The Supreme Court in Jerusalem,

Presiding as the High Court of Justice (HCJ)

Yesh Din - Volunteers for Human Rights (Registered association # 58-0442622)

Represented by Attorneys Michael Sfard and/or Shlomy Zachary and/or Neta Patrick and/or Avisar Lev - all from 49 Ahad Ha'am St., Tel Aviv 65206; tel: 03-6206947, fax: 03-6206950

The Appellant

VS

1. **Major General Gadi Shamni, commander of IDF forces on the West Bank**

2. **Brigadier General Yoav Mordechay, Judea and Samaria Civil Administration head**

   Represented by an attorney from the State Attorney's Office, the Justice Ministry, Salah al-Din St., Jerusalem; fax: 02-6467011

3. **Hanson Quarry "Nahal Raba" (private firm # 51-020554-5)** from 5 Jabotinsky St., Ramat Gan 52520, P.O.Box 21137, tel 03-5764258, fax 03-6135110

4. **Barkan Quarry - Bney Hasharon Co. (p.f. # 51-321725-7**) of 41 Hameyasdim St., Even Yehuda; Tel: 03-9060505, fax: 03-9060373

5. **Kokhav Hashahar Quarry - Kokhav Hashahar Management (p.f. # 51-1859076),** Moshav Sde Trumot, 10835

6. **Natof Quarry - Shafir Engineering (p.f.** # **51-050024-2)** from 12 Habareket St., Petah Tikva, 48170; P.O.Box 7113, tel: 03-9169500, fax: 03-9169600

7. **Meytarim Quarry Ltd. (p.f. #-51-343634),** of 9 Yehoshua Zoref St., Beersheba, P.O.Box 12420; tel: 08-6236087, fax: 08-6236086

8. **Kfar Giladi Quarries (limited partnership # 57-003639-2)**, Kfar Giladi, 12210

9. **HGI House - Agricultural Association for Communal Settlement Ltd.,** Mobile Post Har Hevron, 90430

10. **Medan General Contractor for earthworks, road, and quarries (1964) Ltd. (p.f. 51-039829-0)** P.O.Box 2319, Rehovot; tel: 08-9358004, Fax: 08-9358005

11. **Netivey Betar Company, through Ashtrom Co., (p.f. # 51-03816-01)**, Elat Industrial Zone, 8800

12. **Elyakim Ben-Ari Ltd. (p.f.# 51-053256-7)** from 6 HaHadarim St., Ashdod, 77613, P.O.box 2455; tel: 08-9358004, fax: 08-8562364

13. **Salit Adumim Quarry and Plant Ltd. (p.f.# 56-001498 -7)**, P.O.Box 1001, Maale Adumim 90610

The Respondents

Petition for an *Order Nisi* and an Interim Injunction

This is a petition for an *order nisi* according to which the honorable court is asked order the respondents to appear in court and explain, should they desire -

(A) Why should the honorable court not rule that the mining for natural resources in the West Bank for the needs and uses of the State of Israel and/or its population, as well as mining for natural resources in the West Bank for the needs of the Israeli construction market **is an illegal act**.

(B) Why should respondents 1 and 2 not take all the necessary measures to terminate all mining operations carried out throughout the West Bank by respondents 3 to 13, and other companies, whose product is transferred to Israel, including suspending and/or revoking all the mining licenses and/or concessions they had issued.

(C) Why should respondent No. 2 completely abstain from issuing and/or extending the validity of mining licenses and/or concessions of natural resources in the West Bank, except for mining for the immediate needs of the protected citizens of the occupied territories that is done by them or other acting on their behalf.

This is also a petition for an interim injunction whereby the honorable court is asked to order:

(A) respondents 1 and 2 -- to take all necessary action required to freeze all mining activities in quarries managed by respondents 3 to 13 in the West Bank until a final judgement is given by the Court in this petition;

(B) respondent 2 -- to immediately abstain from issuing licenses and/or concessions for the mining of natural resources in the West Bank, and to abstain from renewing or extending the validity of existing and/or extending the validity of licenses and/or concessions of natural resources in the West until a final judgement is given by the Court in this petition;

(C) respondents 3 to 13 -- to immediately cease all operations of mining and quarrying for natural resources in the West Bank, directly or by proxy, until a final judgement is given by the Court in this petition;

Arguments for the interim injunction shall be presented at the closing of this petition.

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A. Introduction

> "The Military commander may not consider the national, economic, and social interests of his country, inasmuch as they do not impair on its security interest in the area, or on the interests of the local population, even if the army's needs are its military needs and not national security needs in the broader sense. **A territory held through belligerent seizure is not a field open for economic or other exploitation**."
>
> Honorable Justice (then) A. Barak in HCJ 393/92 **Jamait Askan v Commander of IDF forces in Judea and Samaria** (pd 37(4) 785, pp 794-795

1. This petition addresses the illegal practice of brutal economic exploitation of a conquered territory to serve the exclusive economic needs of the occupying power that bluntly and directly violates basic principles of customary international law.
2. The subject of this petition is the extensive mining of natural resources contained in the occupied West Bank soil by Israeli companies that transfer the fruits of their mining to the State of Israel proper, serving the Israeli construction market.
3. This petition, therefore, addresses a practice reminiscent of occupation patterns in ancient times, days in which there were no rules or laws in war, and the winner was entitled, by the power of his victory, to plunder the occupied territory, enslave its economy and citizens for its own purposes, and transfer their treasures to his own land.
4. Indeed, we are committing a crime on the West Bank's land when we extract deposits of gravel and rock from its soil **and take them by the truckload to the sovereign territory of the State of Israel to serve the Israeli economy.**
5. **According to international law, this kind of activity is a violation of occupation laws as well as of human rights laws and, in certain cases, might be defined as pillage.**
6. This looting pillage has been perpetrated for several years under the protection, with the approval, and with the permission of the governing authorities of the State of Israel, as well as of the authorities ruling the occupied territory.
7. Furthermore, **according to documents in the possession of the appellants, which will be presented below, multiyear government plans for the Israeli construction business are made based on the looting of natural resources that do not belong to the State of Israel and under the assumption that the State of Israel will go on transferring building materials mined out of West Bank soil to its territory for its purposes. In fact, the State of Israel's planning authorities expect mining operations in regions under IDF occupation to continue serving the State of Israel's construction needs for the next three decades, no less!**

8. In this petition, the honorable court will be asked to put an end to this clearly illegal activity, which constitutes blunt and ugly **colonial exploitation** of land we had forcefully seized and which, symbolically, tons of it are physically transferred each year into the State of Israel boundaries.

