

Exploiting a *Dynamic* Law of Prolonged Occupation: The Israeli High Court of Justice and Israel's Quarries in the Occupied Palestinian Territory

By Valentina Azarov¹

On 26 December 2011, the Israeli High Court of Justice (HCJ) rendered its judgment in a case challenging Israel's quarrying activities in the occupied Palestinian territory (OPT) filed by the Israeli human rights organisation Yesh Din. The petitioners demanded that the activities be terminated since they violate Israel's obligation to administer the OPT for the benefit of the local population.² Israel started operating quarries in the OPT in the 1970s; today there are ten, eight of which are in operation. Approximately 75% of their yielded product is used on the Israeli construction market; in some quarries, this number reaches 94%.

By adopting a dynamic interpretation of the international law principles of belligerent occupation, in particular the 'usufruct rule' enshrined in Article 55 of the 1907 Hague Regulations, the HCJ's ruling construes a right for Israel to extensively exploit the natural resources in the OPT for the benefit of the Israeli private market.³ Following the judgment, on 10 January 2012, Yesh Din submitted a request for a further hearing of the case by a larger panel of judges on the principle legal questions raised by the petition, along with an amicus brief by a group of Israeli international law experts.⁴

The PLO-Israel Interim Agreements 1995: An absolution for international law violations

The Court begins its decision by examining the PLO-Israel Interim Agreements 1995 in which the parties agreed to transfer rights over the quarries to the Palestinian Authority (PA). While noting their political character, the Court finds that the Agreements effectively grant Israel a (legal) right to operate quarries in the OPT (paragraph 6 of the judgment). The Court accepts that "[t]he suitable framework for deciding the issue of the future activities of Israeli quarries in the Area is within the framework of diplomatic agreements, wherein the Petitioner would not be an eligible party to bring claims before the State" (Ibid). By defining the issue of the quarries as a political matter, it renders the matter as 'non-justiciable'.

¹ The author is a lecturer in human rights and international law and the chair of the Human Rights Program at the Al-Quds Bard College, Al-Quds University, Palestine. Formerly she worked as a legal researcher with Al-Haq and HaMoked.

² HCJ 2164/09 *Yesh Din v The Commander of the Israeli Forces in the West Bank et al.*, judgment of 26 December 2011:

<<http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%D7%93%D7%99%D7%9F/psak.pdf>> (Unofficial English translation).

³ Gross' Op-Ed on the judgment notes the purposive character of the Court's argumentation, and the way in which its verdict violates the rules of the international law of belligerent occupation. Aeyal Gross, 'Israel is exploiting the resources of the occupied West Bank', *Haaretz*, 28 December 2011 <<http://www.haaretz.com/print-edition/news/israel-is-exploiting-the-resources-of-the-occupied-west-bank-1.403988>>.

⁴ 'Yesh Din Requests further Hearing in West Bank Quarries Petition', 12 January 2012 <<http://www.yesh-din.org/postview.asp?postid=193>>; and <<http://www.yesh-din.org/userfiles/file/summary.pdf>> (English summary of the amicus brief).

The Court adds that “the Interim Agreement stipulates that responsibility over the issue of quarries [...] shall be gradually transferred from the Civil Administration [Israel’s military government in the OPT] to Palestinian hands” (Ibid). Critically, the Court fails to mention that these responsibilities were never actually transferred to the PA. As such, Israel’s quarrying activities are being undertaken *ultra vires* of the authorities assigned to it in the Agreements.⁵ The Court further holds that, “the Petitioner’s arguments were eventually based on an alleged general infringement of Palestinian rights under circumstances in which the PA itself had been a party to a settlement referring to the activities of the Quarries within the Interim Agreements” (Ibid). This rationale sidelines a fundamental rule of the law of occupation that guarantees the inviolability of protected persons’ rights by prohibiting the occupied population from legally waiving their rights.⁶

This reasoning not only unwarrantedly grants the Agreements a quasi-legal character, but it also implies that the (political) Agreements can trump Israel’s international law obligations. The Court’s rationale justifies Israel’s violation of the law of occupation and allows for the Israeli authorities’ unlawful exercise of sovereign rights, by allowing it to invoke its national law to justify its violations of international law.⁷

Two wrongs make a right: A ‘dynamic’ expansion of the prolonged occupier’s rights under the ‘usufruct rule’

The ‘usufruct rule’ is codified in Article 55 of the 1907 Hague Regulations, which reads as follows:

“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.”

The provision is admittedly unclear, however, most publicists agree that the Occupying Power is prohibited from undertaking permanent changes in the occupied territory, including exploiting a mine at a rate more rapid than the previous level of production, or opening mines that were not in use prior to the occupation.⁸ This is complemented by the rule that the activities must not be undertaken to the detriment of the local population, or primarily benefit the occupier’s domestic affairs.⁹

⁵ See also the Amicus Curiae brief submitted to the Court in a request for a further hearing.

⁶ Including the right to self-determination and Article 25 of the 1966 International Covenant on Economic Social and Cultural Rights, which arguably flow from the ‘usufruct rule’. While the relevant provisions of the Fourth Geneva Convention (GCIV) refer to the rights “secured to them by the present Convention”, it is not completely clear whether these include the rights provided for in the Hague law of occupation.

⁷ Enshrined in Article 27 of the 1969 Vienna Convention on the Law of Treaties.

⁸ Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, The Hague, 2009).

