *Judicial Control of Administrative Action*, page 492, are relevant to this case:

> …it is not the subject matter as such which is political (though foreign affairs might appear to suggest the contrary). It is rather that the question is one for the decision of which there are no well-developed principles, of the issue is felt to be closely related to a complex of decisions not within the court's jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex.

And now, we should turn to the Hague Regulations, which are widely considered to constitute international customary law and the court will use them and apply them to the extent they do not contradict domestic statutory provisions (**HCJ 302/72** [1], page 177C, **CrimApp 336/61**, [6] page 2055). Mr. Khoury has rightfully noted that Regulation 23(7) was not applicable to this case since it was included in Section II entitled "Hostilities", the provisions of which applied when actual hostilities took place. The regulations which may apply to this case are those included in Section III entitled "Military Authority over the Territory of the Hostile State" (subject to the problem of the special status of Judea and Samaria which are not a territory of a "hostile state"). In that regard my honorable colleague has already noted that the last part of Article 46 which prohibited confiscation of private property did not apply to property such as the lands at hand the ownership of which was not confiscated from their owners, but rather, only the use thereof was prohibited and the respondents were willing to pay leasehold fees in consideration for the use thereof (and some of the petitioners even received leasehold fees). Article 53 which pertains to seizure usually applies to movable property (and possibly also to immovable property which directly serves movable property, such a train facility and the land on which it is located – see Schwarzenberger, International Law, Vol 2, page 301).

The only Article which still remains to be considered is Article 52 (Requisition) which states as follows:

> Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

The Article was interpreted as applicable to the seizure of land as such as well, although I must point out that the expression 'in kind' which appears therein ostensibly refers, according to its regular meaning, to movable property only (for instance, Oxford dictionary: in kind: in goods or natural produce); and so does the parallel expression in the French version of Article 53: *en nature*.

However, the acceptable interpretation also includes real property within the scope of Article 52, and "requisition" includes taking possession: see Schwarzenberger, *ibid*., page 288:

> Requisition… may be described as an Act of State, authorized on conditions laid down by international law, by which a belligerent occupant may deprive a private person or local authority of ownership in movable and **possession in immovable**. (Emphasis added by the undersigned).

One of the conditions established by Article 52 is that the requisition is required "*for the needs of the army of occupation*". Mr. Khoury wishes to interpret this term very narrowly, in a manner which applies solely to the immediate needs of the army itself. I am not willing to accept this interpretation. Indeed, the quotes from the literature and case law relied on by Mr. Khoury in this regard limit the interpretation of Article 52 in a bid to prevent the exploitation of the resources of the occupied territory for the benefit of the economy of the occupying power (see for instance: the *British Manual of Military Law*, Third Volume, paragraph 598, page 166: Oppenheim, *On International Law*, Seventh Edition, Second Volume page 410). They do not limit the meaning of the term *"the needs of the army of occupation"* when actions taken in the occupied territory itself are concerned. My honorable colleague has already quoted the words of von Glahn who says that "Temporary use of land and buildings for different purposes is seemingly permitted if required by the necessities of war". I shall add to that a quote from Oppenheim's book on international law, *Ibid*., paragraph 140, page 403:

> … confiscation differs from the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war.

And also see the Third British Manual of Military law, section 592:

> The temporary use of land or buildings for the needs of the army is justified… privately owned land and buildings may be used for military movements, quartering and the **construction of defence positions** (Emphasis added by the undersigned).

A major role imposed on the military in an occupied territory is "to ensure public order and safety" as specified in Article 43 of the Hague Regulations. What is required for the attainment of this objective is required anyway for the needs of the occupying army in the sense of Article 52. Securing the safety in Judea and Samaria imposes on the military special assignments and on occasions obligates the execution of military actions also at times of relative calm, to thwart in advance the danger of terror attacks sourced from within or without the occupied territory. Under these special circumstances of ongoing low level fighting no sharp distinction should be drawn between the powers vested with the military at times of active fighting and at calm times. Even if it is currently quiet in the Bet-El area it is advisable to take preventive steps ahead of time. In this context I have already referred in **HCJ 302/72** [1] (in page 178) to the quote from Schwarzenberger's book in page 257, which speaks of actions that are all the more so justified to maintain public order when measures are taken to suppress hostile activities within the occupied territory. Therefore I also conclude, in view of what I quoted from Major General Orli's affidavit, that the continued confiscation of the area in which the Beit El settlement was established is necessary for military needs.