9. While the legality of this activity has never been examined by the military authorities through the self-evident view of belligerent occupation laws pertaining to relevant territories and human rights' laws, quite scandalously, it continues even though respondents 1 and 2 have defined it as "problematic and not simple," saying it requires "staff work" and "a legal examination."

10. This exploitation of natural resources imposes extensive liabilities on the State of Israel, raising heavy suspicions of grave violations of the international law. Nevertheless, the relevant government authorities are incapable of stopping that violation because, as in many other cases of economic exploitation and enslavement, the enslavers themselves have become addicted to the exploitation, "counted" on it, "planned" according to it, and cannot imagine the world without it.

11. Hence, appeals made by the appellants to responder No. 2 that he order the mining suspended -- at least until an educated decision is attained through the "staff work" and "a legal examination," which he stated is needed -- have been turned down. Hence, the responder chose to take the risk of perpetrating an activity which, even according to his own advisers, might constitute the crime of looting.

12. Thus, this honorable court must save the State of Israel and the IDF from themselves. The honorable court must stop the mining at once. This is the appellants request in this petition.

B. Factual Background

I. Petition parties

13. The appellant, Yesh Din, an organization of volunteers for human rights, is a legally registered non-profit organization, established in March 2005 (hereunder: "the appellant" or "the organization"). The organization engages in a variety of issues pertaining to human rights in the occupied territories. The organization operates a number of projects that address the empowerment of law enforcement processes in the West Bank. Among other things, the organization is active in matters pertaining to the illegal use made of West Bank lands.

14. Respondent No. 1 is the commander of the IDF forces in the West Bank. According to customary international law and rules of belligerent occupation, he holds the powers of management and administration of the territories occupied by his troops. As such, Respondent No. 1 is the supreme authority for all government activities taking place in the West Bank.

15. Respondent No. 2 is the head of the Judea and Samaria Civil Administration. Respondent No. 1 delegated the authority to manage civilian life in the West Bank to him and, as such, Respondent No. 2 is the party that issues the licenses and/or concessions for mining in West Bank quarries, mostly using the officer in charge of abandoned government property.

16. As far as the appellants know, Respondents 3 to 13 are various companies and corporations that operate quarries and are, apparently, holders of licenses and/or concessions for mining natural resources from West Bank soil. These respondents were named in this petition for cautionary measure only, due to the fact that they might be affected by any future decision that is made in this petition.

II. Mining activities in the West Bank

17. The West Bank has been under IDF occupation since 1967 and is subject to belligerent occupation laws and to the rules that follow such a regime.

18. As part of the laws of occupation that apply to the region, various orders have been issued by the commander of the IDF forces in the West Bank who, by the power of international occupation laws, acquired *temporary* management and administrative powers, acting as the *temporary* replacement of the sovereign. One of those orders is *The Order on Government Property (West Bank Region) (No. 59) - 1969*. In this order, the regional commander authorized the officer in charge of government property to take possession of government properties (see articles 1, 2 of this order).

    To accommodate the honorable court, a copy of Order 59 is attached and marked **appendix 1**.

19. **Specifically, that order does not assign the officer in charge of government property with ownership of that property, but only authorizes him to assume tenure of the property and its management. According to the philosophy of international occupation laws -- a branch of international humanitarian law -- occupying forces hold an occupied territory *temporarily and in trust* until a final, permanent agreement is attained. Thus the occupier is not a sovereign, but only a trustee who was accorded merely *temporary* management and administrative powers**. (See, among other things: Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: The Framing of the Occupied Palestinian Territory* 23(3) **Berkeley Int'l. Law Journal** 551-614 (2005).

20. As far as the appellant knows, as of the 1970's, respondents 1 and 2 have been granting, by way of concession, Israeli corporations with permits for mining and quarrying in the West Bank. For the mining rights, the concession buyers need to make two kinds of payment: the first kind pertains to a permanent fee for the use of the land, paid by the mining body; the second kind of payment pertains to royalties obtained as a relative part of the total quantity mined in the territory for which the permission was given. The appellant is not aware of the rate of payment and/or the ratio between the two kinds of payments. Furthermore, it should be noted that the appellant does not know how respondent No. 2 selects the parties that receive the permits or whether a tender is issued for the right to mine for natural resources.

21. It should also be noted that, according to State Comptroller's Report No. 56a from 2005, the officer in charge of government and abandoned property has sweepingly failed to collect the fees to which he is entitled, and that specifically, the debt of quarries in the region has reached some 4.5 million shekels. The state comptroller's grave findings establish this:

> ***"Officer in Charge's Failure to Collect Debts***
>
> *It appears from the documents of the officer in charge that government and private bodies that operate in Judea and Samaria have for years owed the officer sums of money for the permission to use state lands that, according to the officer's own calculations from November 2003, have reached some 32 million shekels, and that some of those sums do not include interest and attachment as required by the Israel Land Administration (ILA). Main debitors are the Defense Ministry, 16 million shekels; the World Zionist Organization, some 10 million shekels; and the remaining debt is divided between* ***quarries, some 4.5 million shekels****; gas stations, some 1.7 million shekels; and some 100 private debitors, between 2,000 and 8,000 shekels each. When he was audited, the officer in charge was not found in possession of documents attesting to the dates in which most of these debts were created, or proof of moves taken to collect the said debts."*
>
> State Comptroller, **annual report 56a** (2005), p. 218.

22. Thus, respondents 3 to 13 are mining based on a permit they were given for West Bank lands. **To the appellants' best knowledge, and based on a study they conducted over the past month, the lion's share of the mining products has been transferred to the State of Israel boundaries and serves the Israeli construction business.**

A table presenting collected data concerning the quarries that respondents 3-13 operate is hereby attached and marked **appendix 2**.

