The Supreme Court Sitting as the High Court of Justice

HCJ 281/11

Before:	**Honorable Justice S. Joubran** **Honorable Justice E. Hayut** **Honorable Justice U. Vogelman**
The Petitioners:	1. **Head of Beit Iksa Local Council** 2. **Muhammad 'Abd al-Majid 'Abd al-Rahman Hassan Hababeh** 3. **Ibrahim 'Abd al-Rizziq 'Ali Gheit** 4. **Iman Mahmoud Mahmoud Hassan Ahmed 'Awad**
	v.
The Respondents:	1. **Minister of Defense** 2. **IDF Commander in the West Bank** 3. **Head of the Civil Administration** 4. **Israel Railways** 5. **Minister of Transport**
Petition for *Order Nisi*	
Session date:	15 Iyar 5771 (19 May 2011)
Representing the Petitioners:	Adv. Husam Yunis; Adv. Natur Kamar
Representing Respondents 1-3 and 5:	Adv. Yizhak Bert, Adv. Einav Golomb
Representing Respondent 4:	Adv. Gal Somech; Adv. Daniel Reisner; Adv. Raanan Sagi

Judgment

Justice U. Vogelman

The petition at bar concerns the Petitioners' request that we order the revocation Order of Appropriation for Public Use No. 10/02/e, which was issued on November 3, 2010 by the head of the civil administration in the Judea and Samaria Area. This order is the materialization of a previously approved statutory plan pursuant to which lands in the Judea and Samaria Area were expropriated for the planned Jerusalem Tel-Aviv railway line.

The facts

1. The authorities have been engaged in planning and building a high speed railway between Jerusalem and Tel-Aviv for many years. This is a large scale and complex project in terms of planning and logistics, with an estimated cost of some 7 billion shekels. A number of alternative routes for the railroad have been examined since the 1990's. Route A1, which is based on the route of Road No. 1, was the option that was ultimately selected. According to the Respondents, travel between Tel-Aviv and Jerusalem on this route will take approximately 28 minutes. Following the decision on the route for the high speed train, the head of the national planning and building council (hereinafter: **the national council**) approved an amendment to National Steel Rail Master Plan No. 16/23. The amendment was approved by the government on May 25, 2001. The Prime Minister then ordered the Minister of Transport to begin preparing master plan level detailed plans for the railroad and for the implementation of the project. In accordance with the aforesaid, planning officials have approved such master plans over the past decade. These plans were subsequently approved by the government. Respondent 4, on its part, (hereinafter: **the Railway** or **the Israel Railway**) began preparations for the project by issuing a number of requests for tender and signing contracts with construction companies. In some segments of the railroad, work has already begun and a large sum of money has been invested.

2. Some segments of the route of the high speed railroad, totaling 6.7 kilometers, go through the Judea and Samaria Area. This occurs in two locations, one near Latrun and the other, the subject of the petition at bar, near the village of Beit Iksa. The route of the railroad is outlined in a detailed master plan, Plan No. 54/1 (hereinafter: **Plan 54/1**), which was approved for deposit by planning authorities in the Judea and Samaria Area in June 2005. Approval was granted after a number of different options were considered and following an objection procedure. The plan was made public in December of that year. In a decision on one of the objections to the plan, which stated that the plan contravened international law, the subcommittee for objections noted:

> The Jerusalem-Lod railway line, parts of which go through the Judea and Samaria Area, must be seen as one component of the overall land transportation system (…) in a narrow geographic area which includes the State of Israel and the Judea and Samaria Area (…) It is an interconnected transportation system. Each part of the system affects all others (…) The railroad, which includes the segments listed in the plan, must be seen as a single segment of an entire transportation complex in the overall geographic area of the State of Israel and the Judea and Samaria Area which serves all residents of this geographic area. Thus, the project will benefit residents of the Judea and Samaria Area.

3. In the process of planning and implementing Plan 54/1, it became apparent that supplementary plans had to be drawn in preparation for executing the main railway line. This led to the submission of Plan 54/1/2 (hereinafter: **the secondary plan**) which was designed to provide individuals carrying out the work, including heavy equipment operators, with temporary access routes and logistics areas for the duration of work on the railroad. According to the Respondents, these

temporary routes are required due to the complexity of the route and the specific difficulties of laying the tracks, primarily, digging an 11.6-kilometer long tunnel with an entrance on the side of a mountain (hereinafter: **tunnel 3**). An additional purpose of the plan was the building of a permanent access road to the opening of tunnel 3, which would serve as an emergency escape route (hereinafter: **the emergency route**). According to the Railway, the need for an emergency route stems from the exceptional length of tunnel 3 and the fact that one of its openings is located on a bridge which leads to another tunnel. In this situation, there is no choice but to build an alternative road leading directly to the opening of the tunnel, to allow emergency rescue operations. The secondary plan, which spans an area of approximately 50 dunam [1 dunam = approximately 0.25 acres], was approved for submission on April 18, 2007 by the roads subcommittee after examining a number of alternatives. Subsequently, in December 2008, the Israeli and Palestinian publics were notified of the plan in notices published in the Hebrew and Arabic press. On February 9, 2009, two objections were filed against the secondary plan, one on behalf of Peace Now, and the other on behalf of residents of Beit Iksa. The subcommittee for objections held that the suggested plan did not ignore the fact that it involved private lands with agricultural crops, or the environmental sensitivity of the area. The planned route was established such that the harm to the agricultural terraces and the environment were minimized and following a thorough examination of the alternatives. With respect to the objections based on international law, the committee noted that the secondary plan was an aspect of the main plan and that it formed part of the overall land transportation planning in the State of Israel and the Judea and Samaria Area. This transportation complex is intended for use by the entire public, including residents of the Area. The objections to the secondary plan were thus rejected. The plan was published for the purpose of being given effect on March 17, 2000, and on June 16, 2010, the roads subcommittee decided to grant a planning permit for its implementation subject to reservations entered by the committee.

4. Subsequently, staff work was carried out ahead of the land expropriation required by the secondary plan. This staff work concluded with the issuance of Order of Appropriation for Public Use No. 10/02/e, which is the expropriation order that is the subject of the petition (hereinafter: **the expropriation order**). According to the state, only some 11.5 of the 50 dunam included in the secondary plan are privately owned. Most of the expropriated private land is designated for temporary requisition only, for the duration of construction. Requisition will be limited to temporary possession and usage rights. Only about 4.5 dunam of private land, and, according to estimates by professionals working for the Railway, only less 1.8 dunam, would be permanently expropriated for the purpose of the emergency route. On November 21, 2010, Counsel for the Petitioners, Adv. Husam Yunis, filed an objection against the expropriation order arguing that it contravened international law and that land owners had not been given the opportunity to be heard before the order was issued. The objection was rejected by the office of the legal advisor for the Judea and Samaria Area both due to its late submission and since it presented the same arguments that had already been made in other objections to the plan and rejected by the subcommittee for objections. On January 11, 2011, following further correspondence between parties, the petition at bar was filed. In my decision of February 16, 2011, I rejected the petitioner's motion for an *order nisi* and the Railway has begun work on the lands which are the subject of the petition. As part of this work, seven olive trees have been removed from the expropriated area and 14 additional trees are expected to be removed.

