

## Expert Legal Opinion (Executive Summary)<sup>1</sup>

### **HCJ 2164/09 *Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al.* (26.12.11)**

We, the undersigned, Dr. Guy Harpaz (member of the Law Faculty and the Department of International Relations at the Hebrew University of Jerusalem), Prof. Yuval Shany (member of the Law Faculty at the Hebrew University of Jerusalem), Prof. Eyal Benvenisti (member of the Law Faculty at Tel Aviv University), Dr. Amichai Cohen (Ono Academic College), Dr. Yael Ronen (Sha'arei Mishpat College and the Minerva Center for Human Rights, Faculty of Law at the Hebrew University of Jerusalem), Prof. Barak Medina (Dean of Law Faculty, Hebrew University of Jerusalem) and Prof. Orna Ben-Naftali (Law School of the College of Management), present this expert legal opinion with regard to the issues that arose in the judgment delivered on the 26<sup>th</sup> of January 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 Naor and Hayut) (hereinafter: "the judgment"), to the extent that they fall within our expertise in public international law and Israeli constitutional law, when applicable, and in support of the Petitioner's Motion for En Banc Review. This expert legal opinion was written based on review of the Petitioner's written petition, the Respondents' reply, the judgment and the Petitioner's Motion for En Banc Review.

1. To the best of the knowledge of the authors of this expert legal opinion, the interpretation of International Law, and particularly of the Laws of Belligerent Occupation, given in the judgment is inaccurate. The judgment is also irreconcilable with the principled 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 judgment to Article 43 of the Hague Regulations is inconsistent with the objectives of the laws of occupation; (2) the interpretation given in the judgment to Article 43 of the Hague Regulations contradicts the *Jamait Askan* Rule, on which much of the judgment was based; (3) the interpretation given to the relevance of the duration of the occupation in the area stands in direct contrast with the relevance that should, in our opinion, be granted to the time factor; (4) the interpretation given in the judgment to Article 55 of

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<sup>1</sup> This is an executive summary of the expert legal opinion submitted in conjunction with the Motion for En Banc Review in the petition HCJ 2164/09 *Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al.* This summary is not a substitute for the full expert legal opinion, which can be found on the Yesh Din website ([www.yesh-din.org](http://www.yesh-din.org)), but is intended to outline the main points of the opinion.

the Hague Regulations is inconsistent with the wording and purpose of the article; (5) As a consequence, the license granted to Israeli corporations to mine exhaustible natural minerals in territory under belligerent occupation contravenes the laws of occupation.

3. The core of this expert legal opinion is the determination that the appropriate interpretation of Articles 43 and 55 of the Hague Regulations, with all due respect, differs from that which was presented in the judgment. The judgment expands excessively the extent of the interests protected under the laws of occupation *ratione materiae* and *ratione personae*. Furthermore, the judgment is incongruent with the fundamental principles of the laws of occupation as they have been laid out by the Supreme Court in a long line of judgments. The judgment may have been based upon the *Jamait Askan* Rule, which is deeply rooted in the Supreme Court's case law, but in actuality it contradicts that rule. Specifically, the judgment 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, inconsistent with the principle of trusteeship by the occupier toward the protected persons in the occupied territory, contradicts the accepted definitions of the groups protected under the laws of occupation, and deviates from the accepted interpretation, both in the world and in Israel, of the term "for the benefit of the protected population."

**A. The Appropriate Interpretation of Article 43 of the Hague Regulations of 1907**

**4. 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.

**5. The expert legal opinion claims the following with respect to the judgment:**

(a) The interpretation given to Article 43 of the Hague Regulations regarding the Military Commander's powers contradicts the objectives and spirit of the laws of occupation.

(b) The judgment does not distinguish between the question of authority and the manner in which 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 immaterial to the matter at hand.

(c) The determination in the judgment that the license granted by the Israeli authorities to continue operation of 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 under the laws of occupation.

(d) The judgment'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 *Jamait Askan* Rule and other judgments based on it.

(e) The judgment ignores the distinction anchored in the case law of the Supreme Court sitting as the High Court of Justice with regard 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 regulates the extent of the Military Commander's discretion, and perhaps even renders his discretion redundant on this issue, contradicts the laws of occupation as well as another judgment rendered by the Supreme Court two days after the judgment under examination here – H CJ 5324/10 *Malcha, et. al. v. the Civil Administration in Judea and Samaria* (not yet published; judgment from 28 Dec. 2011).

(h) To conclude, the granting of a mining license for the purpose of making use of mining products other than for the benefit of the occupied population constitutes a violation of Article 43 of the Hague Regulations, which requires the preservation of the occupied territory, and constitutes a violation of the obligation to preserve safety and order in that territory.

