Before the Supreme Court sitting as the High Court of Justice

HCJ 2164/09

Before: The Honorable President D. Beinish

The Honorable Justice M. Naor

The Honorable Justice A. Hayut

The Petitioner: "Yesh Din" – Volunteers for Human Rights

Vs.

The Respondents:

1. The Commander of the IDF Forces in the West Bank
2. Head of the Civilian Administration in the Judea and Samaria Area
3. Hanson Quarry – "Nachal Raba"
4. Barkan Quarry – the Bnei Ha'sharon Company
5. Kochav Ha'shachar Quarry – Kochav Ha'shachar Operation
6. Natuf Quarries – Shafir Engineering
7. Meitarim Quarry Ltd.
8. Kfar Giladi Quarries
9. Beit Hagai – Agricultural Cooperative Society for Community Settlement Ltd.
10. Medan – General Contract Works, Earthworks Roads and Quarries
11. Elyakim Ben-Ari Ltd.
12. Silyit Edomim Quarry and Factory Ltd.

Requesting to join as Respondent: The Quarry Materials Manufacturers Association

Petition for an *Order Nisi*

Hearing held on:	22nd day of Kislev 5770, (9 December 2009)
On behalf of the Petitioner:	Adv. Michael Sfard; Adv. Avisar Lev; Adv. Shlomy Zecharia
On behalf of Respondents 1 and 2:	Adv. Hila Gorni
On behalf of Respondent 3:	Adv. Yanir Harel
On behalf of Respondent 4:	Adv. Shifra Gev; Adv. Sharona Bendak

On behalf of Respondents 5, 8 and 11

and the applicant requesting to join as Respondent : Adv. Doron Tishman

On behalf of Respondent 6:	Adv. Eli Zohar; Adv. Yoav Fruchtman; Adv. Elad Bardogo
On behalf of Respondent 7:	Adv. Liron Segal
On behalf of Respondent 9:	Adv. Baruch Haikin
On behalf of Respondent 10:	Adv. Israel Shalev ; Adv. Tal Birger
On behalf of Respondent 12:	Adv. Assaf Shapira

Judgment

President D. Beinish:

By submitting this petition the Petitioner, the "Yesh Din" Association, requests us to order the Respondents to cease any quarrying activity taking place in Israeli-owned quarries operating in Area C within the Judea and Samaria boundaries (hereinafter : the "Area"). In addition, the Petitioner requests us to order the Respondents to stop the licensing and land allocation procedures, which are aimed at establishing new quarries and expanding currently operating quarries.

Summary of the relevant factual background – Operations of quarries in the Judea and Samaria area

1. Before considering the parties' arguments, we shall concisely examine the factual background of this petition, as brought before us in the Reply filed by Respondents 1-2 (hereinafter: the "State"), which described the reality that prevails in the Area in regard to the licensing and the operation of the quarries. As was portrayed in that Reply, the activities of commercial scale quarries in the Area began during the mid-1970s, after the military administration had been introduced in that Area. During the following two decades the scope of the quarries' operations in the Area increased, as did the rate of quarrying products transferred to within the borders of the State of Israel. According to the data provided by the Civil Administration, some 94% of the production of Israeli quarries and some 80% of the production of Palestinian quarries operating in the Area are currently being transported within the borders of the State of Israel (there is a lack of uniformity among different quarries in regard to this issue). The data provided by the Civil Administration also shows that ten Israeli-owned quarries are currently operating in Area C, out of which only eight are active. Those quarries had been established on Israeli state land, which had been allocated for that purpose by the Civil Administration based on the outline plans, which were approved by the relevant planning authorities. Procedures for the establishment of quarries in the Area had involved an examination of ownership over the land, full statutory planning procedures and also quarrying licensing procedures in accordance with the governing law in the Area (the Jordanian Cities, Villages and Buildings Planning Law no. 79 of 1966). Some 200 Palestinian workers are being employed by all the Israeli quarries in Area C. The arguments stated by Respondents 3-12 (hereinafter: the "Quarries") infer that the number of Palestinian residents involved in operations related to the Quarries is even greater. It shall be noted that the Civil Administration has been collecting payments, which include leasing fees and royalties, from the Quarries' operations. The total amount of royalties paid in 2009 for the usage of the Quarries by Israeli entities stands at approximately 25 million NIS. It shall be further noted, in addition to the aforesaid, that nine quarries and some twenty sawmills and stone factories, all of which are authorized and Palestinian-owned, operate within Area C, while other additional Palestinian-owned quarries and sawmills operate within Areas A and B.

According to the National Outline Plan for Mining and Quarrying for the Construction and Paving Industry (National Outline Plan [NOP] 14B), all the quarries in the Area provide approximately one quarter of the entire extent of quarrying material consumption of the relevant type in the Israeli economy. According to the State's estimation, based on the base forecast detailed for the NOP14B, even if the Israeli economy continues to consume mining and quarrying materials originating in the Area, and inasmuch as such shall still take place during the next thirty years at the estimated extent (in an estimated value of approximately 7.2 million tons on average, annually, for the next fifteen years, and approximately 11.2 million tons on average,

annually, for the following fifteen years), the total overall consumption for the whole abovementioned period will exhaust about half a percent of the overall mining potential in the Area, which stands at approximately 65.1 billion tons.

