HCJ 358/88

The Association for Civil Rights in Israel and others
v.
The Central District Commander and Another

The Supreme Court sitting as the High Court of Justice
[July 30, 1989]
Before Shamgar P., Elon D.P., and Wallenstein, J.

Editor's Synopsis -

Regulation 119 of the Defence (Emergency) Regulations 1945 authorizes a Military Commander to order the forfeiture and destruction or sealing of any house from which gun fire has issued or explosive or incendiary material was thrown unlawfully, and of any house in an area or village residents of which violated the Emergency Regulations involving violence or intimidation. These regulations, including the said Regulation 119, were promulgated by the British Mandate during the period of its rule in Palestine.

Regulation 119 continues to be in force in Israel by virtue of section 11 of the Law and Administration Ordinance enacted by Israel upon its establishment in 1948, which provide in essence that the law that was in force on the eve of the establishment of the State shall continue to be in force until abolished or amended by a law enacted by the Israeli Knesset. The Regulation also continues to be in force in Jordan by virtue of similar legislation there. Therefore, it is part of the local law that was in force in Judea and Samaria when those areas were occupied by the Israel Defense Forces during the Six Day War in 1967, and under international law it continues to be the law in force in the

occupied territories. No substantive change has been made in the law in Gaza since the Mandate and Regulation 119 continues in force there as well.

This Petition concerns the procedures applicable when a Military Commander issues an order to demolish a house pursuant to Regulation 119, more particularly, whether the owner or occupants of a house affected by such an order should have the right to a brief delay in its implementation, during which time they can present their objections thereto before the Commander who issued the order, consult with legal counsel and, if they wish, raise their claims by petition before the High Court of Justice. The Court issued an order directing the Respondents to show cause why they should not allow the Petitioners the rights claimed.

The Petitioners argued that the right to present one's claims is a fundamental right of natural justice that has legal force even if it is not set forth expressly in the Regulations at issue. This right is especially important in the case of the Regulation at hand, since the destruction of the property is irreversible. Destruction of the property is a severe sanction, whose very severity requires that an opportunity be allowed to present one's claims before the Regional Military Commander and, if need be, before the Court.

The Respondents asserted that, in practice, it is generally possible for a party affected by such an order to present his claims before the Military Commander who issued the order and that implementation of the order will ordinarily be postponed to enable the affected party to petition the High Court of Justice, if he wishes to do so. But, they contended, there are occasional instances of "severe and exceptional cases" in which it is essential that the powers granted by Regulation 119 be enforced promptly after the event because of which the order was issued, in order to achieve the desired deterrent effect. Such cases consist of incidents involving lethal injury or grievous wounding and the throwing of incendiary bottles. The Respondents objected to a broad ruling that would require a delay in implementing the order in all cases, such as was sought by the Petitioners.

The Court accepted the Petition and issued a rule absolute in the Petitioner's favor to the effect that -

1. Except for matters involving ongoing military-operational needs, such as, for example, the need to clear away an obstacle or overcome resistance that prevents taking prompt military action in response to an attack on military forces or on civilians, an order issued under Regulation l19 should include a notice that the person affected by the order may select an advocate and present his claims before the Military Commander, within a fixed time period set forth therein, before the order is implemented, and that he will be given an additional fixed period to apply to the High Court of Justice;

2. The State may apply to the Court, in an appropriate case, and request that the hearing of the matter be given preference;

3. In urgent situations, the premises can be sealed on the spot before the appeal or hearing takes place. The sealing of the premises, as distinguished from their destruction, is not irreversible.

In reaching its decision, the Court noted, inter alia, that international law does not recognize any right to present one's claims under a regime of military law, as the Petitioners seek in this case. However, Israeli military authorities who function in the occupied territories do so under a dual and cumulative standard. In addition to their duty to abide by the Laws of War, as Israeli officials in the Area, they must also act in accordance with the norms of Israeli administrative law. As such, an Israeli official does not fulfil his duty merely by satisfying the norms of international law, but he must also act in accordance with the rules of Israeli administrative law that define what constitutes

a fair and ordely administration. The right to be heard is not a part of the Laws of War, but an Israeli authority will not fulfil its duty if it does not respect that right.

Israel Supreme Court Cases Cited:

[1] H.C. 897/86 jabar v. The Central District Commander, 41(2) P.D. 522.

