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Expert Opinion:

Regarding the Destruction of Structures Essential for the Survival of the Protected Civilian Population due to Lack of Construction Permits (HCJ 5667/11) By Professor Eyal Benvenisti

I, the undersigned, was asked by Rabbis for Human Rights, to write this expert opinion regarding the legality of the destruction of installations, due to lack of construction permits, which are essential for the survival of the protected civilian population in Area C of the West Bank according to international law. This expert opinion is provided for the proceedings of HCJ petition 5667/11 without any compensation.

1. Background

My opinion shall relate to the legality of the destruction of structures, due to lack of construction permits, required for the survival of the protected civilian population, based on international law. I have read the petition, including the request for an interim injunction, the respondents' response to the request, and the decision of Justice A. Hayut in the matter from 22.8.11.

The petition reflects a reality, according to which the bodies supervising constructions in the under the control of the Israeli Civil Administration (ICA) in the West Bank are regularly exercising their power based on the applicable laws of planning and construction in Area C with regard to the protected civilian population, i.e., the Palestinian population. In this framework, the Sub-Committee for Supervision issues stop-work orders and final demolition orders also to civilian structures serving the protected Palestinian population for civilian purposes, which according to their purpose are included in article 54 of the First Additional Protocol from 1977 to the Geneva Conventions of 1949 (hereinafter – IAP), as will be elaborated below. Some of the final demolition orders are realized by the ICA, and structures are being destroyed. My opinion shall focus on the legality of the destruction of these structures. It shall relate to article 54 IAP and its status as reflecting customary international law, the type of structures it includes, the application of the prohibition regarding the destruction of these structures during belligerent occupation and its scope vis-à-vis essential military necessity.

2. The Prohibition of Damaging Structures Essential for the Survival of the Protected Civilian Population

Article 54 of the first protocol states the following:

Article 54 – Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking

water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - i. as sustenance solely for the members of its armed forces; or
 - ii. if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

The instruction included in article 54 prohibiting the destruction or damage to structures essential for the survival of the protected civilian population is in fact a derivative of the general principle of the laws of war, the "principle of distinction"; it forbids harming the civilian population and civilian targets, and also limits disproportional collateral damage to the civilian population.

The concretization included in this instruction limits the permitted damage only to those vital installations, which constitute, during hostilities, legitimate military targets, in the spirit of article 52 IAP.

In addition, article 54 includes a concrete prohibition to restrict the test of proportionality: it is forbidden to damage even installations which support the enemy's military action (i.e. a canal used as protection from attack) if it shall leave the civilian population without food or water in a way which forces the civilians to move in fear of death due to starvation or thirst (article 54(3) (b)). The risk is two-fold, the population might starve to death, and alternately, the harmed population might decide to move in search for another source of food and water, which might expose civilians to the dangers of war; for instance, when civilians serve as a barrier between the belligerent parties. This article is intended to prevent these two forbidden consequences.

The instructions of article 54 reflect a development in the laws of warfare, compared to the law which was accustomed during the Second World War, when the policy of "scorched earth" was not perceived as forbidden. This development is accepted today as reflecting customary international law. It is clearly evident from the British Military Manual of 2004, which adopts the instructions of article 54 as binding (article 5.27)¹ and determines the following, regarding past traditions:

¹ UK Ministry of Defence, The Manual of the law of Armed Conflict 73-74 (2004).

The customary law rule that permitted measures being taken to dry up springs and to divert rivers and aqueducts must now be considered as applying only to water resources used exclusively by military personnel or for military purposes.²

Additionally the study by the International Committee of the Red Cross (ICRC) on the customary laws of warfare from 2005 determines that the prohibition to damage objects essential to the survival of the population is customary. See rule no. 54 of the customary rules of the international law, which determines the following:

Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population are prohibited.³

According to this study, the customary prohibition applies even if the goal behind the damage is not "for the specific purpose of denying them for their sustenance value to the civilian population."⁴ It shall be noted that opponents to this determination argue that an attack conducted strictly for military purposes, which incidentally results in collateral damage to vital installations, protected by this article, is not forbidden (under the general rules of proportionality). However, even according to this approach, the objective behind the attack, in an area under belligerent occupation, has to be a military one.⁵

3. The Type of Installations Considered to be Essential for the Survival of the Population

Article 54 names examples of objects that are essential for the survival of the population by definition, independently of any proof of de-facto indispensability to the survival of the population. Therefore, the prohibition on destruction of foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works is absolute. Water installations clearly include rainwater harvesting installations.

Moreover, additional structures may, under specific circumstances, become essential for the survival of the population. For example, one may assume that tents constructed by humanitarian aid agencies, in order to protect civilians living in the desert from the hot sun during the day and from the cold wind at night, are essential for the survival of the population. Therefore, in light of the same rule, their destruction is prohibited. Accordingly, the literature provides an example when adequate clothing and basic shelter are considered essential objects in mountainous areas where the climate is difficult.⁶

² Ibid, p. 74.

