



## The Israeli Military Commander's Powers under the Law of Occupation in relation to Quarrying Activity in Area C

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### Introduction

1. This paper discusses the administration of quarrying activity in the occupied Palestinian territory (oPt) by Israel, the Occupying Power. It focuses on the recent judgment of the Israeli High Court which examined the lawfulness of the Military Commander's policy regarding the use and operation of quarries in Area C of the West Bank (hereinafter: the *Quarries* case).<sup>1</sup>
2. According to the *Quarries* case, since the 1970 the Israeli Military Commander has enabled quarrying activity in the West Bank. Currently, there are 10 quarries in Area C<sup>2</sup> which are operated by Israeli nationals and 9 others which are operated by Palestinians, with most of the stone excavated (94% and 80% respectively) transferred to Israel for civilian use. There are also several quarries in Areas A and B of the West Bank which are operated and/or owned by Palestinians and supervised by the Palestinian Authority. All quarries were opened *after* the Israeli occupation began in 1967 however the petitioners in the *Quarries* case challenged only the activity of the quarries in Area C which are Israeli-operated.<sup>3</sup>
3. Rejecting the petition, the Court opined that allowing quarrying activity in Area C by Israelis is lawful and in accordance with the law of occupation. This paper however takes a different view: while it accepts for the purpose of argument – in light of some legal uncertainty – that in a prolonged occupation, quarrying activity initiated and permitted by the Military Commander, including the opening of new quarries, may not be prohibited *per se*, but in this case it seems to be inconsistent with the law of occupation as the Israeli Military Commander has failed to demonstrate that its policy serves the welfare of the local population. To the contrary, his policy appears to adversely affect the interests of the Palestinian people, thus rendering the

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<sup>1</sup> HCJ 2164/09 Yesh Din v IDF Commander in the West Bank (26.12.2011) (*Quarries* case). An English version is available at <<http://www.yesh-din.org/infoitem.asp?infocatid=171>>.

<sup>2</sup> The 1995 Israeli-Palestinian Interim Agreement divides the West Bank, in terms of Israeli/Palestinian civil and security responsibility, to Areas A, B and C. Area C which composes 60% of the West Bank is fully controlled by Israel, see Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington DC, September 28, 1995) reprinted in 36 ILM (1997) especially arts XI, XIII, XVII.

<sup>3</sup> *Quarries* case, para 1; see also Yesh Din submission in the *Quarries* case (9 March 2009) paras 24-26. An English version is available at <<http://yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20-%20Petition%20ENG.pdf>>.

current quarrying activities unlawful, and in particular those carried out by Israeli nationals (including by Israeli settlers).

### **Applicable Law**

4. The quarrying activity in the West Bank, especially when it is conducted by Israeli nationals, raises a number of issues in relation to the powers of the Military Commander to initiate and enable such activity. Under the international law of occupation, these powers are regulated, first and foremost, by the 1907 Hague Regulations.<sup>4</sup> Israel is not a party to the Hague Regulations, but its High Court has long recognized that its provisions form part of customary international law and that as a result Israel is legally bound by them.<sup>5</sup>
5. In addition to the Hague Regulations, the indigenous population under military occupation is protected by the 1949 Fourth Geneva Convention.<sup>6</sup> Although thus far the Israeli High Court has avoided ruling on the question of its application and legal status *en bloc* as customary international law, but rather has chosen to apply the Convention on a case-by-case basis,<sup>7</sup> the Court did recognize that Palestinian civilians have the status of protected persons within the meaning of the Convention. It has also consistently held that the Military Commander is bound by those provisions of the Fourth Geneva Convention which reflect customary international law.<sup>8</sup>

### **Analysis**

6. It is noteworthy that the petition against quarrying activity in Area C was initially rejected on preliminary grounds implying that the case was non-justiciable. The High Court first held that quarrying in Area C is regulated in the 1995 Israeli-Palestinian Interim Agreement. According

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<sup>4</sup> Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907).

<sup>5</sup> H CJ 606/78 Ayyub v Minister of Defence [1978] PD 33 (2) 113 (*Beth El* case); D. Kretzmer *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) 36.

<sup>6</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).