⁹ These limitations strictly prohibit the occupier from interfering with the economic activity of the occupied territory with a view to drawing economic benefits for itself. This was the case with Israel’s exploitation of

The Court's analysis examines two main legal issues: (1) whether exploitation was within the allowed scope, and the occupier could open new quarries; and (2) whether the interests of the local population are being served. On the first issue, the Court concludes that the occupier's only obligation is to ensure that the natural resources of the occupied territory are not depleted or overused, while there is nothing to prevent it from opening new quarries (paragraph 8 of the judgment). Critically, the Court ignores the fact that at the current mining rate, the entirety of quarries in Area C would be completely exhausted in 38 years.¹⁰

In prelude to its second question, the Court recalls that due to the "unique circumstances of the Area" and its "prolonged occupation" regard should be had to the "duty to prevent the local economy from collapsing" (paragraph 8 of the judgment). The Court notes that the quarries closure "might even cause economic stagnation and harm the interests of the Area" (Ibid). As a result, the Court mandates a wide scope of duties to the Military Commander:

"the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities – the occupier and the occupied [...] This kind of conception supports the adoption of a wide and dynamic view of the duties of the military commander in the Area, which impose upon him, inter alia, the responsibility to ensure the development and growth of the Area in numerous and various fields, including the fields of economic infrastructure and its development" (emphasis added; paragraph 10 of the judgment).

The Court affirms the legality of the sale of the quarries' products on the private Israeli market by holding that such sales contribute to sustaining "relations between the authorities", i.e. Israel and the PA (paragraph 10 of the judgment). As such, the Court construes economic relations – which cater primarily to Israel's domestic interests with no concrete benefit to the Palestinian economy – to have a benefit for the local population. This rationale not only undermines the underlying premise of Article 43, but essentially accepts the logic that two wrongs can make a right. In other words, continued violations of Article 55 are permitted for their cessation is seen to result in violations of Article 43.

Furthermore, the judgment mentions the military commander's obligation to ensure the development of the occupied population – a controversial legal pronouncement since no promise of trust between enemies is warranted in wartime. Although in some regard this

oil fields in the Sinai Peninsula, which violated Article 55 on the grounds that Israel used the product primarily for its domestic market. Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Emma Playfair ed., *International Law and the Administration of Occupied Territories* (Clarendon Press, Oxford, 1992).

¹⁰ As officially communicated by the Civil Administration, as referenced in paragraph 24 of the Amicus Curiae brief.

might be a welcomed pronouncement, all measures taken by the occupier that have permanent effects should cater to the interests of the local population and must reasonably reflect their will (paragraph 10 of the Amicus Brief). As such, the occupier is granted only limited discretionary powers to prevent it from turning into a political government in disguise.

Damningly, the Court's notion of the 'benefit to the local population' includes the benefit of the Israeli settler population in the OPT by referring to the use of the quarries' product for "projects within the Judea and Samaria area" (paragraph 12 of the judgment). For the Court, the term "local population" includes Israeli settlers, who have been transferred and maintained in occupied territory by the Israeli government in grave violation of international law.¹¹ Similarly, in the Court's judgment on land confiscation for the construction of the Tel-Aviv-Jerusalem train line (the A1 train), it accepted the State's creative interpretation of the notion 'in the interests of the local population'; namely, the court agreed to an unsubstantiated plan for a train system that would connect Israeli train lines with train lines in the West Bank and Gaza Strip in the future.¹²

Thus, the Court concludes that the petition should be dismissed. In the Court's view, it is not only impractical but also counter-intuitive to the enforcement of the law, for it to interfere with the executive power (paragraph 13 of the judgment).

The HCJ and Israel's administration of Palestinian territory

The Court's interpretation of the 'usufruct rule' effectively dons Israel's exploitation of Palestinian natural resources for benefit of Israel's private market with a mantle of legality. In doing so, it offers a selective interpretation of the rule by disregarding a fundamental and irreconcilable underlying premise of the law of occupation, which requires that the Occupying Power act in the benefit of the local population. In this respect, the *Quarries* judgment recalls Ben-Naftali's views on the illegality of the territorial regime maintained by Israel in the OPT, which demonstrates that law is implicated in maintaining Israel's practice of blurring boundaries by unlawfully exercising sovereign rights in territory where it is not a legitimate sovereign.¹³

In exploring the Court's application of international law, we should not forget the curious context in which the HCJ performs its judicial role. Specifically, the Israeli Ministry of Foreign Affairs has consistently rejected the position that the Palestinian territory is occupied, while the HCJ has applied only the humanitarian provisions of the Geneva Conventions, as opposed to applying the law of belligerent occupation in block. As such, the HCJ's judicial review of the Israeli authorities' acts has often consisted of so-called 'dynamic' interpretations of the law that the Court effectively tailors to the needs of the

¹¹ Article 49(6) of GCIV. This position has been affirmed by the international community in countless UN resolutions and the 2004 ICJ Advisory Opinion ICJ on the Separation Wall in the OPT.

¹² HCJ 281/11 *Head of Beit Iksa Village Council v Minister of Defense et al.*, judgment of 6 September 2011, paragraph 7 <<http://www.news1.co.il/ShowFiles.aspx?FileID=6250>> (Hebrew).

¹³ Orna Ben-Naftali, 'Pathological Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory (OPT) and Other Legal Pathologies', in Orna Ben-Naftali, ed., *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011).

State / occupier. In doing so, while the Court appears to be applying international humanitarian law, it is undermining and violating its essential tenets. The *Quarries* judgment is therefore a case in point for the Court's practice of deferring to and being an apologist for the executive power.