In the Supreme Court sitting as the High Court of Justice

HCJ 548/04
HCJ 670/04
HCJ 898/04

Before:	The Honorable Justice D. Dorner The Honorable Justice A. Procaccia The Honorable Justice E. E. Levy
The Petitioners in HCJ 548/04:	1. Amana – The Gush Emunim Settlement Movement 2. Binyamin Regional Council 1. Shomron Regional Council 2. Gush Etzion Regional Council 3. Har Hevron Regional Council
The Petitioners in HCJ 670/04:	1. Yaakov Ichstein 2. Kiryat Arba Local Council
The Petitioner in HCJ 898/04:	Ofra Cooperative Village for Settlement Ltd.
	v e r s u s
The Respondent in HCJ 548/04:	Commander of IDF Forces in Judea and Samaria
The Respondents in HCJ 670/04:	1. The Prime Minister, Ariel Sharon 2. The Defense Minister, Shaul Mofaz 3. The Commander of IDF Forces in Judea and Samaria, Maj. Gen. Moshe Kaplinsky
The Respondent in HCJ 898/04:	The Commander of IDF Forces in Judea and Samaria, Maj. Gen. Moshe Kaplinsky
	Petition for Order Nisi and Interlocutory Order
Date of the session:	13 Shvat 5764 (5 February 2004)
On behalf of Petitioners in HCJ 548/04:	Attorney Yehuda Rasler
On behalf of the Petitioners in HCJ 670/04:	Attorney Nadav Haetzni; Attorney Orit Haim
On behalf of the Petitioner in HCJ 898/04:	Attorney David Rotem

On behalf of the Respondents
in HCJ 548/04, HCJ 670/04,
and HCJ 898/04: Attorney Osnat Mandell

J U D G M E N T

Justice D. Dorner:

In the three petitions before us, the petitioners challenge the validity of two orders issued by the commander of IDF forces in Judea and Samaria. These are the Order Relating to Unauthorized Structures (Temporary Provision) (Judea and Samaria) (No. 1539), 5764 – 2003 (hereafter: the first order), of 29 December 2003, and the Order Relating to Unauthorized Structures (Temporary Provision) (Amendment) (Judea and Samaria) (No. 1540), 5764 – 2003 (hereafter: the second order), of 6 January 2004. They also object to the declarations on demarcated areas that were given pursuant to these orders.

Background of the petition and the arguments of the sides

1. The wording of the main provisions of the first order is as follows:

> . . .
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> 2. A. The commander of IDF forces in the region may declare, for the purposes of this order, any territory or place on which is located an unauthorized structure, one or more, as demarcated territory (hereafter: "the declaration"):
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> . . .
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> 4. A. At the end of three days following the date of publication of the declaration, no person shall either enter the area demarcated in the declaration or remain in it, except for the persons specified in section 6 of this order.
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> B. Where a person remained in the area demarcated in the declaration in contravention of the provisions of subsection (A), he is obliged to exit it, all as the military commander shall order.

C. Where a person breaches the provisions of this section, every soldier or police officer may remove him to a place outside the area demarcated in the declaration.

5. A. Where property is located in the area demarcated in the declaration at any time following its publication, its owner and/or possessor shall remove it to a place outside the area demarcated in the declaration within three days from the date of it publication, all as the military commander or anyone on his behalf shall so order.

B. At the end of three days from the date of publication of the declaration, property shall not be brought into the area demarcated in the declaration.

C. Where property is not removed as required under subsection (a), any soldier or police officer and also any other person authorized for this purpose by the commander of IDF forces in the region may take actions with respect to this property, including removing it, all as the military commander or anyone on his behalf shall order.

. . .

8. A. A military commander or anyone on his behalf shall not use his authority under sections 4 and 5 unless an opportunity has been given to a person who deems himself harmed by the declaration to file an objection in writing before the commander of IDF forces in the region within three days from the date of publication of the declaration.

