

Expert Legal Opinion

HCJ 2164/09 Yesh Din – *Volunteers for Human Rights v Commander of IDF Forces in West Bank et al* (December 26, 2011)

We, the undersigned, Dr. Guy Harpaz (member of the Faculty of Law and the Department of International Relations at the Hebrew University of Jerusalem), Prof. Yuval Shany (member of the Faculty of Law at the Hebrew University of Jerusalem), Prof. Eyal Benvenisti (member of the Faculty of Law at Tel Aviv University), Dr. Amichai Cohen (of the Ono Academic College), Dr. Yael Ronen (of the Shaarey Mishpat Academic College and the Minerva Center for Human Rights, Faculty of Law at the Hebrew University of Jerusalem), Prof. Barak Medina (Dean of the Faculty of Law, the Hebrew University of Jerusalem), and Prof. Orna Ben-Naftali (of the Law School, The College of Management), present this legal opinion with regard to the issues that arise from the decision delivered on December 26, 2011 by the Supreme Court of Israel sitting as the High Court of Justice in the petition HCJ 2164/09 (the Honorable President D. Beinisch and the Honorable Justices M. Naor and E. Hayut) (henceforth: "the decision"), to the extent that they fall within our expertise in public international law and the Israeli constitutional law, when applicable, and in support of the Petitioner's Motion for an En Banc Review. This expert legal opinion was written on the basis of a review of the Petitioner's petition, the Respondents' response, the decision itself and the Petitioner's Motion for an En Banc Review.

We present this opinion instead of testifying in court and we declare that we are well aware that for the purpose of the provisions of criminal law concerning perjury under oath, our opinion with our signature has the same force and effect as an oath in court.

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Chapter One: Introduction

A. Introduction

1. To the best of our understanding, the interpretation of International Law in general and particularly of the Laws of Belligerent Occupation presented in the decision is inaccurate. The decision is irreconcilable with the principle and consistent case law of the High Court of Justice in the field of the laws of occupation.
2. **This legal opinion makes the following claims:** (1) the interpretation given in the decision to Article 43 of the Hague Regulations is inconsistent with the objectives of the laws of occupation; (2) The interpretation given in the decision to Article 43 of the Hague Regulations contradicts the *Jam'iyat Iskan* Rule, upon which the decision is based to a large extent; (3) the interpretation given in the decision to the relevance of the duration of the occupation in the area contradicts the relevance we think should be given to the time factor; (4) the interpretation given in the decision to Article 55 of the Hague Regulations is inconsistent with the language and purpose of the article; (5) consequently, the permission given to Israeli corporations to mine exhaustible natural resources in an area subject to belligerent occupation contravenes the laws of occupation.
3. The core of this opinion is the determination that the appropriate interpretation of Articles 43 and 55 of the Hague Regulations is, with all due respect, different from that which was presented in the decision. The decision expands excessively the extent of interests protected by the laws of occupation *ratione materiae* and *ratione personae*. Furthermore, the decision is incongruent with the fundamental principles of the laws of occupation as they were interpreted by the Supreme Court in a long line of decisions. The decision may be based explicitly on the *Jam'iyat Iskan* Rule, which is deeply rooted in the Supreme Court's case law, but it actually contradicts it. Specifically, the decision is irreconcilable with the accepted interpretation of the temporal dimension of the laws of occupation and the legal relevance of the prolongation of the occupation, it is inconsistent with the principle of the trusteeship of the occupier toward the protected population, it contradicts the accepted definitions of the groups protected under the laws of occupation and deviates from the accepted interpretation in Israel and the world of the term "for the benefit of the protected population."

B. The factual basis

4. As the various court documents indicate, since the mid-1970s Israeli corporations, under a license (concession) granted by the State of Israel (Respondents 1 and 2), have been excavating minerals in quarries in Judea and Samaria (henceforth: "**the**

area") on a commercial scale. During the 1980s and 1990s the volume of the quarries' activity expanded as did the amount of quarrying products that were transferred into Israel. Today in Area C there are ten Israeli-owned quarries, eight of which are active, which were built on "state land" (henceforth: "the Israeli quarries"). The Israeli quarries operated by Respondents 3-12 did not exist and naturally were not active prior to Israel's occupation of the area. There are also Palestinian-owned quarries in Area C as well as Palestinian quarries in Areas A and B.

5. The Israeli quarries operate under a concession given to Israeli corporations by the Civil Administration. The Civil Administration collects payments from the Israeli quarry owners, including leasing fees and royalties. The total royalties paid in 2009 for the use of the quarries by Israeli parties was NIS 25 million. 94% of the product of the quarries is transported into Israel. According to the National Mining and Quarrying Outline plan, the quarries in the area provide about one quarter of the total consumption of quarrying materials for the Israeli economy. According to the State, about 200 Palestinians are employed in the Israeli quarries.

Chapter Two: The Opinion

A. The appropriate interpretation of Article 43 of the Hague Regulations

A.1 Introduction

6. Article 43 of the Hague Regulations stipulates that: "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 Hebrew version thereof is quoted in HCJ 202/81 *Saeed Mahmud Tabib v Minister of Defense*, PD 36(2) 622, 629 (1981).

7. **In this chapter we wish to establish our position that:**
- (a) The interpretation given in the decision to Article 43 of the Hague Regulations as to the Military Commander's powers contradicts the objectives and spirit of the laws of occupation;
 - (b) The decision does not distinguish between the question of authority and the manner it is exercised and ignores the fact that the mining is conducted *ultra vires*. Therefore, the holding that the harm caused by the quarrying activities is minor (and does not consume the capital) is irrelevant to the matter at hand;
 - (c) The determination in the decision that the license granted by the Israeli authorities to continue operating the quarries is for the benefit of the protected population is based on an erroneous interpretation of the extent of protection afforded the protected population by the laws of occupation;
 - (d) The decision's holding that that the license granted to continue operation of the quarries is for the benefit of the protected population is inconsistent with the case law of the Supreme Court sitting as the High Court of Justice with regard to the powers of the Military Commander, which is anchored in the *Jam'iyat Iskan* Rule and other decisions that were based on it.
 - (e) The decision ignores the distinction anchored in the case law of the Supreme Court sitting as the HCJ as to the difference between a dominant and a subordinate consideration in exercising discretion by the Military Commander under Article 43.
 - (f) The interpretation given to the influence of the temporal dimension (the prolongation of the occupation) on the discretion of the Military Commander contradicts the laws of occupation and their purpose.
 - (g) The determination that the Interim Agreement with the Palestinian Authority limits the extent of the Military

Commander's discretion or perhaps even renders his discretion redundant on this matter contradicts the laws of occupation as well as another decision rendered by the Supreme Court two days after the decision under examination here: HCJ 5324/10 *Malka et al v the Civil Administration in Judea and Samaria* (not yet published; decision from December 28, 2011). (h) In conclusion, granting a quarrying license for the purpose of making use of the mining products other than for the benefit of the occupied population constitutes a violation of Article 43 of the Hague Regulations which requires preservation of the occupied territory, and constitutes a violation of the obligation to preserve safety and order in that territory.

A.2 The quasi-constitutional nature of Article 43 and its objectives and the objectives of the laws of occupation

8. There is no question that Article 43 has a quasi-constitutional nature and as such governs all the laws of occupation. That determination has been recognized in foreign court rulings and in a long series of decisions by the Supreme Court, including the decision at hand:

"Article 43 has been recognized by this Court as a quasi-constitutional framework provision of the laws of belligerent occupation that establishes a general framework for the manner in which the Military Commander should exercise his duties and powers in the occupied territory" (Section 8 of the decision).

9. As we shall detail below, Article 43 in combination with the other central provisions of the laws of occupation, includes five components that together constitute the "DNA" of the laws of occupation: (1) The occupation is temporary,¹ (2) The occupier is not the sovereign but rather administers the territory for the legal sovereign with a status similar to that of a trustee, (3) In order to fulfill that role, the

¹ DORIS A. GRABBER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914- A HISTORICAL SURVEY*, 37 (New York, Columbia University Press, 1949); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY : A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION*, 31-33 (Minneapolis : University Of Minnesota Press, 1957); ROBBIE SEIBEL, *INTERNATIONAL LAW*, 560 (Jerusalem: , 2nd ed., 2010) Orna Ben-Naftali, Aeyal M. Gross And Keren Michaeli, *Illegal Occupation: Framing The Occupied Palestinian Territory*, *BERKELEY J. OF INT'L L.* 23(2) 551, 555, 592-593, 599; Antonio Cassese, *Powers And Duties Of An Occupant In Relation To Land And Natural Resources*, In *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 419, 420 (Emma Playfair Ed., 1992); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 6, 27, 145 (Princeton, N. J: Princeton University Press, 1993); *ICTY Prosecutor v. Naletilic et al* [trial chamber], para.214 (2003); Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, *Stanford Law Review*, 37(6) 1573, 1580 (1985).

occupier steps into the shoes of the occupied ruler, temporarily performs its functions and exercises its authority, (4) When exercising its authority, the occupier must maintain, unless absolutely prevented, the status quo present in the territory at the moment of occupation. The occupier must refrain to the greatest extent possible from altering the status quo in any way that would establish irreversible facts on the ground in the occupied territory,² (5) A duty is imposed upon the occupier to uphold the laws of occupation and to advance their objectives including by protecting the interests of the groups protected under the laws of occupation (which include, first and foremost, according to Article 4 of the Fourth Geneva Convention, the local population that lives in the occupied territory).

10. According to our legal analysis, which will be detailed forthwith, the interpretation giving in the decision to Article 43 (as well as Article 55), is inconsistent with these governing principles of the laws of occupation.
11. The *Jam'iyat Iskan* ruling, which the decision under examination in this opinion references, explains the objectives of the laws of occupation and describes the groups which the laws of occupation protect. The *Jam'iyat Iskan* Rule creates a clear dichotomous distinction between relevant (and therefore legal) discretion by the Military Commander in the exercise of his authorities under the laws of occupation, and irrelevant and illegitimate discretion (and therefore illegal). In the words of Justice Barak (as was his title at the time):

"The Hague Regulations revolve around two main axes: one guarantees the legitimate security interests of the occupier in a territory subject to belligerent occupation; the other ensures the needs of the civilian population in the territory subject to belligerent occupation... Between those two axes, the Hague Regulations seek to establish some balance: in certain matters the emphasis is on the military needs while in other matters the emphasis is on the needs of the civilian population."

The laws of war usually create a delicate balance between two magnetic poles: military needs on the one hand, and humanitarian considerations on the other (Y. Dinstein, "Legislative Authority in the

²Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, The Am. J. of Int'l L., 84(1) 44, 46, 87 (1990); BENVENISTI, *ibid.*, p. 6; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C. J. Reports 2004*, p.136, Separate Opinion by Judge Koroma, para. 2; Guy Harpaz and Yuval Shany, *The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law*, Israel Law Review 43, p.514, 537 (2010).

Administered Territories" (Hebrew), Iyunei Mishpat 3 (1972): 505, 509).

In both cases – both the "military" and the "civilian" need – the principled point of departure is that the Military Commander does not inherit the rights and status of the defeated government...

... The considerations of the Military Commander are ensuring his security needs in the territory on the one hand and ensuring the interests of the civilian population in the territory on the other. Both are aimed at the territory. The Military Commander is not permitted to consider the national, economic or social interests of his own country inasmuch as they do not have implications for his security interest in the area or the interests of the local population. Even the needs of the army are his military needs and not the needs of national security in its broad sense. An area under belligerent occupation is not an open field for one kind of economic exploitation or another." (Iskan affair, p. 794-795).

12. The Honorable President adopts the *Iskan* rule in her decision and rules that her decision is based on it:

"Article 43 has been recognized in our case law as a quasi-constitutional framework provision of the laws of belligerent occupation that establishes a general framework for the way the Military Commander should exercise his duties and authorities in the occupied territory. According to its main determination, the commander of the area must exercise his authority in any case only for the benefit of the area, using relevant considerations only – the benefit of the protected residents on the one hand and the needs of the army on the other. Thus, when exercising his authorities, 'The Military Commander is not permitted to consider the national, economic or social interests of his own country inasmuch as they do not have implications for his security interest in the area or the interests of the local population' (HCJ 393/82 Jam'iyat Iskan v. IDF Commander in Judea and Samaria, PD 37(4), 785, 794-795 (1983) (henceforth: the Iskan affair))... It is also clear, and the State did not dispute this, that 'an area under belligerent occupation is not an open field for one kind of economic exploitation or another' (Iskan affair, ibid)" (Section 8 of the decision).

