At the Supreme Court Sitting as the High Court of Justice

HCJ 3103/06

Before:	**Honorable Justice A. Procaccia** **Honorable Justice M. Naor** **Honorable Justice S. Joubran**
The Petitioners:	1. Shlomo Valero 2. Vivienne Cohen Valero 3. Moshe Valero 4. Liora Shamgar (Valero) 5. Sarah Rachel Ashkenazi (Valero)
	v.
The Respondents:	1. State of Israel 2. Attorney General 3. IDF Commander in the Judea and Samaria Area 4. Custodian of Abandoned and Government Property in Judea and Samaria
Petition for *Order Nisi*	
Representing the Petitioners:	Adv. Renato Yarak; Adv. Ohad Yarak
Representing the Respondents:	Adv. Gilad Shirman, deceased.

Judgment

Justice A. Procaccia

1. This is a petition filed by the heirs of Moshe (Moise) Valero, Deceased (hereinafter: **the Deceased**), seeking a declaration that the immovable property located in the city of Hebron and

registered under the Deceased's name should be deemed immovable property that has been expropriated by the State of Israel, or expropriated from its owner, and alternatively, that it be expropriated now in light of the fact that there is no intention to return it to its owner in the foreseeable future. The remedy of compensation for expropriation of immovable property and for use thereof over the course of many years in a manner that precluded the owner's enjoyment thereof is also sought.

Background

2. The immovable property which is the subject of the petition was purchased by the Deceased in the year 1935 in the city of Hebron and was registered in his name in the city's mandatory land registry. The property comprises four adjacent plots registered as follows: plot A1, size 843.49 square meters, registered on page 31 of book 3; plot B, size 206.39 square meters, registered on page 33 of book 3; plot C1, size 238.18 square meters, registered on page 34 of book 3 and plot C2, size 125 square meters, registered on page 35 of book 3 (hereinafter referred to together as **the property**). The Deceased passed away in 1945 and his property was divided among his three children. The Petitioners herein are two of his children and the heirs of the third.

3. Beginning in 1948, the Judea and Samaria Area (hereinafter: **the Area**), including the city of Hebron, came under the rule of the Hashemite Kingdom of Jordan. An order published on March 26, 1967, vested in the Jordanian custodian of enemy property (hereinafter: **the Jordanian custodian**) all immovable and movable property located in the Hashemite Kingdom of Jordan and belonging to the individuals whose names appeared in the Order (hereinafter: **the Vesting Order**). "Moshe Valero and company" appeared therein.

4. Since 1967, the Area has been held under belligerent occupation by the IDF. In Proclamation No. 2 of the IDF Commander of the Judea and Samaria Area, dated June 7, 1967, the military commander ordered that all property that had belonged to the Jordanian state or had been registered in its name be transferred to his sole custody and management (Section 4 of the Proclamation concerning Law and Administration (Judea and Samaria) (No. 2) 5727-1967 (hereinafter: **Proclamation No. 2** or **the Proclamation**). The Order regarding Government Property (No. 59) 5727-1967 (hereinafter: **Order No. 59**), issued by the IDF commander in the Area, empowered the custodian of government property in Judea and Samaria (hereinafter: **the Israeli custodian**), *inter alia*, to take possession of Jordanian government property and administer it.

5. Between 1967 and 1980, the Deceased's heirs contacted the Israeli custodian and the law staff officer of the IDF Judea and Samaria Area headquarters, asking to be registered as right holders in the property by virtue of inheriting the Deceased's assets. In 1998, the Petitioners again contacted the Israeli custodian with a similar request, but did not receive a satisfactory response. They were not provided with information they had requested about the property, including the amount of profit derived thereof and the identity of the persons in possession thereof. The Petitioners went on to contact various other officials. However, they maintain that they did not receive pertinent responses to their communications. The Petitioners ultimately filed a claim against the Respondents at the Jerusalem District Court (CC (Jerusalem) 6515/04 **Valero v. City of Jerusalem**). The claim was deleted on consent in the absence of material jurisdiction. Hence the petition at bar.

Petitioner's Arguments

6. According to the Petitioners, they have been denied the ability to exercise their proprietary rights as the lawful owners of the property and the right to gain any sort of financial benefit from it. They are unable to make sale, transfer or leasing transactions, etc., and are also unable to register

inheritance rights to the assets. As a result, their constitutional right to property is violated. As such, since the individuals who have effective control and possession of the property are officials acting on behalf of the State of Israel, and since they treat the property as its owners, the property should be deemed expropriated by Israel beginning in June 1967 – the time the belligerent occupation of the Area by the IDF commenced. Alternatively, at minimum, the possession and use of the property by the IDF should be seen as a de-facto expropriation of the property by the military beginning from a time to be determined by the Court. According to the Petitioners, when a resident of Israel is registered as the owner of immovable property located in the Area and is precluded from extracting financial benefits from said immovable property, then despite the vesting of the property in the Jordanian custodian, its registered owner must be seen as having ownership title thereto and he must be compensated for its expropriation. The argument is, therefore, that the State of Israel must compensate the Petitioners at a rate commensurable with the value of the property, as appraised from June 7, 1967 until the date on which payment is made, in accordance with Section 12(1) of the Land Ordinance (Acquisition for Public Use) 1943.

Alternatively, the Petitioners request that we instruct the Respondents to take the action of expropriating the property now and to compensate them accordingly, either in the form of money or alternative property. The Petitioners argue that the position of the Respondents, according to which, the fate of Jewish owned property that was vested in the Jordanian custodian in 1948 and has been considered "government property" since 1967 will be determined only as part of a future peace agreement, cannot be accepted. They add that they have been made aware that the Israeli custodian had, in the past, negotiated with other Jews who owned property in the Area and offered them alternative property inside the State of Israel.

The Petitioners further argue that the status of the custodian of government property is that of a trustee whose role is to safeguard and administer the property he holds until the return of the original owners, whose rights in the property survive. Upon the return of the owners, the role of the custodian ends and he is required to return the property to its original owners. According to this argument, the custodian, or the State, has no proprietary rights to these assets. On this issue, the Petitioners draw on Israeli law with respect to absentee property, in particular the Absentee Property Law 5710-1950 (hereinafter: **the Absentee Property Law**). Moreover, according to the Petitioners, once the Israeli custodian has seized the assets, it can no longer be said that they are held by an enemy state, but rather by the State of Israel, and as such, can no longer be considered enemy property and the State should not continue to hold them. The Petitioners, being citizens of the country that is now in control of this property, should no longer be seen as enemy subjects whose property may be seized. Therefore, the property should be released to them, as the owners thereof, and as the State refrains from doing so, its possession of the property should be deemed to be an act of expropriation warranting compensation.