The Petition and the developments that occurred following its submission

2. In the petition under discussion, which was submitted on 9 March 2009, this court was requested, as abovementioned, to order the termination of quarrying operations run by Israeli-owned quarries located within the Judea and Samaria areas. The petition had been scheduled for hearing, and the initial preliminary Reply by the State had been submitted on 19 May 2009, prior to the scheduled hearing session. In that Reply the State already had announced that "the Respondents take the Petitioner's appeal very seriously." Accordingly, the State announced that it had decided to conduct preparatory staff work in cooperation with various governmental offices for the purpose of reviewing the Respondent's policy in regard to the issue raised by the petition. Therefore, the court was requested to postpone the hearing date. That motion was approved, as was an additional motion that was submitted thereafter. Thus, the hearing was postponed twice and rescheduled to take place on 9 December 2009. Upon the conclusion of that hearing session, we ordered the State to return and provide a revised update regarding the legal issues arising in the petition, within a period of four months. The State submitted its position on 20 May 2010, according to which following the preparatory staff work that was conducted, it was decided to conduct a separate registry of the revenues deriving from royalties and leasing fees paid by the quarries in the Area and that these funds would be designated as funding for the Civil Administration for the benefit of the residents of the Area.

In addition, it was stated that the head of the Civil Administration had formulated a list of recommendations which had been sent up to be approved by the political echelon, due to the broad scope of the issue under discussion. First, those recommendations suggested that quarries that currently operate by virtue of permits, which had been granted thereto by the Civil Administration, shall continue to operate in accordance with the layout by which they currently operate. In regard to the creation of new excavation sites in existing quarries, it was proposed to approve, in general, the creation of such sites as aforementioned, based on the fact that refusing such requests is deemed as equivalent to shutting down the quarry. However, it was recommended that the establishment of new quarries, aimed mainly at the production of quarrying materials to be marketed in Israel, **in general** shall not be approved. Second, it was recommended that emphasis be placed on the rehabilitation of deserted quarries in which quarrying operations had been terminated, while repairing the damage to the landscape, preparing the area for its reinstatement according to its original assignment, et cetera. Third, it was recommended that the possibility of raising the rate of payment to the Area's treasury be considered in regard to the products of quarrying, which are being transported out of and into

Israel. The State is of the opinion that "these measures will allow the application of excessive observation over the rate of mineral production in the Area, and will ensure that such rate shall retain its usage of only a negligible portion of the quarrying potential… in other words, shall be a reasonable usage, which is not squandering in regard to the resources of the Area, and which shall not lead to the exhaustion of such resources."

Summary of the parties' arguments

3. The Petitioner is a voluntary association, which, as a public petitioner, brings before us fundamental arguments from the field of international law, and refers to the issue of the operations of quarries owned by Israelis within the Judea and Samaria area. The main argument presented by the Petitioner revolves around the interpretation of Article 55 under the Regulations concerning the Laws and Customs of War on Land, enclosed to the fourth Hague Convention of 1907 (hereinafter: "Article 55 of the Hague Regulations" or the "Regulation"), which states as follows:

> "55. 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".

And in its Hebrew version, as stated in HCJ 1661/05 **The Hof Azza Local Council vs. The Israeli Knesset** 59(2) PD 481 (2005) (hereinafter: the "Hof Azza case"):

> "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 Hof Azza case, p. 584).

According to the Petitioner's stance, the exhaustive nature of the quarrying activity is inconsistent with the restrictions set under the Regulation. It has been further argued that the activity of the Quarries is inconsistent with the supreme principle of the laws of belligerent occupation, set under Article 43 of the Hague Regulations, by which the military commander is obliged to act exclusively for the benefit of the Area while being absolutely forbidden to use public assets for the benefit of the occupying power and its needs other than those concerning its security. According to the Petitioner's line of argument, the products of quarrying operations in the Quarries do not serve the requirements of the local population nor the security needs of the occupying power, but rather the financial requirements of Israel and private corporations that have been provided with quarrying licenses, and therefore the operation of the Quarries ought to be terminated.

4. On the other hand, the State argues for the dismissal of the petition, both procedurally and on its merits. In its initial arguments, the State had made clear that the issue of the operations of Israeli quarries in the Area is far more complex than the manner in which it had been presented by the Petitioner. Therefore, the State had emphasized that the issue under discussion is a political one, which had been settled under the Interim Agreement on the West Bank and the Gaza Strip between the State of Israel and the PLO as of 1995 (hereinafter: the "Agreement" or the "Interim Agreement") in such a way that enables the operation of the Quarries to continue for the time being, while as according to the Agreement this issue shall be part of any future negotiations held between the State of Israel and the Palestinians. Under these circumstances, and considering the fact that the Petition does not raise any claim regarding the infringement of individual rights of protected persons in the Area, the State had argued that granting the remedy requested under the petition shall constitute an unjustified interference in political issues, and therefore ought to be dismissed on its face. The State further argued that the petition is one of a generalized nature, combining together the cases of all the Israeli quarries operating in the Area without implementing any discernment and without providing the factual background required for such a ruling, such as the quantity of products exported by each one of the Quarries outside the boundaries of the Area and the estimated consequences as a result of the termination of activities of each quarry. In addition, it was argued that the Quarries had gone through public allocation and planning procedures, in the course of which an opportunity to file objections had been granted; hence the petition is flawed due to its substantial delay, both objectively and subjectively.