13. However, as shall be detailed below, the decision contradicts the *Jam'iyat Iskan* Rule: not only does it inadequately perform the aforesaid "delicate balance" between the two "magnetic poles" of the laws of occupation as required by the *Jam'iyat Iskan* Rule, namely the civilian needs of the occupied population versus the security needs,

but it adds to the balancing formula additional considerations and objectives that lead to a significant deviation from the *Jam'iyat Iskan* Rule that formulate a decision that contradicts that rule, as well as Article 43 and its recognized objectives.

14. After reading the Respondents' arguments carefully, we reached the conclusion that granting licenses to continue quarrying is inconsistent with Article 43 and its objectives. Our analysis indicates there are several different potential objectives that can be embodied in granting the quarrying licenses but none of them is actually consistent with the *Jam'iyat Iskan* Rule and the objectives of the laws of occupation.

A.3 Eight different potential objectives embodied in the quarrying licenses and the relation between them and Article 43 and the *Jam'iyat Iskan* Rule

First objective: a security interest?

15. The security interest of the occupier is an objective recognized by the laws of occupation in general and Article 43 in particular. This objective, recognized by the *Jam'iyat Iskan* Rule, was not argued by the State of Israel and therefore is not relevant to this matter.

Second objective: advancing Israel's economic interests by supplying gravel and other natural resources from the occupied territory to fulfill its needs

16. There is no dispute, and the decision does not try to contradict this assumption, that the concessions were intended primarily to serve the Israeli economy. That was the initial grounds for granting them in the first place, and that remained the main objective embodied in continuing to grant them to this day. The figure according to which more than 90% of the products of the quarrying are transferred to Israel speaks for itself (on this matter see the document of the editors' committees, an official document of the Interior Ministry, that served as the basis for National Outline Plan 14a, which indicates unequivocally that the objective of the quarrying was to provide the needs of the Israeli construction and paving market today and in the coming decades). See also the document published by the Interior Ministry (**Interior Ministry – Planning Administration: National Outline Plan 14b - National Outline Plan for Quarrying and Mining Sites for the Construction and Paving Market**

– in the possession of the authors of the opinion),³ which states that if the quarries were transferred to Palestinian control, export from Israel would decline. This government assessment indicates that the Palestinian interest on the one hand and the interest of the State of Israel (as promoted by the Military Commander) on the other, do not overlap but clash with each other.

17. This consideration, focusing on the benefit of the Israeli economy, is an **irrelevant and illegal consideration**, and as such paints the licenses in bold colors of illegality. Indeed, promoting that interest stands in direct and irreconcilable contradiction with the *Jam'iyat Iskan* Rule and its following determinations: "...The considerations of the Military Commander are ensuring his security needs in the territory on the one hand and ensuring the interests of the civilian population in the territory on the other. Both are aimed at the territory. The Military Commander is not permitted to consider the national, economic or social interests of his own country inasmuch as they do not have implications for the security interest in the area or the interests of the local population. Even the needs of the army are his military needs and not the needs of national security in its broad sense. An area under belligerent occupation is not an open field for one kind of economic exploitation or another." (*Iskan* affair, pp. 794-795).
18. The decision under examination in this opinion recognizes the fact that the Israeli economic interest cannot justify the use of the quarries, when it says: "... It is also clear, nor does the State dispute this, that 'an area under belligerent occupation is not an open field for one kind of economic exploitation or another' (*Iskan* affair, *ibid*)" (Section 8 of the decision).
19. However, the decision's willingness to allow activity whose main objective, as indicated by the intention of those involved in it and by its immediate implications on the level of results, is the exploitation of the natural resources of an occupied territory to provide the economic needs of the State of Israel, legalizes what the *Jam'iyat Iskan* affair perceives as illegal. Indeed, the decision, which validates these illegal intentions and results, is inconsistent with the universally supported legal position that quarrying natural resources capital to advance the interests of the occupying power is a violation of the laws of occupation. See the writing on this subject of Prof. Benvenisti concerning the exploitation of natural resources by the occupying forces in Iraq and the prohibition of exploiting those resources for the benefit of the occupant:

³ The document can be viewed on Interior Ministry website:
<http://www.moin.gov.il/SubjectDocuments/Karka0702.pdf> (Hebrew).

"The utilization of public immovable property is qualified by two conditions. The first condition relates to the objective of the use. The occupant may use the different types of property to meet its security needs, to defray the occupation administration's costs, and to promote the needs of the local population. It may not use them for its own domestic objectives. The second condition applies to public immovable property only. It stipulates that the occupant must maintain the capital and use only its fruits".

Eyal Benvenisti, *Agora (Continued): Future Implication of the Iraq Conflict Water Conflicts During the Occupation of Iraq* 97 **A.J.I.L.** 860, 869 (2003).

20. The fact that quarrying minerals in an occupied territory is illegal received explicit recognition in the decision (as opposed to opinion) of the International Court of Justice in The Hague from 2005 in the case of **The Democratic Republic of the Congo v Uganda**. Among other issues, the decision addressed the issue of the duties of the occupying force (in that case Uganda) in relation to the natural resources that were located in the Ituri district, a territory that it had conquered and occupied by belligerent occupation. The natural resources in this case (including diamonds and gold) were mined by private parties, sometimes with military elements, who sold them forward.

CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO, *Democratic Republic of the Congo v. Uganda* [19 December 2005], para. 245, available at: <http://www.icj-cij.org/docket/files/116/10455.pdf>

21. The International Court of Justice ruled in unequivocal language that international law completely forbids the use of natural resources located in an occupied territory for the needs of the occupying power. That prohibition actually extends to any use that is not for the benefit of the occupied state and its citizens. But the decision did not stop with that legal determination. The court chose to expand the rule it established in a manner that radiates directly to the case at hand: the court addressed the question of Uganda's international responsibility because of the violation of its obligations as an occupying force and because of its responsibility for the exploitation of Congo's natural resources. The court ruled that that illegal exploitation of resources was a direct violation of Article 43 of the Hague Regulations, which require the protection of public order:

"250. The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural

resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory."

Third objective: promoting the economic interests of Israeli corporations holding quarrying licenses

22. A third possible objective embodied in the licenses, recognized in the decision itself, is the interests of Respondents 3-12, which are Israeli corporations that gain financial profits from exploiting the natural resources of the occupied territory. Actually, the decision not only recognizes that interest but it seems to even go as far as to give that interest normative seniority over the interests of the protected local population. When it sets out to reject the petition on grounds of delay, the decision makes a determination that is inconsistent with the pyramid of interests recognized by the laws of occupation: (although this determination relates directly to the preliminary issue of delay rather than the material issue of the pyramid of interests protected by the laws of occupation): "Under the circumstances, accepting the Petitioner's argument today would cause considerable damage, which we believe is greatly excessive... to the quarry owners" (Section 6 of the decision).
23. Needless to say that the private interest of a corporation incorporated in the occupying state to exploit an exhaustible natural resource located in the occupied territory is a completely irrelevant interest to the laws of occupation, by any acceptable interpretation, whether narrow or broad, of the laws of occupation and their objectives.
24. Naturally, considering that interest, let alone giving it normative seniority, contradicts the *Jam'iyat Iskan* Rule ("*...The considerations of the Military Commander are ensuring his security needs in the territory on the one hand and ensuring the interests of the civilian population in the territory on the other. Both are aimed at the territory*").
25. Relevant to this case are the words of the American scholar Paust, on the question of the legality of the "privatization" of the obligation to administer occupied public property (in this case in Iraq) by the occupying power:
- "With respect to Iraqi oil and oil production and distribution facilities, the occupying power must safeguard the oil and must administer extraction processes like a trustee

for the Iraqi state or people. Thus, an occupying power cannot engage or participate in "privatization" of Iraqi oil or the state-owned oil production and distribution industry and must not tolerate rates of extraction beyond prior "normal" rates of extraction or excessive fees or profits by others administering such properties. Similarly, the occupying power must not contract with private companies in such a manner as to allow them to engage in the same sorts of prohibition".

Jordan J. Paust, "The US as an occupying power over any portion of Iraq and special responsibilities under the law of war," 27 **Suffolk Transnational Law Review** 1, Winter, 2003, at pp. 12-13.

Fourth objective: tightening cooperation between the occupier and the occupied

26. The decision establishes the assertion that the occupier may exercise the discretion vested in him by Article 43 in consideration of:

"the existence of an economic relationship between the two authorities: the occupying and the occupied." (Section 10).

27. The decision determines in the same spirit that: "It is therefore difficult to accept the Petitioner's resolute assertion that the quarrying activity has no aspect of promoting the benefit of the area, especially considering the joint economic interests of the Israeli and Palestinian sides..." (Section 13 of the decision).

28. Our position on this matter is that the objective of promoting the relationship between the occupier and the occupied is not anchored directly or indirectly, explicitly or implicitly, in the laws of occupation, neither in Article 43 of the Hague Regulations nor in Article 4 of the Fourth Geneva Convention. Nor does that objective appear in the *Jam'iyat Iskan* Rule (as the decision provides, erroneously, in the section quoted above), and appears to contradict that rule. Furthermore, a change of the status quo so as to create dependence of the occupied territory on the occupier while serving the economic interests of the latter contradicts the principles of temporality and trusteeship that are at the basis of the laws of occupation.

29. In this context, this affair must be distinguished from the Abu Ayta case (HCJ 69/81 *Abu Ayta v. Commander of Judea and Samaria area et al*, PD 37(2) 197). The Abu Ayta case was about uniting certain aspects of the tax policy in the territories with that which applied to Israel in an economic reality of intensive trade and free movement between the occupied territories and Israel. That situation is very different from the current situation, in which the activity of the quarries cannot be considered to be a significant element of an integrative economic relationship that

serves the interests of both sides. Furthermore, as opposed to the political situation in the early 1980s, Israel in the Oslo agreements recognized the Palestinian Authority as a political entity responsible for promoting the Palestinian interest. Under these circumstances, it is harder to view the activities of exploiting natural resources unilaterally by Israel without the agreement of the Palestinian Authority as consistent with the interest of the local population in the territories. Indeed, an official document published by the Palestinian Ministry of Economy in September 2011 indicates an absence of such consent (The Economic Costs of the Israeli Occupation for the Palestinian Occupied Territory).

30. The occupation is temporary, and the occupier must maintain the status quo in the territory entrusted to him by trusteeship when the occupation occurred (unless a deviation from the status quo is necessary). If the Military Commander does in fact act to tighten the relationship between "the occupier and the occupied," as the decision asserts, it could topple the foundations of the laws of occupation (temporality, trusteeship and status quo) with everything that implies.

Fifth objective: providing products of quarrying to the Israeli settlers in the area

31. The decision establishes the assertion that the occupier may exercise the discretion vested in him by Article 43 in consideration of the interests of the "Israeli settlers:"

"Considerable percentages of their quarrying output are sold within the area both to Palestinians and to Israeli settlers (at varying degrees depending on the quarry) and providing the remedy requested in the petition would cause fatal damage not only to them... Under the circumstances it is therefore difficult to accept the Petitioner's resolute assertion that the quarrying activity has no aspect of promoting the benefit of the area..." (Section 13 of the decision).