[2] H.C. 513, 514/85 *Nizal v. The Commander of the I.D.F. Forces in the Judea and Samaria Region,* 39(3) P.D. 345.

[3] H.C. *434/79 Schoweel v. The Regional Commander of Judea and Samaria,* 34(1) P.D. 464.

[4] H.C. 22/81 *Chamad v. The Regional Commander of Judea and Samaria,* 35(3) P.D. 223.

[5] H.C. 274/82 *Chamamra v. The Minister of Defence,* 31(2) P.D. 755.

[6] H.C. 69, 493/81 *Abu Aita v. The Regional Commander of Judea and Samaria,* 37(2) P.D. 197.

[7] H.C. 619/78 "Al Tliyah" *Weekly v. The Minister of Defence*, 33(3) P.D. 505.

[8] H.C. 331/71 *Almakdesah v. The Minister of Defence,* 26(1) P.D. 574.

[9] H.C. 361/82 *Chamri v. The Regional Commander of Judea and Samaria,* 36(3) P.D. 439.

American Cases Cited:

[10] *Hirabayashi v. United States* 320 U.S. 81 (1954).

[11] *Korematsu v. United States* 319 U.S. 432 (1944).

[12] *Calero-Toledo v. Pearson Yacht Leasings Co.* 94 S. Ct. 2080 (1974).

JUDGMENT

SHAMGAR P.: 1. This petition concerns the introduction of fixed and general appellate procedures to apply in Judea, Samaria, and the Gaza Strip, following the issuance of an order pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945, with regard to the demolition or sealing of a building or part thereof.

Based on the petition, this Court issued an order nisi, instructing the Respondents to appear and explain:

> "A. Why they should not permit a resident of a house, as to which an order of demolition or sealing will be issued pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945, to present his claims before the competent authority prior to the implementation of the order.
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> B. Why they should not allow such resident a delay of 48 hours from the denial of consent to his application, or of a longer period of time as may be determined by this Court, to submit a petition to this Court, if he should so desire, prior to the implementation of the order.
>
> C. Why they should not permit such a resident to establish immediate contact with a lawyer, if he should so desire.

D. Why they should not notify such a resident that he has these rights."

2. The aforementioned Regulation 119 of the Defence (Emergency) Regulations was promulgated by the High Commissioner in the year 1945, during the time of British rule over all the territories which today include the State of Israel and the areas occupied by her. This is the text of the regulation:

"FORFEITURE AND DEMOLITION OF PROPERTY, ETC.

119. (1) A *Military Commander* may by order direct the *forfeiture to the Government of Israel of any house,* structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or of any house, structure or land situated in any area, town, village, quarter or street, the *inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or* been accessories after the fact to the commission of, any *offence* against these Regulations *involving violence or intimidation or any Military Court offence*; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land. Where any house, structure or land has been forfeited by order

> of a Military Commander as above, the Defence Minister may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land shall revest in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order of forfeiture had not been made.
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> (2) Members of the Government Forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, without compensation, any property in any such area, town, village, quarter or street as is referred to in subregulation (l), after eviction without compensation, of the previous occupiers, if any." (Emphasis added - M.S.)

The Regulation continues to be in force in Israel by virtue of the provisions regarding the continuity of the law, as stated in paragraph 11 of the Law and Administration Ordinance, 5708-1948.

It continues to apply in Judea and Samaria by virtue of similar provisions regarding the continuity of the local law, which were enacted by the Jordanian government.

In H.C. 897/86 [1], we stated in this regard, at pp. 525-526:

"... Regulation l19 is part of the law which was in force in Judea and Samaria just before the establishment there of I.D.F. rule.... The local law remained in force, with exceptions not related to the matter before us, in accordance with the principles of public international law, as set forth also in the Law and Administration Proclamation (Judea and Samaria) (No. 2), 5727-1967 of the Regional Commander of I.D.F. Forces (see Regulation 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention). Hence, the authority granted by the said Regulation ll9 is local law that exists and applies in the area of Judea and Samaria, that was not abolished during the previous regime or the Military Rule, and no legal reasons have been brought before us, on the basis of which it should be deemed abolished now."