On the merits of the petition, the State had responded that alongside the interpretation granted by the Petitioner to Article 55 of the Hague Regulations, there are other trends within the legal literature that suggest a broader interpretation of that article. According to those trends, Article 55 provides the occupier in a belligerent occupation the right to exploit minerals reasonably, in other words usage that does not exhaust the capital. The State, following its line of argument, presented various figures in support of its argument, according to which the usage of quarrying products has been extremely low in proportion to its overall potential, and thus ought to be deemed as insufficient to exhaust the capital. It was argued further that the operation of the quarries serves the best interest of the Area. In any case, the State argued further that the Petitioner's interpretation is inconsistent with state practice and therefore does not reflect customary law.

5. Respondents 3-12, consisting of licensed operators of quarries operating in the Area, had joined in the arguments outlined in the State's Reply and saw fit to raise additional arguments. The Respondents' Replies show that each one of the Quarries differs from its counterpart in terms such as scope of activity, type of products, the number of years of operation, the ratio of Area residents among its entire employee roster, the ratio of quarrying products it markets within the borders of the State of Israel, the portion of its quarrying products that are being marketed

within the boundaries of the Area and the identity of consumers of quarrying products within the Area (Israeli settlers, Palestinians or military authorities). The Respondents' Replies indicate that the factual information reflects a diversity that prevents the consideration of them as one single entity. Nevertheless, some arguments seemed to reappear in the Replies of all the Respondents: the Respondents emphasized that by their actions they have been contributing the economic development and modernization of the Area in various manners such as training of employees, payment of royalties and providing quarrying products required for construction purposes. In this context, the Respondents noted that a significant portion of their quarrying products is being marketed within the borders of the Area, to Palestinians and Israeli settlers alike (at a rate that varies from one quarry to another) and that granting the remedy as requested under the petition will inflict a fatal blow not only upon them, but also upon their employees and service providers among the local population, for which the Quarries serve as a source of livelihood.

Discussion

6. The Petition under discussion has been submitted by a public petitioner, and it urges the cessation of the long lasting activities of Israeli quarries operating in the Area, based on arguments regarding the safeguarding of the interests of the entire protected Palestinian population within the Area, which is being subjected to belligerent occupation. The petition does not include any concrete petitioners claiming to be injured by the aforementioned activity, while the general and all-embracing remedy requested therein regards the termination of quarries' operations, wherever they may be operating. However, it seems that the Petitioner may have forgotten that the best interests of the protected population – certainly considering the manner by which such interests have been portrayed in this petition – lie within the responsibility of the Palestinian Authority, alongside other entities, which is engaged in diplomatic agreements with the State of Israel. This shall apply in general, and specifically considering the circumstances under discussion, the issue concerning the regulation of quarries' operations within Area C was explicitly brought to the negotiation table between Israel and the Palestinians regarding the Interim Agreement and was anchored therein. Accordingly, Article 31 of the first Schedule to Appendix 3 (the civil appendix) of the Interim Agreement stipulates that responsibility over the issue of quarries and mining within Area C – including licensing authorities, supervision, their expansion and operation – shall be gradually transferred from the Civil Administration to Palestinian hands as a part of a comprehensive process aimed at transferring powers and responsibilities within those areas. Within that framework, the parties had agreed that during the interim term the quarries would remain active, and it was even decided that in case any questions should arise in the course of the process of transferring rights over the quarries, such questions shall be discussed by a joint committee, and the parties had undertaken to respect the recommendations of said committee, and it had been also agreed that "until the committee had

reached its decision, the Palestinian party shall refrain from taking any measures that could negatively affect those quarries".

This suggests that both the Israeli and Palestinian parties had seen fit to maintain explicitly the status of quarries operating within Area C, such that it could be determined in the course of future negotiations over the final agreement. These circumstances not only raise questions regarding the position of the Petitioner as an entity arguing on behalf of the Palestinian population's rights in this context, but they also paint the issue that the Petitioner had attempted to raise in vivid political colors and, therefore, bear consequences in regard to the scope of our intervention in state activities with respect to this issue, which is in fact equivalent to an interference in the arrangement formulated under the Interim Agreement. It is well known and settled in case law that this court, sitting as the High Court of Justice, shall not involve itself, on the whole, in petitions whose dominant aspect consists of considerations of the political-security-national kind, as that subject is vested in the capacity of a different authority (HCJ 4354/92 **The Temple Mount and Land of Israel Devotees vs. The Prime Minister** (unpublished, 10.1.1993); HCJ 4877/93 **The Victims of International Arab Terror Organization (Neta) vs. The State of Israel** (unpublished, 12.9.1993); The Hof Azza case (p. 556). Under these circumstances, we are of the opinion in this case, too, that the 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. This is true in particular considering the fact that, as aforementioned, the Petitioner's arguments were eventually based on an alleged general infringement of Palestinian rights under circumstances in which the Palestinian Authority itself had been a party to a settlement referring to the activities of the Quarries within the Interim Agreements.