32. In our opinion, these statements cannot, with all due respect, justify granting the licenses under the laws of occupation and Article 43. The brief paragraph quoted above contains a number of problematic legal assumptions.
33. **Firstly**, the Israeli settlers in the area are not mentioned directly or indirectly as beneficiaries of the occupation by Article 43 of the Hague Regulations.
34. **Secondly**, the Israeli settlers in the area are explicitly excepted from the definition of "protected persons" in the sense of that phrase in Article 4 of the Fourth Geneva Convention. (Indeed, Supreme Court case law has found resolutely that the Israeli settlers are excepted from the list of the beneficiaries of the Fourth Geneva Convention concerning the protection of a civilian population in a state of

occupation. See HCJ 1661/05 *Gaza Coast Regional Council et al v Israeli Knesset et al*, sections 4 and 12: "... The State was right to note that 'the Petitioners and the residents of the evacuated areas are not included in the term 'protected' for the purpose of the Fourth Geneva Convention from August 12, 1949 concerning the protection of civilians during war... According to Article 4 of the convention, which provides that 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' The Israeli settlers are for the most part Israeli nationals. Therefore they do not fall under the definition of "protected persons" in its sense in the Fourth Geneva Convention (see Article 4 of the convention)."

35. **Thirdly**, the Supreme Court has ruled – correctly, in our opinion – that Article 43 allows and even obligates the Military Commander to protect the lives of the Israeli settlers in the area (as long as they are present in the area) since that is necessary from the security aspect. That determination, made in the context of the separation fence, relies specifically and narrowly on the need to protect the lives of the Israeli settlers against murderous terrorist attacks. Therefore, by the Supreme Court's case law (which contradicts the opinion of the International Court of Justice in Hague about the separation fence/wall), Article 43 may be exercised for the benefit of the settlers if that is necessary from the security aspect. (See HCJ 7957/04 *Mara'abe et al v. Prime Minister of Israel*, PDI 60(2), the President's comments in sections 18-10). That position is supported by a series of decisions (see for instance HCJ 9593/04 *Rashed Murad, head of Yanun Village Council v. Commander of IDF Forces in Judea and Samaria et al*, 61(1) 844 (2006) as well as HCJ 2150/07 *Abu Safiya v Minister of Defense* (unpublished, December 29, 2009). But in this case the licenses do not embody any security (or other) need of the settlers. Their needs can be met by other sources outside of the area without quarrying the area's minerals.

Sixth objective: promoting the overall Palestinian interest – modernization and employment of workers

36. The decision contends that continuing to grant quarrying licenses would serve the Palestinian interest in general. As the President writes:
"... The respondents emphasized that their activity contributes to the economic development and modernization of the area in many ways including training workers..." (Section 5 of the decision). And: "The quarries operating today provide a livelihood to a significant number of Palestinian residents" (Section 13 of the decision).
37. With all due respect, these statements cannot justify, to our mind, granting the licenses under the laws of occupation and Article 43, for the following reasons:

38. **Firstly**, even according to the Court it is a speculative argument: "Accepting the Petitioner's argument today would entail serious damage that we believe far exceeds the damage it claims both to the quarry owners and possibly even to the Palestinian population itself". The decision notes that:

"The State announced the political echelon was presented with recommendations that, among other things, no new quarry be built in Judea and Samaria whose main objective is to produce quarry materials for sale in Israel. These recommendations reflect a worthy position that from a certain aspect resolves the disputed issue and provides the second remedy requested in the petition. Inasmuch as this happens there will no longer be a need to discuss the question of the possibility to build new quarries" (Section 12 of the decision).

39. But if that were the case, and the quarrying really does develop the local economy and help the local workers, then the volume of the quarries' activity should have been expanded! Yet the decision emphasizes that Israel decided to undertake a number of actions whose objective is "to closely control the rate of production of minerals and ensure it remains such that makes reasonable use of the minimal amount" (Section 2) and that no additional quarrying licenses be granted. So that along with the argument that quarrying contributes to the Palestinian economy, the opposite argument is made that the extent of quarrying should be significantly restricted to limit its damage (and thereby benefit the aforesaid population) – (Sections 6-7, 12).
40. **Secondly**, quarrying has been taking place in the territories for 40 years and as the decision itself indicates, there are many Palestinian quarries that for some 40 years have specialized in quarrying and operate in areas A and B. Therefore the argument, which was not refuted by any of the respondents, can be made that the Palestinian economy has developed the necessary skills to promote that industry. Therefore the statement that the continued quarrying activity of the Israeli quarries will lead to modernization of the industry is not necessarily true (and it should be stressed that even if it is true it does not outweigh the question of lack of authority as detailed above and below).
41. **Thirdly**, if there really is honest concern for the occupied economy, the occupier could grant the licenses in question to Palestinian corporations and thereby help not only to "train workers" who have already been competent in this profession for decades but also Palestinian entrepreneurs and executives. That would also create a larger number of jobs for Palestinians than those created by granting licenses to Israeli corporations. Providing the licenses to alien Israeli corporations instead of to

local corporations which are "protected persons" under Article 4 of the Fourth Geneva Convention calls into question the state's arguments as to its consideration of the interests of the local population.

42. **Fourthly**, if Israel really is interested in acting out of honest concern for the human development of the local population and expanding its employment opportunities, it could cooperate with the Palestinian Authority and allow it to grant concessions to local corporations, a possibility specifically and explicitly recognized in Section 31 of the First Attachment to the Third Appendix (the Civilian Appendix) of the Interim Agreement. See <http://www.knesset.gov.il/process/docs/heskemb.htm> (Hebrew) (See section A.4 below).
43. **Fifthly**, even if we presume that the local population derives a benefit from granting licenses for the operation of the quarries, because of the modernization of the local labor market and the employment of Palestinian workers, then according to the Supreme Court's consistent case law vis-à-vis Article 43, there would be grounds to exercise the test of the dominant/subordinate consideration in order to exercise judicial review of the decision to grant licenses. That test was recognized explicitly in the *Dweikat* decision vis-à-vis Article 43 itself, and was applied in the same decision by determining that Israel's claimed interest (security) was secondary to Israel's main and illegal interest (political) – HCJ 390/79 *Dweikat v State of Israel*, PD 34(2), 1. Since then that test has been with us through many decisions including the *Jam'iyat Iskan* decision itself.
44. The application of this test would lead to the unequivocal conclusion that the main consideration in granting the licenses is an Israeli economic consideration whereas the consideration of the Palestinian interest is at best if at all secondary, negligible and subordinate. This conclusion should have led the court to rule that the exercise of discretion in this case is illegal. The case did not apply that test and thereby ruled incongruously with its generally consistent decision on the matter of administrative discretion.
45. Actually, the decision also ignores the question of the relativity of the relevant considerations. In the *Jam'iyat Iskan* affair it was found that in the test of outcome, expropriating land for the objective of paving a road system would benefit the protected local population and as such is legal, even if the expropriation and paving would consequently also benefit the citizens of Israel, who are not a protected population under the laws of occupation. The *Jam'iyat Iskan* Rule thereby implemented the dominant/subordinate test in the outcome dimension of exercising authority. There is no dispute that on the outcome level of the decision, the direct, palpable and principal profit derived from the licenses is an Israeli economic profit, whereas the profit for the Palestinian interest is at best if at all secondary, negligible

and subordinate. The decision thereby contradicts the *Iskan* Rule by being satisfied by any beneficial outcome at all, as small, indirect and speculative as it may be, instead of a significant benefit to the protected population, as the decision said:

"Under the circumstances, it is therefore hard to accept the resolute assertion of the Petitioner that the quarrying activity entails no aspect of promoting the good of the area" (Section 13 of the decision).

46. By implicitly adopting a new rule according to which authority and/or the exercise of authority is illegal only in circumstances where there is no aspect of promoting the area by the quarrying activity, the decision actually renders the main objective of Article 43, which is to restrain the powers and discretion of the Military Commander and maintain the status quo as far as possible, meaningless.
47. **Sixthly**, even if the Court were permitted to balance the various costs and benefits, it would have to apply that balance based on the test of proportionality with its three subtests. The test of proportionality has been defined by the Supreme Court as a general principle of international law, and runs like a thread through hundreds of Supreme Court rulings on the exercise of the occupier's authorities in the occupied territories. See on this matter the analysis by Prof. Yuval Shany in "The Principle of Proportionality under International Law" (The Israel Democracy Institute, 2009).
48. **Seventhly**, the decision relies on the overall Palestinian interest but completely ignores the reversible environmental consequences that could stem from the continued mining activity (especially considering the fact that the expansion of the mining sites was not limited), including air, water and noise hazards, and especially irreversible damage to the landscape of the area and to the ability of the future generations of the protected population to enjoy it. It should be noted that the Israeli quarries receive licenses and operate without the full extent of Israeli environmental legislation applying to them and without even being committed to transfer money to rehabilitate the quarries. Without discussing this matter in depth, it is noteworthy that international environmental law imposes on Israel various legal obligations based on principles such as sustainable development, the 'polluter pays principle,' the prohibition on causing trans-border damage (obligations some of which apply to Israel extraterritorially regarding the territory under belligerent occupation). Article 43 and the discretion inherent in it obligate the Military Commander to consider that consideration and give it the appropriate weight. The continued granting of licenses for mining activity that has continued for some 40 years and allowing the expansion of the quarrying sites of the active quarries, without conditioning their continued operation on adopting stiff environmental standards, seemingly indicates that this relevant consideration was not fully taken

into account by the Military Commander or at least was not given the appropriate importance.

Seventh objective: promoting the Palestinian interest by transferring the quarrying products to the Palestinian residents

49. According to the decision, the continued granting of mining licenses will serve the overall Palestinian interest. As the President wrote: "It was noted too that a significant percentage of their quarrying products are marketed inside the Palestinian area." (Section 13 of the decision).
50. **Firstly**, in our opinion, this determination is inconsistent with the accepted interpretation of the laws of occupation and even contradicts the Supreme Court's case law, including the *Jam'iyat Iskan* Rule. As aforesaid, the occupier could have granted the licenses to Palestinian corporations and thereby allowed the Palestinians to provide their own needs. Particularly in light of the fact that there are active and experienced Palestinian-owned quarries that could have operated in that area. Alternatively, Israel could cooperate with the Palestinian Authority on this matter.
51. **Secondly**, even if we assume that the local population derives a benefit from the activity of the quarries because of the resulting incidental supply of its needs, the Supreme Court should have applied the test of the dominant/subordinate consideration as detailed above. The application of that test would have led to the unequivocal conclusion that the main consideration in granting the licenses is providing the Israeli consumption, whereas the consideration as to supplying the needs of the local Palestinian population is at best, if at all, secondary, negligible and subordinate. The fact is that a negligible portion amounting to a few single percentages of the mining products are transferred to the protected population, whereas the vast majority of the consumption (more than 90%) is transferred to the residents of Israel.
52. **Thirdly**, the decision ignores, yet again, the question of the relativity of considerations. In the *Jam'iyat Iskan* case it was found that expropriating land for the objective of paving a road system would ultimately benefit the protected local population and as such is legal, even if the expropriation and paving would consequently also benefit the citizens of Israel. The *Jam'iyat Iskan* Rule thereby applied the dominant/subordinate test in the outcome dimension of exercising authority. There is no dispute that in the outcome dimension of the decision, the direct, palpable and principal profit derived from the licenses is an Israeli economic profit (providing a product to the residents of Israel), whereas the profit for the Palestinian interest (providing mining products to the local Palestinian population) is at best if at all secondary, negligible and subordinate. The decision thereby

contradicts the *Iskan* Rule by failing to demand a principal beneficial outcome for the protected population, but rather being satisfied with any beneficial outcome at all, as small, indirect and speculative as it may be. By implicitly adopting a new rule according to which the exercise of authority is illegal only in circumstances where there is no aspect of promoting the area by the quarrying activity, the decision not only contradicts, again, the *Jam'iyat Iskan* Rule but actually renders meaningless the main objective of Article 43, which is to restrain the powers and discretion of the military commander.

53. **Fourthly**, a document published by the Interior Ministry (**Interior Ministry – Planning Administration: National Outline Plan 14b - National Outline Plan for Quarrying and Mining Sites for the Construction and Paving Market** – in the possession of the authors of the opinion), states that if the quarries were transferred to Palestinian control, export to Israel would decline (thereby increasing the supply of mining products to the local Palestinian population). This government assessment indicates that the Palestinian interest on the one hand and the interest of the state of Israel (as promoted by the Military Commander) on the other, do not overlap but clash with each other.