B. Where an objection is filed, the prohibitions specified in section 4 and 5 shall not enter into force, and the military commander shall not exercise his authority under these sections, unless three days have passed following the time that the decision was given with respect to the objection.

The order was issued by the military commander on the basis of a directive in writing that he received from the prime minister and the minister of defense (hereafter: the directive). They, on their side, relied on decisions made by the government in 1996, 1999, and 2003. The directive issued by the prime minister and the defense minister mentioned four unauthorized outposts that the commander was requested to evacuate. The directive states that this list may be changed, and that additional communities may also be added to it.

Following a petition that was filed on 1 June 2003 by Professors for Political Strength, the first order was amended by the second order, to specify a period of eight days to file an objection, and interim arrangements were also specified. See HCJ 11481/03, *Professors for Political and Economic Strength v. Minister of Defense* (not yet reported, given on 5 January 2004) (hereafter: Professors for Political Strength).

2. The petitioners argue that removing illegal structures is regulated by the Planning and Building Law of the Judea and Samaria region, and also the Fresh Squatting on Land Law. This law, which enables removal of squatters and the removal of unauthorized structures, grants the right to the person who is removed to challenge the decision to remove him and also enables petitioning to this court. The petitioners argue that the respondents must act in accordance with the existing law, which properly balances their rights and opposing interests. In addition, the draconian orders were issued without authority and resulted from extraneous considerations of the prime minister and the defense minister, which are not based on government decision. Also, they argue, the orders contravene article 43 of the Hague Convention, which commands respect for the laws in force prior to military occupation of the region, unless there is an absolute prevention from doing so. In addition, the petitioners argue that the orders, which are intended to uproot only Jews from their place, discriminates between them and the local Arab population with respect to unauthorized building. In any case, the violation of the human rights of the settlers far exceeds the extent necessary to achieve the purpose of the order.

And finally, the petitioner in HCJ 898/04 claims that the objection it filed in the framework of the orders was denied improperly and without first studying the documents that it presented, which provide a foundation, it contends, for its right in the land on which it placed a mobile structure (Tal Binyamin Outpost). The petitioners in HCJ 670/04 raise an argument against demarcating a structure that serves as a synagogue on the Hazon Ish site, contending that, in the short time given them to file an objection, they were unable to fully exercise the right to be heard.

The state, in its response, explained that the political echelon decided to handle more expeditiously the phenomenon of unauthorized outposts in Judea and Samaria, some of which were also erected on Palestinian-owned land. This decision follows a showing that evacuation in reliance on existing law did not succeed, given that, immediately following removal of the settlers, who acted out of ideological reasons, they returned and rebuilt the outposts in a nearby area. The commander of the region [of the West Bank] issued orders within the limits of his authority to maintain public order, which were flagrantly breached by the repeated re-establishment of outposts that had been evacuated. The state further argued that the decision was based on directives of the political echelon, which wanted to handle a phenomenon that was unique to settlers who are citizens of Israel, thus the action is not a discriminatory act, but is a distinction that the state is permitted to make. The state also argues

that, following their amendment, the orders offer reasonable time to file an objection, and also to petition the High Court of Justice to prove the rights claimed in the outposts that the state seeks to evacuate. Regarding the individual petitions, the state responded that the objection relating to the Tel Binyamin site was rejected after it was found that the documents that the petitioner submitted showed that the permission give was only for agricultural use of the land. As for the Hazon Ish outpost (used as a synagogue), it was built on privately owned land, and a demolition order was given with respect to it some time ago.

The questions to be examined are, then, first, the legality of the action of the military commander, and second, the legality of the decision of the prime minister and the defense minister. I shall discuss these questions in their order.