23. To understand just how deep has the use of products from mining in the West Bank taken root in the Israeli economy, we wish to point at a document authored on behalf and for the Interior Ministry ahead of a discussion of a ministry committee that deals with future outline plans (the Editors Committee). Prepared ahead of an Editors Committee meeting in January 2008, the document analyzes the future reserves of mines from which raw materials for roads and construction can be produced (the document's full title is: The Ministry of Interior's Planning Administration, "**National Blueprint (NBP) 14b - NBP of Mining and Quarrying Sites for the Construction and Road Building Business**" (an estimate of existing raw materials' potential) -- Report on stages A1-A4 of the work plan; the document was authored by Lerman Architects and City Planners Ltd., and Aviv Engineering Management and Information Systems Ltd.; and will be referred to henceforth as **Editors' Committee Document**"). The third chapter of that document is dedicated to the assessment of raw materials for roads and buildings that can be mined or quarried in the West Bank. It should be noted that quarries operating in Area C, the West Bank region under Israel's civilian and security control, are mainly managed by Israeli companies whose plans and permits are issued by respondent No. 2.

A copy of the third chapter of the Editors' Committee Document (pp. 72-80) is attached and marked **appendix 3**.

24. Addressing the issue of production by West Bank regions, P. 75 of the Editors' Committee Document carries the following data.

"C. Production by Regions

"The Quarries in Area C produce the largest amount of mining and quarrying material, mainly gravel.

"Most of the mines are owned by Israeli companies and operate under the permits and supervision of the legal authorities in the Civil Administration in Judea and Samaria.

"The product of mines in this region has been estimated by the Staff Officer on Mines in the Civil Administration at some 12 million tons a year, most of which is sold in Israel (some 9 million tons annually) and the rest is sold on the local market.

"The quarries in Areas A and B are all owned by Palestinians and are licensed and supervised by the Palestinian Authority (PA). Some 60% of the quarries are located in the Hebron and Bethlehem areas, providing the local consumption of gravel and, in addition, transfer some 0.8 tons annually to Israel."

On p. 78, under the subhead on "Forecasts of Mining and Quarrying Reserves," the report says:

> "**A. In Area C in Judea and Samaria:**
>
> **"The Civil Administration's staff officer for trade, industry, and mining estimated the annual gravel yield in that region at a total of some 12 million tons a year.**
>
> **"Most of the quarries are owned by Israeli companies and mainly market the product in Israel (some 74% of the yield). It is estimated that this trend will continue in the future as well.**
>
> **"Estimated reserves (active quarries and future plans) - some 360 tons.**
>
> **"Given the current level of production there, it is estimated that these reserves shall yield products in the next 30 years, assuming that no political developments should change the Area C boundaries."**

And on p. 79, the summation and assessment of Chapter C that deals with quarrying in the West Bank, it says:

> **"The main product marketed to Israel is gravel (mainly from Area C), reaching nearly 10 million tons a year. It is estimated that such quantities will continue moving to Israel in the coming years. Estimated reserves (active quarries and future plans) - some 360 tons.**
>
> **"In case changes are made in the arrangements with the Palestinians, mainly in terms of the status and territory of Area C, it is feared that the quantities of gravel might diminish, but we estimate that the marketing of the material to Israel will not cease completely."**

25. Thus, according to the Editors' Committee Document, some three-quarters of the quarried products are transferred to Israel. It should also be noted that the "local market" to which the remaining 25% of the quarries' products are transferred, according to the report authors, includes the Israeli settlements as well. Clearly, the international law that bans the establishment of settlements would not accept this approach.

26. To the appellant's best knowledge, and to complete the picture, it should be stated that all the quarries operated by respondents 3 to 13 are new; that is, they did not exist before the West Bank was occupied in 1967.

III. Exhaustion of Proceedings

27. On 3 December 2008, the undersigned contacted Respondent 2 and the Judea and Samaria Legal Adviser, on behalf of Appellant 1, the Yesh Din

organization, and demanded that all quarrying carried out by Israeli companies in the West Bank be terminated at once.

28. This step was taken after the appellant received information according to which, quarrying license and permits are give to various Israeli companies, allowing them to quarry as mentioned, while the vast majority of the quarried products are consumed inside the State of Israel and used mainly by the Israeli construction market. After the demand was made, the appellants received the Editor's Committee Document that supported the information they had and confirmed their concerns.

29. When they made the demand, the appellants clarified their unequivocal stand, according to which the exploitation of natural resources of an occupied territory by an occupying power to serve its economic needs is banned by the Rules of Occupation, and that such acts give rise the suspicion that the alleged felony of looting of an occupied territory has been perpetrated.

    A copy of the appellant's letter to Respondent 1, dated 3 December 2008, is attached and marked **appendix 4**.

30. Some 6 weeks later, on 15 January 2009, the appellant received the answer of the Judea and Samaria legal adviser (JSLA), Lieutenant Shalev Branc, that supported information the appellants had been aware of, stating, among other things that *"**as your letter noted, there are indeed active quarries in Judea and Samaria that are managed by private Israeli entrepreneurs, and a significant part of the quarried material is taken out of the region.**"*

31. Lt. Branc added:

    "***Following your request, we asked for staff work to be carried out in the Civil Administration that would map the data and examine the current policy.***

    "… As part of examining the issue, we will also look into the international law aspects that you mentioned in your letter."

    Lt. Branc's letter dated 15 January 2009 is attached and marked **appendix 5**.

32. After receiving the reply of the JSLA , the undersigned hastily filed an urgent request that all mining activities be ceased immediately pending the conclusion of that "staff work" and the examination of "international law aspects". Since JSLA officials admitted that the relevant aspects and consequences will have to be examined -- including international law issues that apply to this region, and after the appellants were amazed to hear that such an examination was never done before, the undersigned demanded that **quarrying stop at once** due to the fact that it might implicate the parties involved in the violation of an international law, at least pending the final clarification of the legality of that mining.

    The undersigned letter to the JSLA dated 15 January 2009 is attached and marked **appendix 6**.

33. This request was denied. On 8 February 2009, Lt Branc responded laconically that the issue raised is a complicated one, both factually and legally, and that no

decisions should be made prior to a thorough and serious examination of the issues. We shall address the judicial meaning of this response later in this petition.

Lt. Branc's reply dated 8 February 2009 is attached and marked **appendix 7**.

34. Well, in view of the mentioned correspondence with the representative of Respondent 2, clearly the picture is even grimmer than the appellants initially believed. It seems that the most basic legal issues have not been examined before mining licenses were granted, and still Respondents 1 and 2 found no reason to stop the mining activities that are based on permits they issued, or to even permanently suspend them until the legality of that quarrying is clarified. Instead, the appellants chose to allow that activity to continue, though as we will soon see, it is very hard to find legal arguments that justify it.