Furthermore, we have found the other preliminary arguments raised by the State to be fairly reasonable. First, the State is justifiably arguing that the petition in question is general and generalized and that its underlying factual basis overlooks specific details that are essential for this matter, a fact which renders it difficult to order the remedy requested therein and justifies its dismissal. For instance, and seemingly this also could be inferred from the arguments of the Petitioner, there is a possibility that differences between individual quarries could affect the relevant interpretation of Article 55, in regard to the extent of quarrying or the contribution of such activity to the benefit of the local population. This court has held in the past in relation to the importance of the specificity and concreteness of the dispute brought before it, in the absence of which it shall refrain from involving itself in such cases, except in extreme circumstances (see: HCJ 10026/01 **Adalah – The Legal Center for Arab Minority Rights in Israel vs. The Prime Minister of Israel**, 57(3) PD 31, 48-47 (2003) ; HCJ 240/98 01 **Adalah – The Legal Center for Arab Minority Rights in Israel vs. The Minister of Religious Affairs**, 52(5) PD 167, 180-183 (1998) ; HCJ 1901/94 **Landau vs. The Municipality of Jerusalem**, 48(4) PD, 403, 411 (1994)). It had been held that "when the issue brought before us is of a general and

generalized nature, as important as it may be, where it merely constitutes the presentation of an overall desirable policy, we will no longer consider such an issue to reside within our realm" (HCJ 2926/90 **Ben-Haim vs. The Minister of Agriculture**, 46(4) PD 622, 626 (1992); HCJ 4481/91 **Bargil vs. The State of Israel** (unpublished, 25.8.1993)). Therefore, in the absence of a relevant factual basis in support of the legal argument presented before us, as specific and concrete as required, we have found that the sufficient grounds required for our intervention have not been established.

The same applies with regard to the Respondents' argument according to which the petition is flawed due to its delay. As is well known, the delay [laches] consists of three elements: subjective delay, objective delay and the extent of harm inflicted upon the Rule of Law maxim in case the claim of delay is accepted (HCJ 940/04 **Abed El-Rachman Ibrahim Abu Tir vs. The Military Commander in the Judea and Samaria Area**, 59(2) PD, 320, 332 (2004) (hereinafter: the "Abu Tir case"); Administrative Petition Appeal 7142/01 **The Haifa Local Planning and Building Committee vs. The Society for the Protection of Nature in Israel,** 56(3) PD 673 (2002)). The essence of the subjective element lies in the conduct of the petitioner and in the question of whether the passage of time could indicate that he had waived his rights. The essence of the objective element lies in the question of whether the delay in submitting the petition has compromised the valuable interests or rights of the administrative authority or of third parties. The third element concerns the severity of the harm inflicted upon the rule of law by the administrative action that forms the subject of the petition, and in the course of its application one should balance the harm caused due to the passage of time and the public interest that lies in hearing the petition. The court, upon ruling on the issue of delay, shall examine and balance the relationship between those three elements, and especially the relationship between the extent of harm inflicted upon valuable interests of an individual or the public against the extent of harm caused to the law and to the values of the Rule of Law (the Abu Tir case, p. 332; HCJ 2285/93 **Nachum vs. The Mayor of Petach-Tikva**, 48(5) PD 630, 643-640 (1994)).

Under the circumstances of the case before us, the subjective delay element is significant and could be deemed sufficient to tip the balance toward accepting the Respondents' arguments, certainly considering the status of Respondents 3-12 under this petition. As aforementioned, the Quarries in the Area have been operating, to varying extents, for more than forty years. Their establishment was accompanied by tedious planning and licensing procedures, and their activity even was settled, in relation to its political aspects, in 1995 in the Interim Agreement. The Petitioner first appealed to the State only in 2008 with a request to completely cease the Quarries' activities – which, as previously mentioned, both the Israeli and the Palestinian parties had seen fit to keep in its current format until a final settlement is reached. The Petitioner's appeal was not conducted in the name of any particular petitioner claiming an infringement of his rights, but rather in the name of general principles, while completely ignoring the long lasting reliance of the Quarries' owners upon the policy that permitted them to maintain their activities

and the entitlements deriving thereof (compare to: the Abu Tir case, p. 334). In such a state of affairs, accepting the Petitioner's argument today might cause significant damage, which outweighs, in our opinion, the harm claimed in the petition, both in regard to the owners of the Quarries and perhaps even to the Palestinian population itself, some of whom are employees in those quarries, in addition to the economic ties with the residents of the Area, as stated in detail by Respondents 3-12 in their Replies. This conclusion becomes even more robust considering the change that occurred in the State's position following the submission of the Petition, which allegedly diminishes the claimed harm; the decision to refrain from granting new licenses, the transfer of the royalty fees directly to the Civil Administration, and the settlement of the overall handling of the expansion of quarrying areas in existing quarries.