<sup>7</sup> Israel became a party to the Geneva Conventions on 6 July 1951. Since 1967 the Israeli Government asserted that the Fourth Geneva Convention has only a conventional nature however the Military Commander undertakes to apply the Convention's 'humanitarian provisions' on a *de facto* basis, see H CJ 785/87 Afu v IDF Commander in the West Bank [1988] PD 42(2) 4; Y Dinstein, 'Deportation from Administered Territories' (1988) 13 Tel Aviv University Law Review 403 [in Hebrew]; N. Bar-Yaakov 'The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip' (1990) 24 Israel Law Review 485. The customary status of the Fourth Geneva Convention, as well as its applicability in the oPt, has been affirmed by various international tribunals and human rights bodies, as discussed in detail by the International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, pp.173-177, paras 90-101.

<sup>8</sup> For example, H CJ 7015/02 Ajuri v IDF Commander in the West Bank [2002] para 13; H CJ 2056/04 Beit Sourik Village Council v The Government of Israel [2004] para 24; H CJ 7957/04 Mara'abe v Prime Minister of Israel [2005] para 14; H CJ 769/02 Public Committee Against Torture in Israel v the Government of Israel [2005] (*Targeted killings* case) para 20.

to its judgment, it was agreed that the matter shall be resolved through negotiations on a permanent peace settlement, and that until responsibility over quarrying is transferred to the Palestinian side, quarrying in Area C will carry on.<sup>9</sup>

7. Leaving to the side the exact arrangement adopted in the Interim Agreement and its subsequent implementation by the parties, it suffices to say that the Interim Agreement cannot derogate from the fundamental protections granted to the local population under the law of occupation which the Court has been asked to secure and enforce in this case. For instance, Article 47 of the Fourth Geneva Convention stipulates that protected persons shall not be deprived, in any case or in any manner whatsoever, of the benefits of the Convention *inter alia*, “by any agreement concluded between the authorities of the occupied territories and the Occupying Power”.<sup>10</sup> This is, as the ICRC authoritative commentary notes, in order to prevent a situation where such agreements will be used by the Occupying Power “to free itself from the obligations incumbent on it under occupation law”.<sup>11</sup>
8. The Court also mentioned – as a preliminary ground for rejecting the petition – “the long years of reliance” of the quarries' Israeli operators on the Military Commander's policy that permitted their activity.<sup>12</sup> Nonetheless, even if under Israeli municipal law Israeli nationals possess a right or remedy opposable to the Israeli Government, this cannot derogate from the law of occupation which applies in the oPt.<sup>13</sup> It is further recalled that insofar quarries in the West Bank are operated by Israelis that live in settlements established by, or with the consent of, the Israeli Government, their residence in the oPt clearly constitutes a violation of the law of occupation that prohibits the transfer of the Occupying Power's own civilian population into the occupied territory. This breach may even carry criminal implications under international criminal law.<sup>14</sup> Thus, an alleged reliance interest of Israeli nationals, emanating from the continuous quarrying activity, cannot be protected as their activity is tainted, from the outset, by serious illegality under international law.
9. Turning to the powers of the Israeli Military Commander, the essence of the law of occupation is the preservation of the status quo ante, the state of affairs existing in the eve of occupation.

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<sup>9</sup> *Quarries* case, para 6.

<sup>10</sup> GCIV, arts 7, 47.

<sup>11</sup> J. Pictet (ed), *Commentary: Geneva Convention IV* (ICRC, 1958) ('ICRC Commentary') 70-71, 274.

<sup>12</sup> *Quarries* case, para 6.

<sup>13</sup> See Vienna Convention on the Law of Treaties (1969) art 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

<sup>14</sup> GCIV, art 49; Rome Statute of the International Criminal Court, art 8(2)(b)(viii). This prohibition is considered to form part of customary international law, see J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC, Cambridge University Press, 2005) 462 (Rule 130). The operating of quarries by settlers also substantiates illegality under Article 43 of the 1907 Hague Regulations (discussed later).

