HCJ 393/82

Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters

v.

1. **Commander of the IDF Forces in the Area of Judea and Samaria**
2. **Supreme Planning Committee in the Judea and Samaria Area**

At the Supreme Court Sitting as the High Court of Justice

(25 July 1982, 28 December 1983)

Before Justices, A. Barak, Yehuda Cohen, H. Avnor

S. Tussiya Cohen - on behalf of the petitioner

Att. R. Yarak, Director of HCJ Division at the State Attorney's office - on behalf of the respondents

Judgment

Justice A. Barak

1. The petitioner is a cooperative association. Its purpose is to build housing for teachers who are members of the association and residents of Judea and Samaria. For this purpose, the association purchased land near the Atarot industrial zone. Members of the association applied, as individuals, for building permits – each for their own home. They did not mention the association in their applications nor that the purpose was to establish a residential neighborhood for members of the association. The applications were approved. The applicants received building permits under the Law regarding Planning of Cities, Villages and Buildings, which is the applicable Jordanian law (hereinafter – the City Planning Law). At the time the permits were granted and due to the manner in which the applications had been submitted, the fact that the issue was the planning of an entire neighborhood was not considered. Once building permits were granted, members of the association engaged a building contractor who set out to begin construction. At that stage, the planning authorities were alerted to the reality that was being established and decided to freeze the building permits. After some time (on 24 July 1979) the Supreme Building Committee (hereinafter – the Committee) which operates pursuant to the City Planning Law, decided to cancel the building permits granted to the petitioner's individual members. At that time, a detailed plan concerning construction of housing for

teachers which was prepared by the association was submitted to the Committee. Processing of this plan was delayed, as at the same time, the Committee commenced exploration and discussion of a road plan designed to arrange for new roads in the vicinity. In the course of these discussions (on 8 May 1980), the Committee decided to reject the detailed plan for two major reasons: one, the planned neighborhood's proximity to the industrial zone inside Israel and security facilities in Judea and Samaria; the other, the neighborhood's location inside an area some of which was to be expropriated and in another part of which construction was to be prohibited for the purpose of building an interchange between the highways planned nearby. At the time, the road plan was yet to be approved, but its principles had been presented to the Committee. In HCJ 145/80[1] the association and three of its members protested the freezing and rejection of the building permits on the one hand and the rejection of the detailed plan on the other. The Supreme Court ruled that the granting of the permits contravened the City Planning Law, as the permits had been granted without a division plan and without a detailed plan. The Committee's considerations were found to be relevant planning considerations, no extraneous considerations were proven, and therefore, the rejection decision was lawful.

2. The road plan which was the basis for the Committee's refusal to approve the detailed plan (on 8 May 1980) had yet to be approved at the time. The association filed an objection to the proposed road plan. On 24 July 1980, the Committee held a hearing on the road plan and decided to resubmit it in view of a number of changes that had been made to it. The petitioner filed an objection to the new road plan as well. This objection was heard by the subcommittee for objections (on 29 January 1981) and by the Committee plenum (on 25 November 1981). Upon conclusion of its hearings, the Committee decided to approve the road plan. The petition at bar is directed against this approval and against the expropriation of some of the petitioner's land, as required by the plan, whilst paying compensation.

3. The road plan which was approved by the Committee – as far as the petition at bar is concerned – relates to an interchange between two highways which are to be built in Judea and Samaria. One of the roads is the Ben-Shemen Atarot road. Part of this road runs through Israel and the other through Judea and Samaria. The other road is to connect Ramallah, Jerusalem and Bethlehem (road no. 4). This road runs mainly through the Judea and Samaria Area. A small segment of it – near Jerusalem, is inside Israel. These two roads are designed to be metropolitan roads. They are designed – upon completion – to be built on four lanes – two two-lane tracks in each direction as well as a service lane in each direction; this, in order to make them accessible to nearby elements. At the intersection between the two roads, an interchange is planned which requires the construction of three levels, a lower level which connects the Ben-Shemen Atarot road to road no. 4 in the direction of Jerusalem; a middle level which continues the Ben-Shemen Atarot road toward Ma'ale Edumim; an upper level which connects the service roads from the interchange to road no. 4. The aforesaid interchange plan reflects the final plan, which is to be realized in a multi-phase process, the first phase of which is in the advanced, substantive planning stage.

4. At the widest point, the interchange will be 300 meters wide. This strip will include the six traffic lanes, including two service roads and the two two-lane tracks. The distances are a result of the need for curves which are not too sharp in relation to this road, differences in height and topography of the area, the need for earth mounds to support the lanes, and other planning reasons which take into account land reserves. The petitioner's land is in the area of the interchange, some of it is designated for expropriation and construction will be prohibited on another part, due to its proximity to the roads.

---

[*] *Piskey Din* 35(2) 285.

The Respondents' Position

5. Factually, the respondents argue that the purpose of this road plan is to serve the needs of the Area. It will allow a rapid link among the communities of Judea and Samaria. It will serve the local populations of Ramallah, Bir Nabala, Al Judeira, An Nabi Samwil, Beit Iksa, Beit Hanina, Biddu, Rafat and Bethlehem. The respondents particularly point to the fact that the Ramallah-Jerusalem road is turning into an urban road and the alternative to this will be the planned road system. The respondents emphasize that the road system in the Judea and Samaria Area is outdated and can no longer service the large number of cars using it. Thus, for example, in 1970 there were 5,000 cars and 7,000 drivers in the Area, whereas in 1983, there are 30,000 cars and 35,000 drivers. This increase requires, according to the respondents, the planning and implementation of a new road system. Although the development of the Area for the benefit of the population therein stands at the center of this plan, the respondents do not ignore the fact that this plan is connected to planning inside Israel, it takes it into consideration and forms a joint project for Israel and the Area. It will serve not only the residents of the Area, but also residents of Israel and the traffic between Judea and Samaria and Israel. In this context, it is was noted that many laborers – their numbers increasing from 14,700 in 1970 to 44,300 in 1983 – travel to and from Israel in order to work every day, as well as other people both from Israel and the Area. Finally, it was noted that funding for the road plan would be partially provided by regular taxes collected from the local population and partly by funding from Israel.