³ <http://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf>

⁴ "Most military manuals, however, do not indicate such a requirement and prohibit attacks against objects indispensable to the survival of the civilian population as such", see summary of state practice in international armed conflicts, ICRC customary law study of 2005, Vol. 1, p. 190 <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

⁵ The British Military Manual, *ibid* fn. 1, p. 74 and the examples therein.

⁶ Dieter Fleck (Ed.) *The Handbook of International Humanitarian Law* 218 (2nd ed., 2008).

4. The Application of the Prohibition in Occupied Territory

a. The Application of the Prohibition during belligerent occupation

As stated above, the prohibition to destroy or damage structures essential for the survival of the protected civilian population applies during hostilities. Nevertheless, **the application of the prohibition extends beyond warfare to actions taken by the military administration which controls the territory under belligerent occupation.** This is clearly evident from article 54(5), which states the following:

5. In recognition of the vital requirements of any Party to the conflict in the defence of **its national territory** against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict **within such territory under its own control** where required by imperative military necessity. (Emphases added).

This means that an army acting within its **own sovereign territory under its own control** (for instance, a military withdrawing inland in order to stall an invasion) has limited options to damage these essential objects.⁷ This is definitely an irregular instruction in the laws of warfare (which commonly deals with limiting the harm to the enemy and its citizens, and not with damage caused to one's own state and its resources); this irregularity emphasizes the immense importance that the laws of warfare attach to the obligation to protect civilians from hunger and thirst, and the prohibition to abuse their inaccessibility to essential sources of livelihood as a means to displace the population from its places of residence.

The application of this principle in an area under belligerent occupation is even more obvious. During belligerent occupation the military regime has effective control over the occupied territory, the fighting has finished, the military situation has relatively stabilized, and the holder has time to examine suitable alternatives for ensuring its safety. On the other hand, the military administration has increased liabilities towards the well-being of the protected population in particular, and towards maintaining its humanitarian needs in general; these include, among other things, access to food including water, medical supply, clothing, bedding and means of shelter (articles 55-59 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War from 1949 (hereinafter - IVGC), article 69 IAP).

Article 54 represents *lex specialis* compared to the general principle prohibiting the destruction of civilian structures in an occupied territory, as per article 53 IVGC:

Art. 53. 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.

While article 53 speaks of "military operations" as the exception to the rule prohibiting destruction, thus setting a **stricter test** in relation to the general military necessity test, as

⁷ See the ICRC commentaries to article 54 <http://www.icrc.org/jihl.nsf/COM/470-750069?OpenDocument> on p. 659.

set in other articles of the Fourth Geneva Convention⁸, article 54 goes beyond due to the vital importance of the objects and permits damage to essential objects only if they primarily serve as a legitimate military target. This is emphasized by the ICRC commentaries to article 54 and its relation to article 53 IVGC⁹:

2120. As regards Occupying Powers, Article 53 of the Fourth Geneva Convention of 1949 prohibits the destruction of real or personal property, except where such destruction is rendered absolutely necessary by military operations. This is a general rule which is now supplemented by the provisions of Article 54 or the Protocol as regards objects indispensable to the survival of the civilian population.

2121. "Scorched earth" policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimately if required by imperative military necessity. **Article 54 does not change that situation except as regards objects indispensable to the survival of the civilian population.** In other words, an occupation army which is withdrawing may, if military operations render it absolutely necessary, carry out destructions (bridges, railways, roads, airports, ports etc.) with a view to preventing or slowing down the advance of enemy troops, but may not destroy indispensable objects such as supplies of foodstuffs, crops ripe for harvesting, drinking water reservoirs and water distribution systems or remove livestock. To summarize:

2122. In the case of imperative military necessity a belligerent Power may in an extreme case even destroy objects indispensable to the survival of the civilian population in that part of **its own territory which is under its control**. On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control.

2123—**An Occupying Power may not destroy objects located in occupied territory which are indispensable to the survival of the civilian population.** Any "scorched earth" policy carried out by an Occupying Power, even when withdrawing from such territory, must not affect such objects. (Emphases added).

In other words, the applicability of article 54 during belligerent occupation means an additional restriction beyond the one mentioned in the general instruction of article 53 IVGC, as far as installations that are essential to the local population are concerned.

The position dedicating a protected and special status to essential installations is strengthened by human rights law, which is also applicable during belligerent occupation.¹⁰ For instance, the right to food is a part of the right to adequate standard of living. Violation of the right to food leads to violations of other human rights such as the right to life, and the

⁸ For instance, articles 30, 49, 55 IVGC.