Given the temporary nature of the Occupant's presence in the occupied territory, it lacks sovereignty and its de facto control of the territory – based solely on the use of force – leaves the Occupying Power with only administration powers.<sup>15</sup>

10. As the Israeli High Court noted, correctly, in the *Quarries* case, the powers of the Military Commanders are framed by the “quasi-constitutional” Article 43 of the Hague Regulations which sets a general framework for his obligations and powers in occupied territory.<sup>16</sup> Article 43 provides:

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 civil life, while respecting, unless absolutely prevented, the laws in force in the country.<sup>17</sup>

11. While the Military Commander must respect and preserve as much as possible the law that were in effect at the beginning of the occupation, the law of occupation also aims to allow daily civilian life in the occupied territory to continue. Article 43 imposes an active duty to protect the civilian population, not only in terms of law and order, but also “from a meaningful decline in orderly life”.<sup>18</sup> Thus, while the Military Commander is required to secure as much as possible the status quo, he also may introduce changes that are compelled by its security needs on the one hand, and by the welfare of the local population on the other hand.<sup>19</sup>
12. The duty to secure and promote the well-being of the local population encompasses public order and civil life “in all their aspects” and the Military Commander is required “to take all necessary measures in order to ensure growth, change and development”.<sup>20</sup> The implementation of this obligation in a prolonged occupation is challenging considering the starting point which is the preservation of the status quo ante. Indeed, there is an inherent tension between the temporary nature of the occupation and the limited authority of the occupant administering the territory as trustee, and the Occupant's obligation “to maintain the orderly government of the territory” and to accommodate the changing needs of the local

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<sup>15</sup> ICRC Commentary 273.

<sup>16</sup> *Quarries* case, para 8.

<sup>17</sup> The French text, which is authoritative, refers to an occupant's duty to restore ‘l'ordre et la vie publique’ in occupied territory. The common English translation of ‘public order and safety’ has been criticized for not conveying accurately the meaning of the original: see, for instance, EH Schwenk, ‘Legislative Power of the Military Occupant under Article 43, Hague Regulations’ (1945) 54 Yale Law Journal 393, note 1.

<sup>18</sup> Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009) 92-93.

<sup>19</sup> See also GCIV, art 64; HCJ 393/82 *Gamiyat El-Iskan v the Military Commander* [1983] (*Gamiyat El-Iskan* case) para 12; Dinstein (2009) 112, 115; M Sassoli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 Eur J Intl L 661, 673-674; C. Greenwood, ‘The Administration of Occupied Territory in International Law’ in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Oxford University Press, 1992) 26.

<sup>20</sup> *Gamiyat El-Iskan* case, paras 18, 26.

population including by introducing changes and new policies.<sup>21</sup>

13. As a general rule – even when acting for the benefit of the local population – the Military Commander must avoid taking measures that have a long-term effect designed to outlive the occupation itself.<sup>22</sup> Changes which have a far-reaching effect on the fundamental institutions in the occupied territory are prohibited as these are reserved only to a sovereign government. For example, 'transformative' changes such as the major institutional reforms that were introduced since May 2003 in Iraq by the US and the UK, as Occupying Powers, were considered to exceed the law of occupation and *ultra vires*, and indeed had required a specific authorization by the UN Security Council.<sup>23</sup>
14. While there is a grey area in this matter, the established position of the Israeli High Court is that during a prolonged occupation the Military Commander has a greater latitude to make changes in the status quo ante, notwithstanding that these changes have a lasting effect beyond the occupation period, insofar as they serve the needs of the local population:

In determining the scope of powers granted to the military administration according to the formula “public order and life”, it is appropriate to consider the distinction between short-term military administration and long-term military administration... in a prolonged military occupation, the needs of the local population receive more strength. Therefore legislative measures, such as new taxation or a new rate to an existing tax, that may be inappropriate in a short-term military administration, may become appropriate in a long-term military administration.<sup>24</sup>

To allow such changes, the Court has demanded that 1) these changes are required for the benefit of the local population; and that 2) these changes would not lead to a substantial change in principal institutions of the occupied territory.<sup>25</sup>

15. It should be clarified however that contrary to the view taken by the High Court in a number of cases, including in the *Quarries* case,<sup>26</sup> the term “local population” in this context does not

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<sup>21</sup> GCIV, art 64; *Gamiyat El-Iskan* case, paras 26-27; Greenwood (1992) 263; Sassoli (2005) 679-680.