6. Legally, the respondents' position is that their actions are entrenched both in domestic law and in the rules of customary international law. They claim that the role of a military government is not restricted to security only and that it must ensure the normal life of the local population. A military government must act as a proper government would have acted in all areas of life, including transportation. In this context, the planning of the road system and its implementation are a lawful act by the military government as they are carried out for the benefit of the Area's residents and do not constitute sacrificing the interests of the Area for the interests of Israel. Indeed, the planning of the road system was carried out in cooperation with Israel, but this is of no consequence, as it was carried out - as far as the military government was concerned – with the purpose of promoting the interests of the Area. The military government's role, fifteen years after it was established, cannot be limited to preserving an old and outdated road system. According to the respondents, if the administration were to act in this manner, it would have been rightly accused of freezing development and preventing the natural development of the Area and its population.

The Petitioners' Position

7. Factually, the petitioner argues that the purpose of the road plan is not to serve the needs of the Area, but rather the transportation needs of Israel. The initiative is Israeli, and the military government is blindly following it without using any independent discretion and without considering the best interest of the Area. The petitioners claim that the Area does not require such a lavish and ostentatious road system. The purpose of the interchange is to serve an Israeli traffic route – from Ben-Shemen to Atarot – and has nothing to do with the benefit of the Area.

8. Legally, the petitioners argue that the plan and the actions that followed (expropriation and building prohibition) are illegal as they contravene customary international law. The reason for this is twofold: *Firstly*, the purpose of the road is not to benefit the Area, but to benefit Israel. In this state of affairs, the military government is prohibited from taking action; *Secondly*, even if one could say that the purpose of the plan was to benefit the Area, indeed, a military government, which is temporary by nature, is not permitted to plan and implement an action which has long term ramifications. Had the Jordanian rule continued, there is no telling whether it would have considered planning such a plan, and in view of these doubts, the military government must refrain from the plan. The authority of the

military government, due to its being temporary, extends to maintenance and routine administration of the existing. It does not have the authority to make far reaching changes. Therefore, the military government is not permitted to plan and implement a road system which includes permanent facts designed to continue to exist following the termination of military rule in the Area.

The Scope of the Dispute

9. The dispute between the parties spans both the facts of the case and the legal framework. As for the facts, the parties are in dispute as to the purpose of the road plan. The petitioner claims that its purpose is to serve the needs of Israel and its needs alone. In contrast, the respondents claim that the purpose of the road plan is to serve the needs of the local population, while cooperating with Israel. As for the law, the parties are in dispute as to the scope of the powers of the military government to plan and implement permanent plans which may continue to exist following termination of the military government. The petitioner claims that the temporary nature of the military government limits its powers only to preserving and administrating what is already in existence. In order to understand this dispute, one must first turn to the normative framework in which the Israeli regime in Judea and Samaria operates and the powers it legally holds. It is against this background that a decision on the dispute between the parties will be possible.

The Normative Framework

10. During the Six Day War, "eastern" Jerusalem and Judea and Samaria were captured by the Israel Defense Forces. "The state's law, jurisdiction and administration" were applied to "eastern" Jerusalem (see Art. 11 to the Proclamation on the Administration of Rule and Law (No. 1), 5727-1967). The approach was different in the case of Judea and Samaria. Israeli law, jurisdiction and administration were not implemented in Judea and Samaria (HCJ 390/79 [1]; HCJ 61/80 [2]). Judea and Samaria are held by Israel under military occupation, or "belligerent occupation." A military government was established in the Area, headed by a military commander. The military commander's powers and authorities imbibe from the rules of public international law concerning military occupation. Under the provisions of these rules, all powers of governance and administration are held by the military commander (HCJ 619/78 [3]). These powers may imbibe from the law that was in place in the Area prior to the military occupation and from new legislation enacted by the military commander. In the first instance, the military commander exercises existing local executive powers. In the second instance, the military commander exercises new executive powers. In both cases, the exercise of power must uphold the rules of public international law concerning belligerent occupation and the principles of Israeli administrative law regarding the exercise of executive powers by a public servant. (See: M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," Military Government in the Territories Administered by Israel 1967-1980 (Jerusalem, ed. By M. Shamgar, 13 (1982)). It has been found that the existence of an executive power under local law – such as the power to expropriate land for public needs – is neither a necessary nor a sufficient condition for an executive act in an area under military occupation. It is not a necessary condition, as, in the absence of local executive power, the military government may grant itself a new executive power, provided this is possible under the rules of international law concerning belligerent occupation. It is not a sufficient condition, since even in the existence of a local executive power, indeed it is insufficient that it be exercised in accordance with the rules of local law, but rather it must be consistent with the rules of Israeli administrative law and with the rules of international law concerning belligerent occupation (HCJ 61/80 [2] supra, HCJ 351/80 (HM' 764/80) [4]).