Eighth objective: promoting the overall Palestinian interest by transferring royalties to the Civil Administration

54. According to the decision, continuing to grant mining licenses would continue to serve the overall Palestinian interest because the mining royalties would be transferred to the Civil Administration and thereby benefit the local population by enabling the occupier to fulfill its duties under international law to safeguard the benefit of the area. As President Beinisch wrote:

"... The State emphasized that the use of the royalty money paid by the quarry operators is for the benefit of the local population. In this context the State repeated that after the petition was submitted it decided to maintain a separate record of the revenues of the Civil Administration in Judea and Samaria, including its revenues from royalties from the quarries in the area, which would be dedicated by and large to activities under the responsibility of the military administration in the area. Thereby, it was argued, the money allows the Civil Administration to fulfill its duties under international law to safeguard the benefit of the area" (Section 12 of the decision).

55. But this determination too is inconsistent with the objectives of the laws of occupation and the accepted interpretation of Article 43.

56. **Firstly**, there is reasonable cause to believe that this argument was raised by the State in bad faith because for many years those royalties were transferred directly to the state treasury and only after the petition was submitted was the possibility of transferring the royalties to the Civil Administration raised.

57. **Secondly**, in the context of the exploitation of natural resources, according to the protraction principle detailed hereinafter the exploitation of natural resources is subject to the obligation by which all of the revenues from said exploitation must be invested in the humanitarian needs of the occupied population. On this matter see the study published a few months ago which found that:

"...we cautiously endorse the fiction that non-renewable resources can be exploited by an occupying army, provided that the money from these sales is spent exclusively on the humanitarian needs of the local population".

James G. Stewart, **Corporate War Crimes: Prosecuting the Pillage of Natural Resources**, (Open Society Institute, 2011). Available at: http://www.soros.org/initiatives/justice/articles_publications/publications/pillage-manual-20101025/pillage-manual-2nd-edition-2011.pdf

58. Relevant to this issue are the words of Prof. Eyal Benvenisti concerning the mining of resources and the derivative obligations of the occupying forces in Iraq. The author refers to a letter by the occupying powers to the Security Council, in which they undertake to operate the Iraqi oil industry in such a manner that safeguards the interests of the Iraqi people and that all of the proceeds from such sales shall serve the benefit of the Iraqi people and be deposited in a fund that can be used only by a recognized representative of the Iraqi people:

"All export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board . . . in order to ensure transparency, [and that]_all proceeds from such sales shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted."

(Quoted at Eyal Benvenisti, "**Agora (continued): Future implication of the Iraq conflict: Water Conflicts During the Occupation of Iraq**", 97 American Journal of International Law 860, October 2003, at p. 864)

59. According to an official document published by the Palestinian Ministry of Economy in September 2011, the value of the product of the quarries is estimated at \$900 million a year (The Economic Costs of the Israeli Occupation for the Palestinian

Occupied Territory). Israel claims that the revenues that will be transferred to the Civil Administration will amount to NIS 25 million a year. It is impossible to understand from the information provided by the Respondents and/or the State how the returns of quarrying break down. Therefore it is clear that if indeed the rate of paid royalties is negligible while Israel makes a considerable financial profit from the quarrying activity (even if the amount is lower than that claimed by the Palestinian Authority), the arrangement that was reached does not meet that requirement of the laws of occupation. Indeed, it cannot be deduced from the state's arguments and from the decision that all of the royalties of quarrying will be transferred for the humanitarian needs of the occupied population. Actually, the State is declaring a recommendation to increase the rate of royalties paid to the Civil Administration, which is to say that presently not all of the profits from quarrying are transferred to it. Nor does the State undertake to transfer all of the royalties as required by the laws of occupation:

"... In this context the State repeated that after the petition was submitted it decided to maintain a separate record of the revenues of the Civil Administration in Judea and Samaria, including its revenues from royalties from the quarries in the area, which would be dedicated as a whole to activities under the responsibility of the military administration in the area. Thereby, it was argued, the money allows the Civil Administration to fulfill its duties under international law to safeguard the benefit of the area" (Section 12 of the decision).

60. It is obvious that the State reserves the right not to transfer all of the royalties to the Civil Administration in the area, contrary to its obligation under the laws of occupation.
61. But even if all of the royalties are transferred to the Civil Administration, it is still not clear that they will all be transferred for the humanitarian needs of the local population, as required by the laws of occupation. On the contrary. It is most likely that a large portion of those royalties will be transferred to the funding of the Civil Administration itself (or at the very least will allow the State to reduce the funding it transfers to the Civil Administration from other sources) and will thereby benefit, yet again, the State of Israel, by saving the State and the Israeli taxpayer an amount equal to the royalties, rather than benefiting the local population. This result yet again contradicts the *Jam'iyat Iskan* Rule by imposing the funding of the occupation on the (mineral) treasure of the local occupied population, instead of taking care of that population.
62. **Thirdly**, even if we suppose the local population derives a benefit by way of the funding of the Civil Administration, then according to the Supreme Court's ruling as

to Article 43, the Supreme Court should have applied the dominant/subordinate consideration test (in the dimension of the initial discretion that led to the decision to continue granting the licenses). The decision did not apply that test and thereby contradicts the Supreme Court's consistent case law in general and the *Jam'iyat Iskan* decision in particular.

63. **Fourthly**, contrary to the *Jam'iyat Iskan* Rule, the decision ignored the dominant/subordinate test in the outcome dimension of exercising authority under Article 43 as detailed above.
64. **In summary**, there is no dispute that Respondent No. 1 granted all of the concessions to Israeli corporations only and that consequently the mining products as well as their profits are transferred by and large outside of the area under the belligerent occupation of the occupying state. Our position is that no reasonable interpretation, as flexible as it may be, can determine that the dominant consideration that guided the concession provider was the benefit of local (Palestinian) population or security considerations. Therefore the decision contradicts the laws of occupation as well as the *Jam'iyat Iskan* Rule. The determination in the decision that granting mining licenses to Israeli corporations can be legalized by the existence of some "aspect" of "promoting the benefit of the area" (Section 13 of the decision) does not change our conclusion. On the contrary. There is no legal interest or objective, neither in the decision nor outside of it, that can justify granting mining licenses under Article 43.
65. We think **the two additional interpretive considerations cited in the decision** do not change the results according to which the licenses contravened the laws of occupation. The first consideration cited in the decision is the fact that the quarry issue was arranged in the Interim Agreement with the Palestinian Authority, an arrangement that limits the Military Commander's discretion under Article 43. The second consideration is the determination that because of the protraction of the occupation, Articles 43 and 55 should be given an expanded-interpretation. Neither of these arguments supports the determination that the Military Commander may grant mining licenses under Article 43, for the following reasons:

A.4 The interim agreements do not limit the discretion of the Military Commander under Article 43

66. The decision stipulates that:

"Section 31 of the First Attachment to the Third Appendix (the Civilian Appendix) of the Interim Agreement says that responsibility for quarries and mines in areas C – including the powers of their licensing, inspection, expansion and operation – shall be transferred gradually from the Civil Administration to the Palestinian side as part of an overall process of a

transfer of powers and responsibility in those areas. In that framework the parties agreed that the quarries would continue operating during the interim period and decided that questions that arise during the transfer of rights to the quarries will be heard by a joint committee whose recommendations the parties undertook to respect, and that 'until the committee's decision is made, the Palestinian side will not initiate any measure that could negatively impact those quarries... Both the Israeli side and the Palestinian side decided explicitly to leave the situation concerning the quarries operating in area C as is, so that it be decided in the future as part of the discussion of the final settlement...' (Section 6 of the decision).

67. However, the arrangement of one issue or another in the Interim Agreements does not necessarily limit the Military Commander in exercising his discretion under Article 43. It must be remembered in this context that Article 43 has a quasi-constitutional character that governs all the laws of occupation and the technical arrangement of a specific subject in the framework of a political agreement does not outweigh its provisions or void it of content.
68. Furthermore, the determination that the Interim Agreements limit the Military Commander's discretion contradicts the explicit position of the Supreme Court as expressed specifically and explicitly in a decision given only two days after the decision under examination here. See H CJ 5324/10 *Malka et al v the Civil Administration in Judea and Samaria*, not yet published, decision from December 28, 2011, which determines that explicit arrangements in the Interim Agreements as to regulating taxation in the area do not limit the Military Commander's discretion.
69. Furthermore, a close look at Section 31 of the First Attachment to the Third Appendix of the Interim Agreement leads to the opposite conclusion from the one advocated by the State. This section actually creates an arrangement that strives not to maintain the status quo but to transfer authority for the quarries to the Palestinian Authority, including in the area of licensing and including in Area C (Section 31, subsections 1-2). Section 31, subsection 3 sets forth a mechanism in which quarry licenses for active quarries can be transferred from Israeli to Palestinian hands; until the transfer takes place, it is determined that "the Palestinian side will not initiate any measure that could negatively impact those quarries..." It is clear that the aforesaid appendix on which the State relied imposes on the Palestinians a duty not to act in a certain way during the time period during which the licenses were to be transferred to the Palestinians. The State erred in arguing that that provision imposes a duty on the Military Commander not to change the status quo in favor of the Palestinians because a Palestinian undertaking not to harm the Israeli interests during the negotiation stage, or to accept a temporary arrangement for the quarries

until they are transferred to them, does not amount to forbidding the Military Commander from taking measures that benefit the local population or limiting his discretion when he sets out to benefit them. That argument finds no support in the language of the appendix or the laws of occupation as a whole.

70. To complete the picture, we should stress that under the Geneva Convention, the beneficiaries of the laws of occupation are not allowed, generally speaking, to waive the rights granted to them under those laws. Furthermore, the State's reliance on provisions of the Interim Agreements to validate the illegal and render it legal lacks any legal basis. Moreover, the Interim Agreement is just that, an interim agreement, meant to serve for a transition period of several years (originally until 1999). Reliance on it in 2011 in order to validate illegal licenses, intended to remain in effect for many years into the future, raises, to put it delicately, serious legal questions.

A.5 The appropriate interpretation of the continuous temporal dimension of the occupation in the area

71. According to the decision, because of the protraction of the occupation, Articles 43 and 55 should be given an expanded interpretation and this reality should allow changes of the law that applies to the occupied territory. In this subsection we will establish our position that this interpretation of the decision contradicts the appropriate and accepted interpretation of the dimension of the protraction of the occupation.

72. The decision relies on the protraction of the occupation in the following manner:

"... Israel's belligerent occupation of the area has unique characteristics, primarily the duration of the occupation which requires an adjustment of the laws to the reality on the ground, which imposes on Israel the obligation to manage normal life for a duration that, although legally temporary, is certainly long term. Therefore, the traditional laws of occupation require an adjustment to the prolongation of the occupation, the continuation of normal life in the area and the maintenance of economic relations between the two authorities: the occupier and the occupied..."

This perception requires the adoption of a broad and dynamic view of the obligations of the Military Commander in the area, which impose on him, among other things, responsibility to guarantee the development and growth of the area in numerous and varied areas, including economic infrastructure and its development..."

This accepted perception has implications for the matter at hand. After reviewing the positions of the parties in this context, we reach the conclusion that in consideration of the factual basis the State presented to us, and in consideration of the unique circumstances of the area, the interpretation proposed by the State to the manner of the exercise of its authority under Article 55, is reasonable and involves the adjustment of the laws of occupation to the reality of the prolonged occupation...

The Respondents also stressed that the Hague Regulations, including Article 43, ought to be interpreted consistently with the uniqueness of the belligerent occupation of the area, which is a prolonged occupation that imposes positive obligations to prevent the stagnation of the occupied territory, including its economic development.

It appears that a full solution to those aspects cannot be given without adequately addressing the unique aspects of the belligerent occupation of the area in general and the issue of the quarries therein in particular. Considering the accepted interpretation in our case law of the international law that applies to the area, and the weight that must be given to the fact that the occupation of the area is a prolonged occupation, there is concern that it is precisely the adoption of the Petitioner's pedantic approach that might lead to the result of the Military Commander failing to meet his obligations under international law. For example, adopting the position that in the circumstances of this time the Military Commander must stop the operation of the quarries could harm the existing infrastructures and paralyze the industry, which could actually compromise the benefit of the local population...