<sup>22</sup> Y Dinstein, 'Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding' (2009) 1 HPCR Occasional Paper Series 9 <<http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf>>.

<sup>23</sup> SC Res 1483 (23 May 2003); Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580 (2006); E. Benvenisti & G. Keinan, 'The Occupation of Iraq: A Reassessment' (2010) 86 International Law Studies 263, 270-271, 273. A similar argument was made in relation to far-reaching institutional changes that victorious Allies introduced during the occupation of Germany and Japan post World War II, see Dinstein (2009) 33.

<sup>24</sup> *Gamiyat El-Iskan* case, para 22 (all translations are unofficial); On legislative powers during prolonged occupation, see also Dinstein (2009) 116-118, 120; Kretzmer (2002) 63; Greenwood (1992) 263.

<sup>25</sup> *Gamiyat El-Iskan* case, para 27; See also A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Playfair (1992) 423-424, 426-427.

<sup>26</sup> For example, H CJ 256/72 Electricity Company for Jerusalem Ltd v Minister of Defense [1981] 27(1) PD 124; H CJ 9717/03 Na'ale v Civil Administration of Judea and Samaria [2004] (*Na'ale* case) para 6; *Quarries* case, para 13.

include settlers. They are not entitled for the status of protected persons under the Fourth Geneva Convention<sup>27</sup> and indeed, as citizens of the Occupying Power, they are not in need of the minimum safeguards and protections secured for those living under foreign military occupation. The interests of the settlers are therefore irrelevant when the Military Commander is looking to introduce new legislation and policies in accordance with Article 43 of the Hague Regulations. In fact, their interests may frustrate the minimum protections granted to the occupied population by the law of occupation, including by virtue of the exploitation of natural resources in the occupied territory.<sup>28</sup> It is further recalled that the establishment of settlements in the oPt is in violation of the law of occupation.<sup>29</sup> Taking settlers' interest into account is thus unlawful from an additional aspect: it legitimises a breach of international law.

16. From the foregoing, and given the legal uncertainty regarding the exact latitude granted to the Military Commander to introduce significant changes in the status quo ante, we are ready to assume – for the sake of the argument – that given the prolonged occupation of the West Bank, quarrying activity in Area C may be consistent with Article 43 of the Hague Regulations. Nonetheless, opening new quarries, as well as significant changes in the operation of existing quarries such as 'enhanced production' of stone, are exceptional to the general rule of restraint. The mitigating safeguard is a careful evaluation: it is the Occupant that carries the burden to persuade that changes are essential to the welfare of the local population and do not radically change the principal institutions of the occupied territory.

17. In addition to Article 43 and general principles of the law of occupation, the utilization of natural resources by the Occupying Power, including quarrying activity, may also be subject to Article 55 of the Hague Regulations which provides:

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.

According to the rules of usufruct, the Occupant does not possess ownership over immovable public property, and thus cannot sell or transfer the property. It may however use or lease the property and enjoy its fruits – use, consume or sell them – insofar the capital is not depleted.<sup>30</sup>

18. Given the 'conservative' starting point of the Military Commander's powers to initiate changes

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<sup>27</sup> See GCIV, art 4; HCJ 1661/05 Gaza Coast Council v The Knesset [2005] paras 4, 12.

<sup>28</sup> See A. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 EJIL 1, 14-26.

<sup>29</sup> n 14.

<sup>30</sup> Dinstein (2009) 214.

in occupied territory, Article 55 is exceptional as it allows the Occupant's to use public property – with certain limitations – from the beginning of the occupation. Two questions however arise: *first*, whether this use must be for the benefit of the local population; and *second*, does quarrying activity in general fall within the ambit of Article 55.