11. This review indicates that from the legal aspect, the source for the power and authority of the military commander in an area under belligerent occupation is located in the rules of public international law concerning belligerent occupation (occupatio bellica), which form part of the laws of war (see: HCJ 69/81, 493 [5]). As far as the state's duties vis-à-vis the international community, these rules are

found both in customary international law and in international treaty law, to which the state is party and which applies to the matter. As far as the right of a resident of an area under military government vis-à-vis the military commander – a right which may come under judicial review before the court of the occupying power – the rules of belligerent occupation are entrenched in customary international law and international treaty law, inasmuch as it was injected into the domestic law of the occupying power by way of a valid domestic legislative act (HCJ 69/81, 493 [5], supra). As far as Israel's belligerent occupation is concerned, and in the absence of injecting legislation, the principle norms of the laws of war concerning belligerent occupation are the ones included in the Regulations respecting the Laws and Customs of War on Land 1907 which are appended to the Fourth Hague Convention of 1907 (hereinafter – the Hague Regulations). Although the Hague Regulations are treaty, the accepted opinion – and this opinion has been accepted by this court (HCJ 606/78, 610 [6]; HCJ 390/79 [1]) – is that the Hague Regulations are declarative by nature and reflect customary international law which applies in Israel even in the absence of an Israeli legislative act. This is not the case regarding the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, which even if it applies to Israel's belligerent occupation in Judea and Samaria – and this question is bitterly disputed and we shall not express any position on it (see HCJ 61/80 [2], supra) – indeed, it is principally a constitutive treaty which does not adopt existing international practices, but rather creates new norms, which, in order to be applied to Israel, require a legislative act (see: Y. Dinstein "The Expulsion of Mayors from Judea," *Iyunei Mishpat*, 8 (5741-42) 158). We can leave for further review the worthy question whether the humanitarian provisions of the Fourth Geneva Convention, which the government of Israel decided to uphold (HCJ 698/80 [7]), are not sufficient to constitute obligatory norms, even if only partially – pursuant to their being part of the internal instructions of the government of Israel to the military commander and pursuant to their being self instructions of the military commander himself.

12. The Hague Regulations revolve around two central axes: one – ensuring the legitimate security interests of the occupier in a territory which is under belligerent occupation; the other – safeguarding the needs of the civilian population in a territory under belligerent occupation (HCJ 256/72 [8] at 138; 69/81, 493 [5], supra, at 271). The Hague Regulations seek to strike a certain balance between these two axes, whilst in some matters the emphasis is on military necessity and in others, the emphasis is on the needs of the civilian population:

> "The laws of war usually strike a delicate balance between two magnetic poles: military necessity on one hand, and humanitarian considerations on the other." (Y. Dinstein "The Legislative Authority in the Held Territories," *Iyunei Mishpat*, 2 (5732-33) 505, 509).

In both these matters – the "military" necessity and the "civilian" necessity – the basic premise is that the military commander does not inherit the rights and status of the defeated regime. It is not the sovereign in the held area (see: Oppenheim, "The Legal Relations between the Occupying Power and the Inhabitants" 33 L.Q. Rev. (1917) 363. The powers of the defeated regime are suspended and the military commander is vested with the "overarching governance and administration authority in the area" pursuant to the rules of public international law (HCJ 619/78 [3] supra; at 510). These authorities are, from the legal aspect, temporary by nature as belligerent occupation is temporary by nature (see: Oppenheim, International Law (London, 7th ed. by H. Lauterpacht, vol. 2, 1952) 436; see also The British Military Manual – H. Lauterpacht, The Law of War on Land being Part III of the Manual of Military Law (London, 1958) 143). This temporariness may be long term (see: HCJ 351/80 (HM' 764/80) [4], supra, at 690). International law does not set a time limit thereto and it continues as long as the military government effectively controls the area (see: HCJ 69/81, 493 [5] supra).

13. We have seen that the considerations of the military commander are ensuring his security interests in the Area on one hand and safeguarding the interests of the civilian population in the Area on the other. Both are directed toward the Area. The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population. Military necessities are his military needs and not the needs of national security in the broader sense (HCJ 390/79 [1], at 17). A territory held under belligerent occupation is not an open field for economic or other exploitation. Thus, for example, a military government is not permitted to levy taxes intended for the coffers of the state on behalf of which it operates on the residents of a territory held under belligerent occupation (HCJ 69/81, 493 [5], at 271). 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. The planning and implementation of a road plan in a held territory may be carried out for military reasons (see: HCJ 202/81 [9]). As we shall see, the planning and implementation of a road system may be carried out for reasons relating to the best interest of the local population. This planning and implementation may not be carried out simply to serve the holding state. Therefore, if the petitioner is correct that the purpose of the plan is not the needs of the Area (either military or civilian) but the needs of Israel, then, they are also correct in their legal position that this purpose is extraneous to the considerations of the military commander. It seems that the respondents themselves do not dispute the aforesaid legal proposition, but do dispute the position of the petitioner regarding the facts. It is found that this is the "geometric point" in the legal analysis at which we must address the factual dispute between the parties regarding the purpose of the plan.

14. In the factual dispute between the parties we have no reason not to accept the position of the respondents. We were presented with the planning considerations which lay at the basis of the plan and we have no grounds to doubt their veracity. The petitioner, on its part, raised no fact which could undermine the position of the respondents and other than a general argument, did not present any evidence or proof sufficient to cast a doubt over the respondents' approach. A review of the material presented to us reveals a picture of professional planning which takes into consideration the conditions and needs of the Area rather than only the conditions and needs of Israel.

15. I have noted that we are satisfied that the considerations weighed by the respondents were the considerations of the Area and not of Israel. However, I do doubt if the considerations of the Area are only considerations regarding the benefit of the local population – as has been argued before us – or if there are also security-military considerations alongside considerations regarding the interests of the population in the Area. This doubt does not arise from reading the respondents' affidavit, as this affidavit is devoted to considerations of the benefit of the Area and its population and includes no hint of a security consideration. The origin of this doubt is in the judgment of this court in HCJ 202/81 [9]. This case too concerned the planning and implementation of a road in the Area. In the judgment of the Honorable Justice Shiloh, it was noted that the network of regional roads which run the length and breadth of Judea and Samaria was not built only for reasons of the benefit of the local population, but also has a clear military purpose:

> "If, God forbid, war breaks out and a need to transport troops across the length and breadth of Judea and Samaria arises, their advance may be protracted, both since the present roads are narrow, winding and long and because of ordinary civilian vehicular traffic which may completely block them or slow movement on them. Wider, straighter and shorter alternative roads (following elimination of the bends) which do not run within communities are strategic assets of primary importance during war" (*ibid.* at 635).