Petitioner's arguments

5. According to the Petitioners, the expropriation order breaches international humanitarian law. The order is guided by extraneous considerations and causes them irreparable, unreasonable and disproportionate harm. The Petitioners maintain that in view of the harm the provisions of the secondary plan cause them, the Respondents should have given them advance notice of the plan, so that they would have the opportunity to file an objection and take the necessary action to have the

plan revoked, as they did indeed as soon as they learned of the order. According to the Petitioners, the Respondents have violated the rules of natural justice in not giving all the victims the right to a fair and effective hearing. Such conduct should have included guidance on how to file an objection and a referral to obtain legal counsel. The Petitioners also maintain that the fact that the order does not provide those wishing to object with complete information and provides for an immediate land seizure undermines the practicability of objecting thereto.

On the merits of the order, the Petitioners note that the original railway route did not go through their lands, but rather near Mevasseret Tzion. The route was transferred to Beit Iksa, where their private lands are located, only because Mevasseret Tzion residents complained of noise. According to the Petitioners, the purpose of transferring the route to the Beit Iksa area is improper and, considering the available alternatives, it disproportionately impinges on their rights. The Petitioners also maintain that the railway line which is the subject of the order does not benefit the Palestinian residents of the Judea and Samaria Area and benefits only Israeli residents traveling from Tel-Aviv to Jerusalem. As such, the expropriation order is a breach of Israel's obligation to guarantee the rights of the protected persons – including their property rights – as an occupying power under the Hague Convention respecting the Laws and Customs of War on Land of 1907 and the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. These obligations are particularly strong considering the duration of the occupation. The expropriation order also breaches domestic law, violates the Petitioners' constitutional rights and effectively annexes the expropriated lands to the State of Israel. The Petitioners argue that the Respondents' claim that the train might in future serve Palestinian residents living in the Judea and Samaria Area is no more than an excuse for legitimizing the illegal route. As the railroad is designed to serve Israeli residents only, it must be held that the order was issued *ultra vires* and that it is null and void.

The State's arguments

6. The State argues that the petition must be rejected both *in limine* and on its merits. Rejection *in limine* is required due to extreme *laches*. The State argues that arguments to the effect that under international law lands in the Judea and Samaria Area cannot be used for building a railway should have been made at the stage in which various alternatives were discussed and the route was established, some ten years ago, rather than years after the planning process was completed and the project went into production at a high cost. According to the State, the expropriation order is a single operation which is part of the broader process of implementing the railroad, and if they so wished, the Petitioners should have made their claims against it at the time Plan 54/1 was approved in 2005, or, at least, after the secondary plan was approved in 2010. Since they failed to do so and chose to wait until after the Respondents put the plan into action, their petition must be dismissed. With respect to the specific lands which are the subject of the petition, the State notes that the plan was published for deposit in December 2008 and that objections to the plan were filed, including by residents of Beit Iksa. These objections were reviewed and rejected. According to the State, the petition at bar was filed a year and two months after the objection by Beit Iksa residents was rejected and some ten months after the plan was published for the purpose of being given effect . This, despite the fact that the Petitioners were aware of the intention to lay infrastructure in the lands, as reflected by the objection Beit Iksa residents filed against the plan. According to the State, *laches* is both subjective and objective as the Petitioners should have made their arguments at a much earlier stage and the result of their failure to do so, should their petition be granted, would be the loss of the significant investments made in the project and a breach of public interest. The State also maintains that dismissing the petition for *laches* would not undermine the rule of law as the route was examined by senior legal officials and was found to be lawful. Additionally, the size of the expropriated land is quite small and the harm to the Petitioners can be rectified by way of monetary compensation.

7. On the merits, the State claimed that the Petitioners' argument that the expropriation order was issued *ultra vires* has no substance. The State does not dispute the claim that the military commander's authority to expropriate private land is subject to the expropriation serving the local population. However, the utility of the railroad must be examined from a broad perspective in which the railroad is seen as a single component of an overall plan for a regional steel railway, including such that would allow connecting the Judea and Samaria Area to the railway infrastructure inside Israel and others that would allow a future connection between the Judea and Samaria Area and the Gaza Strip, as accepted in railroads in other parts of the world. The State emphasized that various plans for building steel railways in Palestinian cities in the Judea and Samaria Area are already under discussion. These would enable a planning infrastructure that would allow connecting the railways in the Judea and Samaria Area to the Israeli railway infrastructure, as well as a track connecting the Judea and Samaria Area to the Gaza Strip – when security conditions are amenable.

   The State emphasizes that when complex plans, such as the plans which are to be implemented in the Judea and Samaria Area, are at issue, planning must be done early, prior to the practical formulation of the plan, in order to secure appropriate land reserves. In this context, the State notes that the funding required for such plans, which are all designed for the benefit of the local residents, is provided by the Railway, which has invested and will continue to invest a great deal of money in the project. Thus, the civil administration in the Judea and Samaria Area and the Israel Railway have undertaken to pay for the railroad included in Plan 54/6 (from Mevasseret Tzion to Ramallah), as well as to deposit money intended for planning steel railways in the Judea and Samaria Area in a designated fund. Upon signing the agreement, the Railway will deposit 2.5 million shekels with an option to increase to 10 million shekels. It was further decided that the quarried substances extracted from the tunnels inside the Judea and Samaria Area would be deposited in the Area and, if they are usable, the civil administration would receive payment for them. On the basis of all the aforesaid arguments, the State considers that there is no substance in the Petitioners' argument that the expropriation order and the railroad which goes through the Area do not serve the interests of the Palestinian residents of the Area.

   The state adds, in this context, that the expropriated area is quite small and as it is designated as an emergency route, its purpose is to protect the lives of train passengers and ensure their safety, including when they are inside the Judea and Samaria Area, in accordance with the authority of the military commander.

   With respect to discretion, the State claims that in view of the small size of the area to which the expropriation order applies, the fact that most of it is being expropriated only temporarily, the fact that a very small number of olive trees must be removed for the purpose of the works and in view of the clear benefit expected from building the railroad and the fact that the route was chosen after a number of alternatives were rejected while minimizing environmental damage, it cannot be said that the route is disproportionate.