Under these circumstances, it is therefore difficult to accept the Petitioner's resolute determination that the quarrying activity does not contain an aspect of promoting the benefit of the area, especially considering... the prolonged duration of the occupation."

73. According to the Court, the prolongation of the occupation should broaden the Military Commander's discretion under Article 43, broadening his authorities and obligations to develop the area, and that such broadening has implications for the appropriate interpretation of Article 55.
74. According to the decision, this line of interpretation is supported by President Shamgar's ruling in the Abu Ayta decision (HCJ 69/81 *Basil Abu Ayta v. Commander of Judea and Samaria area et al*, PD 37(2) 197, 313 (1983)) as well as the *Jam'iyat Iskan* Rule itself:

"Therefore, the authority of the military government extends to taking all necessary measures to guarantee growth, change and development. This leads to the conclusion that the military government is permitted to develop industry, trade, agriculture, education, health, welfare and other such matters concerning proper government, which are required to ensure the changing needs of the population in the territory under belligerent occupation" (the Jam'iyat Iskan affair, p. 894) (Section 10 of the decision).

75. This line of interpretation, which constitutes a central component of the decision, is erroneous. In our opinion, it contradicts the laws of occupation and their basic objectives, as well as the *Jam'iyat Iskan* Rule.
76. We stress that (1) occupation is a temporary situation, (2) this temporariness is intended to advance the interests of the protected population by guaranteeing that upon conclusion of the temporary occupation, control will be returned to the hands of the sovereign over the territory, (3) the protraction of the occupation for a long period of time harms the protected population because throughout the duration of the occupation it is not ruled by a sovereign ruler but rather subject to a temporary-military regime. Therefore, (4) the protraction of the occupation imposes increased and expanded duties on the occupier⁴ (5) to protect the interests of the protected population⁵, and (6) this clarifies and strengthens the prohibition on using the Military Commander's powers for the benefit of foreign interests of his own subjects⁶.

⁴ YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 49 (Cambridge: Cambridge University Press, 2009), 120, (henceforth; DINSTIEN 2009); Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, *Stanford Law Review*, 37(6) 1573; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *The Am. J. of Int'l L.*, 84(1) 44, 52; Dinstein, *The Dilemmas Relating to Legislation under Article 43 of The Hague Regulations and Peace Building 1*, 5-7 (paper submitted to the informal high-level expert meeting on current challenges to International Humanitarian Law, Cambridge, June 25-27, 2004) available at <http://www.ihlresearch.org/ihl/pdfs/dinstein.pdf>. (henceforth: Dinstein 2004).

⁵ Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *The Am. J. of Int'l L.*, 84(1) 44, 96; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 49 (Cambridge: Cambridge University Press, 2009), 116-117; EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 6, 27, 145 (Princeton, N. J: Princeton University Press, 1993), 147; GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY : A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION*, 31-33 (Minneapolis: University Of Minnesota Press, 1957), 97.

⁶ Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, *Stanford Law Review*, 37(6) 1573, 1586; EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 6, 27, 145 (Princeton, N. J: Princeton University Press, 1993), 147; Roberts, *Prolonged Military Occupation: The Israeli-Occupied*

77. Therefore, the protraction of the occupation, which harms the occupied population, requires adjusting the "traditional laws of occupation," as they were called in the decision, in such a way that they will benefit the protected population rather than harm it. The prolongation should not increase the benefits and profits from the occupation to the citizens of the occupying power. This simple conclusion was clearly and explicitly recognized by the Supreme Court itself in a series of decisions. For example, in the *Abu Ayta* Rule cited above, upon which the decision at hand relies, President Shamgar found that:

"The needs of any territory, whether it is under military occupation or otherwise, naturally change with the passage of time and the attending economic development. As explained above, the authors of the regulations were not satisfied with a definition of an obligation limited to restoring the previous condition. The duration of the military occupation might influence the nature of the needs, and the necessity of performing adjustments and a new deployment might grow the longer the duration... The time element influences the range of authorities, whether weighing the needs of the army or the needs of the territory, or when forging the balance between the two" (HCJ 69/81 Basil Abu Ayta v. Commander of Judea and Samaria area et al, PD 37(2) 197, 213 (1983)).

Likewise:

"The provisions of the Hague Convention must be applied to the area in adjustment to the circumstances created in the territory as a result of the prolonged occupation thereof... And with utmost consideration for the needs of the area." (Abu Ayta, ibid, p. 209).

78. Clearly, the protraction of the occupation radiates on the army's needs or the territory's needs, which include the need for utmost consideration of the protected local population.

79. As determined in the *Jam'iyat Iskan* Rule by Justice Barak (as was his title at the time), the military government is not a sovereign but a temporary ruler of the occupied territory:

"These powers are, legally speaking, temporary in nature, because the belligerent occupation is temporary in nature... This temporary status

Territories Since 1967, The Am. J. of Int'l L., 84(1) 44, p. 87; Antonio Cassese, *Powers And Duties Of An Occupant In Relation To Land And Natural Resources*, In INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 419, 420 (Emma Playfair Ed., 1992), 420.

may be of a long duration... International law does not limit its time and it continues as long as the military government rules the area effectively... which does not draw its vitality from the election of the residents of the area, which is not a sovereign in its own right, and which draws its power from the laws of war. It is a temporary regime by definition, even if that temporariness endures for a long time," Ibid, p. 794 and 802).

80. The non-sovereign and temporary nature of the rule of the Military Commander "to restore and ensure, as far as possible, public order and safety" requires, according to the Supreme Court, a balance that emphasizes the needs of the civilians. As the Gaza Coast rule stipulated:

"... to balance between the security needs and the needs of the people protected by the laws of belligerent occupation. The longer the military government endures and a transition occurs from a short-term military government to a long-term military government, so do the 'civilian' needs of the civilian population grow, and the Military Commander's 'civilian' authority is understood in the context of those needs" (see HCJ 1661/05 Gaza Coast Regional Council et al v Israeli Knesset et al, Section 9).

81. See also the words of Justice Barak (as was his title at the time) in the *Jam'iyat Iskan* affair:

"In a long-term military occupation, the needs of the local population gain extra emphasis... Therefore, legislative measures that could be inappropriate in a short-term military government, might become appropriate in a long-term military government." (ibid, pp. 800-801).

82. It should be emphasized that in the *Gaza Coast* decision, the Supreme Court emphasized that the prolongation of the occupation must work in favor of the protected population. In order to prevent exploitation of the protraction of the occupation by advancing the interest of the occupier, the Supreme Court emphasized that its prolongation does not negate or blur the military-temporary-non-sovereign nature of the military ruler:

"However, these developments do not divest the military government from that nature (see HCJ 500/72 Maryam Khalil Salem Abu al-Tin v Defense Minister, PD 27(1) 481, 484). They do not blur 'the difference between a military government and a regular government' (Jam'iyat Iskan affair, p. 803). They do not extend Israeli law, jurisdiction and administration to those areas. The temporariness of the belligerent occupation and its actual difficulties do not cancel the belligerent occupation. Acting President Shamgar (as was his title at the time) noted

correctly in the Abu Ayta affair that the temporariness of the military governor's authority means that 'its duration and validity are equal to the duration of the effective control of the area and the duration of the military government established in the territory'" (p. 230) (ibid, Section 9 of the decision).

83. See also the words of Prof. Benvenisti, who asserts that the protraction of the occupation must not be exploited to expand the powers of the occupier to the point that blurs the distinction between sovereign and ruler-occupier:

"...in a prolonged occupation the maintenance of the status quo ante could prove insupportable to the local population. Indeed, it would be wrong, and even at times illegal, to freeze the legal situation and prevent adaptations when an occupation is extended. But this does not mean that it is the occupant who is entitled to assume the duty to update the law. In prolonged occupations conditions change quite regularly, partly because of the occupant's own policies; to recognize the occupant's widening powers to react to these changes or even to initiate new ones would effectively grant the occupant almost all the powers a modern sovereign government would wield. In modern times, the occupant's interests encompass not only the safety of its troops but also a wide variety of economic concerns, and not only temporary benefits but also long-term advantages. Politicians and soldiers are not saints, and one must expect the occupant to be prejudiced in favor of its own country's interests at the expense of the indigenous community. Therefore, instead of allowing the occupant to extend its powers as new circumstances require, the aim of the law of occupation should be to encourage the participation of the indigenous community and of the ousted government, all subject to the occupant's safety concerns"..

EYAL BENVENISTI, **THE INTERNATIONAL LAW OF OCCUPATION**
146-148 (1993) .

84. It is important to reiterate the following principles: the protraction of the occupation does indeed broadly impact the appropriate interpretation of Article 43 and consequently the powers of the Military Commander according to the laws of occupation as a whole, but this broad impact is subject to two strict and basic limitations: the first is that such expansion does not allow the Military Commander to factor in considerations that are prohibited under Article 43 or to act outside of the other provisions that apply to his powers, and the second is that the expansion must be exercised for the benefit of the local population and not against it.
85. These two limitations have been articulated in a long line of Supreme Court decisions. See, for example, the words of the Supreme Court in H CJ 351/80 *The*

Jerusalem District Electric Company Ltd. v. The Minister of Energy and Infrastructure, PD 35(2), 673:

"In the absence of special grounds the commander of the area does not generally need to initiate such changes in the area, which, even if they did not change the existing statute, will have a far-reaching and long-term impact on the situation in the area, beyond the period when the military occupation ends one way or another, unless the actions in question are for the benefit of the residents of the area." (ibid, p. 690).

86. Especially pertinent to this matter are the words of the Supreme Court in the *Beit Sourik* affair:

"The Supreme Court has reiterated that the powers of the Military Commander are temporary in nature because the belligerent occupation is temporary in nature. The permanent arrangements are not the concern of the Military Commander. Indeed, the belligerent occupation of the area is long. This has an influence on the extent of the Military Commander's authority... The passage of time does not expand the authority of the Military Commander and allow him to factor in considerations beyond the actual proper management of the area under belligerent occupation" (HCJ 2056/04 *Beit Sourik Village Council et al. v. Government of Israeli et al*, PD 58(5), 807, 830, Section 23).

87. This prohibition on the occupier's abuse of the dimension of protracted temporality for an illegal expansion of his discretion or authorities was explicitly addressed in the *Valiro* decision that discussed Articles 43 and 55 in the context of quarrying activities. The determination in this decision is very important for the matter at hand:

"In exercising his authorities in a territory under belligerent occupation, the Military Commander is required, therefore, to find balance between the needs of the army and the needs of the local residents (Article 43 of the Hague Regulations; the Beit Sourik affair, p. 830; the Hass affair, pp. 455-456; the Mara'abeh affair, p. 506). This supreme principle is also correct in regard to the exercise of the commander's authority under Article 55 of the Hague regulations. It should be emphasized: even though the IDF's belligerent occupation of the area is prolonged, 'The passage of time does not expand the authority of the Military Commander and allow him to factor in considerations beyond the actual proper management of the area under belligerent occupation' (the Beit Sourik affair, p. 830). In exercising his authority of management and usufruct of the public land he occupied, the Military Commander must, therefore, act for the benefit

of the area, exercising relevant considerations only – the benefit of the protected residents and the needs of the army (the Beit Sourik affair, p. 833-836). Particularly, 'he must not consider the considerations of the State by virtue of whose belligerent occupation of the territory he is exercising his authorities' (the Hass affair, p. 456) (See: HCJ 3103/06 Shlomo Valiro vs. The State of Israel (not yet published, February 6, 2011), Section ???).

88. The decision under examination in this opinion completely and irreconcilably contradicts the rules of *Valiro* and *Beit Sourik*. Although the decision determines it is based on the *Jam'iyat Iskan* Rule in its giving an expansive interpretation to Article 43, the *Jam'iyat Iskan* Rule makes different determinations from the decision:

"In establishing the extent of the Military Government's authorities according to the formula of 'public life and order,' the distinction between a short-term military government and a long-term military government should be taken into account... This distinction between a short-term military government and a long-term military government has considerable influence on the contents that should be given to ensuring 'public life in order'" (ibid., pp. 800-801).