Seemingly, the aforementioned reasons are sufficient for the dismissal of the Petition on its face.

The merits of the Petition

7. Needless to say, and considering that the Petitioner's argument, which concerns a major question regarding the State's possession of the Area's minerals, has caused the State to review, re-examine and even to modify its policy in regard to the operation of quarries in the Area, I see fit to address the position presented to us as a position on the merits of the Petition. The Petitioner and the Respondents had referred us, in their pleadings, to Article 55 and to the interpretation granted thereto by various experts from the field of international law. According to those sources, as well as other sources, it seems that the issue of the interpretation granted to Article 55 is under dispute among scholars.

For purposes of convenience, we shall turn again to Article 55, which states as follows:

> "55. 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".

And in its Hebrew version, as stated under the Hof Azza case:

> "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 Hof Azza case, p. 584).

And so the term "usufruct" is defined as follows:

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

This Article, according to its formulation, contains a limited authorization enabling a state, which holds another territory in belligerent occupation, to be the administrator and usufruct of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in that territory, while refraining from damaging the capital of these assets. Hence, a state holding such territories is allowed to administer the property of the hostile state situated in the occupied territory and to enjoy the fruits of such property. At the same time, the state is obliged to safeguard such property and refrain from damaging it (see: HCJ 3103/06 **Shlomo Valiro vs. The State of Israel** (unpublished, 6.2.2011) (hereinafter: the "Valiro case"); HCJ 285/81 **El Nazer vs. The Commander in the Judea and Samaria areas**, 36(1) PD, 701, 704 (1982); Hila Adler "Occupation Laws" in Ruby Seibel *International Law* 575 (2nd edition, 2010) (hereinafter: "Adler"). The administration of such property shall be conducted in accordance with the rules of usufruct, by which the occupying state shall not be entitled to sell the asset or to use it in a way that shall result in its depletion or exhaustion (see Yoram Dinstein *The Laws of War* 230 (1983) (hereinafter: "Dinstein (1983)"), Michael A. Lundberg, *The plunder of Natural Resources During War: A War Crime* (?), 39 Geo. J. Int'l L. 495, 515 (2008)).

By examining Dinstein's book, it could be inferred that there are some who argue that the beneficial use could serve the benefit of the occupier even outside the boundaries of the territory that is being held in belligerent occupation, and could even be sold by said occupier (see: Yoram Dinstein, *The International Law of Belligerent Occupation* 215 (2009)) (hereinafter: Dinstein (2009)). Von Glahn further states in his book that the holder of a territory in belligerent occupation is even entitled to grant concessions for the purpose of using the usufruct, subject to the limitation of such concessions to the term of the occupation, as follows:

> "It would seem reasonable to assume, however, that an occupant in principle ought to be free to grant concessions for the exploitation of the usufruct of public real or immovable property, with the obvious reservation that no such concession could exceed the duration of the belligerent occupation"
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> (Gerhald Von Glahn, The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation 209 (1957)) (hereinafter: "Von Glahn").

8. The implementation of the provisions of the Article regarding mining minerals by the holder of territories in belligerent occupation raises a number of questions.

The first question is whether it is possible to state, on the whole, that the mining of minerals shall be deemed as damaging to the capital and, therefore, forbidden in accordance with the provisions of Article 55. In fact, this is the fundamental argument by the Petitioner, who regards any quarrying activity as an exhaustive activity, thus contradicting the provisions of Article 55. Inasmuch as the Petitioner is willing to acknowledge that such activities are permitted by that Article, according to its line of argument, such activities might be allowed under international law based only on a narrow exception known as "the principle of continuity", in other words only in those cases in which the minerals had been active during the period preceding the belligerent occupation. The State, together with Respondents 3-12 (jointly hereinafter as: the "Respondents"), presented a different interpretation, according to which such usage of minerals is permitted subject to the principle of reasonableness, in other words usage to an extent that does not lead to over-exploitation. An opinion similar to the one expressed by the State could be inferred from Ruby Seibel's book *International Law* 461 (1st Edition, 2003), which states as follows:

> "The occupying state never becomes the owner of public natural resources in the occupied territory; however, it is entitled to exploit such resources (usufructuary rights). Such exploitation must only be implemented to the degree by which a reasonable owner would have exploited such resources, in other words, over-exploitation shall not be allowed. This entitlement also includes the right to exploit existing oil-field resources".
>
> See also: Adler, p. 576; Dinstein (2009), p. 215.

Regarding the concrete aspect of the Quarries, references to the position according to which the mining of minerals *per se* does stand in contrast with the provisions of Article 55 can be found in various other sources. For instance, the aforementioned book by Dinstein (1983) states that "it is accepted that the production of minerals – such as mining coal in **existing** state-owned mines – is allowed, notwithstanding the fact that it certainly derogates from the remaining quantity in the capital" (ibid, ibid. emphasis added – D.B.). The judicial overview by Eyal Zamir concerning state land in the Judea and Samaria area also stated that "….it is accepted that the occupier is allowed to produce minerals from existing mines. **However, there are different opinions as to whether and to what extent said occupier is entitled to develop new mines…**" (Eyal Zamir *State Lands in the Judea and Samaria Area – Judicial Review 11* (Researches by The Jerusalem Institute for Israel Studies no. 12, 5741 – 1985), emphasis added – D.B. (hereinafter: "Zamir")).