With regard to the continuing force of the above-mentioned Defence (Emergency) Regulations in Judea and Samaria, see also H.C. 513, 514/85 [2], at p. 650; as to the validity of Regulation 119, see also, inter alia, H.C. 434/79 [3], at p. 466; H.C. 22/81 [4], at p. 224; H.C. 274/82 [5], at p. 756.

No substantive change in the local law has occurred in the Gaza Strip since the period of the Mandate, so no claim has ever been raised against the continuing validity of the above-noted Defence (Emergency) Regulations in general, and of Regulation 119 in particular, there.

3. The Petitioners claim that the owners of the building or those who reside in it, as to which an order pursuant to Regulation 119 is about to be implemented, should be permitted to present objections to the Regional Commander who issued the order. Thereby, the right to present one's claim will be given expression prior to implementation of the order, so that one who is affected by the matter can try to persuade the Regional Commander that the order should not be issued in the circumstances. As requested by the Petition before us, if the Regional Commander declines to rescind his decision, there should be an additional delay in implementing the order for 48 hours or more, as will be determined, so as to permit application to the High Court of Justice prior to implementation of the order. Thus the right to present one's claim will find its expression before the property of those affected in the matter is damaged. According to the Petitioners, the right to present one's claim is a right rooted in Israeli law, available to every person in judicial, quasi-judicial and even administrative proceedings. They assert:

> "The principle accepted in Israel is that when legislation grants a government authority the power to take a decision that injures a citizen, the principles of natural justice apply without the need that they be enacted expressly. These principles do not apply only when there exists an explicit and clear legislative provision that negates their applicability. Legislative silence should not be interpreted as a negative regulation, when it comes to the applicability of principles of natural justice, and its express recognition in the one case does not imply its rejection in others."

In the Petitioners' opinion, the emergency situation does not abolish the existence of the right as stated, and the power applied pursuant to emergency regulations - including both those who source is Mandatory legislation as well as those whose basis is paragraph 9 of the Law and Administration Ordinance - does not limit the described right. In their words:

> "The essence of Regulation 119, which grants power to inflict extreme and severe punishment, does not suggest the negation of principles of natural justice. On the contrary. The more extreme the authority, and the more severe the injury to the citizen's rights, the more it is necessary to adhere strictly to the procedural protections given to the person who is likely to be hurt, including his right to have his claim heard."

They further contend that the negation or postponement of the right to present their claim can be justified only to prevent serious danger or the complete frustration of government action. An example of circumstances of the first type is the hospitalization of a person against his will if he is liable to hurt himself or another, or the destruction of a dangerous article. Also, a security operation, such as the destruction of a building for immediate-operational reasons to prevent it from being used as a hiding place for terrorists, can justify a departure from the right to present one's claim. An example of the second array of circumstances is the issuance of an order barring departure from the country or the seizure of an item which may be removed beyond control; even then, two cumulative conditions must be satisfied, that the action taken is reversible (a bar against

leaving the country can be cancelled), and that the right to be heard will be granted immediately after the action is taken.

The sanction pursuant to Regulation 119 is severe, and the demolition is irreversible. The claim is that the Respondents' opposition to permitting a delay in enforcement of the order for the purpose of presenting their objection is intended primarily, according to the Petitioners, to prevent application to the High Court of Justice, because in this forum, the question whether the issuance of the order was weighed pursuant to standards formulated in this Court will be put to test, including whether there is an adequate factual basis for the exercise of the authority. Without hearing the claim by the owner of the building, there is no opportunity for suitable weighing and examination of the facts by the competent authority:

> "When an order is issued immediately after a horrible terrorist episode or a serious incident (such as the Baita Incident), the Military Commander is liable to reach his decision as a result of his and the public's emotional reaction, and sometimes even before the facts of the incident are thoroughly clarified. The Commander must act from logical and relevant considerations. He must not operate - and the public must not fear that he operates - out of anger, haste or a public atmosphere that demands revenge. A reasonable pause and listening to the affected party are the best assurances for making a reasoned decision".

According to the Petitioners, there is no proof that speed of action helps bring about deterrence, and, even if the matter were so, it would not justify making an exception to the principles of natural justice.