Authority of the military commander

3. As we know, since the Six Day War, Israel has held the territory of Judea and Samaria in belligerent occupation. In accordance with international public law, which regulates such occupation, a military government was established, whose forces and administrative and governmental powers are concentrated in the hands of the military commander (hereafter: the commander), who stands at the head of the military government. These rules grant the commander powers that are derived from three primary sources. The first source is the specific provisions of international customary law. The second source is the law existing in the territory prior to its occupations. The third source is the new legislation of the military government. The military commander is the Israeli military commander. As such, he is subordinate to the senior military echelon, and the government over them, whose decisions guide military policy in its entirety. See HCJ 9195/03, Weinstock v. Supervisor of Government Property in the Gaza Strip (not yet reported, given on 31 December 2003). The Israeli military commander, in exercising his governmental powers, is subject also to the fundamental principles of Israeli administrative law. See HCJ 393/82, Ja'iyyat Iskan Almu'aliman Almahddudat Almas'uliyyah v. Commander of IDF Forces in Judea and Samaria, P. D. 37 (4) 785, 792 (hereafter: Iskan); Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," Military Government in the Territories Administered by Israel 1967-1980 (Meir Shamgar ed., Jerusalem, 1982) 13.

As stated in article 43 of the Hague Regulations, the commander must ensure public order. See Iskan, supra, 798. There is also no doubt that repeated building of unauthorized structures, some of them on Palestinian-owned land, despite their evacuation, disrupts public order. Indeed, the commander did not act in the framework of the local laws, which were incapable of coping with this phenomenon, and issued new orders. But the rule is that the military commander's powers under

international law do not limit him to maintaining order within the limits of the existing law; rather, he is empowered to establish additional regulations in orders. See Iskan, 797; HCJ 69/81, Abu 'Ita v. Commandeer of Judea and Samaria, P. D. 37 (2) 197, 310.

4. However, as stated, the orders that were issued in this case must also be examined to determine if they meet the fundamental principles of Israeli administrative law.

The principle argument the petitioners make in this context is the claim of discrimination. Indeed, the order is intended to evacuate outposts that were built by citizens of the State of Israel, while the unlawful building by the local Palestinian population is handled, as a rule, in accordance with the local law. But this alone does not provide a foundation for a claim of discrimination, given that, as a rule, equality is providing equal treatment to persons who are equal and providing different treatment to persons who are different based on the extent of their difference. See, for example, HCJ 6/69, Boronovsky v. Chief Rabbis of Israel, P. D. 25 (1) 357. It is permitted, and is even required, to treat different persons differently, when the difference is relevant. Here, the phenomenon of the building of unauthorized structures and their repeated construction following evacuation exists only among settlers who are citizens of Israel, and this is sufficient to distinguish between them and the local population.

But the main point in my view is the different status, in the territory of Judea and Samaria, of citizens of the State of Israel and of the local population. First, Israeli legislation distinguishes between the status of Israeli citizens and the status of the local population, in that Israelis are subject, personally, to the laws of the State of Israel, except with respect to legislation that relates to land. Also, the disparity with respect to land is reduced by legislation enacted by the military commander, which granted Israeli communities in parts of Judea and Samaria the powers of local government, as is customary in Israel, without giving local communities in the same area comparable powers or enabling them to join in the Israel councils. See Amnon Rubinstein, "The Changing Status of the 'Territories': From A Held Deposit to Creation of a Legal Hybrid," 11 Iyuney Mishpat (5746 – 1986) 439, 455. Second, alongside conditioning Israeli settlement in Judea and Samaria on approval of the state's authorities, Israeli communities received special benefits, and the state invested many resources in building and expanding them, which was not done with respect to the local communities.

Under these circumstances, the different treatment of the two populations is not discriminatory, but a permissible distinction, based on the relevant difference between them. Compare the comments of Justice Dov Levin in HCJ 4400/92, Kiryat Arba Local Council v. The Prime Minister, P. D. 48 (5) 597, 615 (hereafter: Kiryat Arba Local Council).

Regarding the arguments involving the objection and the appeal, the amendments made to the order following the judgment in Professors for Political Strength, supra, safeguard the right of settlers to object to the order, and subsequently to petition the High Court of Justice, which, as is known, where necessary, issues an interlocutory order to stop evacuation of outposts.