It seems that mining activities are both accepted and common among other countries, provided that actions performed on the property are not implemented in a negligent manner such that they could lead to the impairment of natural resources or the exhaustion thereof. For instance, the American Military Manual FM 27-10, the Law of Land Warfare, states as follows:

> 402. Occupant's Disposition of Real Property of a State Real property of the enemy State which is essentially of a nonmilitary nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations (see *Art. 53, GC;* par. 393 herein). The occupant does not have the right of sale or unqualified use of such property. As administrator or usufructuary he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war. (emphasis added – D.B.)
>
> Retrieved: http://www.globalsecurity.org/military/library/policy/army/fm/2710/Ch6.htm#s5

A similar stance is expressed in the provisions of the British Army Manual, according to which:

> "The occupying power is the administrator, user, and, in a sense, guardian of the property. It must not waste, neglect, or abusively exploit these assets so as to decrease their value. The occupying power has no right of disposal or sale but may let or use public land and buildings, sell crops, cut and sell timber, and work mines. It must not enter into commitments extending beyond the conclusion of the occupation and the cutting or mining must not exceed what is necessary or usual" (emphasis added – D.B).
>
> U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict*, 303 (2004).

After reviewing the International Red Cross's website it seems apparent that a similar stance is also prevalent in Canada:

> "Section B. Immovable public property in occupied territory
>
> III. Military Manuals
>
> Canada's LOAC Manual (1999) provides that, in occupied territory: Enemy public immovable property may be administered and used but it may not be confiscated.
>
> …
>
> Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests,

> parks, farms, and mines, may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The occupant becomes the administrator of the property and is liable to use the property, but must not exercise its rights in such a wasteful or negligent way as will decrease its value.
>
> The occupant has no right of disposal or sale. Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the occupant." (emphasis added – D.B.)
>
> Retrieved: http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ca_rule51

Considering all of the aforementioned, it could be inferred that the mere mining of minerals in territories held under belligerent occupation by the occupying force (or by others to whom such force had granted concessions) is acceptable and does not contradict international law.

However, and as suggested by Dinstein (1983) and by Zamir, the issue of mineral mining raises another question for discussion, namely even should we accept the assumption by which international law permits the mining of minerals pursuant to the provisions of Article 55, despite the harm caused to the capital, some are of the opinion that this assertion refers exclusively to minerals existing prior to entering the territories, and that it does not allow production of new minerals (see also: Adler, p. 576; Dinstein (2009), p. 215-216). This is in fact the Petitioner's stance, which is based as aforesaid upon the principle of continuity. The State is of the opinion that this kind of interpretation of Article 55, which renders the authority to produce usufruct subject to the principle of continuity, is a narrow interpretation that is not only unnecessary but might even cause economic stagnation and harm the interests of the Area. This applies, particularly under the unique circumstances of the Area, in cases of prolonged belligerent occupation. Moreover, the State argues that the rationale underlying the principle of continuity, which imposes upon the State – as a trustee of the public property in the occupied territory – a duty to prevent the local economy from collapsing, might justify the quarrying activities. This position is based upon the fear that such a decision to cease quarrying activity at this time might lead to a degeneration of existing infrastructure and to the neglect of financial enterprises in such way that will contradict the rationale underlying the principle and the duties imposed upon an occupier by international law.

However, additional issues still remain. Alongside the internal issues arising due to the authority set under Article 55, an additional question arises, whose roots lie in Article 43 under the Hague Regulations, which states as follows:

> "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".

And in its Hebrew version, as held in HCJ 202/81 S**aid Mahmud Tabib vs. The Minister of Defense**, 36(2) PD 622, 629 (1981):

> "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 life, while respecting, unless absolutely prevented, the laws in force in the country".

As is well known, Article 43 has been acknowledged in our rulings as a quasi-constitutional framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory. Pursuant to the main assertion arising thereof, the commander of the Area must exercise his powers under all circumstances exclusively for the benefit of the Area, while applying only the relevant considerations – the best interest of the protected persons, on the one hand, and the needs of the military, on the other hand. Thus, by exercising its powers "the military commander is not allowed to consider the national, economic and social interests of his own state, inasmuch as such interests have no effect on his security interest in the area or the interest of the local population" (HCJ 393/82 **Jamit Askaan vs. The Commander of the IDF Forces in the Area**, 37(4) PD 785, 794-795 (1983) (hereinafter: the **"**Askaan case")). See also: HCJ 2056/04 **The Beit Surik Village Council vs. The Government of Israel**, 58(5) PD, 870, 833-836 (2004), the Valiro case, in para. 43). It is also clear, and this remains undisputed by the State, that "a territory held in belligerent occupation is not an open field for economic or other kinds of exploitation" (the Askaan case, ibid).