4. The Respondents claim that, in reality, it is generally possible for the affected party, against whose property an order of demolition or sealing has been issued pursuant to Regulation 119, to present objections to the Regional Commander even though Regulation 119 in particular and the local law in general do not contain provisions allowing objections or appeal before a judicial authority. In other words, according to the Respondents' answer, it is the practice today, in many cases, to delay the implementation of an order if the affected party wishes to petition to the High Court of Justice concerning the issuance of the order after rejection of his application to the Regional Commander.

As stated in the Respondents' answer, the Regional Commander's work practices contain directives to provide the affected party an opportunity to set forth his claims during the time period necessary for gathering the facts and reaching a decision, except in serious and exceptional cases, subject to such limitations as will ensure that this will not frustrate the primary goal, which is to exercise the authority without particular delays so as to fulfil the Military Commander's obligations and rights to protect public law and order in the area.

These matters, according to the Respondents, are a consequence of the policy that seeks to apply the general principles of law, as far as possible, even in times of emergency and in conditions of emergency; but this is to be done in such a way as to

preserve the required balance between the principles mentioned and safeguarding security needs and the public order in the area, as changing conditions require from time to time.

The Respondents further explained in their Response the background for their opposition to the Petitioners' request that a delay be allowed *in every case* to raise an objection and apply to a court before the excercise of the said authority based on Regulation 119; and thus it is said, inter alia, in the words of the Response:

> "Regulation 119, by its very nature, grants the Military Commander the authority to apply the sanctions specified therein at varying levels of severity, beginning with forfeiture, partial or complete sealing, and ending with forfeiture and demolition of the structure.
>
> The more severe the implemented sanction, the greater is the corresponding deterrent effect.
>
> Alongside the severity of the sanction and its level, it is of the greatest importance that it be implemented *quickly* and immediately after the criminal act, because of which it was taken in the first place.
>
> An immediate response in executing the sanction is of the greatest importance, particularly in serious and exceptional events, in which demolition of the building urgently and immediately - as distinguished from sealing it - will have the greatest deterrent effect.

> I wish to reassert once again that the defence establishment is cognizant of the extreme seriousness of the destruction of a house without providing a prior right to assert claims, but this sanction will be applied only in serious and exceptional cases, that result in a lethal injury or grievous wounding, and against those who throw incendiary bottles and are caught within a short and reasonable time thereafter."

In a notice from the State Attorney, detail is given of the lines of action approved by the Minister of Defence, pursuant to which the Respondents will operate from now on. The statement reads:

> "(A) Except in severe and exceptional cases, notice is to be given to the residents of the house concerning the possibility to present their contentions before the Military Commander, before the excercise of the authority under Regulation 119 of the Defence Regulations. Afterwards, if they should so desire, they are to be given additional time to submit their contentions to the honorable Court, before the implementation of the order.
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> (B) 'Severe and exceptional cases' will be deemed particularly serious events that result in lethal injury or grievous wounding.
>
> (C) Also, the residents of the house will not be given the opportunity to raise their claims prior to implementation of the order, in situations requiring, in the Military Commander's opinion, a quick deterrent

response, shortly and within a reasonable period of time after the event.

Such situations occur today in cases of the throwing of incendiary bottles.

(D) Residents of the building are not to be prevented from contacting a lawyer, if they so desire."

In the course of the hearing, the Court raised a proposal, according to which, if there is an intention to seize the house, it would be possible to seize the house and *seal* it before hearing the residents' claim, but the act of *demolishing* the house would not be taken until after the right to present the claims has been allowed, pursuant to the usual time periods. The Petitioner's learned counsel, Advocate Shoffman, agreed to the said proposal.

The Minister of Defence's response to the Court's said proposal was presented in a notice from the State Attorney's Office, which stated:

"After the Minister of Defence consulted with various security officials, including the Respondents, and after he considered the Court's proposal and examined it, and giving consideration to the current circumstances and situation, the Minister of Defence cannot accept the honorable Court's proposal, at this time".

Nevertheless, the Respondents once again confirmed that they will adhere to the arrangement whose salient points were quoted above.

We will now examine the litigants' claims.