8. In view of the Petitioners' allegations regarding flaws in the publication of the plan for deposit, and as per our decision, the State attached to its response to the petition a supplementary affidavit by Mr. Daniel Halimi, Deputy Director of the Judea and Samaria Area Civil Administration Planning Bureau. The deponent states that according to the relevant statutory provisions and the common practice, the detailed master plan and the secondary plan were published in two Hebrew language newspapers and two Arabic language newspapers. According to the deponent, the allegation that the newspapers at issue are not distributed in the Judea and Samaria Area is baseless, lacks supporting documents and is inconsistent with objective data on the issue. In any event, the State was unable to publish a notice about the plan in other Arabic newspapers due to the latter's refusal to publish the notice. On this issue, the State further notes that the Petitioner's allegation regarding

insufficient publication of the plans is inconsistent with the fact that objections against Plan 54/1 were indeed filed, including by residents of a village located in the Judea and Samaria Area, and with respect to the secondary plan, also by various residents living in Beit Iksa, the Petitioners' village. In any event, the State emphasized that even if the Petitioners were unaware of the submission of the secondary plan, their subjective lack of knowledge has no impact on the legality of the planning process.

9. The Petitioners responded to this affidavit with an affidavit of their own given by Beit Iksa Local Council Head, Omar Hamdan. According to Hamdan, the al-Quds and Kul-al-Arab newspapers, in which the State allegedly published the plan, are Israeli newspapers which are not distributed in rural areas, such as Beit Iksa. He claims that the fact that the Respondents sought publication in other newspapers which are published in the Judea and Samaria Area demonstrates that they themselves considered the publication that had been done to be insufficient. Hamdan also rejected the claim that the notice could not be published in newspapers distributed in the Judea and Samaria Area and pointed to al-Hayat al-Jadida which is published in Ramallah and in which, as noted by the Respondents, notice that the secondary plan had been given effect was published.

The position of the Israel Railway

9. [*sic*] Israel Railway also maintains that the petition must be rejected *in limine* and on its merits. The Railway repeats the State's claim regarding *laches* and adds that the petition must be rejected due to bad faith on the part of the Petitioners, which was expressed in the fact that they did not reveal all the facts required for a ruling on the petition in their submissions. The Railway maintains, *inter alia*, that the Petitioners' account of the facts, whereby no less than 500 olive trees used for their livelihood would be cut down as a result of the expropriation is incorrect, as there are only 14 trees that are designated for removal from the area and these too are abandoned, unattended and are not used for generating income. The Railway adds that the petition fails to mention the efforts made by the Respondents, with the cooperation of the Petitioners, to reduce the size of the seized area, the alternatives presented to them and the compensation offered for the expropriation. The Railway further states that the petition must be rejected *in limine* in view of the fact that the Petitioners failed to diligently exhaust the remedies available to them prior to filing the petition. The Railway claims, *inter alia*, that as the Petitioners did not file an objection to the secondary plan and, it follows, did not appeal the decision on this issue, they cannot rely on the fact that other residents of Beit Iksa did file an objection to the plan.

10. With respect to the lawfulness of the route that runs through the Area, the Railway claims that it is consistent with internationally accepted professional conventions, as this is a short segment which is mostly expected to run through an underground tunnel deep under the surface in a manner which would not detract from the possibility of making other use of the land above. The Railway further maintains that international practice acknowledges the insurmountable physical limitations faced by engineers when deciding on railroad routes, which sometimes result a situation in which national borders must be crossed. This is true for occupied territories as well, according to the international legal concept of usufruct. This concept allows a party in possession of another party's property to use such property and reap its benefits, as long as the property is not damaged and the residents of the occupied territory also enjoy the benefits. On this last issue, the Railway repeated the State's argument regarding the benefit the residents are expected to reap as a result of the railroad. According to the Railway, the manner in which it exercised its discretion in deciding on the route was not flawed, as the route was planned following a process in which alternatives were examined and the relevant considerations were taken into account and balanced against each other. Finally, the Railway claims the argument that the expropriation order is disproportionate is unfounded.

Review

11. Having studied Parties' arguments in the petition and examined the various documents presented to the Court, I have come to the conclusion that the petition must be rejected on the grounds of *laches*.

The *laches* doctrine – general

12. An individual who wishes to present his arguments for judicial review by the High Court of Justice must file a petition on the matter without delay. If a petition is not filed promptly, the Court may reject it *in limine*, if it finds that the delay has led to prejudice or changed the array of individual or public interests (HCJ 453/84 **Iturit Communication Services LTD. v. Minister of Communications**, IsrSC 38(4) 617, 621 (1985)). The basis for rejecting a petition on the grounds of *laches* is not the passage of time itself, but rather the balance between the prejudice caused to the various litigants as a result of the acceptance or dismissal of the petition at the point in time in which it is examined (see, HCJ 7053/96 **Amcor LTD. v. Minister of Interior**, IsrSC 53(1) 193, 202 (1999). According to this rationale, one petition could be filed with considerable delay with no finding of *laches*, while another petition, filed prior to the completion of an administrative action might be rejected *in limine* for this reason. This question is circumstantial and it is decided based on the specific facts of each case and as a derivative of the interests that are at issue (see for example, HCJ 4841/90 **Mortgage Victims' Association v. Governor of the Bank of Israel**, IsrSC 45(2) 227, 229 (1991).

13. What are interests that are to be considered in the context of the aforesaid balance? On the one hand, there is the Petitioner's interest in resolving the dispute which forms the basis for the petition. The competing interests are the interests of the administrative authority, which may have already undertaken actions based on the challenged decision, or the interests of third parties who have also taken various actions based on the assumption that the authority's decision would stand, given the passage of time and the objective situation it has created. A third interest that must be examined is the broader public interest. One aspect of this interest concerns the rule of law and the extent to which it would be compromised if the defense of *laches* were accepted and the petition were denied. Another public interest aspect centers around the objective of reaching speedy decisions in disputes between civilians and administrative authorities, in order to cast away any legal ambiguity and achieve certitude (see HCJ 2632/94 **Deganya Aleph v. Minister of Communications**, IsrSC 50(2) 715, 742 (1996); HCJ 1135/04 **Israel Union for Environmental Defense v. Master Plan 31/A/18 "Overseeing Staff**, IsrSC 59(4) 784, 789 (2005); Eliad Shraga and Ro'i Shahar, **Administrative Law – Causes *in Limine***, 193-197 (2008) [in Hebrew] (hereinafter: **Shraga and Shahr**)).