35. This petition starts below.

C. The Legal Argument

I. The normative framework: law of occupation and the rules of belligerent occupation

36. As mentioned before, the West Bank was conquered by the IDF in 1967, which is why the laws of belligerent occupation apply to the IDF activities there. These laws are anchored in The Hague Convention on laws of war from 1907 and associated regulations, on the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, and the customary instructions established in the Additional Protocols to the Geneva Conventions from 1977, and general principles of international law.

37. In the matter before us, The Hague Convention reflects customary international law and thus applies to the IDF activities in the occupied territories and is binding on the State of Israel authorities, including Respondents 1 and 2 (see HCJ 606/78 Suliman Tawfik Ayub and 11 others v. the defense minister and 2 others, PD 33(2) 113 (1979, pp. 120-121)), outlining the basic principles concerning the relations between conqueror and conquered and addresses the limitations of force of conquering power in the occupied territories.

38. Regulation 43 of The Hague Regulations establishes the general framework for the activities of an occupying force in an occupied territory, constituting a supreme rule concerning the relations between the government and the civilians in the occupied territory (in the literature, this regulation has even been dubbed "mini constitution" of occupation; in this respect, see HCJ 69/81, **Abu-Ita v Commander of IDF troops in the West Bank,** PD 37(2) 197).

39. Regulation 43 grants the occupying army governmental powers and authorities and defines the main consideration for their application by the occupying force: the welfare of the local population in the occupied territory and the principle of *maintaining the existing situation*. For the record, here is the regulation in full:

> **Regulation 43**
>
> **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**

40. On top of the law of occupation that it mentions explicitly -- concern for the welfare of the occupied population-- the interpretation of Regulation 43 added a juxtaposing requirement that follows from the fact that the law of occupation, including Regulation 43, are part of the Laws of Armed Conflicts: Observing the security interests of the occupying power. These two juxtaposing ends -- the welfare of the occupied and the security of the occupant, drive the laws of occupation and create the fabric of "legal" considerations that the occupying

power may consider when it uses governmental powers and manages the occupied territory.

41. This interpretation is threaded through this honorable court's rulings on the Israeli occupation (for an extensive discussion of the "two ends" of occupation rules see: HCJ 393/92 Jamait Askhan v Commander of IDF Troops in Judea and Samaria, PD 37(4) 785 - hereunder, the "Jamait Askan affair").

42. According to this view, the rules of occupation constitute a regime of *temporary* trust which necessitates that, among other things, any long-term alteration made in the occupied territory, inasmuch as it is permissible, shall benefit the local population (which is the population of protected civilians). Another, negative aspect of the trustee's duty are rules that **ban the occupying power from exploiting the territories under its domain for its own needs, except for (with certain restrictions) its security needs**. This is very logical, for if it were not so, the occupying force would have been encouraged to extend the period of its occupation beyond the time required which is, as noted, a minimal and temporary period or, even worse, might have encouraged states to go to war and conquer territories for needs other than defense and protection.

43. A clear example of this view is the famous ruling of this honorable court on the Jamait Askan affair, which stipulated that when a military commander employs the power of administration in an occupied territory that the rules of occupation handed to him, he must not make considerations pertaining to the economic needs of his country. We quoted this relevant passage at the onset of this petition, but we shall repeat them due to its importance:

> "The Military commander may not consider the national, economic, and social interests of his country, inasmuch as they do not impair on it security interest in the area, or on the interests of the local population, even if the army's needs are its military needs and not national security needs in the broader sense. **A territory held through belligerent occupation is not an open field for economic or other kind of exploitation**."
>
> (The Jamait Askan affair 794-795; our accentuations)

44. The legal view of occupation as temporary, as part of a necessary evil that might derive from acts of belligerency, actually binds the occupying power not to introduce long-term changes in the occupied territory and thus violate its trustee's duty. The scope of long-term changes is a debated issue, but even those who maintain that certain changes are permissible impose clear restrictions on the scope and depth of those changes, primarily the sine qua non view according to which all long-term changes are only legal if they serve to benefit the protected civilians in the occupied territory. **This is the realization of the supreme principle of the Laws of Occupation as established and anchored in The Hague Regulation 43.**

45. Consequently, the law of occupation accord the occupying power governmental, administrative, and managerial powers, but they do not make it sovereign. The occupier must use its powers, which he holds *temporarily,* in a manner that upholds its duty according to regulation 43 "to ensure… the public order and safety" of the occupied population, and to uphold the security interests of the occupying power.

II. Rules Pertaining to the use of Public Property in an Occupied Territory

46. As noted above, by force of the law of occupation, the occupying power assumes all management and administrative authorities, and thus has the power, and even the duty, to manage the public property of the occupied territory.

47. One of the principles that follow from the above is that while an occupying power may not exploit the public property it manages, or the fruit they yield, while performing its duties according to the laws of occupation, **it may not destroy these properties, assign ownership to others, or exhaust them** either. This principle derives from the "Occupation Constitution" which is regulation 43, which outlines the limitations of force for the occupying power, but also from specific regulations that address the occupier's powers concerning public properties.

48. The Hague Regulation 55 (hereunder "Regulation 55") explicitly states:

> **"Art. 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. <u>It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."</u>** (Accentuations added, M.S., S.Z., A.L.)

49. As we had noted before, the occupying power is merely a trustee of the territory that it holds in deposit **<u>only temporarily</u>**, and enjoys merely a <u>usufruct</u> status with regard to the property. These rules allow using that property without exhausting or damaging it:

> *"**Usufruct** – A right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time"*
> (**Black's Law Dictionary** (7th Edition) P.1542)

50. Since the presence of the military commander on that ground is temporary, he must avoid introducing long-term changes and, as in any case of trustees' duty, he must administer the capital according to usufruct rules. Therefore, **the administration of public property and use of its fruit by an occupying power is allowed, but damaging the capital of those properties is banned.**

51. American scholar J. Stone addressed the essence of that trustee duty according to Regulation 55, explicitly stipulating the following concerning the quarrying of ore:

> *"The usufructuary principle forbids wasteful or negligent destruction of the capital value, whether by **<u>excessive cutting or mining or other abusive exploitation</u>**, contrary to the rules of good husbandry."*

J. Stone, **Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law** (1954), at p. 714. Accentuations added, M.S.m S.Z., A.L.)

52. While banning harm to the capital value of the properties, The Hague Regulations explicitly describe the use an occupying force may make of government property and for what purpose. The opening paragraph of Regulation 53 states:

> **"Art. 53**
>
> **"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."**

53. Clearly, Regulation 53, while allowing the occupier certain use of the occupied state's property, it also restricts such use to properties that may assist in the war effort, and to that end only.