These remarks were made regarding the entire plan rather than the specific road addressed in that case. Indeed, in an affidavit of response filed in that same petition – which I have studied in the files of the court– the head of the infrastructure planning division in the national security unit of the ministry of defense notes that "the military need to create free passage of IDF forces on the spatial and longitudinal arteries of the Area while minimizing friction with population centers along the way, which is reflected in the entire building of the national and regional road system in Judea and Samaria, of which this road is part, is incorporated" with the needs of the local public, "this both in order to ensure daily traffic as well as the passage of IDF forces during war." Indeed, this rationale is reasonable and one might have expected that in the case at bar too, the "security" consideration, which is incorporated with and completes the "civilian" consideration of the benefit of the local population would have been stressed before us. Yet, this military need was not mentioned. This approach is baffling. The military government is one, whether it stands before this court in the aforementioned HCJ 202/81 [9], supra, or whether it stands in the case at bar. How is it possible that what is said to one bench of this court is not said to us? I do wonder. In any case, this grim reality cannot tip the scales, as the respondents' legal status is solid especially if one supposes there is a military consideration alongside the civilian consideration. Therefore, we shall examine the legal situation in view of the factual supposition which less convenient for the respondents, which is the presupposition from which we depart - according to the accepted rules of procedure – in the case before us.

16. In view of our conclusion – which we do not doubt or question – that Israel's considerations and civilian needs did not lie at the basis of the planning and implementation of the road plan, we are left only with the legal dispute between the parties concerning the power and authority of the military government to plan and implement a "civilian" project in the Area – without any military implications – which has long term permanent ramifications, sometimes beyond the limits of the term of the military government itself.

17. Various provisions of the Hague Regulations safeguard certain specific rights of the civilian population in an area held under belligerent occupation. These arrangements are partial and provide a solution to a small number of special situations. Alongside these provisions, the Hague Regulations include an "overarching" general provision which seeks to establish a normative arrangement for an entire array of cases. This provision is set forth in Regulation 43 of the Hague Regulations. In the French version, it stipulates:

> "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mésures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique en respectant, sauf empêchement absolu, les lois en vigeur dans le pays."

The translation of this version raised certain difficulties (see: E.H. Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations," 54 Yale L.J. (1945) 393). The Hebrew version of Regulation 43, as adopted by this Court (HCJ 202/81 [9], at 629), sets forth:

> "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."

The first clause of the provision of this Regulation addresses the power of the military government to restore and ensure "public order and safety": this matter includes both the military necessities of the army itself and the needs of the civilian population under its control (see: Y. Dinstein, The Laws of

War (Shoken, 5743) 216). The final clause of the Regulation addresses a special case which has special symbolism – and that is the case where a military government seeks to change the laws applicable to the territory. The established rule is that existing laws in the territory must be respected and may not be altered unless a legislative change is required in order to realize the powers of the military government (whether on the civilian or military level) and to the extent of this requirement (see: HCJ 69/81, 493 [5] supra, at 310; Dinstein in the cited article in *Iyunei Mishpat* 2, at 509). The case at bar does not involve amendments to existing legislation, but rather acts of planning, expropriation and prohibition on construction in the framework of existing legislation. It is found that the center of gravity of our review is the first clause of Regulation 43 and not the final clause (compare: HCJ 351/80 (HM' 764/80 [4] supra, at 688; HCJ 97/79 [10], at 314).

18. The first clause of Regulation 43 of the Hague Regulations vests in the military government the power and imposes upon it the duty to restore and ensure public order and safety. This authority is twofold: first, restoring public order and safety in places where they had previously been interrupted; second, ensuring the continued existence of public order and safety. The Regulation does not limit itself to a certain aspect of public order and safety. It spans all aspects of public order and safety. Therefore, this authority – alongside security and military matters – applies also to a variety of "civilian" issues such as, the economy, society, education, welfare, hygiene, health, transportation and other such matters to which human life in modern society is connected. As Justice Shiloh remarks in HCJ 202/81 [9], at 629:

> "What is ensuring public order and safety? The obvious answer is: implementing good governance, encompassing all its agencies practiced in a civilized country in our day and age, including security, health, education, welfare, but also including quality of life and transportation"

19. The key question – which lies at the foundation of the legal dispute between the parties is the one related to the scope of the power of the military government to ensure public order and safety. Does the military government have the same powers as an ordinary government, or rather does its nature as a military government limit its possibilities and if so, under what circumstances? This question is nothing new. Feilchenfeld addressed it in noting:

> "Nations, tribunals and authors are by no means in agreement on the more practical question of how far short of full sovereignty the authority of a belligerent occupant falls" (E.H. Feilchenfeld, The International Economic Law of Belligerent Occupation (Washington, 1942) 87).

Naturally, Regulation 43 stipulates only a general formula and does not include any details of specific solutions to concrete problems (see: Stone, Legal Controls of International Conflict (New York, 1954) 728). We must therefore infuse the general provision of the Regulation with concrete content against the background of the fundamental legal parameters which outline the limits of the powers of a military government.

20. It seems to me that the scope of the power of the military government – alongside security and military considerations – is delimited by two major parameters: the first concerns the duty of the military government to act as a proper government which sees to the needs of the local population in all areas of life; the second concerns the limits of a military government which is not a permanent government but a temporary one that is not a sovereign but rather a ruler pursuant to the laws of war. The first parameter tends to broaden the powers and duties of the military government to the point of creating an analogy to an ordinary government. The second parameter tends to limit the powers and duties of a military government while creating a substantive difference between the scope of the

power of the military government and the scope of the power of an ordinary regime. It seems that the appropriate scope of the power of a military government is a result of the cumulative and mutually offsetting effect of these two parameters. The first parameter sets the optimal limit of the power and the second parameter sets its appropriate limit.