14. In order to examine the balance among the various interests systematically and analytically, *laches* is commonly broken down into three elements: subjective delay, objective delay and the extent to which the rule of law is undermined. The examination of subjective delay – the evidentiary aspect of *laches* – focuses on the Petitioner's conduct. The question asked is whether the great delay in filing the petition creates an evidentiary presumption that the Petitioner has waived his right to seek relief. Even if such an evidentiary presumption were established, it is not conclusive and the Petitioner may counteract the objective appearance of forfeiture of rights created by his delay in filing the petition, if he presents evidence to explain or justify this delay (see and compare: HCJ 3421/05 **Makhoul v. Minister of Finance**, §17 (unreported, June 18, 2009) (hereinafter: **Makhoul**)). Unlike subjective delay, the examination of objective delay focuses on the possible harm judicial intervention would cause to the interests of the administrative authority and the relevant third parties, given the protracted period of time that has elapsed since the administrative decision was made and given the change in the situation on the ground. If the first two elements of *laches* are established, they must be pitted against the adverse effect dismissal of the petition on the grounds of *laches* would have on the rule of law and on public interests. This third element reflects, *inter alia*, the principle that the Court shall not support a grave breach of the rule of law, even when

a petition is filed so late as to harm protected interests (see: HCJ 8119/10 **Freidman v. Minister of Interior**, §13 (unreported, January 13, 2011); HCJ 3937/07 **Beit Sahur Municipality v. Prime Minister,** §8 (unreported, January 4, 2010)).

From the general to the particular

15. Although the petition at bar poses a direct challenge only to the expropriation order issued during the final phase of the process of planning and building the railway, it is effectively directed against the earlier phases of this process and the decisions that were made during that time. Note well: the expropriation order is merely the act that executes Plan 54/1 and, mostly, the secondary plan. As such, the Petitioners should have challenged the provisions of the plan itself rather than the expropriation order. Having failed to do so, their petition must be examined in view of its substance rather than its title (Shraga and Shahar, pp. 201-204).

    In so doing, and since the Petitioners' main legal argument is based on the claim that the route goes through the Area without benefitting its residents, it has been found that Plan 54/1, which established that the route of the railway would go through the Beit Iksa area, was published for deposit and for submission of public objections in late 2003, and was given effect in 2005. The secondary plan, on the other hand, the need for which emerged at a later stage (and for the execution of which the expropriation order was issued) was published for deposit in December 2008. Objections thereto were reviewed in May 2009 and rejected by the subcommittee for objections in August of that year. In March 2010, the plan was published for the purpose of being given effect. The petition at bar was filed ten months later, in January 2011. Thus, ten months elapsed from the time the secondary plan was published to the time the petition was filed and five years had elapsed from the time Plan 54/1, which included the Beit Iksa area railway segment, was published for the purpose of being given effect.

16. However, as stated, the passage of time alone does not suffice for a decision on the issue of *laches* and the effects of the delay on the array of the parties' interests, as reflected in the three elements of *laches*, must be examined.

Subjective delay

17. The Petitioners' failure to file the petition in a timely fashion amounts to **subjective delay**. As noted by the State, public notice of Plan 54/1 was issued in two Arabic language newspapers in December of 2003, in accordance with Section 24 of the Jordanian Urban, Rural and Structure Planning Law No. 79 of 1966 (hereinafter: the **Urban Planning Law**). Three objections were filed against the route – one of these, filed by the Mevasseret Tzion Action Committee, related to the Beit Iksa segment of the plan and requested the segment be moved northward, inside the Judea and Samaria Area. Another objection was filed by residents of the Palestinian village of Yalo. No objection was filed on behalf of the Petitioners or anyone related to them.

    A number of years later, an additional planning procedure was required, hence the secondary plan. This plan was also published for deposit, including in two Arabic language newspapers: "al-Quds", which, according to a survey by the Palestinian Central Statistics Bureau, is read by 18.1% of readers over age 18 and is the most popular Palestinian newspaper and in "Qul al-Arab", which, according to the same survey, is read by 68.7% of adult readers in the Judea and Samaria Area. Objections were filed to this plan as well, including one on behalf of residents of the Petitioners' village, Beit Iksa, albeit without a list of specific, named signatories. As with the former plan, the subcommittee for objections examined a number of possible alternatives and considered measures for reducing the damage to private lands. The objections were once again rejected in a detailed decision and once again, the Petitioners' voice was unheard throughout the process. The Petitioners failed to take any action ten months later, when the Palestinian public was notified of the plan's

publication for the purpose of being given effect, *inter alia*, in ads appearing in the "al-Quds" and "al-Hayat al-Jadida" newspapers, which are published in the Arabic language. It was only after ten more months had elapsed , and only after the expropriation order was issued, that the Petitioners saw fit to file the petition at bar.

Parenthetically, we note that in view of the figures on the wide distribution of the newspapers in which the plan was published, we are unable to accept the Petitioners' claims that publication in these two newspapers was flawed.

18. We see, therefore, that the Petitioners had failed to take the legal measures available to them for objecting to the plan for a protracted period of time, a time during which others, including residents of the village where the Petitioners themselves live, and, at an earlier stage, residents of another village in the Judea and Samaria Area, filed their objections to the plans. They continued on this path even when work on other segments of the railway began and even when work began on preparing the logistics areas and roads on the specific segment of the route. The publication of Plan 54/1 and the secondary plan failed to move the Petitioners to take action. It must be emphasized that this plan was publicly known. As explained, the Tel-Aviv Jerusalem railway line is one of the largest projects of recent years, as attested by the great deal of time and money invested in this project.

19. The petitioners seek to counteract the objective evidentiary presumption with respect to their waiver of the right to object to the plans. They contend that the plans were not properly publicized and that they were unable to learn of them "in real time". Having reviewed this allegation, I am of the opinion that the Petitioners have failed to substantiate the claim that the planning process was flawed.

With respect to the submission of a detailed plan for objections, Section 24 of the Urban Planning Law stipulates that "the same procedures stipulated in Section 20 of the Law shall apply". Section 20 of the law sets forth:

> A master plan shall be submitted, in conjunction with the specific instructions related thereto, according to the decision of the district planning committee and based on the recommendation of the local urban planning committee. Notice of the submission will be issued in the official gazette and two local newspapers. It shall remain open in the office of the local urban planning committee for the duration of two months following publication in the official gazette. Notice of the submission will be given, to the extent possible, to individuals who own lands that are included in the plan.

With respect to publication in the official gazette, the Order regarding Interpretation (additional provisions) No. 2 (West Bank Area) (No. 161) 5727-1967 stipulates that the former shall be interpreted as "publication in a manner which the commander of the IDF in the Area deems sufficient for informing the relevant individuals".