54. Article 23 of the 1907 The Hague Regulations bans the use of property found in an occupied territory by the occupier, except when they are imperative for its military purposes:

> *"Art. 23.*
>
> *"In addition to the prohibitions provided by special Conventions**, it is especially forbidden -** […] **(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."***

55. Not only The Hague Regulations follow the said outline, banning damage to property except under the minimal exception of imperative military means. The Fourth Geneva Convention includes a similar rule:

> *"Art. 53.*
> *Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited,* ***except where such destruction is rendered absolutely necessary by military operations."***

56. As a result of the clauses cited above, which address the use of public property by an occupying force, a customary rule has been created. The study of the International Committee of the Red Cross on the Customary International Humanitarian Law that was recently published confirmed that indeed there is a rule, that has the status of a customary international law, according to which immovable public property must be managed according to the rules of trust (administration), except when their exhaustive or otherwise damaging use is required due to an "imperative military necessity."

> *Rule 51. In occupied territory:*

*(a) movable public property that can be used for military operations may be confiscated**;***

(b) immovable public property must be administered according to the rule of usufruct; and

(c) private property must be respected and may not be confiscated;

Except where destruction or seizure of such property is required by imperative military necessity.

J.M Henckaerts and L. Doswald-Beck**, <u>CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I: Rules</u>** (Cambridge, 2005), at pp.178-179.

57. The ICRC file on customary principles of international humanitarian law further elaborates, adding that this is an ancient principle dating to the 1863 Lieber Code (President Lincoln's war instructions to the US Army soldiers during the American Civil War, clause 31).

58. That principle was repeated in every document that collected the instructions of humanitarian law. Thus, the 1874 Brussels Declaration on the rules and customs of war, one of the oldest statements of modern humanitarian law, established the principle that an occupying force is only an administrator of public property and must use them according to rules of usufruct (article 7):

> *"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"*

59. The instructions of this ancient rule are, therefore, crystal clear: When dealing with immovable property, it must be managed according to the **<u>rules of trust</u>** -- namely, in a way that allows the occupier to manage and yield fruit from them for the benefit of the usufruct (the citizens of the occupied territory), or for its security needs, and in any event must protect them while observing the rules of good husbandry.

60. In summary: public property, government property, state lands, and other state-owned properties when under the administration of an occupying regime, that regime must make decisions that concern them which in its best judgment shall help it carry out its assigned duty to "restore and ensure the order and public life" in the occupied territory, all under the rules of usufruct. **Use of property in a way that damages them is forbidden, and certainly it is absolutely forbidden to use such property for the benefit of the occupying power and for non-security needs.**

61. It should be noted that this is the official stand of the State of Israel concerning the relations between Regulation 55 and Regulation 43; a stand recently expressed in its preliminary reaction to HCJ 10611/08 <u>The Maale Adumim Municipality and others Vs the Commander of IDF Troops in Judea and</u>

Samaria and others, concerning the placement of waste in landfills in the West Bank by local Israeli authorities from within and out of the West Bank.

62. This is how the state addressed the relations between regulations 55 and 43:

> "60. Without delving into the specific issues that deal with the precise interpretation of that regulation, it is clear beyond doubt that even **exercising the powers under Regulation 55 is subject to the basic principle that pertains to the powers of the military commander of an area under belligerent occupation, and follows from Regulation 43, according to which that region is not open for economic exploitation.**
>
> "Thus, all the powers of a regional military commander may be used for security interests or the civilian needs of the population of that territory, including the power according to Regulation 55. The Civil Administration's policy was meant to realize this basic principle (…)."

Cited from the state's preliminary response to HCJ 10611/08 The Maale Adumim Municipality and others Vs the Commander of IDF Troops in Judea and Samaria and others, dated 22 February 2009, which is attached in full to this petition and marked **appendix 8**.

III. Exploitation of Natural Resources in an Occupied Territory

63. Having laid the normative foundation (belligerent occupation laws or rules of occupation) and qualified the narrower normative foundation (rules of use of public property in occupied territory), it is now time to examine, according to the outlined principles, the principles that specifically pertain to the use of natural resources in an occupied territory by an occupying power.

64. In the matter before us, the use made of quarries in the West Bank, under the management of Respondents 3 to 13, is not regular use made of immovable property, such as leasing or renting, that yield. As is known, quarries are expendable assets; hence, quarrying is not an operation that cultivates fruit, but actually chops down the tree -- i.e., harms the capital.

65. Therefore, mining creates two problems: First, the question of whether mining of natural resources in an occupied territory is even allowed because, as noted, such acts exhaust the capital; hence it constitutes damage to the property, not the use of fruits. Second, **the mining in question yields product that does not exclusively serve to the local population, but almost exclusively serves the population of the occupying power, and, in any event, Israeli companies benefit from every business transaction, even in the few cases that the product is sold to a Palestinian buyer.**

66. Let us examine each of the above issues:

1. Exploiting Natural Resources - Harming Their Capital

67. The mining, which is the subject of this petition, is perpetrated in state-owned lands, and even if they had been carried out on private lands, natural resources are public property according to the property rules that prevail in the region. Therefore, there can be no dispute that extensive quarrying will eventually exhaust the limited natural resource, which is a communal public property of the occupied Palestinian population.

68. Indeed, many believe this is so and maintain that the *temporary nature* of the occupation and the principle of *maintaining the existing situation* it contains require the imposition of strict restrictions on activities such as using finite natural resources, which might create *permanent* changes in the occupied territory and cause irreversible damage to natural public property (for a discussion of the issue, see: Stone, **Legal Controls of International Conflict** (1954), p. 714).

70. At the same time, there exist more "lenient" interpretations, certainly in the context of long-term occupation, that acknowledge the option of a legal **limited** use of natural resources in an occupied territory. These views also subject that use to the strict and unequivocal rules of occupation; namely, observing the administrative trust and adhering to the usufructuary rules. Dufresne, for example, addresses the gap between the permission to use the fruit of public property and the ban on exploiting of non-renewable ones, offering a solution (our accentuation):

> *"[U]usufructuary powers are patrimonial powers of a limited ambit: They usually entail the power to use and to collect the fruits generated by the property, and the correlative obligation to preserve the capital thereof.* ***This is an impossible combination in relation to non-renewable resources. The ability to use the proceeds of exploitation inevitably entails the consumption of the capital.*** *In such a situation, it seems most reasonable to apply a principle of continuity and allow for exploitation to continue at the pre-occupation level."*
>
> Robert Dufresne, "Reflections and Extrapolations on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case", 40 **N.Y.U. J. Int'l L. & Pol.** 171, Special Issue, 2008, at p. 200.