⁹ <http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument>

¹⁰ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (ICJ, April 2004), para. 106.

right to health. It includes the right to water.¹¹ The right to access water resources is recognized as part of the rights to life, to adequate standard of living and to health. The right to access water resources includes the right for sufficient, safe, accessible, physically acceptable and affordable water.¹²

b. The Duty to Adequately Administer Water Sources of a territory under belligerent occupation includes the Prohibition to Damage Installations for Water Supply and Storage

The duty to administer the occupied territory in a way which guarantees public order, safety and civil life of the protected population in the occupied territory is set in regulation 43 of the Hague Regulations Annexed to the Hague Convention Concerning the Laws and Customs of War on Land of 1907 (hereinafter – the Hague Regulations).

Destruction of structures essential for the survival of the population by non-military means is still prohibited as it leads to similar consequence – destruction. Therefore, the prohibition on damage to the said structures is *lex specialis* to the general rule also set in regulation 43 of the Hague Regulations.

According to rule no. 54 of the Berlin Rules on Water Resources from 2004, formulated by the International Law Association (ILA), and which principally reflect customary law, the occupying state shall administer water resources in an occupied territory in a way that ensures the sustainable use of the water resources and that minimizes environmental harm. Additionally, it shall protect water installations and ensure an adequate water supply to the protected population.¹³

The commentaries to article 54 clarify that it implicitly includes¹⁴, rather than excludes, the prohibition against damaging water installations, which is a customary prohibition. See the explicit prohibition determined in article VI (3) of the ILA Resolution from its 57th Session of 4th of September 1976.¹⁵

In occupied territories, seizure, destruction or intentional damage to water installations should be prohibited when their integral maintenance and effectiveness would be vital to the health and survival of the civilian population.

The commentaries to rule 54 mention that article VI presumes a short-term occupation,¹⁶ and therefore, did not relate to damage caused to the environment and the need for sustainable administration, thus dedicating a specific section to damage for water installations.

In long-term occupation, the duty to ensure water and foods supplies increases, and it obliges an adequate administration of the obviously limited water sources. Rainwater

¹¹ For elaboration on the sources of the right to food in international law see <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>

¹² For elaboration of sources in international law see <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> and also the commentary to rule no. 17 of the Berlin Rules regarding Water Resources from 2004, the International Law Association, http://internationalwaterlaw.org/documents/intdocs/ILA_Berlin_Rules-2004.pdf

¹³ See the Berlin Rules above, rule no. 54.

¹⁴ See the Berlin Rules above, the commentary to rule no. 54, on p. 46: "There is nothing explicit in this Article [no. 54] that corresponds to art. VI(1), but that obligation might be considered implicit in this Article or in this Chapter".

¹⁵ See http://untreaty.un.org/ilc/documentation/english/a_cn4_427.pdf, p. 55.

¹⁶ Ibid, ibid.

harvesting installations constructed by the protected population for civilian usage, serve the purpose of maximizing the use of the existing water resources. Their destruction is in direct opposition to the obligations to secure the provision of water and food, to adequately administer the occupied territory, and to the prohibition against destruction.

The enforcement of the planning and construction laws in an occupied territory is an important cause in itself. However, guaranteeing food supply and water resources by Israel in the West Bank in general, and in Area C in particular, as providing for the permit procedures to construct and maintain food and water resources as specified in article 54, should be managed in a way which meets and upholds international humanitarian law.

Maintaining public order, safety and civil life cannot infer enforcing local planning and construction laws in a way which does not discern between different types of structures; the exercise and enforcement of local laws must be consistent with applicable humanitarian laws, i.e., without damaging, under the military caveat and subject to the exception in article 54(3)(b) as mentioned above, structures that are defined as essential for the survival of the protected civilian population.

Therefore, even structures that are essential for the survival of the population, which are situated in an area which is considered a closed military area, are indestructible as long as they serve the protected civilian population. The existence of a closed military area cannot be regarded, in itself, as a military necessity, in the meaning of article 53 IVGC. Only when there is danger to the security of the protected population or to the existential security of the military regime, it can and even obliged (in case there is a need to protect the protected population) to temporarily prevent access to these structures, as required based on the nature of the actual danger; but it cannot destroy them.

5. Summary

Enforcing final demolition orders given to the structures specified in article 54(2) IAP, including rainwater harvesting installations, even if they were built without a building permit, and even if they are situated within a closed military area, disagrees with the instructions of the international humanitarian law. This is true, if the installations are defined or are used, as specified above, for the survival of protected residents of a territory under belligerent occupation, when there are no concrete and weighty reasons to support necessary acts of hostilities.

Even if such reasons exist, those should be a balanced with the need to protect the population in need of those installations, while avoiding excessive and disproportional harm. **Therefore, in any case, damage is prohibited when it is expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.**

Professor Eyal Benvenisti