20. As a rule, in the absence of any other particular statutory provision, the test for a landowner's knowledge of a plan being carried out on his land is **objective**. The criterion for deciding whether the authority has met the obligation to publicize the plan and provide an opportunity for a hearing is the existence of a reasonable, defined publication, usually in high circulation newspapers and in the local language, as required by the provisions of the relevant law. If such publication was made, the law considers the landowner as having knowledge of the plan (compare to the statutory arrangements inside the State of Israel in Section 89 of the Planning and Building Law 5725-1965;

HCJ 3459/10 **al-'Athaiman v. Government of Israel**, §15 (unreported, June 14, 2011). It should be noted that legislation in the Area does not contain a provision parallel to that of Section 89a of the Planning and Building Law). The Planning and Building Law adds an additional condition to the ordinary rule – providing owners of lands that are included in the plan with individual notices of the submission "inasmuch as possible". The phrase "inasmuch as possible" linguistically implies the absence of an obligation to arrive at a specific **result**, but rather the existence of an obligation to **make an effort**, meaning, an obligation to take the necessary measures for achieving the goal, without an obligation to achieve it (HCJ 634/11 **Basha v. State of Israel**, §14 (unreported, July 27, 2011); compare, with respect to contract law: CivA 10745/06 **Azoulay v. Singalovsky-Polak Ort Academic College Tel-Aviv**, §14 (unreported, July 13, 2009); CivA 444/94 **Orot Artist Representation v. Atari**, IsrSC 51(5) 241, 254 (1997)).

However, it is clear that planning officials may not use the absence of an obligation to achieve a result to exempt themselves from making a true attempt to meet their obligation to provide notice to owners of lands that are included in the plan. The aforesaid obligation of effort is infused with concrete meaning derived from the objective values of fairness, good faith and upholding fundamental rights such as the right to property, which underlie any statute (see Aharon Barak, **Legal Interpretation – Legislative Interpretation**, 549-554 (1993)) [in Hebrew]; HCJ 6824/07 **Mana' v. Tax Authority**, §15 (unreported, December 20, 2010) and from the authority's duty to act fairly and reasonably. Has the authority fulfilled this obligation?

21. As stated, the premise is that the Urban Planning Law does not name a concrete means by which the authority must inform landowners. As such, information regarding the plan could be given to landowners using any reasonable means available. The path chosen by the Respondent, in addition to publication in two widely circulated Arabic newspapers in the Judea and Samaria Area, was, as stated, posting a notice for 60 days on the notice board at the offices of the Ramallah district coordination office. Given that this office is the agency that provides the connection between the civil administration and local residents, the latter often arrive there for their daily needs. In the circumstances of the case at bar, I have not found that use of these measures in the context of the obligation to provide notification provides no cause for intervention on our part. I shall clarify my reasons.

The lands which are the subject of this petition are unregulated and under these circumstances, I accept the Respondent's claim that it was not possible to identify the owners with certitude and demand notification of the submission be given to the owners directly. Additionally, as indicated by Daniel Halimi's affidavit provided by the Respondent, notification in the manner in which it was done in the case at hand is the common practice in the Judea and Samaria Area. The rule with respect to interpreting laws is that weight should be given to the manner in which the competent official has interpreted his authority, if his interpretation thereof is considered possible (see: AAA 9654/06 **Society for the Protection of Nature in Israel v. National Building and Planning Council Subcommittee for Objections**, §13 (unreported, May 5 2008); CivA 4257/94 **Tel-Aviv Stock Exchange v. A T Rabbinic Literature Database**, IsrSC 50(5) 485, 525-526 (1997); HCJ 547/84 **Off HaEmek, Registered Agricultural Association v. Ramat Yishay Local Council**, IsrSC 40(1) 113, 145-146 (1986)).

It is indeed possible to say that in the circumstances of the case at hand the authorities could have followed the path outlined in Section 89a of the Planning and Building Law (although, as stated, it does not apply to the Area) and put signs notifying of the submission of the plan in the lands themselves. Alternatively, it was possible to notify the head of the local council of the submission of the plan in order to have him attempt to locate the landowners. I do not wish to determine iron-clad principles with respect to these possible actions (I presume that the authorities are able to consider, with an eye to the future, whether these measures should be implemented where

appropriate). This is so since in this case, the objection Beit Iksa residents filed against the secondary plan, even if without full disclosure of names and without appearing for a hearing, along with the objection filed by Peace Now, indicates that the existence of the plan was known in the community and therefore, the purpose of the aforesaid provision had been fulfilled.

Parenthetically, it should be noted that the objection filed by unnamed Beit Iksa residents with respect to the secondary plan is not to be considered a substitute for on objection filed by the Petitioners. In the absence of any indication that the Petitioners took part in filing the aforesaid objection and considering their statements indicate that they were not parties thereto, indeed, the fact that an objection had been filed by a different party does not "exempt" them from filing their own objection (see HCJ 3581/07 **Kalo v. National Committee for State Infrastructure**, §13 (unreported, April 18, 2010); HCJ 9074/09 **Banai v. Inspector of Insurance, Ministry of Finance** (unreported, February 7, 2010)). Indeed, the objection must refer to the concrete particulars of the person or agency wishing to object to the plan, as the particulars relevant to one person living in the community and his land are not necessarily identical to the particulars relevant to another person and another plot of land. Every segment of the area covered by the plan may have distinct characteristics and different circumstances which would justify different planning approaches and, as a result, the filing of separate individual objections.

Thus, the Petitioners have failed to counter the argument regarding subjective delay.

Objective delay

22. The Petitioners' failure to submit the petition in a timely fashion amounts to **objective delay**. During the months and years in which the Petitioners failed to take action, the planning and implementing agencies have not been idle and have taken various steps to promote and implement the plan. This holds true for the section which is the subject of the petition and for other sections of the planned route.

The route of the section which is the subject of the petition was formalized at the conclusion of lengthy planning procedures during which various alternatives were considered, including those suggested by the Petitioners in their petition. In this process, the access points to the east and west portals of tunnel 3 were examined. This examination included tours on the ground in the presence of representatives from the Judea and Samaria supreme planning committee and from the Railway and the submission of the findings made in these tours to the authorizing agency. An environmental survey was conducted with respect to the west portal. This survey indicated that the alternative that was chosen was environmentally and topographically preferable to the one suggested by the Petitioners. An additional alternative for accessing the east portal which was examined traversed Mevassert Tzion. Following deliberations, this alternative was also rejected, for reasons related to the length of the road, its topographic characteristics and its location in the heart of a residential community.

Concomitant with planning procedures and once the alternative which is the subject of the petition was selected, various steps were taken on the site to reduce the environmental damage, including sending the plan to a hydrologist for an expert opinion. The hydrologist's opinion indicated that the Loz spring, which flows in the area would not be harmed by the planned route. In addition, the Railway funded a number of activities near the spring, including the fortification of terraces, the regulation of the water flow, cleaning and the building of a fence around the spring in order to prevent the vehicles working on the railroad from driving into the area. Work on clearing the logistics areas and roads has recently begun and the necessary procedures for obtaining permits to begin digging tunnel 3 are underway.