71. The author maintains that the heart of the solution is *the principle of continuity*, mainly referring to the continuation of policies and practices that prevailed before the occupation, **and bans the opening of new quarries.** Support for the principle of continuity can be found in the literature and practices of states:

- Edward R. Cummings, "Oil resources in occupied Arab territories under the law of belligerent occupation", **Journal of International Law and Economics**, vol. 9 (1974), pp. 533-593;
- Antonio Crivellaro, "Oil operations by a belligerent occupant: the Israel-Egypt dispute", **The Italian Yearbook of International Law**, vol. 3 (1977), pp. 171-187;

- United States Army Field Manual (F. M. 27-10) para. 402;
- United Kingdom Manual of Military Law, para. 610;

72. We must not forget that this principle is supposed to primarily pertain to the general rules of occupation and follow the restrictions under such a legal regime, primarily the **regime of trust.**

73. Against the backdrop of the rules of belligerent occupation, the restrictions on the principle of continuity are expressed in several ways: first, the occupying power is restricted to the de-facto policy and rate of exploitation of the occupied territory that pertained before it occupied it. Second, under the principle of continuity, the occupying power is restricted just as it is barred from expanding mining activities and from developing plans that did not exist before it occupied that territory. These restrictions indeed minimize the occupier's ability to develop the territory and exhaust its economic potential. Dufresne says:

> *"While empowering in the sense that it goes beyond mere preservation and non-alienation, a principle of continuity is simultaneously restrictive in two ways. First, an occupant is thereby limited in its exploitation prerogatives by the de facto or regulatory pre-occupation exploitation pace. In corporate parlance, business-as-usual sets an upper limit to exploitation. The second limit is that the principle of continuity covers exploitation schemes existing at the beginning of the usufruct, thus limiting the occupier's capacity to develop the full potential of the territory."*
>
> Dufresne, "Reflections and Extrapolations on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case," **Ibid**, at p. 200.

74. In summary: The question of whether an occupier may allow mining for natural resources in an occupied territory is disputed. The minimalists say that the *temporary* nature of the occupation and the *Principle of maintaining the existing situation* call for the conclusion that quarrying should not be allowed because it tantamount to the destruction of the property. The maximalists maintain that the use of natural resources in an occupied territory is possible under the restriction of *the principle of continuity* - namely, in a way that continues the policy and pace of resource exploitations that existed before the occupation, without expanding the type and regions of quarries.

2. Exploiting Natural Resources - Not To Serve the Needs of the Occupied Power and Population

75. As elaborated on in the factual part, the natural resources mined in the quarries mentioned in this petition do not serve the military needs of the IDF commander in the West Bank or the needs of the protected population, but primarily serve the economic needs of the State of Israel and of private Israeli corporations that were lucky enough to obtain quarrying permits. This is true for most of the quarried products, and often to all of them.

76. The Editor's Committee Document proves that the quarrying was meant to satisfy the needs of the Israeli construction and road building needs. Such considerations, which pertain to the needs of an Israeli economic branch, are **illegal considerations** that stain the entire quarrying enterprise with a stain of illegality.

77. Unlike in the case of the permissibility of mining for natural resources in an occupied territory as a rule, in this matter -- quarrying for natural resources for the benefit of the occupying power -- the scholars are not disputed at all. It is agreed by all of them that not only is this a violation of the international laws of occupation, but many of them even believe that under certain circumstances, this constitutes the war crime of pillage.

78. A resolution of the 1943 London International Law Conference states clearly:

> *"The rights of the occupant do not include any rights to dispose of property, rights, or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies. This status of the occupant is not changed by the fact that he annexes by unilateral action the territory occupied by him"*

(A resolution of the London International Law Conference of 1943, quoted in full in Von Glahn, The Occupation of Enemy Territory (1957), pp. 194-195).

79. Namely, the occupant does not have the right to use property or to other rights he manages in the occupied territories for purposes **other than maintaining public order and safety in the occupied territory**.

80. This assertion was reiterated by the International Military Tribunal that judged Nazi war criminals in Nuremberg:

> *"… Articles 53, 55 and 56* [of The Hague Regulations, M.S., S.Z.] *dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear."*

Trial of the Major War Criminals before the International Military Tribunal, vol. 1 (1974), pp. 238-239, 6 F. R. D. 69, 120. **Annual Digest and Reports of International Law Cases**, vol. 13 (1946), p. 203 at pp. 214-215

81. Many scholars have recently addressed the issue of exploitation of natural resources in occupied territories mainly in view of economic operations that include ore mining and oil drilling in occupied territories in Iraq. A review of the literature on the issue reveals that there is a wall-to-wall agreement that violating the duty of trustee and the economic exploitation of a territory by an occupying power is banned and contradicts the international law.

82. For example, Prof. Eyal Benvenisti, on of the world's leading experts on the law of occupation, addressed this issue in a paper he wrote for the American Journal of International Law, one of the leading journals on this matter, and referred to the issue of mining for resources and the decreed duties of the occupying forces in Iraq as entailed by regulation 55. In this article, the author referred to the letter that the occupying powers sent to the UN Security Council, pledging that the operation of the Iraqi oil industry shall be carried out so as to observe the interests of the Iraqi people and that **all** the proceeds made will serve the Iraqi people and will be reserved in a fund that only a recognized representative of the Iraqi people would be able to use.

> *"All export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board . . . in order to ensure transparency, [and that]* ***all proceeds from such sales shall be deposited into the Development Fund for Iraq*** *until such time as an internationally recognized, representative government of Iraq is properly constituted."*
>
> (in Eyal Benvenisti, "Agora (continued): Future implication of the Iraq conflict: Water Conflicts During the Occupation of Iraq", 97 American Journal of International Law 860, October 2003, at p. 864)

83. Please pay attention to the fact that, according to pledges made by the Iraq occupying powers, the production and sale of oil is conducted under the supervision of an external body that reports to an international monitoring committee, all to guarantee that the occupation law of trustee regime is not violated.