Respondents' Arguments

7. The Respondents argue that the petition must be dismissed. The essence of their argument is that the historical owners of property vested in the Jordanian custodian during Jordanian rule do not have a vested right to have the property released or to receive compensation in lieu thereof, and that the matter of such owners may be discussed, if at all, in the framework of a future peace treaty, if and when such is made with respect to the Area. Therefore, the Petitioners should not be viewed at the present time as the owners of the property or as individuals whose property had been expropriated by the State, and they are not entitled to any sort of compensation. The following is the Respondents' line of argument:

First, with respect to third-party rights to the property, it is argued that other individuals have had possession of the Valero property since 1953, in a manner that gives rise to a claim of

prescription on their part (exhibit R/4). The property is registered in the register of deeds and is not regulated land. Therefore, the individuals in possession thereof may cite prescription against any demand by the authorities to have them removed. The authorities, for this purpose, are, first, the Jordanian custodian who had acquired control over the Valero property pursuant to a vesting order under the Trading with the Enemy Ordinance, 1939 (hereinafter: the **Trading with the Enemy Ordinance**), and thereafter to the Israeli custodian who received into his possession all property previously acquired by the Jordanian custodian pursuant to Order No. 59. It is argued that eviction may be precluded in private property that is registered in the register of deeds, such as the Valero property, due to adverse possession over many years. The individuals in possession of the property have a right to prescription, and therefore the Jordanian custodian did not take action to have them removed. The Israeli custodian replaces the Jordanian custodian on this matter as well. The occupants of the Valero property could have already claimed prescription at the time the IDF entered the Judea and Samaria Area in 1967. Their rights have survived to the present day.

Moreover, Jordanian law provides lessees with broad protection vis-à-vis landlords. The tenants in the property in the case at hand enjoy protected tenancy rights and their eviction requires specific causes, which have neither been alleged nor proven.

8. The Respondents specify that the three plots, A1, B and C1, are recorded in the 1935 register of deeds under the name Mosheh Valero and that plot C2 is not registered under his name, with the exception of rights to the roof of a structure housing two shops that was present in that location in 1935. In the register of city property taxes (tachmin) for the City of Hebron from the years 1962-1963, these plots are registered under the names of other individuals. Plot A1 is registered to 'Abd al-Fatah Naser a-Din and his brother as owners, and others as subtenants. It houses several shops, most of which are closed. Plot B is registered in the tax registry under the City of Hebron as owner and other individuals as subtenants. It contains one two-story structure whose top floor is used by the City of Hebron to provide various municipal services. It is occasionally used by security forces. The ground floor of the structure contains shops which are closed due to the security situation. Plot C1 is registered in the tax register under the Nasser a-Din family as owners and other individuals as subtenants. It contains a two-story structure. The top floor is unfinished, and the bottom floor is used for various commercial purposes by subtenants. Finally, plot C2 is registered under the name of Abu Munshar Massudi and others and to other individuals as subtenants. The ground floor contains shops that are used as a grocery store by one of the listed tenants and by other individuals. The appearance of the top floor indicates that it has been built recently.

   As argued, third parties have rights to the property by virtue of prescription and protected tenancy. According to both domestic Jordanian law and international law, the rights of the protected persons must be respected. For this reason alone, it is doubtful whether the Petitioners could be deemed to be right holders whose property had been expropriated or maybe expropriated by the Respondents.

9. With respect to the status of Jewish land in the Area, the State argues as follows:

   In mandatory Palestine, some of the land in Jerusalem and Hebron belonged to Jews, dating back to historic Jewish communities in the area. Most Jewish-owned land was purchased as part of the Zionist settlement movement. Some 30,000 to 40,000 dunum of Jewish land came under the control of the Jordanian government following the War of Independence.

   During the War of Independence, parts of mandatory Palestinian were conquered by the armies of Jordan and Egypt. In 1950, Jordan annexed the areas under its control and issued Proclamation

No. 55 in which all residents of the State of Israel were declared "enemies" of the Kingdom of Jordan. Following the Proclamation, the British Mandate's Trading with the Enemy Ordinance was applied to property inside Judea and Samaria and East Jerusalem that belonged to Israelis, and a Jordanian custodian of enemy property was appointed. The Jordanian custodian administered this property, and at least some of it was vested in him pursuant to vesting orders. He performed various actions in this property, whether for public or private use.

10. After the IDF entered the Judea and Samaria Area in 1967, it established in a proclamation that the law that was in force in the Area on June 7, 1967 would remain in effect, subject to adjustments listed in the proclamation. The Trading with the Enemy Ordinance that was in force in the Area during Jordanian rule has remained in effect pursuant to this provision.

Pursuant to Order No. 59, Jordanian government property, including enemy subject property, was transferred to the administration of the Israeli custodian of government property. The result is thus, that immovable property belonging tosubjects of an enemy state which constituted Jordanian government property was transferred to the possession of the Israeli custodian for the purpose of administration thereof.

Respondents' position is that the vesting of the property in the Jordanian custodian has severed the original owners' title to the property and that their rights had expired. However, upon the cessation of hostilities and in the framework of peace arrangements, the government could revive such rights should it see fit to do so, while taking into account the rights that have accrued to third parties in the interim. This position is purportedly based on the provisions of the Trading with the Enemy Ordinance, the principles of international law and policy considerations. According to the Trading with the Enemy Ordinance, the vesting of the property in the Jordanian custodian constitutes a full and complete vesting of private property, which is similar in some respects to the arrangement contained in the Absentee Property Law, according to which the rights of the original owners do not survive the vesting of immovable property in the custodian. The end of hostilities does not automatically give the original owners the right to retrieve their property. However, retrieval of property or receipt of its equivalent value may be an issue for peace treaty negotiations.

According to the State, the vesting of the Valero property in the Jordanian custodian obviated the Petitioners' rights to this property and its fate will be decided according to future regional agreements.

11. The State adds that the law of belligerent occupation, which governs the IDF’s control over Judea and Samaria, also instructs that the Israeli custodian may not release the property from his possession. This position derives from the rules set forth in international law, whereby the occupying power that replaces the sovereign does not acquire ownership of the government property it receives as part of the belligerent occupation, but rather simply holds it, administers it, and has a right to enjoy its fruit. Therefore, it may not release any government property it holds or vest rights thereto in others.

12. The State adds that, until the mid-1990s, it did, in a number of cases, reinstate the rights of original owners to property, whether directly or by way of granting building rights. In 1997, a government policy preventing the release of property as aforesaid was formulated. The policy has left the issue of compensating original owners for consideration in the framework of a future regional arrangement. The subject of the petition has complex and sensitive repercussions, including concern of a possible wave of claims concerning Jewish-owned property in the Judea and Samaria Area. It also bears directly on the issue of the refugees and their claims to property inside Israel, which is a central issue in the Israeli-Palestinian conflict. The complex issue of

property rights claimed on both sides, both in Israel and in the Area, directly affects the overall political and security situation in the Area. Therefore, even if the Israeli custodian had the authority to release the property to the original owners, this should not be done due to complex considerations of state policy.

13. To summarize the State's arguments: the property at issue was lawfully vested in the Jordanian custodian, became Jordanian government property, and was administered by the Jordanian custodian. In the interim, third parties have accrued rights to the property. When the belligerent occupation of the Area by the IDF commenced, the Israeli custodian became responsible for Jordanian government property. According to the law in effect in the Area and international law, the custodian must administer the property as Jordanian government property, subject to the rights of third parties. Thus, no act of expropriation was taken with respect to the Petitioners' property; its administration by the Israeli custodian cannot be deemed as quasi-expropriation and the Petitioners obviously have no right to compensation. The possible resolution of the issue raised by the Petitioners may be achieved as part of future peace accords. Aside from all this, even if the Israeli custodian had the power to release the property of the original owner, indeed, complex policy considerations justify refraining from doing so and in any event, this issue does not justify judicial intervention.