21. The first parameter, which sets the scope of the power of the military government concerns good governance which cares for the local population. A review of the significance of this parameter requires an examination of the perceptions regarding the obligations and powers of ordinary, proper government. In this matter one must note that the Hague Regulations were formulated against the background of the social reality in effect in the second half of the 19th century. This was a reality of laissez faire in which the ordinary regime did not intervene much in society or the market on one hand and in which utmost protection was given to private property on the other. As noted by Feilchenfeld:

> "The Hague Regulations were a late codification of a body of law adopted in an atmosphere of nineteenth-century liberalism, shaped by the basic philosophy of that era, and drafted for the conditions of a nineteenth century liberal world" (Feilchenfeld, supra, at 17).

And, relating to the Hague Regulations, Professor Stone finds that:

> They assume a laissez faire economy in both the Occupant and the occupied States, giving little guidance for the positive economic action which is now routine in modern States. The restraints on taxation, requisition and confiscation, do not prevent an indirect depletion of the economy and the guidance of the labour force to demanded tasks as a means of their bare survival. The Regulations are silent as to responsibility of the Occupant to ensure minimum living standards now assumed by most governments. They provide only the vaguest inferential guidance on the now basic State functions of currency, banking, debt, exchange and import and export control." (Stone, supra, at 729).

As a result, the Hague Regulations are characterized by a static rather than dynamic approach as far as the military government is concerned. Private property is protected, but the economic and social interests of the area which is under military government are not adequately addressed. Feilchenfeld rightfully points out:

> "Thus, the Hague Regulations protect private property, but do not deal adequately with other economic interests. They do not safeguard coherently the whole economic life of the region. In accordance with the trands of the last century, their emphasis is 'static' rather than 'dynamic' on 'having' rather than on 'doing' or even 'obtaining', on vested rights rather than on economic function or opportunity" (Feilchenfeld, supra, at 13).

This court acts in accordance with the Hague Regulations as long as they have not been changed by new customs or an international treaty which is applicable in Israel. However, in the framework of the Regulations themselves, there is room to address the powers and functions of a proper government, and this not according to social views which were prevalent more than a hundred years ago, but according to what is accepted and practiced among civilized peoples in our day and age. Therefore, the concrete content which was given to the provision of Regulation 43 of the Hague Regulations regarding ensuring public order and safety shall not be according public order and safety as at the end

of the 19th century, but rather according to public order and safety in a modern civilized country at the end of the 20th century.

22. In establishing the scope of the powers of the military government according to the formula regarding "public order and safety," it is appropriate to take into consideration the distinction between short term military government and long term military government. This distinction runs through the legal literature regarding the laws of belligerent occupation (see HCJ 69/81, [5] 493 supra, at 313). The Hague Regulations themselves were developed and formulated against the background of short term military occupation. It seems that the military reality at the time had no experience, in principle, of long term military occupations. Graber addressed this when noting, with regards to the Regulations, that they:

> "… were developed in a relatively peaceful period in which no major wars occurred and in which belligerent occupations were generally of short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign" (D.A. Graber, The Development of the Law of Belligerent Occupation, 1863-1941 (New York, 1949) 290).

This distinction between a short term military government and a long term military government has significant influence over the content which is to be infused into securing "public order and safety." As Justice Shamgar remarks in HCJ 69/81, 493 [5], at 313:

> The needs of any area, whether under military government or otherwise, will naturally change over the course of time, along with attendant economic developments. As explained above, the drafters of the Regulations were not satisfied with defining a duty which is discharged by restoration to the former situation. The length of time that a military government continues may affect the nature of the needs involved, and the urgency to effect adjustment and reorganization may increase as more and more time elapses… [T]he time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them."

It is only natural that in short term military occupation, military-security needs reign supreme. However, in long term military occupation, the needs of the local population receive extra validity (see: Dinstein, op. cit., at 217). Therefore, legislative means (such as new taxation or a new rate for an existing tax) which may be inappropriate for a short term military government may become appropriate for a long term military government. von Liszt rightfully notes (v. Liszt, Das Voelkerrecht (12th ed. 1921) 491):

> "The longer the occupation lasts, the more comprehensive will be the interference with the administration and legislation of the occupied country for its own sake" (cited in Schwenk, supra, at 399, note 25).

The fact that the Hague Regulations were enacted against the backdrop of short term belligerent occupation may cause the situation whereby there is no appropriate answer in the Regulations to many of the questions which arise in the daily life of a long term military occupation. Here too, we cannot change the Hague Regulations. We must implement them, since they form part of our law. However, this distinction between the types of military government according to the time element may serve as a consideration for policy in all those cases where there is room to develop such policy

within the framework of the Regulations themselves. A clear example of this is Regulation 43. Public order and safety require consideration of the time element and the very fact that the Regulations in their entirety were formulated against the backdrop of a short term military government does not prevent the development of rules regarding the scope of authority in a long term military government within the broad and flexible framework created by Regulation 43 of the Hague Regulations. As Justice Shamgar remarks in reference to the Hague Regulations in HCJ 69/81, 493 [5], at 313:

> "It is true that this article contains no rules as to adjustment or reclassification bound up with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life, which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities. In the legal interpretation of Article 43, the relationship between the time element, and the form taken by the provisions of Article 43 is stressed more than once."

23. The second parameter affecting the framework of the authorities of the military government is related to the character of the military regime, a regime which does not imbibe life from election by locals, which is not a sovereign by its own right and which receives its power from the laws of war itself. It is, of its essence, a temporary regime even if this temporariness is of long duration. Therefore, the conclusion that some powers which are vested in the ordinary sovereign are not vested in a military government follows from the very essence of the military government, as Oppenheim notes:

> "Moreover, the administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military government" (Oppenehim, International Law, supra, at 437).

The U.S Army Field Manual on the Law of Land Warfare, Department of the Army (Washington, 1956), repeats the same principle:

> "Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force."

The Supreme Court has also repeated this approach (HCJ 500/72 [11], at 484). The conclusion that follows is that a military government is not permitted to make substantive changes of a permanent character to the political, administrative or judicial institutions in an area which is under belligerent occupation other than in extraordinary cases such as where existing institutions contravene, in content, the principles of basic justice and morality (see: Feilchenfeld, supra, at 89; HCJ 61/80 [2], at 599). Thus, for example, this parameter necessarily leads to the conclusion that a military government may not sell government real estate and its legal status in this real estate is that of usurfructory only.