84. Prof Benvenisti believes that this one-sided pledge coincides with the legal duties to which occupying powers are subject, which commit them to act in trust to benefit the Iraqi people. In his article, he adds:

> *"This paragraph implies that the occupant is fully entitled to utilize public resources provided such use benefits the lawful owner; namely, the people of Iraq. This is* ***consonant with the***

> ***traditional reading of Article 55 of The Hague Regulations, and ends the debate over whether oil could be exploited by the occupant and, if so, for what purposes.***"
>
> Benvenisti, **Ibid,** at pp. 863-864.

85. The occupier's duties re the occupied population and its properties do not conclude with its obligations toward privately owned property, but also, and even more so, pertain to public property in the occupying power's hands, that is -- property held in trust by that power.

86. American scholar Jordan Paust recently addressed the ban on "privatizing" the occupying power's duty to administer public property, siding with the view that *the principle of continuity* dictates the pace of mining (and drilling) for the natural resource:

> *"With respect to Iraqi oil and oil production and distribution facilities, the occupying power must safeguard the* ***oil*** *and must administer extraction processes like a trustee for the Iraqi state or people.* ***Thus, an occupying power cannot engage or participate in "privatization" of Iraqi oil or the state-owned oil production and distribution industry, and must not tolerate rates of extraction beyond prior "normal" rates of extraction or excessive fees or profits by others administering such properties. Similarly, the occupying power must not contract with private companies in such a manner as to allow them to engage in the same sorts of prohibition."***
>
> Jordan J. Paust, "The US as an occupying power portion of Iraq and special responsibilities under the law of war," 27 **Suffolk Transnational Law Review** 1, Winter, 2003, pp. 12-13.

87. The International Court of Justice in The Hague, has recently addressed the issue of using mining products obtained in an occupied territory for purposes other than serving the needs of the occupied territory and its civilians. A verdict it handed down in the case of **The Democratic Republic of Congo v. Uganda** addressed, among other things, the issue of the duties of the occupier (Uganda in this case) re the use of natural resources found in the Ituri region, which Uganda conquered and held trough belligerent occupation. The resources in question (diamonds, gold, and more) were mined by private bodies that often cooperated with military men who sold them.

> **CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO,** *Democratic Republic of the Congo v. Uganda* [19 December 2005].
> Available at: *http://www.icj-cij.org/docket/files/116/10455.pdf*

88. This verdict leaves no room for interpretation concerning the right and wrong uses of natural resources in an occupied territory: It is absolutely forbidden to use natural resources from an occupied territory for the needs of the occupying

power. In fact, the ban applies to any form of use that does not benefit the occupied state and its citizens.

89. In its verdict, the court elaborated on the international, general, and reparation responsibility of Uganda because it had violated its duties as an occupying power and because of its responsibility for the exploitation of Congo's natural resources. This illegal exploitation, the ICJ established, even directly violates regulation 43 concerning the observance of public order, stating:

> *"250. The Court concludes that it is in possession of sufficient credible evidence* ***to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of The Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory."***

90. Thus we learn that granting permission, explicitly or by implication, to mine for natural resources, using them, or otherwise exploiting them in a way that does not benefit the occupied population is a violation of regulation 43, which necessitates protecting the territory, and constitutes an infringement on public order and government.

91. It should be noted that Uganda was found internationally responsible for the said violations through misdeed because it did not do enough to prevent the exploitation of natural resources in the occupied territory of Congo. In the case before us, the respondents bear direct responsibility due to their deeds, not misdeeds.

92. In conclusion, while there is a certain debate on whether an occupying regime may even allow the mining for natural resources in an occupied territory, and while the maximalists say it may be done under the restrictions of the *principle of continuity*, there is no argument that it is absolutely forbidden to use natural resources from an occupied territory to benefit the occupying power, or any other body that is not the occupied people.

IV. Israeli Rulings [Adjudication]

1. Interpretation of Regulation 55

93. The appellants will claim that the Israeli ruling also necessitates the conclusion that the quarrying activity, subject of this petition, is illegal and must stop.

94. This honorable court addressed Regulation 55 in the past in a way that, we believe, coincides with the aforementioned interpretation thereof. The honorable court established, for example, that sales cannot be part of the management and fruit production from a property under the management of the occupying government (see HCJ 9717/03 Naale, an IAI Workers Association for Settlement in Samaria et al. v. the Judea and Samaria Civil Administration's Supreme Planning Council et al., PD 78(6), 97 [14.6.2004], p. 104 (hereunder, "the Naale affair" to which we shall refer extensively later on; and the case of Al-Nazar v. IDF Commander, PD 36 (1) 701, p. 704 (hereunder, "the Al-Nazar affair")). This assertion is, naturally, justified by the ban on introducing long-term changes in property held in trust that do not benefit the occupied population.

95. In the aforementioned Al-Nazar affair, the honorable court addressed this issue making the following unequivocal assertion:

> *"Regulation 55 further adds and elaborates on the practical duties of the military government, stating:*
>
> *'It must safeguard the capital of those properties, and administer them in accordance with the rules of usufruct.'*
>
> *"Thus,* ***it is the first respondent's duty to safeguard the properties.*** *That is to say that Regulation 55 was not only made to declare that the rights of the military government are relatively restricted and that the continuity of government does not entail a real continuity of ownership, and that its wording does not merely grant the right to administer and produce fruit,* ***but it entails the duty to safeguard and maintain the property.***" (The Al-Nazar affair, ibid, p. 704; accentuation added: M.S., S.Z., A.L.)

96. The question of whether mining for natural resources is allowed by the rules of occupation was raised in HCJ 9717/03 Naale v. Planning and Construction Committee. The appellants there, residents of the settlement of Naale, filed an objection to the construction of a quarry near their houses. They based their claim on regulation 55, according to which an occupying power may administer and produce fruit from public properties in an occupied territory, but the establishment of a quarry does not coincide with the limited permission to manage and produce fruit.

97. Addressing the Naale petition, the HCJ established that the term "fruit production" as interpreted in the aforementioned Al-Nazar affair indeed does not allow the kind of use that changes the occupied territory for good. In the

Naale affair, the honorable court equated the mining activity (whose result would be the total exhaustion of the resource) with the act of building a road because in both cases, the activities change the shape of the land irreversibly. This comparison allowed for the implementation of the test of "benefitting the local population," as established in the Jamait Askhan affair.