Decision

The normative framework

14. The remedies sought in the petition are recognition of the Valero property as expropriated by a public authority, or requiring such expropriation due to its prolonged possession by the custodian of government property, and compensation both for such expropriation and for the use made of the property by others for a prolonged period of time.

15. As detailed above, the Valero property in Hebron was transferred to the control of the Hashemite Kingdom of Jordan following the War of Independence and then vested in the Jordanian custodian of enemy property. Its fate was determined according to Jordanian law. Later, in 1967, the Area came to be controlled by the IDF under belligerent occupation – a situation that remains in effect today. The Petitioners bear the burden of establishing their right to have the property returned to them, or for payment of its equivalent value, under Israeli, Jordanian and international law. It appears that they have not met this burden and have failed to establish a solid legal foundation that would lead to the conclusion that they continue to have an executable right of ownership to the land, that they are entitled to demand be exercised today, whether in the form of the return of the property itself or payment of its equivalent monetary value. Hence, the petition must be dismissed.

16. The normative framework relevant to the Valero property has three layers: **first**, the law in effect in mandatory Palestine until 1948; **second**, the law that applied to the property after the War of Independence and until 1967; and **third**, the law that has applied to the property from 1967 to the present day. We will examine this framework and its various layers.

The law in effect in mandatory Palestine until the War of Independence in 1948

17. The Valero property in Hebron was part of mandatory Palestine until the War of Independence in 1948. Until that time, Valero, and thereafter his heirs, were able to exercise their proprietary rights in the property without limitation. During the War of Independence, the Jordanian and Egyptian armies conquered parts of mandatory Palestine. Jordan conquered the West Bank and proclaimed that the mandatory laws of Palestine would remain in effect so long as they did not conflict with Jordanian law (CivA 459/79 **The General Committee of Knesset Yisrael v. al-**

Ayubi, IsrSC 35(4) 188, 190 (1981) (hereinafter: **al-Ayubi**); CivA 602/82 **Estate of Abu Nia' v. Mandlebaum**, IsrSC 37(3) 281, 287 (1983) (hereinafter: **Abu Nia' estate**); Eyal Zamir and Eyal Benvenisti, **Jewish Owned Land in Judea, Samaria, Gaza and East Jerusalem,** 48 (1993) (hereinafter: **Zamir and Benvenisti**)). In 1950, Jordan annexed the areas under its rule. In the same year, the governor of the West Bank issued Proclamation No. 55 which declared residents of Israel as enemies of the Kingdom of Jordan. The issuance of Proclamation No. 55 allowed for the Trading with the Enemy Ordinance to be applied to the property of Israelis inside Judea and Samaria. According to the Ordinance, a Jordanian custodian of enemy property was appointed and entrusted with the administration of this property.

The Trading with the Enemy Ordinance and the Order issued pursuant thereto

18. The Trading with the Enemy Ordinance empowered the High Commissioner to appoint a custodian of enemy property and vest enemy property in him pursuant to orders (section 9 of the Ordinance). It defined, *inter alia*, the term "enemy property", "assets" and "enemy subject" (Zamir and Benvenisti, p. 221).

19. Section 9(1) of the Ordinance clarifies the main currents underlying it as follows:

> Collection of enemy debts and custody of enemy property
>
> With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the High Commissioner may appoint custodians of enemy property for Palestine, and may by order –
>
> (a) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, or which would, but for the provisions of section six or section seven of this Ordinance, be payable to any other person;
>
> (b) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the administration by that custodian of such enemy property and regulate such administration as prescribed by order;
>
> (c) vest in the prescribed custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is not required by the order to be, vested in the custodian;
>
> (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects–
>
> I. property which has been, or is required to be, vested in a custodian by or under the order,
>
> II. property of which the right of transfer has been, or is required to be, so vested,

III. any other enemy property which has not been, and is not required to be, so vested, or

IV. money which has been, or is by the order required to be, paid to a custodian;

(e) require the payment of the prescribed fees to the custodians in respect of such matters as may be prescribed and regulate the collection of and accounting for such fees;

(f) require any person to furnish to the custodian such returns, accounts and other information and to produce such documents, as the custodian considers necessary for the discharge of his functions under the order;

and any such order may contain such incidental and supplementary provisions as appear to the High Commissioner to be necessary or expedient for the purposes of the order.

20. The Trading with the Enemy Order (Custodian), 1939 was issued pursuant to the Ordinance (hereinafter: the **Trading with the Enemy Order**). It sets forth detailed instructions with respect to the powers and functions of the custodian of enemy property.

Section 5 of the Trading with the Enemy Order sets forth:

(a) With consideration for the provisions contained in the following subsection and with the exceptions of such cases in which the High Commissioner prescribes otherwise, whether generally or with respect of a specific case, the custodian must hold until the conclusion of the current war, all money paid to him pursuant to this order and any property or right to transfer property vested in him under any vesting order, whereas following the war, the custodian shall administer the property and the right in such manner as prescribed by the High Commissioner.

(b) With consideration for all special provisions prescribed by the High Commissioner, the custodian may, at any time, pay any special money paid to him under this order, or transfer any special property in respect of which a vesting order had been issued, to a person or to the benefit of a person who but for the application of the Ordinance or any order given pursuant thereto would have been entitled to same, or to any person the custodian deems to have been authorized by that person to receive same.

(c) No money paid to the custodian pursuant to this order and no property in respect of which a vesting order had been issued shall be liable to the execution of a lien or other seizure.

(d) ….

Section 13 of the Order delegates all powers vested in the High Commissioner under section 9 of the Ordinance to the Jordanian custodian.

21. The purpose implied by the provisions of the Ordinance and the Order has a double dimension: On the one hand, it aims to prevent the enemy from benefitting from its property or making any use thereof so long as the state of war between the two countries persists. On the other hand, the custodian must protect the property and safeguard it pending "arrangements to be made at the conclusion of peace". This means that while, indeed, during a state of war, the enemy cannot be allowed to benefit from its property, the Ordinance, looking to the future, envisions the days to come after the war and presumes that once peace is concluded, arrangements that will determine the fate of this property will be made (HCJ 1285/93 **Shechter v. Commander of the Judea and Samaria Area,** §15 (unreported, December 5, 1996) (hereinafter: **Shechter**)). Of said purposes, special emphasis is given to the negative aspect of severing the enemy's connection to its property during a state of war:

> The purposes of the aforementioned ordinance have a negative aspect: separating the enemy and its subjects from their property located within the territory of the state and severing their connection thereto; and a positive aspect: vesting the property in the custodian who may administer it in a manner that advances public goals and perhaps helps the war effort. A review of the provisions contained in the Ordinance and the manner in which it was implemented by the mandatory regime indicates that it is rather the negative aspect that is the more important of the two. Both during the war (denying the enemy control over and benefits from the property) and during peace negotiations (ensuring reciprocity in the manner in which the enemy administers property belonging to Britain and its subjects), the emphasis is put on taking the property out of enemy hands and less so on the custodian's use and benefit thereof" (**Zamir and Benvenisti**, p. 40; see also pp. 36-39).