24. The two aforesaid parameters – good governance on one hand and the temporary lack of sovereignty on the other – outline the framework inside which the military government's authority exists. It is only natural that specific rulings in individual cases are made according to the special circumstances

of each and every case. However, it seems to us that one can point at a number of trends which may affect the appropriate balance between these two parameters. One must reiterate that these trends exist where military or security considerations are inapplicable and the only consideration being weighed is the benefit of the local population. Under this assumption, we must aspire to the solution which ensures good governance without obscuring the difference between military government and ordinary government.

25. As we have observed, it follows from the explicit wording of Regulation 43 itself that the authority of a military government extends not only to restoring public order and safety, but also to ensuring the latter. Indeed, restoring and ensuring are not one and the same (HCJ 69/81, 493 [5] supra, at 309). Alongside the authority to restore the disrupted public order and safety, there is a power to ensure public order and safety, even if these had not been disrupted, or where public order and safety had already been restored.

26. The life of a population, as the life of an individual, does not stand still but is rather in constant motion which includes development, growth and change. A military government cannot ignore all these. It may not freeze life. As noted by Greenspan:

> "However, human existence demands organic growth, and it is impossible for a state to mark time indefinitely. Political decisions must be taken, policies have to be formulated and carried out." (M. Greenspan, The Modern Law of Land Warfare (Berkeley, 1959) 225).

Justice Sussman repeats the same notion in HCJ 337/71 [12], at 582, when remarking:

> "The scholars of international law have not lost sight of the fact that where a military occupation continues for a protracted period of time before peace is achieved, the occupant's duty toward the civilian population may even require it to change some of the laws, as the needs of society change over time and the law must address the changing needs…
>
> Life does not stand still, and no regime, whether occupying or another, adequately fulfils its obligation toward the population if it freezes legislation and refrains from adjusting it to the necessities of the times."

Therefore, the power of the military government extends to taking all necessary measures to ensure growth, change and development. The conclusion that follows is that a military government may develop industry, trade, agriculture, education, health and welfare and other such matters which are related to good governance and are required in order to ensure the changing needs of the population in an area under belligerent occupation (see: Feilchenfeld, suprat, at 24; Greenspan, supra, at 23; E. Colby, "Occupation Under the Law of War" 26 Colum. L. Rev. (1926) 146, 159). This approach in some way validates the first of the two aforementioned parameters. It includes care for the local population, as required by a proper government. However, this approach does not ignore the second parameter, as the aforementioned approach does not alter the temporary and unique character of the military government and does not obscure the distinction between military government and ordinary government.

27. Sometimes, it is impossible to secure growth and development within the framework of a long term military government without making infrastructural investments that would bear fruit in the future. These investments may sometimes cause permanent changes in the area, which may remain following

the termination of the military government. Is a military government permitted to plan and implement such actions? Clearly, the first parameter, which concerns good governance, may justify vesting the military government with powers to plan and implement such infrastructural investments. Does the second parameter, which concerns the temporariness of the military government, deny these actions? This question was raised in HCJ 256/72 [8], and the answer of the court, at 138, by Justice Landau was:

> "Supplying the electricity which is required for the needs of the local population is undoubtedly one of the roles incumbent upon the military government in order to ensure the population's normal life. We have seen above that the current supply of electricity to the city of Hebron is unreliable and is in need of speedy improvement and that there is no dispute that such an improvement may only be achieved by connecting the city to one of the networks outside the Area. This need is present and it must be fulfilled. Mr. Shimron claims that installing the power line needed for this purpose establishes long term facts, whereas a military government is not permitted to take measures beyond those needed for the days of that government itself. However, there is no reasonable way to satisfy existing needs without infrastructural investment, including installing a power line. In any case, no one knows at this point how long the existing situation in the Area will prevail and what the final arrangements at the end of the military rule will be. If there is a need, such arrangements may include agreed conditions for adapting the facts currently being created to the final situation, whether by purchasing for compensation or by other means. The military government's actions, therefore, do not constitute a violation of Article 43 of the Hague Regulations. On the contrary, this action seeks to fulfill the administration's duty to see to the economic welfare of the Area's population."

It was found that infrastructural investments which may bring about permanent changes that may remain after the termination of the military government are permitted, if they are reasonably required for the needs of the local population. As Justice Y. Cohen remarks in HCJ 351/80 (HM' 764/80) [4] at 690:

> "From the nature of military government in a held territory and from the aforementioned it is clear that such a government is fundamentally temporary and its main role, in keeping with the necessities of war and security, is to act to the best of its ability to ensure public order and safety. Indeed, the 'temporariness' of holding the territory is relative and the case of Judea and Samaria will so prove, when thus far the holding of the territory as an area under the control of a military commander has endured for close to 14 years. From the provision regarding respecting existing law, one may deduce that in the absence of special reasons, the commander of the Area should not generally initiate such changes in the Area, which, even if they do not alter existing law, will have a far reaching and long lasting effect on the situation in the Area beyond the period in which the holding as a military zone ends in one way or another, unless these are actions which are taken for the benefit of the residents of the Area."

In both the abovementioned cases, the court did not review institutional changes which may lead to a blurring of the distinction between temporary military government and ordinary permanent government. We must always consider this parameter when ruling on the scope of the power of the military government. It seems to me, therefore, that long term infrastructural investments which may bring about permanent changes that may remain following the termination of a military government are permitted, if they are required for the benefit of the local population and provided they do not bring about a substantive change in the fundamental institutions of the Area. This approach appropriately balances the needs of a proper government which cares for the local population and ensures its interests, not just for the short term but for the long term also, whilst not freezing its development but rather considering the "dynamics of life" (in the words of Justice Shamgar in HCJ 69/81, 493 [5], at 709), and the natural limitation placed on the military government, which is temporary and derives its power from the laws of war.