What is more:

"In a long-term military occupation, the needs of the local population gain extra emphasis... Therefore, legislative measures that could be inappropriate in a short-term military government might become appropriate in a long-term military government." (ibid, pp. 800-801).

And this:

"The life of a population, like the life of an individual, does not stand still but is in constant motion that contains development, growth and change. A military government cannot ignore all of those things... Therefore the authority of a military government extends to exercising all the necessary measures to ensure growth, change and development... And other such matters that concern proper government and are needed to ensure the changing needs of the population in an area under belligerent occupation..." (ibid, pp. 804-806).

As well as this:

"Long-term basic investments, which can cause permanent change, [EITHER REMOVE COMMA OR REPLACED "THAT" WITH "WHICH".] that might endure after the termination of the military government, are allowed, if they are needed for the benefit of the local population, as long as they do not cause fundamental change in the basic institutions of the area." (ibid, 801, 811).

89. A careful examination of the *Jam'iyat Iskan* decision leads to the unequivocal conclusion that when the Court discusses the interests of the local population, it is referring to the protected population, namely the Palestinian population.
90. It should be stressed that this rule is not obsolete. On the contrary. See for example the words of President Beinisch in H CJ 2690/09 *Yesh Din – Volunteers for Human Rights et al v Commander of IDF Forces in the West Bank et al* (published in Nevo; decision from March 28, 2010), according to which the prolongation of the occupation requires:

"... First and foremost, considerable weight to the rights of the protected population..." (Section 7).

91. However, despite the fact that the decision under discussion stated explicitly that it was based on the *Jam'iyat Iskan* Rule, it held exactly the opposite. The decision permits: (1) the continued mining of exhaustible natural resources, (2) even after some 40 years of mining, (3) where the mining is conducted by Israeli corporations and for their economic benefit, (4) the mining gradually consumes the capital of resources, (5) permission is granted to expand the quarries in operation, and as such it (6) causes irreversible environmental damage to the occupied territory, all while (7) the vast majority of mining products are transferred into the territory of the occupying power (according to the State, 94%), under circumstances in which (8) the remaining 6% that are marketed in the occupied territory are used by the occupying army and the Israeli settlers in the occupied territory – in order to expand those very settlements while harming the interest of the local population – and, therefore, (9) only a fraction of a percent, if any, of the local population's natural resources are marketed to that same local population.
92. As we can see, in its attempt to expand the provisions of Articles 43 and 55, it appears that the decision adjusts the provisions to accommodate the reality on the ground instead of subjecting that reality to the rule of law and limiting the authorities of the Military Commander so as to accord with the provisions of the laws of occupation. This adjustment by way of an expanding interpretation completely contradicts the two limitations that case law has imposed on the expanding interpretation of article 43 to adjust it to the prolongation of the occupation: (1) that the expansion not let the Military Commander factor in considerations that are not

relevant under the traditional and accepted interpretation of Article 43, and that (2) the expansion must be used in favor of the local population rather than against it.

B. The appropriate interpretation of Article 55 of the Hague Regulations

B.1 Introduction

93.

94. In this section we wish to establish our position that: (1) The interpretation given in the decision, according to which the occupying power is authorized, in practice, to make "reasonable use" of the capital (to be distinguished from the fruits) of the natural resources located in the occupied territory, contradicts the objectives of the laws of occupation and the provision of Article 55 of the Hague Regulations. (2) The interpretation given in the decision, according to which quarrying activities are allowed by quarries that were not in operation prior to the occupation contradicts the objectives of the laws of occupation and Article 55 of the Hague Regulations.

95. Article 55 of the Hague Regulations stipulates the following legal arrangement:

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

96. The Hebrew version was quoted by the Supreme Court in the *Gaza Coast* affair (ibid, p. 584).

97. According to the rules of interpretation of international treaties anchored in Section 31 of the Vienna Convention on the Law of Treaties, treaties should be interpreted in the following manner:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended".*

98. According to Section 32 of the Vienna Convention, recourse can be had to supplementary means of interpretation in the following circumstances:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable....".

99. We believe the interpretation the decision gives Article 55 contradicts the correct interpretation of the article in light of these rules of interpretation. The interpretive error in the decision has two planes. One is the broad plane of the objectives of the laws of occupation in general, and the other, the narrow literal-objective-contextual plane of the article itself. In this section we shall analyze the flaws in the decision on both of those planes.

B.2 The decision's interpretation of Article 55 on the broad plane – the objectives of the laws of occupation

100. Methodologically, the Court erred, with all due respect, when it primarily interpreted Article 55 and only later examined the interpretation it gave that article in light of Article 43. As the Court recognized itself in the decision, Article 43 is the most central article of the Hague Regulations and in the context of the laws of occupation enjoys a quasi-constitutional status:

"Article 43 has been recognized in our decisions as a quasi-constitutional framework provision of the laws of belligerent occupation that establishes a general framework for the manner the Military Commander should exercise his duties and powers in the occupied territory" (Section 8 of the decision).

101. Therefore, every provision of the laws of occupation in the Hague Regulations is informed by Article 43 and its interpretation must be subject to that article. In the case before us, Article 43 is the main and most basic part of the third part of the Hague Regulations (concerning the laws of occupation) and its application is supreme, principled and comprehensive, whereas article 55 is a single, specific and limited provision, one of many in the entire body of the laws of occupation. Therefore, appropriate interpretation should have begun by an accurate extraction of the objectives and principles of the laws of occupation as anchored in Article 43, and only then should Article 55 have been interpreted in the light of those objectives and principles. As explained below, such a necessary and worthy interpretational trajectory would have led to different interpretational results from the ones the Court reached concerning Article 55.

102. Following are the main principles of the laws of occupation:

- (1) The occupation is temporary;
- (2) The occupier is not the sovereign but rather manages the territory for the legal sovereign with a status similar to that of trustee;
- (3) In fulfilling its role, the occupier fills the shoes of the occupied ruler, temporarily performs its functions and exercises its authority;
- (4) In exercising its authority, the occupier must maintain, unless absolutely prevented, the status quo present in the occupied territory at the moment of occupation, in order to
- (5) Advance the objectives of the laws of occupation and protect the interests of groups protected under the laws of occupation, as defined by Article 4 of the Fourth Geneva Convention as the occupied population, whereas
- (6) Restrictions on the benefit of the protected population can be imposed by the occupier only for necessary security reasons.

103. Therefore, the wording of Article 55, as well as its purpose, which will be detailed below, which is supported by an objective interpretation of the entire body of laws of occupation, leads to the unequivocal conclusion that the occupying power is entitled to usufruct of the fruits of the capital, but no more.

104. These principles must be examined and contrasted with the decision, which interpreted Article 55 as approving (1) the legality of the continued mining of exhaustible natural resources, (2) even after some 40 years of mining, (3) where the mining is conducted by Israeli corporations and for their economic benefit, (4) the mining gradually consumes the capital of resources, (5) permission is granted to

expand the quarries in operation, and as such it (6) causes irreversible environmental damage to the occupied territory, all while (7) the vast majority of mining products are transferred into the territory of the occupying power (according to the State, 94%), under circumstances in which (8) the remaining 6% that are marketed in the occupied territory are used by the occupying army and the Israeli settlers in the occupied territory – in order to expand those very settlements while harming the interest of the local population – and, therefore, (9) only a fraction of a percent, if any, of the local population's natural resources are marketed to that same local population, whereas (10) there is no available information whether the profit derived from the quarrying activities is transferred to the protected population or remains in the hands of the Military Commander.

105. This interpretation of Article 55 contradicts the supreme principles and supreme objectives of the laws of occupation as detailed above: (1) quarrying should not be viewed as an activity whose results are temporary but as one that changes the status quo in the occupied territory and causes irreversible changes therein, (2) the occupier in this case is not acting as a ruler-trustee-benefactor of the local population but as someone who is harming the interests of that population, defined as a protected population under the laws of occupation, (3) without any necessary security grounds that could justify such harm.

B.3 The decision's interpretation of Article 55 on the narrow plane – the literal-intentional-contextual plane of the regulation

106. The court's interpretation is inconsistent with a literal interpretation of Article 55, the binding interpretation under Article 31 of the aforementioned Vienna Convention.
107. Article 55 imposes on the occupier the role of administrator (not "administrant," as the provision was erroneously translated in the *Gaza Coast* affair). The role of the administrator is limited: it is not the role of entrepreneur, developer or governor but an administrative role, limited in its essence and nature. Furthermore, the job of the occupier-administrator is, in the words of the Article, "usufructuary," operating in accordance with the rules of "usufruct." The meaning of these legal terms, which originate in Roman law and are recognized in American law, can be found in legal dictionaries. For example, the Curzon dictionary says that the definition of the former term is: "one having a usufruct" whereas the definition of the latter term is: "rights of using and enjoying profits or fruits from something belonging to another." See also, the following legal dictionary definition upon which the decision relies:

"A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time" (Bryan A. Garner, **Black's Law Dictionary** 1580 (2004)).

108. According to the provisions of the Article, the administrator must preserve the "capital of assets." In other words, it must fill a temporary administrative role in order to preserve the "capital of assets" located in the occupied territory. In our opinion, under no accepted literal-legal interpretation may gravel dug from the ground be classified as fruits of the earth or as its profits. The gravel in this context is not "fruits." It is not "profits." The gravel is part of the ground and as such it must be classified as an exhaustible resource and not as the fruits or profits of a renewable resource.

109. This legal obligation to protect the capital of assets has ancient historic roots. For instance, Article 7 of the 1874 Brussels Declaration concerning the Laws and Customs of War stipulates that the occupier is a trustee of the public property and must handle it in accordance with the rules of usufruct:

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

110. The reference in Article 55 to the term "capital" and the expression "benefit" create a legal distinction between use (permitted under certain circumstances) of the fruits of the capital (use that preserves the capital itself), and (prohibited) use of the capital itself.

111. The expressions "to preserve" and the "capital of assets" indicate preservation, in other words protection, of the capital and naturally this literal interpretation cannot be maintained alongside an interpretation that allows the capital itself to be eaten into and/or worn down and/or exhausted, even in a "reasonable" manner. In sum, the implied possibility that arises from the wording of the Article, according to which the fruits of the capital may be used, cannot be interpreted to allow the occupier to make use of the capital itself.

112. Therefore, Article 55 contains three essential components: (1) the occupier-administrator (2) acts as trustee, in order to (3) administer the assets temporarily in order to preserve them, and that is even if the occupier is permitted to make legal use of the fruits of those assets.

113. Our conclusion is supported by the words "shall" and "must," which appear in the Article. The imperative form of these words imposes an obligation on the occupier to preserve the capital. This explicit duty embodies a (negative) duty to refrain from harming it, as well as a (positive) duty to initiate measures to preserve it. This duty is incongruous with the interpretation that permits the occupier to take active measures, as in the case at hand, that harm the capital.
114. Even the decision itself recognizes the quarried land as a natural resource or capital of the asset. The decision even categorizes it as "... The natural treasures of the area" (Section 7 of the decision) and does not try to categorize the mined land as the fruit of the resource. A literal interpretation of Article 55 therefore leads to the unequivocal conclusion that the capital of the natural resources, or in the language of the decision, "the natural treasures of the area," must be protected and not destroyed, exhausted, wasted or gnawed.
115. This interpretation is all the more applicable to this case in the context of quarrying minerals from the land, compared to the other minerals specifically mentioned in the article, such as "forests" or "rivers." If the land grows "fruits" of any sort (such as crops), the occupier is permitted to use them but is absolutely forbidden to use the capital of the quarry – namely the land itself, for example by mining it. The land itself is an exhaustible resource and its exhaustion is irreversible. Conversely, "forests" or "rivers" can, under certain circumstances, rejuvenate after the use of their "capital." Therefore, the distinction provided in the article between the permissible use of the fruits of the resource and the forbidden use of its capital is applicable, a fortiori, to the quarry that is the subject of the decision.
116. The interpretation allowing "reasonable" use of the capital of the assets is inconsistent with that literal interpretation of Article 55. As detailed below, the literal interpretation absolutely forbids the use of the capital of natural resources and therefore does not recognize the test of "reasonability" or "proportionality" for that purpose.
117. **This literal interpretation of Article 55 is consistent with an objective interpretation thereof.**
118. The objective of Article 55, just like the supreme objective of the whole body of laws of occupation, is to set strict boundaries on the temporary occupier, such that it will not be allowed, in general, to engage in quarrying activities that alter the status quo in a permanent way, especially if the alteration acts to the disadvantage of the occupied-protected population. This objective is fulfilled by the implicit distinction between the capital of resources and its fruits and between the prohibited use of the former and the permitted use of the latter.