In light of the difficulties encountered by the military commander in evacuating unauthorized outposts, it cannot be said, therefore, that the mode of demarcation that he chose, while enabling objection to be made to it, in accord with the specified conditions, does not meet the fundamental principles of Israeli administrative law.

Authority of the prime minister and minister of defense

5 As stated, the orders were not issued at the initiative of the commander, but at the directive of the political echelon – the prime minister and the defense minister – and they reflect the policy of that echelon. The considerations of the prime minister and the defense minister, which are purely political considerations, are not extraneous considerations. Israeli settlement in Judea and Samaria, that which is permitted and that which is forbidden, is established by the government of Israel, and in any event reflects its policy from time to time.

The order under discussion refers, as mentioned, to three government decisions. The government decided as far back as 1996 that permission for every new Israeli settlement and every allocation of land for Israel settlement requires the approval of the defense minister. A decision made in 1999 empowered the prime minister and the defense minister to act in accord with their discretion with respect to isolated communities in the region. In the government's last decision, made in 2003, the government undertook, as part of its agreement to the plan presented by the United States Administration, known as "The Road Map," to evacuate outposts that were built in Judea and Samaria after Mach 2001, and also to freeze expansion of existing communities.

Indeed, the decision contains a provision that this consent is given based on the consent of the United States Administration to deal with Israel's comments that conditioned advancement of the process on various conditions that have not yet been met. But in our case, the decision of the political echelon is limited to unauthorized outposts. Thus, the decision of 1996, which conditions allocation of land on approval by the defense minister, and even more so the decision of 1999, which gives broad discretion to the prime minister and the defense minister to evacuate isolated communities (unauthorized and authorized), allows them to order the evacuation that is the subject of the petition.

The intervention of the political echelon, although it is, as stated, based on previous decisions of Israeli governments, reflects, without doubt, a new policy. But a right cannot be created for the builders of unauthorized outposts whereby their breaches will not be dealt with in a serious manner. See HCJ 5035, 5324/92, Fund for the Redemption of the Land of Israel, of the Ancient Land of Israel Institute v. State of Israel (not reported, given on 31 October 1993); Kiryat Arba Local Council, supra, 611. In any case, the government of Israel, on whose policy the orders are based, is the proper address for the petitioners to make their complaints about that policy.

5. We also cannot accept the individual arguments relating to the outposts of Tal Binyamin and Hazon Ish. The state's response – that in the first case the agreement on which the filed objection was based was checked, and it was found that it does not grant the petitioner the right to establish the outpost, while in the second case, a demolition order was already issued – is satisfactory. It is found that the orders were lawfully issued, and that there are no grounds to interfere in the two declarations on their face. As stated, the orders grant the persons who built the settlements the right to object to the demarcation and if their objections are rejected, even to petition the High Court of Justice to prove their rights.

The three petitions are, therefore, denied.

Justice

Justice E. E. Levy:

I concur.

Justice

Justice A. Procaccia:

1. I agree with the conclusion of my colleague, Justice Dorner, whereby the orders relating to unauthorized structures issued by the military commander should be deemed valid, and that these orders are lawful under the law applying to the commander of the region, that is, the principles of international customary law, the local law applying in the region, and the principles of Israeli public law (HCJ 393/82, Iskan v. Commander of IDF Forces, P. D. 37 (4) 785, para. 10). I would like to add the following comments.

2. The military commander's action meets the criteria of international law. Article 43 of the Hague Regulations, which is part of international law applying to the actions of the commander of the region, states that "he shall take all the measures in his power to restore, and ensure, as far as possible, pubic order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (HCJ 202/81, Tabib v. Minister of Defense, P. D. 36 (2) 622, 629). The beginning of this provision relates to the power of the military government to ensure order and public life in the region. The provision covers both the security needs of the occupying force in the area and the needs of the civilian population living there. The end of article 43 deals with a situation in which the military government seeks to change the laws in effect in the region. The relevant principle is that the military government must respect the laws in force in the region, and not to change them unless doing so is necessary to achieve purposes within the commander's powers that cannot be achieved without altering the legislation (Iskan, supra, 797; Y. Dinstein, "Legislative Power in Occupied Territories," 2 Iyuney Mishpat (5732-5733 – 1972-1973) 505, 509).