Regarding the link between the exercise of powers set under Article 55 and the provisions of Article 43, see also:

Eyal Benvenisti, *Agora (Continued): Future Implication of the Iraq Conflict Water Conflicts During the Occupation of Iraq* 97 A.J.I.L 860, 864; Antonio Cassese *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in International Law and the Administration of Occupied Territories 419, 428-432 (Emma Playfair ed., 1992).

9. According to the Petitioner's line of argument, the operation of the Quarries in the Area contradicts the provision of the aforementioned article, as significant portions of the minerals being mined therein are allocated for use by the Israeli construction and paving industries, and the profits deriving from the sales thereof are being transferred to the hands of the private owners of the Quarries. Therefore, according to that claim, the use of minerals was not aimed at serving either the needs of the local population or the military needs of the sovereign. The Respondents beg to differ. According to their line of argument, the Petitioner applies a narrow interpretation

to the principle expressed in Article 43, which does not fit the unique circumstances of a prolonged belligerent occupation, which is relevant to the prevailing situation in the Area. Thus, according to the Respondents' line of argument, the interpretation suggested by the Petitioner might lead to a stagnation of the economy in the Area at the same level as it was when the belligerent occupation began, and thus could stand in contrast with the duties imposed by Article 43. It was also noted that in some cases, a situation of prolonged occupation requires an interpretive adjustment of the provisions of international law. In addition, when concerning the arguments on their merits, and as shall be specified in further detail hereinafter, the Respondents argued that the operation of the Quarries serves the best interests of the Area.

10. As has been held in many occasions under our rulings, the belligerent occupation of Israel in the Area has some unique characteristics, primarily the duration of the occupation period that requires the adjustment of the law to the reality on the ground, which imposes a duty upon Israel to ensure normal life for a period, which even if deemed temporary from a legal perspective, is certainly long-term. Therefore, 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 (the Askaan case, p. 800-802), HCJ 9717/03 **Naale vs. The Civil Administration et al.**, 58(6) PD 97, 103-104 (2004) (hereinafter: the "Naale case"), HCJ 337/71 **El-Jamyia vs. The Minister of Defense**, 26(1) PD 574, 582 (1972), HCJ 2690/09 **"Yesh Din" – Volunteers for Human Rights vs. the Commander of the IDF Forces in the West Bank** (unpublished, 28.3.2010), the Hof Azza case, p. 522). So it was held three decades ago by President M. Shamgar:

> "The needs of any area, be it subject to military rule or another rule, tend to change, naturally, with the passage of time and the accompanying economic developments. As was specified above, the drafters of the articles did not deem it sufficient to define the duty as merely restoring the situation to its previous condition. The duration of existing military rule might affect the nature of such needs, and so the necessity of implementing adjustments and reorganization might increase the longer such a period lasts … the time element is a factor that affects the space of powers, whether one considers the needs of the military or the needs of the Area, or when striking the balance between those two" (HCJ 69/81 **Basil Abu-Ita vs. The Commander of the Judea and Samaria Area**, 37(2) PD 197, 313 (1983)).

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. In that context it was held under the Askaan case that:

> "Therefore, the powers of a military administration extend to the implementation of any necessary measures in order to ensure growth, change and development. Thus, a military administration may develop industry, commerce, agriculture, education, health, welfare and other elements regarding good governance, which are required in order to secure the changing needs of a population in an area held in belligerent occupation" (the Askaan case, p. 804).

This widely accepted view entails implications regarding the case under discussion. Following our review of the parties' stances in that context, we came to the conclusion that considering the factual basis presented to us by the State, and while considering the unique circumstances of the Area, the State's interpretation of the manner in which it exercises its powers in accordance with Article 55 is reasonable, and thus it requires the adjustment of the laws of occupation to the reality of prolonged occupation.

11. Accordingly, we shall first examine the extent of the quarrying and its effect on the Area's resources pool. The data presented by the State in this context shows that the usage of the minerals of the Area is indeed relatively limited, and could be deemed as usage by usufructuary, which does not constitute a depletion of the capital. Therefore, it seems that the quarrying activity, in its current extent of operation, does not contradict the provisions of Article 55.

12. It should be stated further, as aforementioned, that the State announced that the recommendations submitted to the political echelon had stated, *inter alia*, that no new quarries, which are primarily aimed at producing quarrying materials for the sale thereof to Israel, shall be established in the Area. Those recommendations express an appropriate stance, which addresses the issue under dispute to a certain extent, and leads to the acceptance of the second remedy requested under the Petition. If this shall take place, there shall be no need in any case to discuss the issue any further regarding the possibility to establish new quarries.