5. According to the Law and Administration Proclamation (Judea and Samaria) (No. 2), 5727-1967, the law which was in force in the Gaza Strip and the Judea and Samaria area on the 27th of Iyar 5727 - June 6, 1967, or the 28th of Iyar 5727 - June 7, 1967, respectively, will continue and remain in force, insofar as there is nothing therein that contradicts the above-mentioned Proclamation or any Proclamation or Order which will be issued by the Commander of I.D.F. forces in the area, and subject to such modifications as may result from the establishment of I.D.F. rule in the area. The Proclamation expresses public international law principles, as they are also set forth, inter alia, in Regulation 43 to the Supplement to the 1907 Hague Regulations regarding the Law and Customs of War On Land (hereinafter - the Hague Regulations) and in Article 64 to the Geneva Convention Relative To The Protection of Civilians in Time of War, 1949 (hereinafter - the Fourth Geneva Convention).

When applying principles of public international law, the Regional Commander operates according to guidelines that are derived from the basic conceptions of administrative law practiced in Israel. We said in H.C. 69, 493/81 [6], at pp. 231-232:

> "...[T]he Court reviews the legality and validity of the action in accordance with the principles of Israeli administrative law, to ascertain

whether the official who carries out functions of the Military Government, acts lawfully and according to the norms binding on an Israeli public servant. More particularly, this does not mean that Israeli administrative law applies to the Region and its inhabitants or that the legality of an act in the Administered Territory will be examined according to Israeli law only. The above dictum means that the legality and validity of actions of the Military Government and its authorities, as arms of the Israeli Executive, will be tested by additional criteria. True, the rules of Israeli law have not been applied to the Area, but an Israeli official in the Area brings with him to his functions the duty to act in accordance with those additional standards that are demanded by reason of his being an Israeli authority, wherever he may be. In this regard he bears an additional and cumulative duty, because the duty to conduct himself according to the norms of Israeli administrative law does not release him from the duty to abide by the Laws of War. Therefore, he cannot rely on norms of the Israeli administrative law to refrain from

fulfilling a duty or honoring a prohibition that applies to him as is customary under the Laws of War. But, *from this Court's perspective, an* official does not generally fulfil his duty by merely doing what the norms of international law require of him, since more is demanded of him as an Israeli authority, namely, that he act in the Military Government Area in accordance with the rules that define fair and orderly administration. For example, the Laws of War do not contain any firmly established rule - or even a developing rule - about the *right to be heard,* but an Israeli authority will not discharge its duty, when its acts are judicially reviewed by this Court, if it does not respect this right in those cases in which the norms of our own administrative law require that it be granted. All this is obviously subject to specific legislation prescribing special regulations in any particular matter. It was to this that the following remarks describing the two-level Israeli conception were directed:

'From the normative point of view the rule of law in the territories found its expression in the adoption of two main principles of action:

(1) the prevention of the development of a legal vacuum by the *de facto* observance of customary international law and the humanitarian rules included in the Hague Rules and the Fourth Convention and furthermore;

(2) the supplementation of the above-mentioned rules and provisions by the basic principles of natural justice as derived from the system of law existing in Israel, reflecting similar principles developed in western democracies.

(M. Shamgar, Legal Concepts and Problems of Israeli Military Government, supra at 48-49)'"

In H.C. 619/78 [7], at pp. 511-512, it was indicated that -

"From the facts and the claims which are before us, it appears that the Israeli Military Government did not exercise its above-stated authority, granted it under international law, to the fullest extent and *severity,* but rather sought to limit itself, as much as possible, to those means *which*

> *are absolutely essential* for the preservation of public safety and peace, while giving expression, in practice and in theory, to the tendency to go beyond the rule of law in the formal sense of this phrase and adopt our conception of the rule of law in its substantive meaning ..." (Emphasis added - M.S.).

In other words, the Israeli regime took a more moderate approach, in various areas, than that permitted according to the principles of international law. Thus, for example, the more extreme approach with regard to its consequences for individual rights, as expressed for example in the circumstances described in the decisions of the United States Supreme Court in *Hirabayashi v. United States* (1943) [1O] and *Korematsu v. United States (1944)* [11], was not taken.

The above noted H.C. 619/78 [7], added, at p. 512:

> "The Respondents' exercise of authority will be tested by the same standards that this Court applies when it reviews the actions or omissions of any other arm of the executive, taking into consideration of course the Respondents' obligations as they are defined from the nature of their functions, as described above."

This means, in defining the obligations of Military Commanders, and when the Court reviews government actions, the Court is guided by the rules of administrative law, which always include, of course, reference to the scope, the character and the substance

of the powers and the duties of the public servant whose actions are being examined by the Court.