28. Infrastructural investments which are planned for the benefit of the local population may sometimes require planning and cooperation with elements outside the Area. These elements may be a neighboring state or the state of the military government itself. Is there something in the character of a military government which prevents it from planning under such circumstances? Clearly, the benefit of the local population requires such cooperation. It is only natural for a proper government to cooperate with its counterparts to achieve its own goals. Does the temporariness of the military government limit this approach? It seems that the answer is negative. Contact with elements outside the Area – and indeed such contact with the state of the military government – is not an act of sovereignty which is beyond the power of a military government (see HCJ 69/81, 493 [5], at 311).

29. We have seen that the power of the military commander develops by way of a delicate balance between the needs of a proper government on one hand and the limitations of a temporary government on the other. This balance does not create an equilibrium point, but rather a surface or expanse in which there are a number of equilibrium points. Choosing between them is up to the military government. It does not have to choose a certain option, but rather may choose the option it deems fitting, as long as appropriate considerations are weighed, as required by the laws of war on one hand and the rules of administrative law on the other. Indeed, sometimes a military government is passive and sometimes a military government is active. Sometimes a military government is satisfied with ensuring a necessary minimum and sometimes a military government seeks to ensure more than this. Sometimes a military government is prepared to make infrastructural investments which will bring about permanent changes, and sometimes a military government does reach for great things. Changes in the fundamental approach itself may occur over the course of the life of a military government. This approach is influenced by various factors, including the military government's physical capabilities, the manpower (military and civilian) at its disposal and financial resources. An expression of this trend is found in Regulation 43 itself, according to which, the military government must take "all the measures in [its] power" to ensure public orders and safety "as far as possible":

> "The degree of possibility of fulfillment of the duties is measured according to a complex of circumstances, that is, not only in the light of the needs of the territory, but also in the light of the legitimate needs of the military government…which is responsible for the 'belligerent occupation' and whilst striving for a proper balance between the two" (Justice Shamgar in HCJ 69/81, 493 [5] supra, at 310).

Indeed, all that can be pointed to in the framework of the broad phrasing of Regulation 43 is that there is clearly a minimum standard of ensuring the public order and safety of the local population of which a military government, acting as a proper government, cannot fall short, and that there is also clearly a maximum standard for ensuring the public order and safety of the local population which the military

government, acting as a temporary government, may not exceed and that between the two there is a spectrum of power in which there is no duty but rather a privilege to choose between various options wherein each military government chooses the balancing points which it sees fit, according to its nature and characteristics on one hand and according to its understanding of the Area on the other.

Legal Measures

30. What are the legal measures a military government may take to actualize an action which is within the scope of its power? It seems that the answer is that subject to specific provisions set forth in the Hague Regulations and according to the general provision in Regulation 43, a military government is vested with all the by-powers which are reasonably needed for exercising the power. Thus, for example, the accepted approach is that a military government may implement a licensing regime, or cancel it, grant individual licenses or cancel them, grant rights or cancel them, hire and fire officials, establish banks and carry out other activities required for exercising its powers (see: von Glahn, The Occupation of Enemy Territory (Minneapolis 1957) 202).

31. Is a military government permitted to use local law and expropriate private property pursuant thereto? The Hague Regulations set provisions relating to expropriation and requisition of property for military purposes. They contain no provision as to expropriation or seizure which serve the benefit of the local population under local law. Is the conclusion to be drawn from the Hague Regulation's silence a negative arrangement on this matter? Is it not correct to say that the provision of Regulation 46 of the Hague Regulations, according to which private property may not be confiscated, denies the exercise of local law? The answer to this is negative. The accepted approach is that one cannot conclude a negative arrangement regarding expropriation or requisition for "civilian" purposes under local law from the arrangements in the Regulations regarding confiscation or requisition for military purposes. The contrary is true: the accepted approach is – and it is infused by the provisions of Regulation 43 – that a military government is permitted to expropriate or take possession of private property under local law, provided that this is carried out under the conditions of that law and for purposes of the local population. As for the provision in Regulation 46, it was designed to apply where there is no local law allowing for expropriation and payment of compensation (HCJ 606/78, 610 [6], at 123). Feilchenfeld notes this:

> "The laws of the occupied state will usually provide for the power to expropriate private property provided it is needed and compensation is paid. During an occupation the occupant's right and duty to maintain public order and safety may involve expropriation" (Feilchenfeld, supra, at 50).

The American Army Field Manual repeats this idea:

> "In order to assure public order and safety, as required by article 43, H.R. … an occupant is authorized to expropriate either public or private property solely for the benefit of the local population. The occupant is obliged, unless absolutely prevented, to respect the laws in force in the occupied area in so doing" (The Law of Land Warfare, supra, at 158).

A similar approach is expressed by Greenspan who states that Regulation 43 of the Hague Regulations:

> "… permits the Occupying Power to expropriate either public or private property in order to preserve and maintain public order and safety [provided he respects] unless absolutely prevented, the laws in force in the occupied country" (Greenspan, supra, at 296).

The author further notes that such expropriation must be for the benefit of the local population and that compensation shall be paid in accordance with local law. This idea is repeated by von Glahn, supra, at 186; G. Schwarzenberger, International Law, vol. 2 – Law of Armed Conflict (London 1968), 246 and P.C. Jessup, "A Belligerent Occupant's Power over Property," 38 Am. J. Int. L. (1944) 457, 461. This approach was also adopted by this court (HCJ 202/81 [9] supra, at 63). In conclusion: local law, which allows expropriation or requisition for public needs continues to exist – provided it has not been revoked or lawfully changed – during the period of belligerent occupation. The power of expropriation is held by the military government pursuant to the laws of war. It is allowed to exercise it upon meeting three cumulative conditions: first, the official exercising the authority is acting in accordance with the requirements set forth in local law; second, the exercise of power is for the benefit of the local population, as required by Regulation 43 of the Hague Regulations; third, the official who is vested with the power exercises it in accordance with the fundamental principles of Israeli administrative law such as providing the right for a hearing prior to the expropriation or requisition (see: Shamgar supra, at 48).