The possibility of not returning the property to the enemy upon conclusion of the war is consistent with the negative aspect of the purpose of the Ordinance (**Zamir and Benvenisti**, p. 40).

22. As aforesaid, according to the Ordinance and the order, property belonging to individuals considered "enemies" was vested in the Jordanian custodian pursuant to vesting orders. It appears too, that the Jordanian custodian effectively administered enemy property even without vesting orders or before such orders were issued. The legal foundation for this administration is most likely found in the provision contained in section 9(1)(d)(III) of the Trading with the Enemy Ordinance, empowering the High Commissioner, and hence the Jordanian Minister of the Interior who assumed his powers – to confer and impose on the custodian rights and duties with respect to enemy property which has **not** been vested (**al-Ayubi**, pp. 193-194). Furthermore, the power to order the administration of property without vesting was also given to the custodian himself in section 13 of the Trading with the Enemy Order, which empowers the custodian to carry out any function the minister was empowered to carry out under section 9 of the Ordinance. In this context, it should be noted that it has been ruled that the presumption of good governance applies to all actions of the custodian of enemy property (CivA 499/78 **Nabulsi v. Council of Jewish Cemeteries**, Jerusalem, IsrSC 33(3), 679, 681 (1979) (hereinafter: **Nabulsi**); **al-Ayubi**, pp. 193-194; **Abu Nia' estate**, p. 290; CivA 51/89 **General Custodian v. Abu Hamdah**, IsrSC 46(1) 491, 203-502 (1992); **Zamir and Benvenisti**, pp. 55-56, 149).

The legal situation in the Area from 1967 to the present day

23. When the IDF seized the West Bank in 1967, it took on the responsibility for administering the Area. In Proclamation No. 2, the military commander ordered that the law in force in the Area on June 7, 1967 (a date that was defined as the "decisive date") would remain in effect inasmuch as it did not conflict with the Proclamation or future legislation enacted by the commander, and with changes emanating from the establishment of the IDF rule in the Area (section 2 of the Proclamation). This provision is consistent with the provisions of international law that set forth that a power holding an area under belligerent occupation must respect the laws that were in force in the occupied territory prior to the occupation, unless absolutely prevented from doing so (Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, 1907, (hereinafter: the **Hague Regulations**); HCJ 202/81 **Tabib v. Minister of Defense**, IsrSC 36(2) 622, 629-632 (1981) (hereinafter: **Tabib**); HCJ 393/82 **Jam'iat Iscan al-Ma'almoun al-Tha'auniya al-Mahduda al-Masuliya v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785, 797, 809 (1983) (hereinafter: **Jam'iat Iscan**); HCJ 277/84 **'Ighrayeb v. Appeals Committee**, IsrSC 40(2) 57 (1986) (hereinafter: **'Ighrayeb**); HCJ 61/80 **HaEtzni v. State of Israel**, IsrSC 34(3) 595 (1980)). After the Area was seized by the IDF, in addition to the laws in force therein prior to the occupation, legislation enacted by the military commander was also applied thereto and as a result, also the rules of Israeli administrative law, which apply to military authorities. In addition, the Area is subject to the binding norms of international law with respect to belligerent occupation (section 2 of the Proclamation; **Jam'iat Iscan**; **Zamir and Benvenisti**, pp 76-81). Governmental, legislative, public appointment and administration powers were transferred, as per the Proclamation, to the military commander or to whomever is appointed by the commander or performs functions on his behalf (section 3 of the Proclamation). Immovable and movable property found in the Area, which belonged to or was registered under the name of the Jordanian Hashemite state or government, or its arms and branches was transferred to the sole custody and management of the military commander (section 4 of the Proclamation).

24. In Order No. 59, issued by the military commander upon the entry of IDF forces into the Area, the custodian of government property was empowered to take possession of any government property and take any measure he deemed required for this purpose (sections 1 and 2 of Order No. 59). According to this order, and pursuant to article 55 of the Hague Regulations, "government property" was transferred to the administration and care of the custodian of government property in the Area. This property included property defined as enemy property under Jordanian rule (**'Ighrayeb**; HCJ 1661/01[*sic*] **Gaza Coast Regional Council v. Knesset of Israel**, IsrSC 59(2) 481, 514, 586 (2005) (hereinafter: **Gaza Coast**)). Proclamation No. 59 is an expression of the military commander's power and responsibility with respect to government property in the Area, in accordance with the provisions of international law (HCJ 285/81 **al-Nazer v. Commander of Judea and Samaria**, IsrSC 36(1) 701, 704-706 (1982) (hereinafter: **al-Nazer**)). The custodian of government property is the custodian of enemy property on behalf of the military commander in the Area, and he is the official authorized by the commander to administer the property transferred to him pursuant to the Proclamation.

25. The definition of "government property" that was transferred to the possession and care of the Israeli custodian under the Order includes, *inter alia*, any property which, on the decisive day or thereafter, belonged or was registered to an enemy state. In addition, according to international law, where there is doubt whether a certain property is government or private property, it is presumed to be government property until its status is determined (**al-Nazer**, pp. 704-705; **'Ighrayeb**, p. 68). It follows that the Israeli custodian of government property has been authorized to administer any property that belonged to the government of Jordan, including any

property previously vested in the Jordanian custodian of enemy property. Indeed, an amendment to Order No. 59, enacted in 1984, clarified that the term government property includes any property that was vested in an enemy state (Order No. 1091: Order regarding Government Property (Amendment No. 7) (January 20, 1984)). Accordingly, this Court has ruled that property vested in the Jordanian custodian of enemy property, transferred to his care, registered in his name or transferred to his possession between 1948 and 1967 constitutes "government property" in the meaning of the term under Order No. 59 (**'Ighrayeb**, p. 68; **Shechter**, §14).

In a further amendment to the Order enacted in 1990, section 1a was added, which reads as follows:

> 1a. Removal of doubt
>
> a. To remove any doubt, it is hereby clarified that […]property that, prior to the decisive date, came under the provisions set forth in section 9(1)(d)(I) or (III) of the Trading with the Enemy Ordinance, 1939 (hereinafter: the sections), or any order that was issued or could have been issued pursuant to the sections, , or any property the owner of which was subject to Proclamation No. 55 of the year 1950, constitutes government property as of the decisive date.

According to this provision, any property administered by the Jordanian custodian, even if not vested in him pursuant to a vesting order, is to be considered Jordanian government property that was transferred to the care of the military commander pursuant to the Proclamation, and vested in the custodian of government property who administers such property on the commander's behalf.

26. The issue before us raises the following aspects:

First, what is the nature of the rights of the original Israeli owner of a property defined as "enemy property" vis-à-vis the Jordanian custodian?

Second, as a derivative – what is the nature of such owner's rights vis-à-vis the Israeli custodian of government property in the Area who operates by virtue of the law of belligerent occupation?