19. One view is that under Article 55, the Occupying Power may enjoy the revenues of public immovable property at its discretion; it can be used in accordance with its own interest including transferred to its own market.<sup>31</sup> This however seems to be at odds with the essence of the law of occupation, that the Occupant is only a temporary administrator and trustee of the occupied territory, and with the “quasi-constitutional” nature of Article 43 of the Hague Regulations.<sup>32</sup>
20. In addition, it is recalled that the Occupant's de facto control of the territory impedes the realization of the right to self-determination of the native population living under occupation. This right has an economic content, and once the occupation ends, the local population should be able to exercise sovereignty over the territory and to enjoy its natural resources as well. As Drew notes “[t]o confer on a people the right of ‘free choice’ in the absence of more substantive entitlements – to territory, natural resources, etc – would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum”.<sup>33</sup>
21. That the Military Commander is not allowed, when exercising powers under Article 55 of the Hague Regulations, to pursue the needs of the Occupant's own territory has been also emphasised in the jurisprudence of the Israeli Court, including in the *Quarries* case. It has ruled that “an occupied territory is not an open field for economic or other exploitation” and that “the Military Commander is not permitted to consider the national, economic and social interests of his state insofar they do not affect its security interest in the occupied territory or the interest of the local population”.<sup>34</sup>

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<sup>31</sup> G. Von Glahn, *The Occupation of Enemy Territory* (University of Minnesota Press, 1957) 177; Cassese (1992) 428 and the sources cited there.

<sup>32</sup> Even state practice that allows the use of property under Article 55 which decreases the capital (see paras 24-25 in the text) stresses that the Occupant is the “administrator” or “guardian” of the property, thus implies that the property should be used for the interest of the local population.

<sup>33</sup> C. Drew, 'The East Timor Story: International Law on Trial' (2001) 12 EJIL 651, 663; See also International Covenant on Civil and Political Rights (1966) art 1: “All peoples have the right of self-determination. By virtue of that right they... and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources... based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”; See also, for example, General Assembly resolutions 1803 (XVII) of 14 December 1962 regarding Permanent Sovereignty over Natural Resources, and 33/144 of 19 December 1983, para 5: “*Emphasizes* the right of the Palestinian and other Arab peoples whose territories are under Israeli occupation to full and effective permanent sovereignty and control over their natural and all other resources, wealth and economic activities”.

<sup>34</sup> *Gamiyat El-Iskan* case, para 13 and cited with approval in the *Quarries* case, para 8. Cassese is clear on this matter: “In no case can it [the Occupying Power] exploit the inhabitants, the resources or other assets of the territory under

22. Hence, the use of public property under Article 55 is subject to the general rule in Article 43: it is strictly limited to the Occupant's military-security needs (including bearing the expenses of the occupation) and/or to the protection of the interests and welfare of the local population.<sup>35</sup>
23. The second question which requires some elaboration is whether quarrying activity falls within the use permitted by Article 55. This is a matter of dispute.<sup>36</sup> For some, it seems prohibited as the excavation and extraction of stone clearly decrease the capital (the amount of stone available for future excavation). This view was taken (in *obiter*) by the Israeli High Court in the *Na'ale* case and by the petitioners here arguing that quarrying activity is unlawful.<sup>37</sup> This position bars a priori all quarrying activity in occupied territory during the occupation period, and in the case in hand it covers not only Israeli-operated quarries, but also the Palestinian owned and operated quarries in Area C and perhaps in Areas A and B as well.
24. Nonetheless, a different conclusion can be inferred from state practice. The Military Manuals of the US, the UK, Canada and New Zealand mention the work of mines within a non-exhaustive list of such public property whose use and operation are permitted under Article 55 of the Hague Regulations.<sup>38</sup> Clearly, the work of mines is similar to the work of quarries as both decrease the capital of minerals, coal and stone that is non-renewable.<sup>39</sup>
25. Moreover, these Military Manuals show a somewhat more lenient approach when it comes to concerns over depleting the capital. They do not prohibit *any* use of property that decreases the capital but only a “wasteful or negligent” use or an “abusive exploitation”.<sup>40</sup> The Manuals of the UK and New Zealand also prohibit the Occupant from entering into commitments (such as leasing or giving mining license) extending beyond the conclusion of the occupation, and add that “mining must not exceed what is necessary or usual”.<sup>41</sup>

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its control for the benefit of its own territory or population”, Cassese (1992) 421.

<sup>35</sup> *Quarries* case, paras 8, 12; Cassese (1992) 422.