A derivative question arises at this point, namely, how do the rules of administrative law integrate themselves within the operation of local law. Do the above statements mean that the provisions of the local law, too, are altered automatically, being subordinated to the rules of Israeli administrative law? Such a sweeping answer must be rejected because, for example, we cannot hold that every local provision of law that grants authority to act to any government authority, incorporates by itself, without supplementary defense legislation, the relevant norm of Israeli administrative law. This approach is not in accord with the principles of public international law, that the local law may only be amended explicitly, on the basis of security legislation within the bounds created by international law (see Regulation 43 to the Hague Regulations and Article 64 to the Fourth Geneva Convention cited above, and see also H.C. 331/71 [8], and H.C. 493, 69/81 [6], referred to above.

To summarize this point: the topic under consideration must be dealt with at all times according to the context, nature and implications of the local law. The primary guideline in a case such as this is that a change in the local law provisions can only derive from legislative directive, which in the area of Military Government finds its sole expression in the security legislation (see, for example, Order Concerning the Cancellation of the Boycott Laws Against Israel (Judea and Samaria) (No. 71), 5727-1967, and Order Concerning Local Courts (Death Penalty) (Judea and Samaria) (No. 268), 5728-1968).

And yet, it is also necessary to examine each subject according to the substance of the directive or the guideline which it is sought to engraft as an additional layer on the existing local law. Therefore, if the Regional Commander establishes *for himself* internal rules of action, by virtue of which he abstains from excercising a certain power in its fullest severity, and establishes for himself a more liberal rule of action that does not harm individual rights, the matter may be expressed in internal working procedures alone, even without legislation.

6. The Regional Commander bears responsibility for the public security and order in the area which he commands. In the framework of his obligations he must also protect the safety of the I.D.F. forces and public administration officials and maintain lines of transportation (see Article 64 to the Fourth Geneva Convention, noted above). He must ensure, as necessary, the appropriate and effective operation of the penal laws and prevent crime and anarchy. A resident of the territory who commits an act of violence against the armed forces commits a crime and it is expected that he will be brought to judgment according to the law and that every possible sanction within the local law or according to the security legislation will be taken against him (see also Sir H. Lauterpacht, *The Law of War on Land, Part III of the Manual of Military Law* (London, 1958) 35-36.

The prevention of acts of violence is a condition for the establishment of public safety and order. There is no security without enforcement of the law, and law enforcement will not be successful and will not be effective if it does not also have a deterrent influence. The range of steps taken to enforce the law is in all cases related to the seriousness of the offense, to its frequency and to the nature of the offense committed. If, for example, there is a proliferation of murders of people because of their contacts

with the Military Government, or if attacks are made which are intended to bum people or property so as to sow terror and fear, stricter and more frequent enforcement of the law is required. These things are true in every location, and the Military Government territory is not exceptional in this regard; to the contrary, the establishment of order and security and its preservation in practice are, according to public international law, among the central tasks of the Military Government.

Regulation 119 cited above is among the lawful sanctions applicable according to the local law, and the excercise of its powers is given, of course, to the discretion of the military authority that commands the territory and whose tasks were defined above.

This discretion is subject to judicial review, just as that of all other administrative authorities, and we have already referred to our statement on this matter in H.C. 619/78 [7] *supra* (see also H.C. 274/82 [5] *supra)*. Judicial oversight examines whether the discretion was excercised lawfully. And in this connection, attention is also paid to the question whether the decision was properly considered and examined and, inter alia, whether the enforcement of the regulation and the level of its enforcement are commensurate with the seriousness of the act for which it is sought to be applied, pursuant to the examination according to these standards.

Thus it was said, for example, in H.C. 361/82 [9], at p. 444, that:

> "The Military Commander's judgment, that the circumstances of the matter before him demand forceful action, which can be a deterrent, and protect thereby security and order, is a consideration that, in the

circumstances of the matter before us, falls within the framework of the lawful considerations that the Military Commander is permitted to weigh."