23. Thus, the long period of time in which the Petitioners refrained from making their voices heard – be it the longer period since approval of Plan 54/1 or the shorter period since the deadline for submitting objections to the secondary plan – has been utilized by the Railway for planning and examination as well as physical activities on site to prepare the area or reduce the environmental damage. The Railway relied on valid plans in various stages in order to commence the actions necessary for implementing the project. The submission of this petition at this late stage, after the project has already been put into motion, if the petition were indeed accepted, would compromise the legitimate interests of the Israel Railway and of third parties with whom it has entered into contractual obligations. As such, the delay in filing the petition harms the Railway's interest in continuing to advance the Beit Iksa route, following completion of the planning procedures and after parties wishing to make their voices heard had been given a reasonable chance to have their positions considered and weighed during the process of determining the route. It also harms the public's interest in advancing the railway project, the economic, environmental and social advantages of which are clear, in efficient manner and within a reasonable amount of time. Changing the approved route in the valid plans and reopening planning procedures would significantly postpone the opening of the high speed train to Jerusalem and, as a result, would significantly harm the public's interest. The remarks of Justice T. Orr in HCJ 7174/94 **City of Tira v. Minister of Energy**, §9 (unreported, December 22, 1994), a case regarding the building of a voltage line by the electrical company, are relevant:

> One must recall that accepting the Petitioners' demands, or part thereof, would require changes to National Master Plan/10. This would require proceedings that may take a substantial period of time, such as planning a new route, coordinating said route with the various communities it would traverse, preparing a new report with regards to environmental affects, obtaining approval for the new plans from the competent authorities, including validation from the Government of Israel. This would impede the possibility of prompt transmission of electricity through Line 400, which was to begin in late 1995, resulting in significant damage and harm to electricity consumes in the country. Under these circumstances, the Petitioners' delay in taking legal action has added weight.

24. As stated, beyond the ramifications of the delay resulting from the operations that have been implemented in the specific segment of the route which is the subject of the petition, the delay in submitting the petition has also led to other operations in other parts of the route, based on the objective situation that had been created. In this context, the Railway notes that the segment running between the Anava and Latrun interchanges, which includes a long bridge, built partly under Plan 54/1 has almost been completed. Additionally, in October 2007, a joint contractor bid has won the Railway tender for the segment of the route running between Shaar HaGai and Mevasseret Tzion. An order to begin construction on this segment was issued some time ago and the parties have signed a 1.6-billion-shekel contract to build a bridge and two tunnels. Excavation along a 600-meter stretch has begun for the purpose of building one of the tunnels in this segment. The drilling of posts for the main supports of the bridge has been completed and work has begun on an access road to the eastern side of the second tunnel. The winner of the tender for another segment which includes a long bridge that would connect the railway between the two tunnels in the area of Arazim Valley Park, was announced in March 2010. A 139-million-shekel contract was signed with the company and it has completed the preliminary planning of the bridge and is undertaking preparations for the building thereof. With respect to the tunnels in this segment, indeed, the winner of the tender for building the same has been announced, a 640-million-shekel contract has been signed, an order to begin construction has been issued and the company has begun excavating the various tunnels. In addition, the relevant logistics sites have been completed

and the temporary access roads have been built. Finally, at the Binyaney HaUma station, which is located at the end of the line, an 80-meter-deep pit has already been dug, ventilation shafts have been built, excavation for the main systems building has been completed and the first story of the building has been built.

Concomitantly with these actions, various planning procedures have been undertaken for developing supplementary plans designed to provide solutions to needs that have emerged during the work on the main line. Apart from the secondary plan which is the subject of the petition, to which we refer hereinafter, additional supplementary plans have been made as part of an overall move to acquire land designated for logistics sites for the contractors who will be implementing the project, for depositing excess sediment, and for breaking ground for access routes. Among the secondary plans that have been drawn and approved are plans for the area between the Ben Gurion International Airport and Kiryat Anavim, the area between Kiryat Anavim and Jerusalem and the railway station at Binyaney HaUma.

23. [*sic*] Indeed, the actions described above have been taken, as noted, in other segments of the railway route. However, I accept the position that there are connections, and at least a mutual influence between the segment which is the subject of the petition and segments in the vicinity, whereby the building of one segment relies, *inter alia*, on the reality that was created as a result of construction in another segment. Indeed, a large scale transportation system, such as the one which is the subject herein, is naturally an integrated system in which each component affects the other components and each component is connected to the other components within the overall transportation complex. Even if changing the route in the segment which is the subject of the petition does not result in most of the operations on other segments coming to naught, it might, nevertheless, lead to some changes in those segments.

Thus, considering the money that has already been spent, the contracts signed and the time invested in planning and actual construction, my conclusion is that accepting the petition at the present time would result in severe harm to the interests of the Railway, third parties involved in the project, and most importantly, the public interest.

Infringement on the rule of law

24. Should the petition be accepted in order to prevent a severe infringement on the rule of law despite the existence of the first two tenants of *laches*, subjective and objective delay? In HCJ 170/87 **Asulin v. Mayor of Kiryat Gat**, IsrSC 42(1) 678 (1988), the Court presented various considerations to assist in ruling on the question of whether the extent of harm to the rule of law might justify hearing a petition despite its late submission. Among these considerations are whether the infringement on the rule of law is specific to the petitioner or pertains to a larger population; whether it was done in good faith; whether its results are singular or ongoing and whether it can be ascertained without reference to documents and information that have been lost due to the passage of time (pp. 694-695; see also Shraga and Shahar, p. 213). In fact, the test at issue is a test of balancing between interests. In other words, when considering whether a petition should be heard despite its late submission, one must examine whether the benefit that would be secured for the public interest and the rule of law as a result of ceasing the action that is challenged exceeds the harm caused to the various parties and the public interest as a result of the late submission.

25. According to the Petitioners, the route of the railway that has been selected breaches international humanitarian law. It is motivated by extraneous considerations and constitutes an irreversible, unreasonable and disproportionate violation of their fundamental rights.