Third, is there, aside from the question of the original owner's proprietary rights, cause to intervene in the Israeli custodian's discretion to refrain from returning the property or providing an alternative of equal value other than as part of peace agreements in the region?

The original owners' title to property defined as "enemy property" in relation to the Jordanian custodian

27. The central material question in our matter is what sort of title the original Israeli owner of the property defined as "enemy property" had vis-à-vis the Jordanian custodian when the property was under the latter's control.

A review of the provisions set forth in the Trading with the Enemy Ordinance and the Order issued pursuant thereto, in conjunction with case law, seem to suggest that the vesting of "enemy property" in the Jordanian custodian resulted in the severing of the original owner's title to the property. However, at the end of the war, such rights may be revived as part of a peace agreement that may include reciprocity in terms of respecting the original ownership rights of the citizens of the countries that are party to the agreement. This possibility does not constitute a legal

obligation, but rather a potential option. In any event, presumably, the rights accrued by third parties during the vesting period must also be considered.

Section 9 of the Trading with the Enemy Ordinance and section 4 of the Order issued pursuant thereto provide for the vesting of enemy property in the custodian. The purposes underlying the Ordinance are integrated, as stated – severing the enemy's connection to its property and having the property protected by the custodian until peace is concluded. This integration of purposes may give rise to a number of possible solutions for the issue of the title an original owner has to property vested in the custodian. One possibility is to view this title as having been completely severed, with an accompanying expectation on the part of the owner to receive the property or its equivalent value in the advent of peace. Another possibility is to view the title as fully, but temporarily, severed, while the owner's legal right to have the property returned at the end of the war, subject to peace agreements, survives (**Zamir and Benvenisti**, p. 42). Whatever the preferred interpretive option, the dominant interpretive approach is that during the time the property is vested in the custodian, the owner's title of ownership to it is severed. The Vesting Order denies the previous owner's rights to the property so long as the vesting is not revoked in a peace agreement.

28. The following has been ruled in Britain with respect to the Trading with the Enemy Act, which was the source for the language of the mandatory ordinance that is applicable to the matter at hand, *In re Münster (Enemy)* [1920] 1 Ch. 268, 277:

> Pending its disposition by Order in Council after the termination of the war, the property is removed from the control and from the beneficial ownership of the enemy. At the termination of war, fresh considerations will arise; and whether the enemy will recover, and to what extend he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of Peace… and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view…

The guiding judgment on this issue is *Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] 1 All E.R. 969, 991, where the following was ruled:

> When such property vests in him [the custodian], it ceases thereupon beneficially to belong to its original owner; and though in pursuance of arrangements to be made at the conclusion of peace… in pursuance of treaties of peace to be negotiated by the Crown, the Crown could re-create a title in the original owners, it could, in my view, equally create such a title in anyone else, including itself. The 'statutory suspension' of title referred to by Lord Russell of Killowen seems to me in its context to point, not to the persistence throughout of a temporarily submerged title, but to the extinction of that title, subject to the possibility of its re-birth.

29. According to this interpretation, vesting enemy property in the custodian pursuant to the Order results in the expiration of the original owner's rights thereto and in their vesting in the custodian. Such vesting does not preclude the possibility of reviving the rights of the owner as part of a peace agreement. **Zamir and Benvenisti** articulate the aforesaid rule in their book as follows:

> This is a full and complete vesting of private or government property, being the property of enemy subjects or an enemy government. This vesting is, in principle, temporary and its demise is determined by the content of the international arrangements put in place upon termination of the state of war.

> So long as the state of war remains, the vesting remains and the original owner of the property has no rights thereto – be they rights to derive profit from the property, receive compensation for it, or intervene in its management (this final rule is emphasized also in section 6 of the Trading with the Enemy Ordinance). Once the state of war comes to an end, it may be possible to *recreate* the original owners' proprietary rights to the property, rights that do not exist until such action is taken (other provisions may be put in place as well, such as providing the original owners with compensation for their rights in the property). The recreation of the original owners' proprietary rights is never automatic. These conclusions are fully consistent with the purpose of vesting property in the custodian (**Zamir and Benvenisti**, p. 44).

The presumption that the original owner's title to a property vested in the custodian has been severed reflects on the nature of the custodian's regard to the vested property. The custodian is not deemed to be a trustee of the property for the original owner, though he does have a responsibility to act with care and skill with respect to the property and to hold it until its fate is decided. The vesting of property in the custodian transfers ownership thereof. This ownership is accompanied by an expectation on the part of the original owner to have the property returned in future, according to post-war arrangements (**Zamir and Benvenisti**, p. 44). The ruling in C.A. 300/43 Pritzker **v. Custodian of Enemy Property** [1944] A.L.R Vol. 1, 376, 380 was of a similar spirit; In **Nabulsi**, the Supreme Court assumed that vesting the property in the custodian of enemy property meant that ownership had been transferred to him (**Nabulsi**, p. 681; see also CivA 58/54 **Habab v. Custodian of Absentee Property**, IsrSC 10(2) 912, 918-19 (hereiafter: **Habab**). However, it is duly noted that in **Shecther**, the Court left this issue for future review, while emphasizing that the resolution of the issues concerning property in that matter might come with a peace treaty that would resolve the entire political conflict (**Shechter**, §18).

30. It should be duly noted that the Absentee Property Law embraces a similar approach to that of the Trading with the Enemy Ordinance with respect to the issue of original owners' ties to abandoned property that had been vested in the custodian. It has also been ruled with respect to the Absentee Property Law, that absentees do not retain rights to property vested in the custodian of absentee property, but that upon disposition of the property, the original owner acquires a new proprietary right. This does not constitute a revival of rights that had expired and disappeared (CivA 263/60 **Kleiner v. Inheritance Tax Director**, IsrSC 14(3) 2521, 2544 (1960)). "Ownership is reborn and it has no relation to the ownership that existed on the decisive date and that was vested in the custodian" (Justice Witkon, *ibid*).

The Court has clarified with regards to the Absentee Property Law, that it is no less designed to safeguard the property than it is designed to fulfill the State's interests therein: using the property to advance the country's development; preventing its use by absentees; holding on to the property or its value until such time as Israel and its neighboring countries agree on arrangements that would determine the fate of the property based on reciprocity between the countries (HCJ 4713/93 **Golan v. Custodian of Absentee Property**, IsrSC 48(2) 638, 644-645 (1994)). The purposes and rationale behind the two arrangements – the law regarding trading with the enemy and the law regarding absentee property – are similar. The concept concerning the nature of the rights vested in the custodian of enemy property under the Trading with the Enemy Ordinance and those vested in the custodian of absentee property under to the Absentee Property Law is also similar (**Habab**, pp. 915-918; **Jabbour v. Custodian of Absentees Property of the State of Israel** [1954] 1 All E.R. 145, 153-154, 157).