119. This interpretive position is supported by the position of the US State Department, according to which the use of natural resources in an occupied territory is absolutely forbidden. In an opinion on the legality of Israel's use of the Sinai oilfields, the US jurists found that:

"[r]esources such as oil deposits, which are irreplaceable and have value only as they are consumed, cannot be used without impairing the capital of the oil bearing land".

Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 16 **International Legal Materials** 733, 740 (1977)

120. The quarrying in question in this petition is being undertaken on state land and is concerned with the use of natural resources, or as the decision itself called them "the natural treasures of the area" (Section 7 of the decision). The mining of those minerals or "natural treasures," as the decision chose to call them, is the mining of non-renewable minerals and therefore it exhausts exhaustible and limited natural treasures that constitute the collective property of the occupied population. The mining of the capital of the natural treasures is therefore illegal, in light of the objective of Article 55.

121. This position is directly and specifically supported by Laurent's writing about the Brussels Declaration on occupation as a regime of trusteeship:

"[t]he products of mines and quarries are certainly not a fruit, but a part of the ground. It is therefore the substance of the thing which the exploiter successively depletes; how can the usufructuary have the right to exploit the mines and quarries when he must conserve the substance?"
F., F. Laurent, **principes De Droit Civil**, 563-564 (1887).

122. The military tribunal of Nuremberg ruled similarly in *The United States of America vs. Ernst von Weizsäcker, et al* ("The Ministries Case") (case #11), when it convicted the chairman of a company who received a license to operate quarries in occupied Russia. The tribunal ruled that the quarrying was a violation of the laws of trusteeship (p. 747 of the decision).

123. The decision under examination in this opinion recognizes the interpretation that requires the occupier to conserve the minerals. It even refers to the minerals as "natural treasures" that require protection, based on the *Valiro* Rule, which determined that "the State is obligated to protect the asset and avoid harming it" (See: HCJ 3103/06 *Shlomo Valiro vs. The State of Israel* (not yet published, February 6, 2011)).

124. Furthermore, the decision explicitly recognizes the legal prohibition on harming the capital of assets, when it stipulates that "the wording of this article gives limited permission to the State occupying another territory by belligerent occupation to administer and usufruct public buildings, land, forests and agricultural plants that belong to the enemy state and are in that territory, without harming the capital of the assets."

125. See also the President's comments in Section 7 of the decision:

"The property should be administered in accordance with the rules of usufruct, according to which the occupying state may not sell the asset or operate it in a way that leads to its elimination or depletion" (See Yoram Dinstein, *Laws of War*, p. 230 (1983) (henceforth: Dinstein), Michael A. Lundberg, *The Plunder of Natural Resources During War: A War Crime (?)*, 39 *GEO. J. INT'L L.* 495, 515 (2008).

126. The decision repeatedly accepts the legal prohibition on the non-usufructory use of assets, for instance when it relies on the scholar Von Glahn, who stipulates that:

"It would seem reasonable to assume, however, that an occupant in principle ought to be free to grant concessions for the exploitation of the usufruct of public real or immovable property, with the obvious reservation that no such concession could exceed the duration of the belligerent occupation" (GERHALD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY- A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT (OCCUPATION) 209* (1957) (henceforth: Von Glahn).

127. However, despite the existence of that duty, the decision under examination in this opinion determines that the occupier is allowed to harm the capital of the occupied population's natural treasures to a reasonable extent. The problem is that such an interpretation is inconsistent with either a literal or objective interpretation of the article.

128. Furthermore, that determination contradicts the determination of the decision in the *Valiro* affair:

"39. The rule that an occupying state must administer public property it seized in accordance with the rules of usufruct is part of international customary law..."

40. *The occupying force may, therefore, under the rules of international law, possess the immovable assets that are government property belonging to the enemy state and usufruct them, but it is obligated to maintain them and avoid harming them... The state is obligated to protect the capital of the assets and administer it according to the rules of usufruct. It does not acquire ownership of those assets and therefore it is accordingly forbidden from selling them or acting in a way that voids the rights to them of content since the capital of the property would be harmed as a result...*

41. *The duty of the occupying force to maintain the immovable property belonging to the enemy is also reflected in the prohibition against destroying it (Article 23g of the Hague Regulations and Article 53 of the Fourth Geneva Convention (Commentary: IV Geneva Convention 301 (Jean S. Pictet, ed., 1958) 301 (henceforth: Pictet); HCl 10356/02 Hass v Commander of IDF Forces in the West Bank, PD 48(3) 443, 456-458 (2004) (henceforth: the Hass affair).*

42. *The occupying state is therefore required to protect the public property in the occupied territory and forbidden from harming that property. Causing widespread destruction and-confiscating property on a large scale are considered serious violations of the convention, unless they were done for military purposes (Article 147 of the Fourth Geneva Convention; Pictet, p. 601). However, as the scholar Pictet noted, the purpose of the Fourth Geneva Convention is to care for the protected civilians themselves and not the property, and therefore the treatment of enemy property and private property in an occupied territory is for the most part regulated by the Hague Regulations (Pictet, p. 271). At any rate, the provisions forbidding the destruction or confiscation of enemy property do not derogate from the occupying power's right to administer public enemy property and usufruct it. Pictet noted this...:*

43. *Therefore, in exercising his powers in a territory under belligerent occupation, the Military Commander is required to strike a balance between the army's needs and those of the local population (Article 43 of the Hague Regulations; the Beit Sourik affair, p. 830; the Hass affair, pp. 455-456; the Mara'abe affair, p. 506). This supreme principle is also true for the exercise of the Commander's power under Article 55 of the Hague Regulations. It should be stressed that, even though the IDF's belligerent*

occupation of the area is long, 'the passage of time does not expand the Military Commander's power and allow him to factor in considerations beyond the proper management of the area under belligerent occupation' (Beit Sourik affair, p. 830). In exercising his administrative and usufructuary powers in the public land he occupied, the Military Commander must, therefore, act for the benefit of the area, exercising relevant considerations only – the benefit of the protected residents, and the needs of the army (Beit Sourik affair, pp. 833-836). Particularly, 'he must not consider the considerations of the State by virtue of whose belligerent occupation of the territory he is exercising his powers' (the Hass affair, p. 456)."

129. The decision relies on the State's position that even if the quarrying and mining were to continue in the area during the coming 30 years to the same extent, the result will be the exploitation of "only one half of a percent of the total mining potential in the area." In light of that prediction by the State, the Court determines that the damage is proportionate and reasonable and is not a real exploitation of exhaustible natural resources or the exhaustive use of the capital.

130. But the distinction between use of the capital and use of its fruits based on Article 55 is a fundamental, rather than a quantitative, distinction. It is absolute, rather than relative. According to the wording (as well as the spirit and objective) of Article 55, it is prohibited to eat into the capital. In fact, the occupier must preserve it. The occupier may use and enjoy only the fruits of the asset, and any exploitation of the capital is prohibited. When the laws of occupation, as well as other laws such as environmental law and the principle of sovereignty over natural resources, generally prohibit the exploitation of natural resources in occupied territory, also prohibited are the mining and quarrying of half a percent of the total potential.

131. Superfluously, it is noteworthy that a document published by the Interior Ministry (**Interior Ministry – Planning Administration: National Outline Plan 14b - National Outline Plan For Quarrying and Mining Sites for the Construction and Paving Market** – in the possession of the authors of the opinion)⁷ indicates that the entirety of the mining quarries in Area C will be exhausted in another 38 years, based on the current rate of mining and taking into consideration the development plans of the existing quarries (p. 71 of the document). That is to say, the presumption by which mining is legal under these circumstances because it is restricted to reasonable

⁷ The document can be viewed on Interior Ministry website:
<http://www.moin.gov.il/SubjectDocuments/Karka0702.pdf> (Hebrew).

use of the capital of resources is an erroneous presumption, and its paradox shakes the foundation on which the decision rests.

132. However, even if the use of natural resources is reasonable, the licenses cannot be justified. According to international law generally, and in particular according to its interpretation by the Supreme Court over the years, when a certain activity in the occupied territory is prohibited and the authority is therefore not authorized to conduct it, carrying it out is intrinsically invalid, irrespective of the actual extent of the activity. Put differently, the question of authority or its absence is a fundamental question and not a question of degree. The obligation imposed on the occupier to preserve the capital, and thus the derivative prohibition on exhausting it, is an absolute prohibition which is not subject, either explicitly or implicitly, to the test of reasonability or proportionality. Therefore, the use, explicit or implicit, made in the decision of the principles of reasonability or proportionality and/or *de minimus* comments in order to justify the use of the capital, has no literal or objective base in Article 55 and as such is, with all due respect, erroneous. Therefore, the interpretation given in the decision, according to which the occupying power is permitted, in practice, to make "reasonable use" of the capital (as distinct from the fruits) of the natural resources located in the occupied territory, contradicts the language of Article 55, as well as its spirit and purpose. Our principled position on this question is also supported by the legal-dictionary definition upon which the Court itself relies in the decision:

"A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time" (Bryan A. Garner, **Black's Law Dictionary** 1580 (2004)).

133. It is clear that the legal-dictionary definition forbids damaging or diminishing. Damaging or diminishing, not disproportional damaging. Not disproportional diminishing. Not unreasonable damaging. Not unreasonable diminishing. Literally: a prohibition on damaging or diminishing the capital.

134. The court's attempt to rely on Prof. Benvenisti's writing is erroneous and actually contradicts the conclusions of the decision that the capital of the assets can be used. As Benvenisti himself writes:

"The utilization of public immovable property is qualified by two conditions. The first condition relates to the purpose of the use. The occupant may use the different types of property to meet its security needs, to defray the occupation administration's costs, and to promote the needs of the local population. It may not use them for its own domestic purposes. The second condition applies to public immovable

property only. It stipulates that the occupant must maintain the capital and use only its fruits."

Eyal Benvenisti, *Agora (Continued): Future Implication of the Iraq Conflict Water Conflicts During the Occupation of Iraq* 97 *A.J.I.L.* 860, 869,

135. These citations indicate that damage to the capital of a natural resource in an occupied territory contradicts the laws of occupation. Note well, to support the position that reasonable damage to the capital is not illegal, the court relies on a quote from Robbie Sabel's book, "International Law," p. 461 (first edition, 2003), which says the following:

"The occupying state does not become the owner of public natural resources in the occupied territory but is allowed to exploit them (usufructuary rights). The exploitation must be only to the same extent that reasonable owners would exploit the resources, which is to say they must not be overexploited. That right also includes the right to exploit the resources of existing oilfields."

136. However, the reference cited does not support the determination that the use of the capital is permitted. On the contrary. The reference discusses the use of the fruit as distinct from the use of the capital, and determines that the use of the fruit must not reach the level of overexploitation. Therefore, the court erred when it relied on a reference that supports the opposite legal determination from the one the decision adopted.

137. The court also tries to support its ruling with the Canadian Military Manual, but that manual too stipulates unequivocally that the prohibition is not subject to a test of proportionality or reasonability but is a prohibition on any use that wastes the capital (emphases ours):

"Section B. Immovable public property in occupied territory

III. Military Manuals Canada's LOAC Manual (1999) provides that, in occupied territory:

Enemy public immovable property may be administered and used but it may not be confiscated....

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The occupant becomes the administrator of the property and is liable to use the property, but must not exercise its rights in such a wasteful

or negligent way as will decrease its value. The occupant has no right of disposal or sale. Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the occupant".