7. The Respondents do not dispute that there are circumstances - and until now these were apparently the majority of instances - in which, even in their opinion, there is no reason not to permit the making of objections (within a fixed time) before the person who issues the order, and also to allow the possibility of postponing its implementation for an additional fixed time (48 hours were mentioned), during which it will be possible to present a petition to this Court requesting the exercise of judicial review over the administrative decision. It is unnecessary to add that it is possible that an interlocutory order will be given, as a result of the application to the Court, and additional time will pass until the actual decision will be given.

However, it is argued, there are situations whose circumstances require on the spot action, and in which it is not possible to delay the implementation of the action until the said periods have passed.

Demolition of a building is, everyone agrees, a harsh and severe means of punishment, and its deterrent power does not diminish its described nature. One of its central characteristics is that it is irreversible, that is, it cannot be corrected after the act; a hearing after implementation of the order is always very limited from the point of view of its practical meaning. According to our legal conceptions, it is, therefore, important that the interested party be able to present his objections before the

Commander prior to the destruction, to apprise him of facts and considerations of which perhaps he was unaware.

This Court considers that the existence of fair hearing rules in a matter involving a person, is expressed, inter alia, in that one who anticipates severe harm to his person or property shall be given advance notice and be granted an opportunity to raise his objections in the matter. This rule applies also when the law permits an act on the scene, such as immediate forfeiture of property (which is permitted in certain circumstances, for example according to the United States decisions, even when the property owner was not involved in committing the offense because of which the property is forfeited. See: *Calero-Toledo v. Pearson Yacht Leasings Co.* (1974) [12]).

8. Certainly there are military-operational circumstances, in which the conditions of time and place or the nature of the circumstances are inconsistent with judicial review; for example, when a military unit is engaged in an operational action, in which it must clear away an obstacle or overcome resistance or respond on the spot to an attack on army forces or on civilians which occurred at the time, or similar circumstances, in which the authorized military authority sees an operational need for immediate action. By the very nature of the matter, in circumstances such as these there is no place for delay in the military action, whose performance is required on the spot.

9. In my opinion, ways should be found to maintain the right to present one's claim before implementation of a decision which is not among the types of situations dealt with in paragraph 8.

This Court, when sitting as the High Court of Justice, has not closed its gates to complaints and appeals of She inhabitants of Judea, Samaria and Gaza since the establishment of military rule in June 1967, and has dealt with them according to the same standard we apply to anyone who presents his matters before us. There is no legal or other justification, particulary in a matter whose consequences are irreversible after the act, for us to raise the threshhold and refuse to listen to claims against the acts of the administration.

The legitimate and proper balance between the need to act in a quick and effective manner and the grant of opportunity to present one's objection to the Commander or by petition to this Court must and can find its expression in the right of preference, which the court can grant in urgent situations, as it has done, more than once, in varied and different situations, if such a request comes to it from an interested party.

In other words, the military practice can allow a fixed delay for application to a lawyer, to the Regional Commander or to this Court, in that order, and upon request the Court may, according to its discretion, grant priority for clarification of matters such as this.

Furthermore, if on-the-spot action is required, it is sufficient to take action which is reversible, such as eviction and sealing, and to delay the matter of demolition until after the judicial decision.

In other words, I see room to distinguish between sealing and demolition. The first may be done on the spot, if circumstances require this. Before taking action of the

second type (demolition), time is to be given to assert one's claims by way of objection or of petition, as the case may be.

In summation:

(A) I think that, except for matters involving military-operational needs as set forth in paragraph 8, it would be appropriate that an order issued under Regulation 119 should include a notice to the effect that the person to whom the order is directed may select a lawyer and address the Military Commander before implementation of the order, within a fixed time period set forth therein, and that, if he so desires, he will be given additional time after that, also fixed, to apply to this Court before the order will be implemented.

(B) Of course, the State may apply to this Court, in an appropriate case, and request that the hearing in a petition of this type be granted a right of preference.

(C) In urgent situations, the premises can be sealed on the spot, as distinguished from demolition, which is, as stated, irreversible, before the appeal or hearing of the Petition takes place. In the case of an on-the-spot sealing, as stated, notice is to be given to the affected party, clarifying that the right of objection or submitting a petition remains available.

This is the absolute order I propose in this situation.

ELON D.P.: I concur.

WALLENSTEIN J.: I concur.

Decided as stated in the President's decision.

Judgment given today, the 27th of Tammuz 5749 (July 30, 1989).