31. The aforesaid analysis of the purposes of the Trading with the Enemy Ordinance and its legal outcomes leads to the conclusion that, in terms of the owners' right to receive compensation from the authorities, there is a fundamental difference between the vesting of enemy property in the custodian pursuant to the Trading with the Enemy Ordinance and a government act of expropriation for public use or military needs or other governmental actions the purpose of which is to transfer private property to state hands for public needs. Zamir and Benvenisti address this in their research:

> There is no logic in speaking about compensating the enemy or its subjects for the vesting of their property in the custodian. Such compensation clearly contradicts the main purposes of the vesting. Providing the original owners with monetary payment in lieu of returning their property to them is one of the possible solutions for the issue of property **as part of a peace agreement**, but so long as the state of war continues, such compensation contradicts the purpose of the vesting (**Zamir and Benvenisti**, p. 41).

The original owner's title vis-à-vis the Israeli custodian

32. We have seen that under the law in force in the Judea and Samaria Area since 1967, any enemy property administered by the Jordanian custodian is considered Jordanian government property that was transferred to the possession and administration of the military commander pursuant to Proclamation No. 2 and entrusted to the Israeli custodian for administration pursuant to Order No. 59. The question is whether the Israeli custodian fully replaces the Jordanian custodian, or whether the Israeli custodian's powers with respect to enemy property transferred to his possession and administration are more restricted than those of the Jordanian custodian, as he is subjected to the rules governing belligerent occupation. The answer to this question is largely derived from the provisions contained in Proclamation No. 2 and Order No. 59, issued by the military commander in the Area and from the principles of international law which apply to belligerent occupation.

The law of belligerent occupation with respect to government property

33. The Judea and Samaria Area is held by Israel under belligerent occupation. The rules of international law regulate conduct in a regime of belligerent occupation. First and foremost among these rules are the provisions set forth in the Hague Regulations, commonly considered an expression of customary international law that applies to Israel even without incorporation into domestic legislation. In addition, the State of Israel has declared in various proceedings before this Court, that it would respect the humanitarian provisions of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 1949 (hereinafter: the **Fourth Geneva Convention**). For the matter herein, and without need to make any findings on the issue, we shall presume that they also apply to the matter at hand (**Gaza Coast**, pp. 514, 516-517). In addition to international law, the domestic law in force in the Area prior to the seizure thereof by the IDF, military security legislation and the basic tenets of Israeli administrative law, which are incumbent upon IDF soldiers, are also applicable to the Area (Proclamation No. 2; **Gaza Coast**, pp. 518-519; HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5) 807, 827-828 (2004) (hereinafter: **Beit Sourik**)).

34. The military regime in an area held under belligerent occupation is temporary by nature (HCJ 7957/04 **Mara'abe v. The Prime Minister of Israel**, IsrSC 60(2) 477, 501 (2005) (hereinafter: **Mara'abe**)). "The premise is that in exercising his power, the military commander is not acting as the successor of a defeated ruler. He is not a sovereign in the held territory. *The powers of the defeated ruler are suspended*" (**Gaza Coast**, p. 520) (emphasis added).

35. The legal arrangements pertaining to belligerent occupation reflect a balance between two major considerations: on the one hand, ensuring the legitimate security interests of the military force in control of the Area; on the other, providing for the needs of the protected persons in the Area (**Jam'iat Iscan**, p. 794).

36. Article 43 of the Hague Regulations constitutes a "supreme" normative provision, according to which the power holding an area under belligerent occupation must use all available means in order to ensure security and routine life in the area and respect the law in force therein prior to the occupation, unless it is entirely prevented from doing so (compare Article 64 of the Fourth Geneva Convention; **Tabib**, p. 629-632; **Jam'iat Iscan**, pp. 797, 809).

These balances and principles are also expressed in the framework of the rules concerning the authority of the holding power with respect to government property in the held territory.

The authority of the holding power with respect to government property in the held territory

37. The third part of the Hague Regulations which addresses belligerent occupation stipulates, *inter alia*, rules regarding the seizure of enemy property – both private and public. Articles 53 and 55 address the seizure of property that belonged to the enemy state by the power holding the territory under belligerent occupation. While Article 53 addresses the seizure of movable public property, Article 55 focuses on powers relating to immovable property belonging to the enemy state (HCJ 574/82 **al-Nawwar v. Minister of Defense**, IsrSC 39(3) 449, 463-464 (1985)).

38. Article 55 of the Hague Regulations stipulates that the occupying power may administer property belonging to the enemy state that is located in the occupied territory and derive benefits from such property, but it must safeguard it. The Article reads as follows:

> 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

39. The rule that an occupying country must administer public property it has seized in accordance with the rules of usufruct constitutes customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck, **Customary International Humanitarian Law, Vol. I: Rules**, 178-179 (2009)).

40. The occupying power may, therefore, under the rules of international law, hold real estate that is government property belonging to an enemy state and derive benefit from such property, but it must safeguard it and refrain from damaging it (Hila Adler, *The Law of Occupation*, Robbie Sable, **International Law** 575, (2nd edition, 2010); Georg Schwarzenberger, **International Law, Vol II: The Law of Armed Conflict**, 248, 311-315 (1968). The State must safeguard the capital of the property and administer it in accordance to the rules of usufruct. It does not acquire ownership of this property and, therefore, may not sell it or take action that would render the rights thereto meaningless, as in consequence the capital would be harmed (**Gaza Coast**, pp. 584-585; Yoram Dinstein, **The International Law of Belligerent Occupation**, 213-218 (2009); UK Ministry of Defence, **The Manual of the Law of Armed Conflict** 303 (2004); Gerhard Von Glahn, **The Occupation of Enemy Territory**, 176-178 (1957); **'Ighrayeb**, p. 67; **al-Nazer**, p. 704; **Zamir and Benvenisti**, p. 120).

41. The occupying power's obligation to safeguard real estate belonging to the enemy is also reflected in the prohibition on destruction (Article 23(g) in the Hague Regulations and Article 53 of the Fourth Geneva Convention; **Commentary: IV Geneva Convention** 301 (Jean S. Pictet, ed. 1958) (hereinafter: **Pictet**); HCJ 10356/02 **Haas v. IDF Commander in the West Bank**, IsrSC 58(3) 443, 456-458 (2004) (hereinafter: **Haas**)).

42. The occupying country is, therefore, required to protect public property in the occupied territory and is prohibited from harming it. Extensive destruction or appropriation of property will be considered a grave breach of the Convention, unless carried out to serve a military necessity (Article 147 of the Fourth Geneva Convention; **Pictet**, p. 601). However, as the scholar Pictet noted, the purpose of the Fourth Geneva Convention is to care for the protected civilians themselves, rather than property, and therefore, treatment of enemy property in an occupied territory is primarily regulated in the Hague Regulations (**Pictet**, p. 271). In any event, the provisions prohibiting destruction or appropriation of enemy property do not undermine the right of the occupying power to administer the enemy's public property and to derive profits from it. Pictet addresses this issue:

> It should be noted that the prohibition only refers to "destruction". Under international law the occupying authorities have a recognized right… to administer and enjoy the use of real property belonging to the occupied State
> (**Pictet**, p. 301).