Mr. Khoury asks: how can a permanent settlement be erected on land which was seized for temporary use only? This is a serious question. But I accept Mr. Bach's answer that the civil settlement may continue to exist in that location only so long as the IDF holds the area by virtue of the confiscation order. Said possession may terminate one day as a result of international negotiations which may end

up with a new arrangement that will be given effect by international law and which will determine the fate of this settlement, like other settlements in the occupied territories.

The petition in HCJ 610/78 pertains to confiscation and closure orders of agricultural land consisting of about 300 dunam of the lands of the Tubas village by the commander of the Judea and Samaria area. The petitioners are the owners of said area and used to farm it. The area was given to the settlers of Moshav Bekaot B (Nachal Roi) which constitutes part of the agricultural union. The respondents argue in this petition too that the above actions were taken due to a military need to maintain presence and exercise security control in that area. In this regard I revert again to Major General Orli (in paragraph 3 of his Affidavit):

> (b) The area consists of a valley which joins the Jordan river along a wadi and is located seven kilometers west of the Jordan river in the heart of an area crossed by access ways from Jordan and from the Jordan valley to populated areas in Judea and Samaria (hereinafter: the Area) and Israel.
>
> (c) Due to the fact that the Area is located in the above described valley it serves as the most convenient infiltration route from Jordan to the Area and Israel…

And in paragraph 4:

> Hundreds of infiltrations of perpetrators' cells took place in the Jordan valley area ever since the Six Day War to date. The vast majority of the infiltrations occurred near the Area being the subject matter of this petition in a radius of up to ten kilometers south east of the Area. As a result of the perpetrators' activity dozens of chases and searches were conducted in the Area. In the searches which were conducted following the infiltrations, the infiltrators' traces led more than once to villages in the Tubas area.

Paragraph 5 includes comprehensive details regarding different types of attacks carried out by perpetrators who infiltrate Judea and Samaria through said Area. It includes a description of the array of measures taken by the IDF to prevent such infiltrations which include the establishment of settlements such as Bekaot B which are integrated into the regional defense system along the Jordan river, the valley and its mountain ridges. The considerations which were taken into account in the establishment of a settlement in this area included the need to block the passage ways of perpetrators and the fact that the area is located on a route which could be used by military forces for transit purposes.

I am of the opinion that these facts indicate that there are substantial military needs which justify the confiscation of the area and its closure. With respect to the legal aspect of the matter, the considerations specified by my honorable colleague and to which I made my above additions, are also applicable.

In HCJ 606/78 (Beit El) an interim order was issued by this court on September 17, 1978, to prevent the execution of excavation and construction works on the land being the subject matter of the petition. Notwithstanding the fact that an order was issued, different excavation and construction works were executed by settlers on site (who are not parties to these proceedings). Therefore, Mr. Khoury requested in Motion 790/78 to enforce respondents' obedience to the interim order and in the petition itself he argued that due to the contempt of court associated with the breach of the interim order respondents' arguments in this petition should not be heard. I am satisfied, following my review

of the response affidavit given by Colonel Moshe Feldman, deputy commander of Judea and Samaria Area that the respondents, on their part, used their best efforts to stop the breach of the order when it was brought to their attention, and the works were stopped. There was therefore no reason to deny their right to present arguments in this court due to the works which were performed by the settlers contrary to the interim order.

I therefore agree that the two petitions should be denied and that the request in Motion 790/78 should be revoked.

Justice Asher: I agree with the opinions of my honorable colleagues, Justices Vitkon and Landau.

Justice Bechor: I agree with the judgments of my honorable colleagues, justice Vitkon and Deputy President (Landau), and I have nothing to add.

Justice Ben Porat: I join the opinions of my honorable colleagues, Deputy President (Landau) and Justice Vitkon and the following remarks are nothing but an addition thereto:

Major General Orli's claim that necessary security considerations required the execution of the acts being the subject matter of the hearing seems to be, *prima facie*, reasonable. Israel, a small state with a territory within the limits of the green line which is long and narrow, is regretfully surrounded by states which do not hide their hostility towards it. It is doubtful whether this situation, on which I shall not elaborate, has a like situation in the history of mankind. The hostility is manifested not only in economic boycott as one of the ways to fight it, but also in infiltrations of PLO members from the territories of some of these countries for the execution of attacks in Israel. In addition to all of the above a constant danger of **unexpected** war hovers above Israel, as happened in October 1973 all of a sudden from the north and from the south. It is therefore reasonable that in this special situation which requires superior alertness to defend against any possible attack if, when and where such may occur, it is also necessary to use exceptional solutions. Against this backdrop the argument that in defending against a sudden attack time is of the essence, reconciles very well with common sense. One of these solutions – which is the subject matter of the hearing before us – is the establishment of civil Jewish presence in **highly** sensitive locations. The area being the subject matter of petition 610/78 constitutes a perfect example therefore It is a valley which runs along a wadi located in the midst of an area through which passage ways run from Jordan and the Jordan valley to the populated areas in Judea and Samaria and Israel. As explained in the affidavit of Major General Orli, said location turns the area into the most convenient infiltration axis from Jordan to said areas. Since reality proved that fighting may commence unexpectedly, it stands to reason that Jewish presence in such a location is necessary.

The question at bar is whether this solution reconciles with the principles of international law. My positive answer is based, as aforesaid, on the reasons of my honorable colleagues and my opinion is reinforced in view of the following considerations:

a. If I correctly understood the texts we were referred to by the learned counsels, the international principles are premised on the idea according to which the occupying power should be prevented from using its powers **arbitrarily**. In other words, it must not be allowed to use the opportunity of occupation for **expropriation and annexation**. The line drawn between arbitrary use and self-defense and necessary security measures is therefore one of the tests which determine whether the act is valid or prohibited: see the book of Schwarzenberger on international law, second volume, page 135 and page 243.

   As aforesaid, I am satisfied that deponent's statement according to which in the case at bar we are concerned with necessary safety precautions, is credible.

b. I am aware of the fact that this case concerns **civil** occupancy. In view of Israel's special situation as described above, be its army as excellent as it may be, it is clear that the security tasks with which it must cope are very difficult, especially in view of the fact that quantitatively it is significantly inferior to the neighboring armies. Against this backdrop I am satisfied with the argument of Major General Orli that civil presence in these sensitive locations is the inevitable solution.

c. I am inclined to think that also applicable to the case at bar is Article 23(g) of the Hague Convention which allows, as is known, as an exception, to forfeit enemy property if it is 'imperatively demanded by necessities of war'.

   Logically, necessities of war may be imperatively demanded not only while active warfare takes place, but **also to prevent existing concrete danger**. As I clarified above, and as the October 1973 war taught us, the risk of an unexpected war hovers above Israel, and there is no telling when and where misfortune will break forth. We should compare the above situation with a different issue: Self-defense. A long time ago the Nurnberg military tribunal decided that a preventive action in a foreign territory was allowed when an '**immediate and overwhelming' need** for self-defense existed. However, this rule was thereafter extended by the military tribunal in Tokyo which applied it also to '**impending attack**'; see Schwarzenberger, pages 28-29 and footnote 6. If this is the rule when violent activity takes place on a foreign territory even as self-defense and as a preventive step, it seems that the rule applies also to the case at bar as aforesaid. The issues which were compared are different (self-defense on the one hand and imperative needs on the other), but they both share the idea, to the best of my understanding, by way of inference, **that a threat which may be momentarily realized is the same as an existing danger**.

d. I was bothered by the question of whether the term "permanent settlement" indicated that there was an intent to deprive the land eternally, but I reached the conclusion that the term "permanent" should be treated as a mere **relative** term. We are not concerned with occasional passers-by or with visitors who come for a short visit of a few weeks or months, but rather with people who will regard this place as their home. However, it should be remembered that Israel has been in a state of emergency since the day of its establishment for over 30 years. The chance for a comprehensive peace with **all** of its neighbors still seems like a wishful aspiration embedded in an unknown future. A peace agreement with our neighbors will anyway require, when time comes, the establishment of appropriate security arrangements. The considerations in the framework of entering into a peace agreement may be different than those which are warranted by the circumstances currently existing. It is therefore clear that the terms of the agreement will eventually decide the fate of this settlement or another.

e. Therefore, I am of the opinion that the *orders nisi* and interim orders should be revoked.

It was decided to revoke the *orders nisi* in the two petitions HCJ 606/78 and HCJ 610/78 and the interim order which was issued in HCJ 606/78 and to deny the petitions. It was also decided to deny the request in Motion 790/78. No order for costs was issued.

Given today, 16 Adar 5739 (March 15, 1979).