Judicial Review

32. It seems that there is no longer cause to doubt the rule that the Supreme Court, sitting as the High Court of Justice, is authorized to exercise judicial review over the actions of the military government in Judea, Samaria and the Gaza Strip. True, the issues was initially left for further review (see: HCJ 302/72, 306 [13]; HCJ 390/79 [1]). Over the years, the status of the military government has been clarified and now there is no doubt that under Article 7 of the Law of the Courts 5717-1957, this court is entitled to the right of review. The reason for this is that the military commander and those under his command are public servants who serve a public function in accordance with the law (see HCJ 802/79 [14]; HCJ 69/81, 493 [5] supra, at 230; E. Nathan, "The Power of Supervision of the High Court of Justice over Military Government" Military Government In the Territories Administered by Israel 1967-1980, supra, at 109.

33. The judicial review of this court extends both to the matter of examining the existence of a formal source for the power of the military government (whether in local law or in security legislation), as well as to the matter of the manner in which this power is exercised. The latter examination is carried out both in light of the rules of customary international law and in light of Israeli administrative law. In this respect it could be said that every Israeli soldier carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law.

34. As for the scope of the review, we will find in the judgments of this court remarks according to which the areas of intervention by this court are extremely narrow (see: HCJ 302/72, 306 [13] at 7, 179, 184; HCJ 606/78 [6], at 126; HCJ 258/79 [15]). The significance of these remarks is not that the causes for review are limited but rather only that in matters of security, the court shall not replace the security considerations of the military commander with security considerations which the court itself favors. This approach is not specific to the military government but is rather a general one. In all areas of administrative law, the court does not appoint itself a supreme public-servant, but merely examines whether a reasonable and decent public servant could have made a decision such as the one made in practice. True, the court went on to say that it was willing to consider the military commander as having genuine reasons and very convincing evidence is required in order to contradict this presumption. This special "presumption" is limited, of course, to the matter of special military considerations. It does not apply to the issue of the "civilian" authority of the military government in all matters concerning ensuring public order and safety, particularly not where a long term military government is concerned. As we have seen, in such a military government the "civilian" side is intensified and there is no reason why the court should not employ the same "presumptions" in the

case of the military commander as those it employs in the case of any public servant who lawfully exercises powers. The military government holds a great deal of power and for the sake of the rule of law, it is appropriate to perform judicial review in accordance with the ordinary tests. It seems that the court has taken this path in the past (see: HCJ 351/80 (HM' 764/80) [4] supra; HCJ 629/82 [16]), and there is no reason to deviate from this path in the future.

From the General to the Particular

35. Against the background of the general principles relating to the authority of the military government, we can now proceed to resolve the dispute between the parties. This dispute has two facets: one relates to the authority to plan a national road system in the scope and size carried out in the case at bar; the other relates to the power to expropriate a part of the petitioner's land and prohibit construction in another.

36. As we have observed, a military government must act as a proper government and must care for the public life of the local population. For this purpose, it is vested with executive powers. In exercising these, one must consider the fact that this is a long term military government and the major changes which occur among the population. In these circumstances, a military government is empowered to make infrastructural investments and instigate long term plans for the benefit of the local population. For this purpose, it may also cooperate with its own state. Against this background, it is clear that there is no fault in the preparation of the national road plan: the transportation needs of the local population have increased; the state of the roads must not be frozen. Therefore, the military government had the authority to prepare a road plan which takes into consideration present and future development. It is indeed true that the roads will likely remain following the termination of the military government. This is insignificant. This planning does not constitute conflation between military government and ordinary government and the mere fact that this planning was carried out in cooperation with Israel does not suffice to reject the plan, provided it was carried out for the benefit of the local population. Indeed, one might assume that the transportation solution which was adopted in the road plan is not the only solution and that other solutions may be possible. This does not suffice to justify our intervention. We do not serve as a supreme planning committee and we are not engineers. Our judicial examination is a review and the question is whether a reasonable supreme planning committee could have planned such a plan. The answer to that is affirmative and there is nothing in the petitioner's affidavit or arguments to refute this. True, a different government might have refrained from preparing a broad and extensive plan. It may be that such an approach fell in the scope of the options available to the military government. However, once the military government chose to prepare an extensive plan, we do not see any legal fault therein, provided that we are satisfied that it is for the benefit of the local population. As stated, we have been satisfied of this.

37. Upon approval of the plan, the petitioner's property rights are infringed. Part of its land will be expropriated and construction will be prohibited on another. The petitioner will receive compensation for the damages it suffered. All of these are carried out in accordance with local law and in the framework of local authority. As we have observed, the rules of public international law grant the military commander the power to infringe upon property rights in accordance to and in the framework of local law if this is carried out for the benefit of the local population and if compensation is paid to the harmed party. Indeed, we understand the petitioner, but there is no reason why it should receive preferential treatment over others whose own property would have been harmed had a different route been chosen.

Conclusion

38. We have, therefore, reached the conclusion that the respondents have acted lawfully and within the scope of their authority and that for this reason the petition must be rejected. For this reason we have

found no room to review the additional argument raised by counsel for the respondents that the petitioner is barred from submitting the current petition as it had exhausted its cause or its remedy in the previous proceeding between the parties. We can leave this question for further review.

The result is that we reject the petition. The temporary order regarding prohibition of changes on the ground is null and void. The petitioner shall pay for the expenses of the respondents, including legal fees, to a total sum of 50,000 NIS.

JUSTICE YEHUDA COHEN: I consent.

JUSTICE H. AVNOR: I consent.

Ordered as set forth in the judgment of Justice Barak.

Given today, 22 Tevet, 5744 (28 December 1983).