The territory which is the subject of the petition is held under "belligerent occupation" (see HCJ 2150/07 **Abu Safiyeh v. Minister of Defense**, §14 (unreported, December 29, 2009) (hereinafter:

Road 443); HCJ 1661/05 **Gaza Coast Regional Council v. Knesset of Israel**, IsrSC 9(52) 481, 514-516 (2005) (hereinafter: **Gaza Coast**)). In a regime of this kind, which applies in territories that have not been annexed to the State of Israel, the military commander serves as the long arm of the state (HCJ 7957/04 **Mara'abe v. Prime Minister of Israel**, IsrSC 60(2) 477, 492 (2005) (hereinafter: **Mara'abe**)). The normative framework in these territories is derived from the rules of public international law regarding belligerent occupation. The main instruments are the Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907 (hereinafter: **the Hague Regulations**), which reflect customary international law (**Mara'abe**, ibid., see also HCJ 393/82 **Jam'iat Iscan al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785, 792-793 (1983) (hereinafter: **Jam'iat Iscan**)). In addition, the international law applicable to a territory which is under belligerent occupation is also enshrined in the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: **the Fourth Geneva Convention**), whose customary provisions have become part of the laws of the State of Israel, and in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, whose customary provisions are also part of the law of the State of Israel despite the fact that it is not party thereto. International human rights law may be used where lacunas are found in the aforementioned laws (see CrimA 6659/06 **A. v. State of Israel**, §9 of the opinion of President **D. Beinisch** (unreported, November 11, 2008); **Mara'abe**, p. 492; **Gaza Beach**, p. 517).

The fundamental principles of Israeli administrative law provide another source for the laws applicable in the territories held by Israel under belligerent occupation, including the norms of fairness, reasonableness and proportionality that are to be exercised when using powers (see **Jam'iat Iscan**, p. 793; **Mara'abe**, pp. 492-493). In the context of this proceeding, we need not address the question of fundamental rights under Israeli constitutional law, since, as explained below, the right to property, which is the subject herein, is also enshrined in international law (see HCJ 9593/04 **Morar v. IDF Commander in Judea and Samaria**, §14, IsrLR [2006] (2) 56; HCJ 10356/02 **Haas v. IDF Commander in the West Bank**, IsrSC 58(3) 443, 460-464 (2004) (hereinafter: **Haas**); cf: Liav Orgad, *A Constitution – by Whom and for Whom? On the Application of the Basic Laws*, **Law and Governance**, 12(1) 145 (2009)).

26. Article 43 of the Hague Regulations stipulates as follows: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". This Article has been interpreted as a quasi-constitutional regulation which frames the law of belligerent occupation (HCJ 69/81 **Abu Aita et al. v. Regional Commander of Judea and Samaria**, IsrSC 37(2) 197, 309-310 (1983); **Road 443**, §18) and like the remaining articles of the Hague Regulations, it reflects a balance between the legitimate interests of the occupying power on the one hand and the requirement to secure the needs of the local civilian population on the other (**Jam'iat Iscan**, p. 794, HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel**, IsrSC 58(5) 807, 833 (2004)).

In the framework of the military commander's duty to secure the rights of the civilian population living in the territory, primarily those of "protected persons" (for the definition of the term see Article 4 of the Fourth Geneva Convention; Orna Ben Naftali and Yuval Shani, **International Humanitarian Law**, 175-177-184 (2006) (hereinafter: **Ben Naftali and Shani**)), Article 46 of the Hague Regulations stipulates: "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." (Emphases added, U.V.). Article 23(g) stipulates: "[…] it is especially forbidden […] [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." In addition to these provisions, Article 52 of the Hague Regulations stipulates: "Requisitions […] shall not be demanded […] except for the needs of the army of occupation. They shall be in proportion to the resources of the country, […] Contributions in kind shall as far is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible." (For more details see **Ben Naftali and Shani**, pp. 178-184). Thus, the occupying power may not seize lands for purposes other than military purposes, unless the lands are used for the benefit of the protected persons. This rule also dictates that the occupying power may not seize the lands for its long-term needs, as the latter's possession of the territory is of a temporary nature (see: David Kretzmer, **The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories**, 73 (2002) (hereinafter: **Kretzmer**). In addition, the military commander may not consider the national, economic or social needs of the occupying power, if these do not affect this country's security interests in the territory or the interests of the protected persons living therein (see HCJ 790/79 **Duweikat v. Government of Israel**, IsrSC 34(1), 17 (1979) (hereinafter: **Duweikat**); **Jam'iat Iscan**, §13; **Road 443**, §23). Indeed, "A territory held under belligerent occupation is not an open field for economic or other exploitation […] Therefore, the military government may not plan and implement a road system in an area held under belligerent occupation if the purpose of this planning and implementation are simply to constitute a 'service road' for its own state" (**Jam'iat Iscan**, Ibid., **Kretzmer**; pp. 85-89).

27. In the absence of a claim regarding a military need for the railway line, the Petitioners focus their submissions on the argument that the railway line connects Tel-Aviv and Jerusalem without stations inside the Judea and Samaria Area and does not serve the population of the Area in any way. The Respondents, on their part, do not dispute the fact that the military commander's power to seize private lands is subject to the seizure being carried out for the benefit of the local population. However, they claim that one must look at the issue from a broad perspective which does not focus solely on the railway line which is the subject of the petition. Such a perspective views this line as part of an entire railroad system that will include lines connecting between various cities in the Judea and Samaria Area. Some of these lines are under construction and others will be built in the future. Based on this perspective, the State contends that the overall planning and monetary investment in railway planning in the Judea and Samaria Area serve the Palestinian residents of the Area.

The content of the obligation to ensure the needs of the population in an area under belligerent occupation as well as public order and safety, raises complex questions. It is clear that the military commander must protect the human rights of the residents living in the territory and make sure to select a route that causes the least possible injury to each and every person among the local population (HCJ 2942/05 **Mansour v. State of Israel**, §22 (unreported, October 26, 2006); HCJ 6451/04 **Halawa v. Prime Minister**, §10 (unreported, June 18, 2006)). There is also no dispute that expropriating lands for the purpose of a project that would serve only residents of a country who do not live in the territory under belligerent occupation contravenes international law and as such, exceeds the competency of the military commander. Yet, what of cases in which a number of objectives are pursued in tandem? Thus, for example, would land expropriation in the Judea and Samaria Area for a purpose that serves both protected persons and Israelis living inside the Green Line be considered as ensuring the needs of the population in the territory held under belligerent occupation? In a case such as this, is one required to examine the primary objective, as is the practice in other contexts? (See **Duweikat**, §20; HCJ 1030/99 **Oron v. Knesset Speaker**, IsrSC 56(3) 640, 666 (2002); Dafna Barak-Erez, **Administrative Law**, 667-669 (2010) (Hereinafter: **Barak-Erez**)).