43. In exercising his powers in an area held under belligerent occupation, the military commander is, therefore, required to find a balance between the needs of the military and the needs of the local residents (Article 43 of the Hague Regulations; **Beit Sourik**, p. 830; **Haas**, pp. 455-456; **Mara'abe**, p. 506). This supreme principle holds true also with respect to the exercise of the military commander's powers under Article 55 of the Hague Regulations. It is important to note that although the IDF has held the Area under belligerent occupation for many years "The passage of time […] cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the Area under belligerent occupation" (**Beit Sourik**, p. 830). When exercising the power to administer and derive profit from seized public property, the military commander's actions must benefit the Area and he may only take relevant considerations into account – the benefit of the protected persons and the needs of the military (**Beit Sourik**, pp. 833-836). In particular, he "must not take into account the considerations of the state by virtue of whose belligerent occupation of the Area he exercises his powers" (**Haas**, p. 456).

44. The orders issued by the military commander in the Judea and Samaria Area interlock with the provisions of international law on the military's powers with respect to property. Section 4 of Proclamation No. 2 stipulates that:

> Immovable and movable property… that belonged to the Hashemite Jordanian state or government… situated in the Area shall be transferred to *my sole possession and come under my administration* (emphasis added).

Order No. 59 regarding Government Property stipulates in Section 2 that "the custodian may take possession of government property and take any measure he deems necessary for this purpose". The orders issued by the military governor relate to taking possession of and administering government property, as opposed to *vesting* it in the military commander. The Israeli custodian's responsibility pursuant to the orders and international law is to hold government property and

administer it within the confines of the purposes of belligerent occupation –– maintaining security and normal life and providing for the needs of the protected civilians in the Area.

45. In conclusion, as a rule, a power that holds an area under belligerent occupation may take possession of and administer the immovable property belonging to the enemy state. It may reap its fruit, but does not acquire ownership thereof. It must safeguard this property and may not render the rights thereto meaningless or transfer ownership thereof to a third party. In exercising these powers, the commander is required to consider the best interest of the protected persons, the residents of the Area, and make sure that public order and safety are maintained. In deciding how to administer the public property in his possession, the military commander may not consider the interests of the state on whose behalf he is acting (**Jam'iat Iscan**, p. 764).

The status of "Jewish property" in the Judea and Samaria Area vis-à-vis the Israeli custodian

46. Enemy property that was vested in the Jordanian custodian was transferred with the status of Jordanian "government property" to the possession and administration of the military commander pursuant to the Proclamation and to the possession and administration of the Israeli custodian pursuant to Order No. 59.

Ostensibly, according to the analysis presented above, the powers of the Israeli custodian are limited to holding and administering government property, including the right to reap its fruit. According to the law of belligerent occupation, the Israeli custodian may administer enemy property and derive profits from it, but he may not release it or pay its monetary value to the original owner.

47. It could have been asked whether Jewish property in the Judea and Samaria Area continued to be "enemy property" vis-à-vis the Jordanian kingdom and what this would mean for the status of this property vis-à-vis the Israeli custodian's powers over it, given the signing of the peace treaty with Jordan in 1994, and the incorporation its main principles into Israeli domestic law in the **Law Implementing the Peace Treaty between Israel and the Hashemite Kingdom of Jordan, 5755-1995** (hereinafter: **the Peace Treaty Law**). This issue is also connected to the establishment of the Palestinian Authority in the Judea and Samaria Area and the Gaza Strip close to the time of the Israel-Jordan peace treaty and the diplomatic relationship that has developed between Israel, Jordan and the Palestinian Authority, which replaced Jordan with respect to control of the Area. This dimension of political developments was not discussed in this petition at all, and there is no room to take a position on the possible implications it may have on the status of Jewish property in the Area. In any case, it is clear that thus far, there have been no political arrangements in connection with this property and the issue of absentee property inside Israel has also been left unanswered and unregulated in an express provision in the peace treaty (Section 8 of the peace treaty and section 6 of the Peace Treaty Law; see also **Bill for the Implementation of the Peace Treaty between Israel and the Hashemite Kingdom of Jordan, 5755-1995**, Bills, 2351, p. 252 (January 23, 1995); CivA 4630/02 **Custodian of Absentee Property v. Abu Hatoum**, §11 (unreported, September 18, 2007); CivA 1134/06 **Rushrush v. Mansour**, §21 (unreported, November 10, 2009) (hereinafter: **Rushrush**)). In the latter matter, Justice Rubinstein noted:

> With respect to the argument regarding the effect of the peace accord with Jordan on the Law of Absentee Property, in **Abu Hatoum**, it was explained in detail (§11) that whatever predated the peace treaty between Israel and Jordan is unaffected by the treaty (Sec. 6(b) of the Law Implementing the Peace Treaty between Israel and the Hashemite Kingdom of Jordan, 5755-1995)" (**Rushrush**, §21).

It appears that a similar situation pertains to enemy property belonging to Israelis in the Judea and Samaria Area.

48. In the matter of **Shechter**, which was resolved after the peace treaty with Jordan was signed, the Court ruled that the Trading with the Enemy Ordinance was still in effect and the Vesting Order issued pursuant thereto was valid. This means that, on the face of it, our matter comes under the general principle that the original owner's title to the property expired upon its vesting in the Jordanian custodian. The possession and administration powers the Israeli custodian enjoys under the law of belligerent occupation do not ostensibly grant him the power to release property and in any event, he is under no an obligation to pay its monetary value to the original owner. The presumption is that once the property is vested in the custodian of enemy property, whoever holds the position at any given time, its release or payment of its equivalent value awaits a peace treaty, as **Zamir and Benvenisti** commented in their research, authored prior to the peace treaty with Jordan.

> There is no continuity between the Jordanian custodian and the IDF and Civil Administration authorities in the Judea and Samaria Area… so long as there is no peace treaty, the IDF authorities are the enemy of the Jordanian regime. Israeli authorities do not consider Israeli citizens and residents enemies and within the framework of peace arrangements, they will undoubtedly take action to ensure the optimal fulfillment of the interests of individuals with rights to "Jewish lands". **However, so long as there is no peace treaty and so long as the Occupied Territories are a distinct and separate territory from Israel legally and politically, the property cannot be released** (**Zamir and Benvenisti**, p. 111) (emphasis added).

49. In the matter before us, there is no need to take a strong position on the question of the scope of the military commander's power to take action with respect to Jewish property in the Judea and Samaria Area, particularly given the peace treaty with Jordan and the establishment of the Palestinian Authority. Thus it is possible to focus on the question of the span of intervention in the discretion of the competent authority in the Area. According to the policy of the competent authority, Jewish property in the Area should not be returned, whether it is the property itself or its equivalent value, so long as no peace settlement has been reached in the Area. This very question was debated in **Shechter**. In that matter, in which, as stated, a ruling was given following the peace treaty with Jordan, the Court addressed the question of whether the head of the Civil Administration had an obligation to release property originally owned by Jews in the Judea and Samaria Area which had been seized as "enemy property" and transferred to the possession of the Israeli custodian pursuant to the law of belligerent occupation.