The beginning of article 43 grants the military commander power and imposes an obligation on him, to ensure public order and safety in the region. This responsibility applies to every area of life as necessary for proper public order in the region. "What is ensure public order and safety? The necessary answer is: operation of proper government in all its branches customary these days in a properly functioning country, and includes security, health, education, welfare, but, inter alia, also quality of life and transportation" (Tabib, supra, 629).

Actions of the commander of the region that are aimed at preventing unlawful settlements, some of which were built on land owned by the local Palestinian population, come within the powers and responsibility to insure public order and safety in the region. Actions that are intended to stop incursion onto private and public land and prevent unlawful construction in their areas, come within the authority of the military commander as stated. In this sense, the commander's actions meet the requirements of the beginning of article 43 of the Hague Regulations.

3. The action of the military commander in issuing the orders comports with the circumstances herein also with respect to the end of article 43. This part of the article requires that the laws in force in the region be respected, unless something exists that absolutely prevents it. On this it should be said, first, that there is question as to the extent to which this provision applies with respect to local laws that were enacted by the military government itself, and in our case at least some of the relevant laws are the result of defense legislation enacted by the military commander. However, also with respect to the merits of the action, issuance of the orders demarcating areas to prevent the phenomenon of unlawful outposts is necessary under the circumstances given the lack of a legislative infrastructure that is capable of responding to the special need inherent in coping with this phenomenon. The

planning and building laws that deal with unlawful building are aimed at handling a specific illegal structure, and the system of rules and procedures contained in them are compatible with achieving that purpose. Coping with the phenomenon of illegal outposts cannot be achieved with the aid of the planning and building laws, when it involves more than preventing such illegal building, but requires efficient means to stop the taking of control of territory – whether by means of illegal building or by other means. Alongside the planning and building laws, the local law in the region, which deals with the removal of squatters (Order No. 1472 Regarding Land (Removal of Squatters), of 1999) also cannot meet the special need before us, if only for the reason that it applies only to private land at the independent initiative of the holder of the right in the land, and this within 30 days from the day possession is taken of the land. Clearly, under the circumstances existing in the region, the ability to take such initiative in the hands of private owners is questionable, whether because, more than once, the owner of the land is not situated in the area or is not aware of the incursion onto his land; or because he does not always have the information, means, and ability to initiate actions himself to evict the squatter. The circumstances prevailing in the area require, therefore, a direct and inclusive legislative arrangement that empowers the military commander to act to prevent unauthorized taking of control of land in the region, and existing legislative arrangements are unable to cope with this phenomenon. In these circumstances, the issuance of the orders by the military commander is necessary to provide what is missing in the local law and to enable achievement of the purpose it is intended to achieve.

4. The contents of the orders comport also with the tests of legality and constitutionality of Israeli public law. First, as stated in the judgment of my colleague, Justice Dorner, the orders are not flawed on grounds of discrimination, in that they are intended to cope with a special phenomenon of a kind that does not exist among the local population in the region. Second, the rights to be heard and to file objections that are given in the framework of the orders to anyone contending injury as a result of their provisions meet the test of constitutionality substantively and with respect to the time given to exercise them. Third, the orders are consistent with accepted societal values in Israel, in seeking to prevent taking control, and trespass, on private and public land, in violation of the property rights of another person; breach of these orders by persons who remain on the land specified in the declaration is a proper purpose, and is proportionate within the meaning given these terms in Israeli constitutional law.

In light of the above comments, I join the opinion of my colleague, Justice Dorner, whereby the petitions before us are denied.

Justice

Decided as stated in the judgment of Justice Dorner.

Given today, 4 Adar 5764 (26 February 2004).

Justice Justice Justice