<sup>36</sup> See I. Scobbie, 'Natural Resources and Belligerent Occupation' in S. Akram el al (ed.), *International Law and the Israeli-Palestinian Conflict: A Rights-based Approach to Middle East Peace* (Taylor & Francis, 2011) 229, 234-236; Y. Arai Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (BRILL, 2009) 210.

<sup>37</sup> *Na'ale* case, para 6. This position was also expressed in an expert opinion prepared by Israeli scholars on the petitioners' behalf, available at <<http://yesh-din.org/infoitem.asp?infocatid=15>>.

<sup>38</sup> For the US Manual, see Department of the Army, *Field Manual No. 27-10: The Law of Land Warfare* (1956) ch 6 sec V para 402 <[http://library.enlisted.info/field-manuals/series-1/FM27\\_10/TOC.PDF](http://library.enlisted.info/field-manuals/series-1/FM27_10/TOC.PDF)>; For the UK Manual see MOD, *The Joint Service Manual of the Law of Armed Conflict* (2004) ch 11 sec 11.86; For the Canadian Manual see Office of the JAG, *Law of Armed Conflict at the Operational and Tactical Level* (2003) ch 12, sec 1243 <<http://www.forces.gc.ca/jag/publications/oplaw-loiop/loac-ddca-2004/chap12-eng.asp>>; For the New Zealand Manual see the ICRC Database on Customary IHL: Practice, Rule 51(b) at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule51\\_sectionb](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule51_sectionb)>.

<sup>39</sup> See also Dinstein (2009) 215.

<sup>40</sup> n 38 (Canada Manual; US Manual; UK Manual; New Zealand Manual).

<sup>41</sup> *Ibid* (UK Manual; New Zealand Manual).

26. Dinstein also allows the use of mines but rather than a concern over the capital, his main focus seems to be the needs of the local population. Regarding the use of existing mines he warns from extracting in an unreasonable accelerated rate that will exhaust the capital in an untimely fashion. At the same time he accepts, in a prolonged occupation, the use of more efficient methods to increase output. When it comes to the opening of new mines, Dinstein cites the *Na'ale* judgment (*obiter*) with approval: their operation is permitted in a prolonged occupation since “as a minimum, one cannot ignore the burgeoning needs of the local inhabitants”.<sup>42</sup>
27. The question whether the Israeli-operated quarries in Area C are used in a negligent, wasteful or abusive manner is subject to factual data and expertise that we do not possess.<sup>43</sup> Nonetheless, in our view, Article 55 does not create a negative arrangement which prohibits any use of public property which does not fall within this Article during a prolonged occupation. Such use may still be compatible with the general powers granted to the Military Commander under the law of occupation, first and foremost under the “quasi-constitutional” Article 43 of the Hague Regulations. The two determinative factors here are the duration of the occupation and a compelling need to secure the well-being of the local population.<sup>44</sup>
28. In sum, even if we assume that quarrying activity in a prolonged occupation – whether it is the opening of new quarries or the ‘enhanced’ use of quarries that existed before the occupation – is not prohibited *per se* and notwithstanding it might decrease the capital, it is permitted only insofar it is essential for the benefit of the local population, and the use is not negligent or wasteful. Given that this activity deviates from the general rule of preserving the status quo and avoiding changes with long-term effects, the Occupant must demonstrate that quarrying is required to secure the local population's welfare.
29. Without a complete factual picture, it is difficult to make a conclusive determination in relation to each and every quarry in Area C. Still, it is possible to evaluate the Military Commander's policy as a whole in light of the following points: from the petition and the Court's judgment it is evident that 94% of the product of the Israeli-operated quarries and 80% of the product of the Palestinian-operated quarries are transferred to Israel. It is therefore clear that quarrying activity in Area C essentially is not required in order to provide the needs of the Palestinian market (which is probably self-supplied by Palestinian-operated quarries in Areas A and B).

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<sup>42</sup> Dinstein (2009) 216. While the Israeli High Court questioned whether the opening of a new quarry in the West Bank can be regarded as the permitted use of fruits under Article 55 of the Hague Regulations, it allowed this activity since “it is an action which is taken for the benefit of the local population or for local needs” and taking into consideration the prolonged occupation of the territory, *Na'ale* case, para 6.