The Court (in the words of President Barak) left most of the disputes connected to this question for future review. Yet, it did make it clear that "**property regarding which an order of vesting in the Jordanian custodian had been issued… is government property**" (**Shechter**, §14). The Court also noted, without ruling on the issue, that the argument that ownership of the property had been transferred to the custodian and that, therefore, the original owners did not have a claim to ownership did carry weight (ibid., §15). However, President Barak was prepared to assume for that matter that the Civil Administration was empowered to return property defined as "enemy property" to the original Israeli owner, given Section 5(2) of the Trading with the Enemy Order. Nevertheless, this question too was left for future review, while President Barak emphasized that even if such power existed, the Civil Administration was clearly under no obligation to use it (ibid.) The President concluded by stating:

> We take the position that the Trading with the Enemy Ordinance remains in effect and the Vesting Order with respect to the plot is valid. **The solution for the situation of the plot may come in a peace treaty which will resolve the political conflict itself**" (**Shechter**, §18) (emphasis added).

The Court further ruled in that mater, that even if the Israeli custodian were empowered to return to the original owner property that was defined as "enemy property" and was transferred to his custody – a question on which the Court did not rule – he was not under an **obligation** to do so, whether pursuant to domestic law regarding trading with the enemy or the rules of international law. It was ruled that in exercising his discretion, the Israeli custodian must consider issues relevant to maintaining peace and security in the Area. Among these issues, weight must be given to the concern that releasing property in his possession to its original Israeli owners may result in increased claims by Palestinians residing in the Area to receive their historic property located inside the State of Israel. The rejection of such claims may exacerbate tension in the Area and increase property disputes therein. It follows, the Court ruled, that the decision not to return property to its original owners on these grounds meets the standards of administrative law and is consistent with the military government's duty under international law to maintain public order in the occupied territory (**Shechter**, §§15-18; compare, **Zamir and Benvenisti**, pp. 100-107). At the same time, the Court did rule that the Israeli custodian may not take into account considerations relating to Israeli property which may be claimed by Palestinians in the Area, as the military commander's duty is to ensure his own security interests in the Area on the one hand and the interests of the local population on the other and he may not take the national, economic or social interests of his own country into consideration (**Shechter**, §18; compare HCJ 2150/07 **Abu Safiya v. Minister of Defense**, §23 of the opinion of Justice Vogleman (unreported, December 29, 2009)).

50. Such policy considerations, which formed the basis for the rejection of the **Shechter** petition, are relevant to the matter at hand. Unfortunately, the political circumstances that underlay those considerations have not changed and they remain valid at this time as well.

Conclusions

51. The analysis presented above leads to the following conclusions:

52. Immovable property in the Judea and Samaria Area, defined as "enemy property", which was vested in the Jordanian custodian of enemy property pursuant to the Trading with the Enemy Ordinance, severed [*sic*] the original owners' title to vested property, and ownership thereof was vested in the custodian. Despite this, the Jordanian custodian should have acted to protect and preserve the property so that, in due time, when peace arrived the fate of the property could be decided as part of a peace agreement wherein mutual arrangements pertaining to the enemy property of both parties might be made.

53. The IDF has held the Area pursuant to the law of belligerent occupation since 1967. Pursuant to this law, the Israeli custodian has become the person in charge of government property belonging to the Jordanian kingdom in the Area, including "enemy property" vested in the Jordanian custodian. According to the law of belligerent occupation, the Israeli custodian has been charged with administering enemy property as Jordanian government property. This means that the Israeli custodian must hold this property and administer it and that he may reap its fruit. In an ordinary situation, wherein the status of the property remains that of "enemy property", the Israeli custodian must not release it to its original owner, but rather, its fate must be decided as part of a peace treaty. In the matter herein, the situation is more complex, given the 1994 peace agreement

with Jordan and the establishment of the Palestinian Authority in the Area – the significance of which for the question before us has not been entirely clarified.

54. In any event, the policy of the Israeli custodian in the Judea and Samaria Area, which precludes returning the property to its original owner or making payment of its equivalent value so long as a peace agreement has not been reached, does not warrant judicial intervention, given that no cause arose for administrative intervention therein. This policy remains within the realm of reasonableness and it is based on relevant considerations. Its principles are based on the central purposes of the belligerent occupation of the Area, which are, maintaining peace and security in the Area and providing for the needs of the residents of the Area as protected persons.

The premise is, therefore, that the resolution of the issue of Jewish property in the Judea and Samaria Area must be found in the framework of peace negotiations and a consensual arrangement enacted in the Area.

55. Releasing land held as enemy property by the Israeli custodian to its original owners, or making payment of their equivalent value outside of a peace accord may undermine public order and lead to unrest that may disrupt public peace and increase tension in the Area. The policy of the authority, whereby the fate of property located in the Area and defined as "enemy property" would be decided in the framework of future peace agreements is reasonable, being based on political, security and social considerations of considerable importance and weight.

From the general to the particular

56. There is no dispute that the property which is the subject of the petition was vested in the Jordanian custodian of enemy property under a vesting order dated March 26, 1967. It seems that the property was managed by the Jordanian custodian even prior to this date, in keeping with his power under the Trading with the Enemy Order. The Respondents make a strong argument that the individuals who have de-facto possession of the Valero property may claim prescription and protected tenancy.

57. Upon the entry of the IDF into the Area, the property was seized by the Israeli custodian as Jordanian government property. The custodian holds and administers the property in accordance with the law of belligerent occupation. According to this law, the argument that the custodian may not release enemy property to its owners carries significant weight, and in any case, he is not obligated to do so. As part of his duty to maintain peace and security in the Area, the military commander has decided that the fate of Jewish property in the Judea and Samaria Area must be decided as part of an overall future peace treaty. He maintains the position that releasing the property or making payment of its value may substantially undermine peace and security in the Area. There is no room to intervene in this policy decision, which has been upheld by this Court in the past.

58. In view of the aforesaid, the Petitioners' argument that the Valero property must be deemed to have been expropriated and that they have a right to receive compensation from the State as a result cannot be accepted. As elucidated above, the mechanism of vesting enemy property in the competent authority is dissimilar to the process of expropriation for public use, which may entitle the owners to compensation. Its purposes are different, and as a derivative, the attendant arrangements are different. The remedy for the rights denied to an Israeli owner of property that was vested in an enemy state as "enemy property" may arrive as part of a peace treaty. The vesting of the property in the custodian of enemy property serves to sever the private ownership title the original owner has to the property and to shift the future solution regarding the fate of the property to the political, international arena, as part of bilateral agreements. We hope and pray that such agreements will be achieved in the not too distant future.

With respect to the alternative arguments made by the petitioners regarding the right to compensation according to the value of the property as a result of the authorities' failure to fulfill their duty to respond and provide reasons and with respect to inappropriate use of the property by individuals acting on behalf of the military commander – these have not been established in any way. These alternative arguments have also not been expressed in the remedies sought in the petition. They must be dismissed.

59. On the basis of the above, the petition must be dismissed

In the circumstances, I suggest no ruling should be made as regards costs.

Justice

Justice M. Naor

I concur

Justice

Justice S. Joubran

I concur

Justice

Thus, it is decided as stated in the opinion of Justice Procaccia

Given today, 2 Adar B, 5771 (February 6, 2011)

Justice Justice Justice