138. What is more, the Supreme Court's interpretation that quarrying activity by quarries that were not active prior to the occupation may be permitted, contradicts the language and objective of the Article. The Article imposes on the occupier the role of administrator: an administrative function that is limited in its essence and by its nature to administering that which exists.

139. This literal and objective interpretive conclusion about Article 55 is also supported by a contextual reading of the Article (the required interpretation according to Article 31 of the Vienna Convention), in light of other provisions of the laws of occupation which protect the property interests and public and other property located in the occupied territory. For example, Article 53 of the Hague regulations provides that the rules of usufruct allow non-exhaustive use that does not damage the property:

"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."

140. Article 23 of the Hague Regulations says the following:

"In addition to the prohibitions provided by special Conventions, it is especially forbidden

[...]

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

141. These regulations should be read along with Article 53 of the Fourth Geneva Convention, which says that:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

142. A contextual interpretation of Article 55, which places it in the wider context of these Regulations, patently points to the strict restrictions imposed by the laws of occupation, and especially by Article 55, on the use by the occupier of the public property of the occupied. It should be emphasized here that these Regulations collectively form a binding customary rule according to which immovable public property in occupied territory must be administered according to the laws of trusteeship, except if the exhaustive use of them or any other harm caused to them is required and necessitated based on "military necessity." See on this matter Rule No. 51 of the International Committee of the Red Cross's Rules of Customary International Humanitarian Law:

"In occupied territory:

1. movable public property that can be used for military operations may be confiscated;

immovable public property must be administered according to the rule of usufruct; and
2. private property must be respected and may not be confiscated;
3. except where destruction or seizure of such property is required by imperative military necessity."

J.M Henckaerts and L. Doswald-Beck, **CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I: Rules** (Cambridge, 2005), at pp.178-179.

143. To summarize this point, Article 55 absolutely forbids the use of the capital of the quarries and we believe the opposite interpretation in the decision is not supported by any reasonable literal or objective or contextual interpretation.

B.4 The protraction principle

144. But even if our aforesaid conclusion is erroneous and therefore it is permitted, in certain circumstances, to make limited use of the capital, such use can only be applied if it existed prior to the occupation (the "protraction principle"). As Dufresne offers, for instance (emphases ours):

"[U]sfructuary powers are patrimonial powers of a limited ambit: They usually entail the power to use and to collect the fruits generated by the property, and the correlative obligation to preserve the capital thereof. This is an impossible combination in relation to non-renewable resources. The ability to use the proceeds of exploitation inevitably entails the consumption of the capital. In such a situation, it seems most reasonable to apply a principle of continuity and allow for exploitation to continue at the pre-occupation level."

Robert Dufresne, "Reflections and Extrapolations on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case", 40 **N.Y.U. J. Int'l L. & Pol.** 171, Special Issue, 2008, at p. 200.

145. In support of the protraction principle, see also:

Edward R. Cummings, "Oil resources in occupied Arab territories under the law of belligerent occupation", **Journal of International Law and Economics**, vol. 9 (1974), pp. 533-593;

Antonio Crivellaro, "Oil operations by a belligerent occupant: the Israel-Egypt dispute", **The Italian Yearbook of International Law**, vol. 3 (1977), pp. 171-187;

Brice M. Clagett and O. Thomas Johnson, "May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?", 72 **The American Journal of International Law**, 558-585, 574

United States Army Field Manual (F. M. 27-10) para. 402;

United Kingdom Manual of Military Law, para. 610;

146. Even if this broad interpretation were to be accepted, under which the protraction principle permits non-exhaustive use of the capital of assets, that use, which is expansive and contradicts the objectives of the laws of occupation, is subject to a number of strict legal limitations: the occupier is limited to the policy and actual rate of exploitation of the natural resources of the occupied territory that was implemented prior to the occupation, and therefore is prohibited to expand the mining activities and to develop plans that did not exist prior to the occupier's entrance to the occupied territory. These limitations indeed reduce the ability of the occupier to develop the territory and to exhaust the economic potential inherent in it.

147. The scholar Gerhard Von Glahn, upon whom the decision relies as if he supports the legality of granting concessions in an occupied territory (end of Section 7 of the decision), explicitly recognizes those strict limitations:

"[the occupant] may not cut more timber than was done in pre-occupation days"
Gerhard Von Glahn, *The Occupation of Enemy Territory*, 177.

148. And as Dufresne said on this matter:

"While empowering in the sense that it goes beyond mere preservation and non-alienation, a principle of continuity is simultaneously restrictive in two ways. First, an occupant is thereby limited in its exploitation prerogatives by the de facto or regulatory pre-occupation exploitation pace. In corporate parlance, business-as-usual sets an upper limit to exploitation. The second limit is that the principle of continuity covers exploitation schemes existing at the beginning of the usufruct, thus limiting the occupier's capacity to develop the full potential of the territory."

Dufresne, "Reflections and Extrapolations on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case", *Ibid*, at p. 200.

149. The position that recognizes the legality of the use of the capital but limits that use to the protraction principle is expressed in the opinion of the US State Department about the operation and opening of the oilfields in the Sinai:

"[a]n occupant may not open wells in areas where none existed at the time the occupation began, since the prior or normal rate of exploitation was zero".

150. In adopting the opposite approach, according to which the occupier is allowed to grant concessions for quarrying regarding mines that were not operative as such prior to the occupation, the court adopted an interpretive approach that is not supported by the relevant literature.

151. Relevant to this matter are the words of the American scholar Paust, on the question of the legality of "privatizing" the obligation to administer occupied public property (in this case in Iraq) by the occupying power:

"With respect to Iraqi oil and oil production and distribution facilities, the occupying power must safeguard the oil and must administer extraction processes like a trustee for the Iraqi state or people. Thus, an occupying power cannot engage or participate in "privatization" of Iraqi oil or the state-owned oil production and distribution industry and must not tolerate rates of extraction beyond prior "normal" rates of extraction or excessive fees or profits by others administering such properties. Similarly, the occupying power must not contract with private companies in such a manner as to allow them to engage in the same sorts of prohibition".

152. The reference presented by the court in the decision to support mining in quarries that did not operate prior to the occupation contradicts the court's own conclusion because it refers to specific quarries that existed and operated prior to the occupation rather than any quarry whatsoever, a fact that is clear from the use in these citations of the phrase "the mines" rather than "mines." For instance, the American military manual states :

FM 27-10 The Law of Land Warfare, American Military Manual:

"402. Occupant's Disposition of Real Property of a State

...As administrator or usufructuary he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war".

153. Our interpretation is supported by extensive writing. For example, Adler says in Sabel's book, as does Prof. Dinstein, that it is forbidden to allow the construction of quarries to quarry new minerals (see also Adler, *ibid*, p. 576).

154. In its attempt to justify such an erroneous legal position, the Court looks to support in the writing of Prof. Benvenisti. But a close reading of his words indicates that his writing is inconsistent with the conclusion the court reached:

"...in a prolonged occupation the maintenance of the status quo ante could prove insupportable to the local population. Indeed, it would be wrong, and even at times illegal, to freeze the legal situation and prevent adaptations when an occupation is extended. But this does not mean that it is the occupant who is entitled to assume the duty to update the law. In prolonged occupations conditions change quite regularly, partly because of the occupant's own policies; to recognize the occupant's widening powers to react to these changes or even to initiate new ones would effectively grant the occupant almost all the powers a modern sovereign government would wield. In modern times, the occupant's interests encompass not only the safety of its troops but also a wide variety of economic concerns, and not only temporary benefits but also long-term advantages. Politicians and soldiers are not saints, and one must expect the occupant to be prejudiced in favor of its own country's interests at the expense of the indigenous community. Therefore, instead of allowing the occupant to extend its powers as

new circumstances require, the aim of the law of occupation should be to encourage the participation of the indigenous community and of the ousted government, all subject to the occupant's safety concerns".

EYAL BENVENISTI, **THE INTERNATIONAL LAW OF OCCUPATION** 146-148 (1993).

155. The Court's attempt to rely on the words of Prof. Dinstein to justify its determination as to the protraction principle is not convincing either. Firstly, because Dinstein's words do not represent the accepted interpretive position. Secondly, Dinstein himself explains the justification for that, among other things, by the need to ensure that the facilities are maintained and not damaged by non-use (ibid, p. 215), an explanation that is applicable in the context of coal mines but not in the context of quarries:

"There is, however, a good practical reason for allowing the Occupying Power to work mines: non-maintenance is liable to lead to long-term system decline, thereby endangering resumption of operations under the restored sovereign".

YORAM DINSTEIN, **THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION** 215 (2009)

156. The Court's also explains its interpretation as to the legal authority to permit the operation of quarries that did not exist prior to the occupation by referring in consent to the State's position: "Moreover, the State argues that the rationale at the basis of the protraction principle that imposes on the State, as trustee of public property in the occupied territory, the obligation to prevent the collapse of the local economy, might be able to justify the activity of the quarry. The reason is the concern that a decision to stop the quarrying activity at this time might cause the stagnation of existing infrastructures and neglect of the economic operation, in contradiction to the rationales at the basis of the principle and the obligations international law imposes on the occupier." (Section 8)

157. But the unproven assumption that closing the quarries would cause no less than "the collapse of the local economy" is, with all due respect, far-reaching. As detailed in Section 1 of the opinion, the Palestinian economy is not likely to stand or fall over ten quarries, which the court says mine a reasonable quantity of minerals.

158. Furthermore, the fact that cessation of the quarrying would cause some kind of economic damage, as argued, has nothing to do with the question of the legal authority and the question of legality under international law to permit quarrying in quarries that were not active prior to the occupation. If international law forbids quarrying in quarries that were not active at that time, then the prohibition applies

regardless of the question of whether cessation of the forbidden action would cause one kind of damage or another.

159. Superfluously, even if the damage that would be caused to the protected local population by failing to grant the permits could justify the retroactive validation of illegal and unauthorized activity, still the decision has made a factual error, because even if there is no choice but to continue granting mining licenses, it would have been possible, as detailed in Section 1 of the opinion, to grant them to Palestinian corporations that specialize in quarrying. The fact that Israel did not do so casts a problematic light on its argument as to the legality of quarrying licenses for quarries that did not exist prior to the occupation as a means to rescue the economy of the occupied population.

C. Conclusion

160. The interpretation given in the decision to Articles 43 and 55 of the Hague Regulations affirms (1) the legality of the continued mining of exhaustible natural resources, (2) even after some forty years of mining them, (3) where the mining is conducted by Israeli corporations and for their economic profits, and despite (4) the fact that the mining gradually exhausts the capital of resources, while (5) expanding the centers of active quarrying sites, and as such (6) it causes irreversible environmental damage to the occupied territory, while (7) the vast majority of mining products are transferred to the territory of the occupying power (according to the State – 94%), under circumstances in which (8) 6% of the remaining mining materials are marketed within the occupied territory to the occupying army and the Israeli settlers living in the occupied territory – for the purpose of expanding the settlements while harming the interests of the local population, and therefore (9) only a fraction of a percent, if any, of the natural resources of the occupied territory and the local population are marketed to that same local population, where (10) there is no information about whether all or any of the profits of the mining are transferred to the protected population, or whether they remain in the hands of the Military Commander.

161. This expert legal opinion established our position according to which the interpretation in the decision is erroneous and stands in direct contradiction with the laws of occupation in light of their wording, spirit and purpose. Furthermore:

1. The interpretation given in the decision to Article 43 of the Hague Regulations is inaccurate;
2. The interpretation given in the decision to Article 43 of the Hague Regulations contradicts the *Jam'iyat Iskan* Rule, on which the Supreme Court tried to base its decision;

3. The interpretation given to the relevance of the duration of the occupation in the area is an incorrect interpretation and contradicts the accepted interpretation of this relevance;
4. The interpretation given in the decision to Article 55 of the Hague Regulations is erroneous;
5. As a consequence, the license granted to Israeli corporations to mine exhaustible natural minerals in territory under belligerent occupation is illegal.

Jerusalem, January 2012

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