<sup>43</sup> According to the judgment, should the quarrying activity in the West Bank continues in the next 30 years, it will use only 0.5% of the total quarrying potential in the West Bank, *Quarries* case, para 1.

<sup>44</sup> See *Na'ale* case, para 6; See also Cassese (1992) 426-427.

The reasonable inference is that quarrying activity in Area C is carried out for the benefit of the Israeli market.

30. Indeed the export of stone from the oPt to Israel may be permissible as Palestinians may enjoy financial profits, as well as economic and professional development. However it is for Israel to show that this export is indeed essential for the welfare of the local population, including that exported products are sold in fair prices; that the Palestinian population indeed enjoys the revenues; and that exporting is not forced by the Military Commander.
31. Dinstein comments that the Military Commander's concern for the welfare of the local population "may camouflage a hidden agenda".<sup>45</sup> Cassese warns in this context from a determination of the Court that will pretend to reflect the interests of the local population.<sup>46</sup> The fact that quarries in the oPt are used and operated by Israeli nationals for their own private benefit, and whose profits are not subsequently transferred to the Palestinian market, seems to be the exact opposite to the interest of the local population had it expressed its "free choice". It is unclear why these quarries could not be operated by Palestinians inhabitants, in the same manner as Palestinians operate a number of quarries in Area C and all other quarries in Areas A and B.
32. In addition, while it is evident from the judgment that Israeli-operated quarries transfer yearly royalties (about 6.6 million USD in 2009) to the Military Commander,<sup>47</sup> it is unclear whether this sum reflects the fair value of the quarries and the sold product, and how it compares to royalties paid by Palestinian-operated quarries. More significantly, it is unclear whether the revenues received by the Military Commander, in whole or in part, are actually designated for the benefit of the local population. Only following the submission of the petition, the Israeli Government announced that starting from 2010, royalties and leasing fees will be registered separately and may be increased in order to finance the Military Commander's activities for the benefit of the local inhabitants. This suggests that thus far these collected payments were not necessarily set at an appropriate rate, nor invested in the Palestinian market. The impression is therefore that Israeli individuals and authorities gain profit from quarrying activity at the expense of the local population.

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<sup>45</sup> Dinstein (2009) 120.

<sup>46</sup> Cassese (1992) 440-441. Cassese maintains that "local administrations run by the inhabitants or their representatives would seem to be the most appropriate bodies for making this sort of decision". It is reminded however that their decisions cannot derogate from the fundamental protections granted to the local population under the law of occupation, see discussion in para 7; see also Kretzmer (2002) 69-70.

<sup>47</sup> *Quarries* case, paras 2, 12.

33. A 2011 report supports the notion that in relation quarrying activity in Area C, the Military Commander does not act to serve the interest of the local population. The report mentions that Israel employs a permit system which limits the operation of quarries by Palestinians owners. The report also raises the issue of unfair competition from several large Israeli companies operating in Area C. Finally, it reveals that Palestinians face obstacles to conduct geological surveys in order to assess the potential for stone deposits in Area C which is essential for the planning of the industry from both an economic and environmental aspects.<sup>48</sup>

### **Conclusion**

34. *Arguendo*, in a prolonged occupation, quarrying activity initiated and permitted by the Military Commander is not prohibited *per se*. Nevertheless, the judgment recently delivered by the Israeli High Court in the *Quarries* case does not ascertain that quarrying activity is required, and indeed carried out, for the benefit of the local population. In this case, not only has the Military Commander failed to demonstrate that this exceptional activity is essential to accommodate the interests of the Palestinian population, but a number of indications suggest that quarries are being used in an exploitative manner. Therefore we conclude that allowing quarrying activity in Area C by Israeli nationals is unlawful under the law of occupation.

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<sup>48</sup> Union of Stone and Marble Industry, *Stone and Marble in Palestine: Developing a Strategy for the Future* (July 2011) 18, 20 available at <[http://blair.3cdn.net/328bd530dca6a02f4c\\_kum6b6dhi.pdf](http://blair.3cdn.net/328bd530dca6a02f4c_kum6b6dhi.pdf)>. The Union is supported by the Office of Quartet Representative.