28. I have seen no need to make a finding on these questions in the context of the narrow question at hand – the question of the implication of rejecting the petition for *laches* on the rule of law. This is so as in my view, even if we were to suppose, for the sake of argument, that the Railway's action does not conform to the law applicable in the Area including all aspects thereof, indeed, in the circumstances, the harm to the rule of law does not exceed the damage caused to the interests of the Railway, third parties and the public interest, should the petition be accepted despite the late submission. My conclusion is a result of a number of reasons taken together, as detailed below:

29. **First – the temporary nature of the expropriation and its scope**. The size of the privately owned expropriated area is some 11.5 dunam, of which only 4.5 dunam, less than 10% of the secondary plan, are designated for permanent expropriation for the purpose of building an emergency route. According to the professional opinion of Railway officials, in practice, this purpose would require **only 1.8 dunam**. The rest of the lands were appropriated for the purpose of temporary roads to be used during the construction of the railway line and, once it is completed, the expropriation order will be cancelled and the lands will be returned to their owners. The size of the expropriated area, the temporary nature of the expropriation and the issue of the extent to which it is required for the purpose of achieving the public purpose underlying the expropriation all bear on the issue of the reasonableness of the expropriation (see Arieh Kamar, **Land Seizure Laws**, 316-320 (Seventh Edition, 2008) (Hereinafter: **Kamar**)). As explained, the temporary nature of the expropriation is particularly significant when the lands at issue are located in a territory which is held under belligerent occupation, wherein the dimension of time is an inherent component, since the occupier's possession of the area is temporary. Limiting the expropriation to the minimal area required and to the shortest duration possible conforms to the principle of proportionality (and particularly to the second test of proportionality – the least injurious measure). This Court has often addressed the centrality of this principle in international law in different contexts (see: **Beit Sourik**, pp 836-846; **Mara'abe**, p. 507; HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel**, §41-46 (unreported, December 14, 2006); see in general: Yuval Shani, **The Proportionality Principle in International Law** (2009); Aharon Barak, **Proportionality in Law – Impingement on Constitutional Rights and their Limitations**, 250-257 (2010)). In addition, the fact that the Railway continually reviews the necessity of the expropriated land and its size and does not "use" areas that were needlessly expropriated (this is expressed in its claim that the area that is actually used has been reduced from 4.5 dunam to just 1.8 dunam), fulfills the administrative principle regarding the ongoing duty to use discretion and continually revisit the necessity of the impingement on rights (see HCJ 297/82 **Berger v. Minister of Interior**, IsrSC 37(3) 29, 46 (1983); **Barak-Erez**, pp. 201-202). This too contributes to reducing the harm to the rule of law caused by the expropriation, inasmuch as such harm did indeed occur.

30. **Second –** The Railway has carried out and will carry out **various actions intended to reduce the harm done to the petitioners**, the owners of the expropriated lands. Thus, olive trees that were located in the area were removed. According to the Railway, there were only a few such olive trees, as opposed to hundreds as the Petitioners claim. According to the Railway, much planning effort was made in advance in order to reduce damage to the environment. This included, as stated, fortification of the olive tree terraces, regulation of the flow in the Loz spring, etc. As for future actions – according to the provisions of the secondary plan, the Railway will restore lands that were not required for the emergency road and lands that were expropriated temporarily and return them to their owners. Section 11.3.2 of the secondary plan protocol stipulates that topographic restoration of the temporary roads, which will be carried out under close monitoring, will be completed within a year and the area will be restored to its original designation – agriculture.

31. **Third** – The Petitioners were offered monetary compensation for the expropriation, as required by law. In addition, the Railway has reached an agreement with the Petitioners whereby it would

provide them with mature trees which they themselves select from a nursery. Providing compensation for land expropriation plays an important role in reducing and mitigating the proprietary harm to the individual, preventing the expansion of the damage caused by the expropriation and helping individuals move forward (See **Makhoul**, §34; CivA 5964/03 **Estate of Edward Aridor, Deceased v. City of Petah Tikva**, §10 (unreported, February 16, 2006)). The payment of compensation also promotes distributive justice, mitigates the inequality inherent in the expropriation and helps the expropriating authority internalize the cost of the expropriation, which increases the chances that it will resort to expropriation only where absolutely necessary (**Makhoul**, Ibid., **Kamar**, p. 48; Hanoch Dagan, *Distributive Considerations in the Law pertaining to Governmental Land Seizure*, **Iyunei Mishpat** 21(3) 491, 495 (1998)). Indeed, the situation at bar is not an "ordinary" situation of land seizure and one cannot ignore its political context and the baggage it carries. However, form the point of view of the Petitioners as landowners protesting the seizure of their property and the harm to their livelihood, compensation does mitigate the harmful effect of the expropriation and renders it more proportionate.

32. **Fourth** – The route which is the subject of the petition was not selected in disregard of the normative aspects applicable to the matter at hand, including those derived from the application of international law to the Area, as interpreted by the Attorney General. Note well: After the Railway determined that "It is impossible to implement and operate the project in the required effective manner in this location without use of the area included in the expropriation order", following the examination of various alternatives, it took action, as specified, to reduce the harm and make sure that residents of the Judea and Samaria Area will benefit from the overall project. In this context, the Respondents clarify that planning authorities in Israel and in the Judea and Samaria Area are currently advancing further plans which, in future, will link the Judea and Samaria Area to the railway infrastructure inside Israel. The Railway points to, *inter alia*, Plan 54/6 whose purpose is building a railroad from Mevasseret Tzion to Ramallah, which was approved for deposit some time ago and for which an environmental report is being prepared, as well as National Master Plan 54, whose purpose is to design a general plan for railroads in the Judea and Samaria Area. This national master plan has been reviewed and examined by the supreme planning committee and will be transferred for review by the Palestinian Authority and the special planning committees in the Judea and Samaria Area. The Respondents note that according to agreements which are currently being formulated, the Railway will bear the cost of planning these railway lines which are designated for serving residents of the Area at a cost of millions of shekels. Without addressing these arguments on their merits, I believe that the Railway did not directly intend to violate rights or breach international law. The fact that its actions were carried out in consultation with legal officials and with the approval of the Attorney General as to the lawfulness of the route under international legal criteria, indicates that the authorities acted in good faith and that they strove to arrive at an arrangement that would be consistent with legal provisions (irrespective of the question of whether the arrangement itself is lawful).

These aforesaid reasons, taken together, have led me to the conclusion that even if I presume that the rule of law has been undermined due to the expropriation, an issue regarding which I did not see fit to make conclusive findings in the context of the petition at bar, in the final balance, the extent of this harm does not exceed the harm that would be caused to the interests of the Railway, third parties and the public interest, in a manner that would justify hearing the petition despite its late submission.

Based thereupon, should my opinion be heard, I shall propose to my colleagues to deny the petition due to *laches* on the part of the petitioners. No costs order is issued.

Justice

Justice S. Joubran:

I concur.

Justice

Justice E. Hayut:

I concur.

Justice

Ordered as per the opinion of Justice U. Vogelman

Given today, 7 Elul 5771 (September 6, 2011)

Justice Justice Justice

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