6. Article 43, combined with the other central provisions of the laws of occupation, includes five components which together comprise the "DNA" 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. 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;
  - (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 groups protected under the laws of occupation (including, first and foremost, according to Article 4 of the Fourth Geneva Convention, the local population living in the occupied territory).
7. The judgment contradicts the *Jamait Askan* Rule, which constituted a basis for the rules of the laws of occupation in the Supreme Court over the last three decades: not only does the judgment fail to perform the Rule's "delicate balance" between the two "polar opposites" of the laws of occupation, as required by the *Jamait Askan* Rule, in other words the civilian needs of the occupied population versus security needs, but it adds considerations and objectives to the balancing formula that lead to a significant deviation from the *Jamait Askan* Rule and formulate a judgment that stands in contradiction with this rule, as well as with Article 43 and its known purpose.
  8. The expert legal opinion also concludes that the Interim Agreement between Israel and the Palestinian Authority, which is mentioned in the judgment, does not limit the Military Commander's discretion under Article 43 of the Hague Regulations. It must be remembered in this context that Article 43 has a quasi-constitutional character over all of 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. It must also be emphasized that according to 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. Moreover, the State's reliance on the provisions of the Interim Agreement in order to validate the illegal and to render it legal lacks any legal basis.

9. Furthermore, the opinion concludes that the appropriate interpretation of the continuous temporal aspect of the occupation in the West Bank in fact requires the opposite interpretation of that given by the Supreme Court in the judgment.
10. The opinion concludes 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 prolongation of the occupation imposes increased and expanded duties on the occupier (5) to protect the interests of the protected population, and (6) this clarifies and strengthens the prohibition on using the Military Commander's powers for the benefit of foreign interests. Therefore, the protraction of the occupation, which harms the occupied population, requires adjusting the "traditional laws of occupation," as they were called in the judgment, 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.
11. The protraction of the occupation does broadly impact the appropriate interpretation of Article 43 and as such 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 of which is that the expansion does not allow the Military Commander to factor in considerations that are prohibited by 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.
12. However, despite the fact that the judgment under discussion stated explicitly that it was based on the *Jamait Askan* Rule, it held exactly the opposite. The judgment 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 financial 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.

## **B. The Appropriate Interpretation of Article 55 of the Hague Regulations of 1907**

13. Part II of the expert legal opinion concludes that:

- (1) The interpretation given in the judgment, according to which the occupying power is authorized, in practice, to make "reasonable use" of the capital (to be distinguished from the fruits) from 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 judgment, 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.

14. 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.

15. The expert legal opinion concludes that Article 55 must be interpreted in light and in the spirit of Article 43, as the latter is the central article in the Hague Regulations and holds the status of quasi-constitutional. Thus, Article 55 must be interpreted in accordance with the objectives of the laws of occupation, as mentioned above. 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.

16. Likewise, the opinion concludes that the interpretation of this article in the judgment, on the literal-objective-contextual plane, is inconsistent with the principles of international law and does not correspond with the binding interpretation according to the rules of interpretation of international law. In this context, Article 55 imposes the job of administrator on the occupier, where this job is limited – the job of the occupier-administrator is, in the words of the Article, "usufructuary," operating in accordance with the rules of "usufruct."
17. 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.
18. The reference in Article 55 to the term "capital" and the expression "benefit" creates 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. The expressions "to preserve" 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 gnawed 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.
19. 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.
20. The opinion's conclusion is supported by the words "shall" and "must," which appear in the Article. These words impose, in imperative language, 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 them. 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.

21. 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.
22. The opinion negates the reliance in the judgment on the State's position that should the quarrying and mining 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 threshold of mining potential in the area," and the court's determination that the damage is proportionate and reasonable.
23. As this opinion concludes unequivocally, 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 gnaw away at 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, like other laws such as environmental law and the principle of sovereignty over natural resources, prohibit generally the exploitation of natural resources in occupied territory, also prohibited are the mining and quarrying of half a percent of the threshold potential.
24. This is beyond the fact that based on documents published by the Israeli authorities the entirety of the mining quarries in Area C will be exhausted in another 38 years, and that is based on the current rate of mining and taking into consideration the development plans of the existing quarries. That is to say, the presumption by which mining is legal under these circumstances because it is restricted to reasonable use of the capital of resources is an

erroneous presumption, and its paradox shakes the foundation on which the judgment rests.

25. However, even if the use of natural resources is reasonable, the licenses cannot be validated. 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 proportion. 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 judgment of the principles of reasonability or proportionality and/or *de minimus* comments in order to validate the use of the capital, has no literal or objective base in Article 55 and as such is, with all due respect, inaccurate. Therefore, the interpretation given in the judgment 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.
26. 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.
27. A contextual interpretation of Article 55, which is based in the wide 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."

28. Regarding the "protraction principle," from which an interpretation may be extracted according to which it is permitted, in certain circumstances, to make limited use of the capital, this opinion concludes that such use can only be applied with regard to use that existed prior to the occupation (the "protraction principle").
29. 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 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 it 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. 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 in the relevant literature.

### **C. Conclusion**

30. The interpretation given in the judgment 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 quarry operation 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 them 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 the profits of the mining

are transferred to the protected population, or whether they remain in the hands of the Military Commander.

31. This expert legal opinion established our position according to which the interpretation in the judgment 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 judgment to Article 43 of the Hague Regulations is inaccurate;
2. The interpretation given in the judgment to Article 43 of the Hague Regulations contradicts the *Jamait Askan* Rule, on which the Supreme Court tried to base its judgment;
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 judgment 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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