The state of affairs is somewhat different regarding the activities of currently active quarries, most of which, if not all of which, seem to be the outcome of the development momentum the industry gained during the mid-1970s, following the beginning of the belligerent occupation era. In accordance with the positions presented by the Petitioner, this activity is inconsistent with the principle of continuity and therefore allegedly inconsistent with international law. As inferred from the material brought before us by both parties, even those scholars who hold the opinion that there is no prohibition on making beneficial use of the minerals of a territory held in belligerent occupation under Article 55, do acknowledge the existence of a dispute regarding whether one may also consider new quarrying sources that had not existed in the era preceding the occupation, as resting within the limits of legitimate use set by Article 55. An answer to this issue, under the circumstances of this case, is directly connected to the question regarding the compliance of the Quarries' activities with Article 43 of the Hague Regulations. The Petitioner is of the opinion, as aforementioned, that the activity of the Quarries

is flawed with regard to that aspect as well. The Respondents beg to differ. According to their line of argument, the activity of the Quarries is beneficial to the local population. The Respondents base their stance on this court's ruling in the Naale case. In the Naale case, the issue under discussion involved the operation of a quarry in the vicinity of two settlements: Naale and Givat Nili. It was held, *inter alia*, that the operation of the quarry was not inconsistent with the rules of international law due to the fact that some of its products also were used for projects within the Judea and Samaria area, thus constituting an action for the benefit of the local population or local needs. According to the State, some of the quarrying products in the case under discussion also are being used for projects within the territory of the Palestinian Authority, including the Gaza Strip. Second, the State emphasized that the use made of the royalty fees paid by the owners of the Quarries is for the benefit of the local population. In that context, the State insisted that following the submission of the petition it had been decided to hold a separate registry of the revenues of the Civil Administration in the Judea and Samaria areas, including its revenues deriving from quarries in the Area, which shall be designated, in general, for activities under the areas of responsibility of the Civil Administration in the Area. Thus, according to this argument, those funds enable the Civil Administration to fulfill its duties in accordance with international law and considering the best interests of the Area. The Respondents also emphasized that the provisions under the Hague Regulations, including Article 43, ought to be interpreted in a way that suits the unique features of the belligerent occupation in the Area, which is a prolonged occupation imposing positive obligations in order to prevent the stagnation of the occupied territory, also in regard to the aspect of its economic development.

13. It seems that a comprehensive reply to those aspects could not be granted without duly referring to the unique aspects of the belligerent occupation in the Area, in general, and specifically to the issue of quarries operating therein. When considering the interpretation of international law governing the Area, as it has been held in the course of our rulings, one may fear that adopting the Petitioner's strict view might result in the failure of the military commander to perform his duties pursuant to international law. For instance, adopting the stance, according to which under the current circumstances the military commander must cease the operations of the Quarries, might cause harm to existing infrastructures and a shut-down of the industry, which might consequently harm, of all things, the wellbeing of the local population. In that context, Dinstein (2009) asserts as follows:

> "There is, however, a good practical reason for allowing the Occupying Power to work mines: non-maintenance is liable to lead to long-term system decline, thereby endangering resumption of operations under the restored sovereign" (Dinstein (2009), p. 215).

Furthermore, Von Glahn refers to the dispute regarding permission to operate new quarries, however, he adds in his book:

> "However, considerable disagreement still prevails about the right of an occupant to grant new concessions in enemy territory. Normally only the legitimate sovereign would seem to have the power to grant concessions, yet conditions in the territory make it desirable to have the occupant grant new concessions in the interest of the native population" (Von Glahn, p. 209, emphasis added – D.B.)
>
> (Also compare to: Eyal Benvenisti, The International Law of Occupation 146-148 (1993)).

Furthermore, one should bear in mind that as stated in the data that have been presented before us, the currently operating Quarries provide livelihood for a considerable extent of Palestinian residents, and as stated in the State's notification, the royalties paid to the Civil Administration by the operators of the Quarries are used to finance the operations of the military administration, which promotes various kinds of projects aimed to benefit the interests of the Area. In their Reply, the Respondents (the Quarries) also emphasized that their activities have been contributing to the economic development and to the modernization of the Area in many ways, such as training of employees, payment of royalties and supplying quarrying products necessary for construction purposes. It was stated further that a significant portion of their quarrying products is being marketed both to Palestinians and to Israeli settlers (at a rate that varies from one quarry to another) and that granting the remedy as requested under the petition will inflict a fatal blow not only upon them, but also upon their employees and service providers among the local population, for which the quarries serve as a source of livelihood.

Considering this state of affairs, it is therefore difficult to accept the Petitioner's decisive assertion, according to which the quarrying operations are in no way promoting the best interests of the Area, especially in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged period of occupation. In that context, it shall be noted that considering the significant delay underlying the petition, in light of the many years during which the Quarries have been operating in their current format and the harm that could be inflicted should the requested remedy be granted, the Petitioner had an especially heavy burden while attempting to establish its arguments. However, it seems to us that the aforementioned array of aspects displays before us a reality that is far more complex than the one presented by the Petitioner and by its strict interpretive stance.

In light of the aforesaid, we had seen fit to dismiss the petition on its face, and even while considering it on its merits, we have found that the State's revised position in regard to the operation of the Quarries in the Area does not constitute a cause for our intervention therein. The petition is therefore dismissed, without an order for costs.

The President of the Supreme Court

Justic M. Naor:

I concur.

Justice

Justice A. Hayut:

I concur.

Justice

Held, as stated in the opinion of President D. Beinish.

Given on December 26th, 2011, the 30th day of Kislev, 5772.

The President Justice Justice

This document was translated to English from the Hebrew original by Yesh Din – Volunteers for Human Rights.