98. As a final move on the Naale Affair we shall use the HCJ instruction in 256/72 Israel Electricity Company (IEC) v. the Defense Minister, PD 27 (1) 124, which established that the "settlers" may be viewed as "local population" because, judging from the material before it, the court ruled that the product of the said quarry will be also used for construction works in the Judea and Samaria settlements, and thus the establishment of that quarry meets the test of "benefitting the local population," and is therefore allowed.

99. With all due respect, we disagree with the ruling in the IEC case and reject the claim that the civilians of an occupying power who settle the occupied territory contrary to the clear instructions of humanitarian law are entitled to the protection accorded in The Hague Regulations and the Geneva Convention when they address residents of occupied territories. Regulation 55 was meant to protect the interests of the community of occupied civilians, not any and all persons found in the occupied territory, and certainly not persons who are there in violation of the international law that applies there.

100. In any event, the Naale ruling, inasmuch as it addresses mining for natural resources for the benefit of "the local population" (however that population is defined), is irrelevant in our case because in the quarries that are the subject of this petition, the quarried building materials serve the **population of the State of Israel** proper and there is no dispute that it is not "the local population."

101. Finally, we shall once again mention here the state's position as it appears in its reaction dated 22 February 2009 to the aforementioned HCJ Petition 10611/08 concerning the placement of waste in landfills. In that petition, the state mentioned a legal opinion of the State Attorney's Office concerning the feasibility of the construction of a cemetery for Israeli Jews in the West Bank:

> *"… It has been found that fundamental investments that could introduce a permanent change, which might remain even after the termination of the military government, are allowed if they are reasonably necessary for the needs of the local population […]*
>
> *(C) Indeed, The Hague Regulation 55 gives an occupying power the right to administer and produce fruit from public properties in an occupied territory. Nevertheless, while it may have this [right] to "eat the fruit," it is also under obligation and responsibility to safeguard the capital, and thus fundamental investments that might introduce permanent changes are banned, except when they are required for the needs of the local population […]."*
>
> Taken from the State's preliminary reaction to HCJ 10611/08, Appendix 8 above, Clause 61.

102. In summary, even the ruling of the honorable HCJ acknowledges the common interpretation of Regulation 55, which establishes that an occupier is a trustee

of public properties in the occupied territory and bans their exploitation in a way that does not safeguard them. The honorable HCJ indeed viewed the settlers population as "local population" for which the use of natural resources is legitimate -- where, in our humble opinion, it is wrong -- this, however, has no implications concerning this petition because it addresses the exploitation of natural resources by the occupying power itself.

2. Order No. 59

103. The legislative powers of the military commander of a region under belligerent occupation are narrowly assigned to him and meant to safeguard the public order and security. As a rule, according to The Hague Regulations and by the power of their view of occupation as a temporary event, the occupying power is required to make restricted use of its powers and must respect the customary rules, unless this is absolutely impossible for him. This is the legislative-operative outcome of the aforementioned The Hague Regulation 43.

104. By the power of this Regulation 43, and by the force of the general authority of the military commander as the party practically administering the occupied territory, IDF Order No. 59 was introduced. This order, as mentioned in the factual section above, seems to serve as the legal foundation for the granting of permits and concessions to quarry in that region, though it **does not accord ownership but only the right to hold in trust**, and thus it coincides with The Hague Regulations and, in any event, there may not be a contradiction between The Hague Regulations and orders issued by the force of these regulations.

105. In other words, the order is merely a legislative-administrative codification that anchors the duties of the occupying power toward the properties of the occupied territory. Order No. 59 indeed placed the management of government properties in the hands of the military government, but at the same time, the government does not have the power to sell it or otherwise transfer ownership of it. Thus the order coincides with the military government's duty, according to Regulation 55, to **administer** the immovable properties that had belonged to the state that ruled that territory prior to the establishment of a military government, as the HCJ already stipulated in the past:

> *"Order 59 is an expression of the authority and responsibility of the first respondent for the government property, and constitutes the realization of his responsibility."*
>
> (HCJ 285/81, **Al-Nazar v. Judea and Samaria Commander**, PD 36(1) 701, p. 707; see also, Tel Aviv District Court 975/95 **Ahuva Galmond v. Isaac Bardarian,** (2004) 8261 , 8258 ,(1)2004 תק-מח; Jerusalem Magistrates' Court 8960/06 **Gershon Bar-Kokhva v. the State of Israel (Israel Police Hebron District)**,.(2007) 14105 , 14102 ,(1)2007 תק-של.

106. Determining the powers of the officer in charge, article 3 of the order stipulates the following:

*"3. The officer in charge shall **administer** the government property of which he **took possession** and, without detracting from the generality of the above, shall be entitled to:*

1. Employ any person that the officer established the employment of which is required for the administration of the government property and under terms he shall stipulate;

2. Carry out any deal associated with administering the government property;

3. Carry out any deal or activity, or issue an instruction as he sees fit for the performance of this order;

[…]

A copy of Order 59 is attached and marked **appendix 1.** Accents added.

107. The definitions of "property" and "government property" also include ores and concessions to ores, as may be gathered from the definitions clause.

108. The definition of the term "administering" includes the following operations: *"using, manufacturing, operating, producing, processing, buying, selling, handing, transporting, leasing, renting, or any other action associated with one of these, or safeguarding, operating, and maintaining the property."* Ruling on the aforementioned **Al-Nazar** and **Naale** Affairs, the court established that Contract of Sale cannot fall under the definition of administration, management, and production of fruits (see, **Al-Nazar** affair, p. 704; **Naale** affair, Clause 6 of the verdict). Furthermore, as can be seen above, it should be noted that according to the officer in charge of government property, the contractual sale operation still falls under the definition of "administering," in explicit contravention of the court's ruling.

109. Clearly, in a normative scaling of the instructions of international humanitarian laws, including and mainly The Hague Regulations that determine the legislation powers in an occupied territory, and practical legislation, The Hague Regulations take precedence. Hence, Regulations 55 and 43 are normatively more prominent than the legislative powers that follow from them. Furthermore, as mentioned above, Regulations 43 and 55 maintain a relation of *Lex Generalis and Lex Specialis*.

110. The appellants, therefore maintain that the performance of certain activities mentioned in Order 59 as part of the administration of government property -- such as sale or, as in the case before us, granting mining rights that do not benefit the protected population -- would violate the trustee duty that follows from Regulations 43 and 55.

111. Hence, even if in theory, the wording of Order 59 seems to allow for a broad spectrum of operations to be performed on government property, the order should be considered restricted by the customary norms of international humanitarian law, including Regulations 43 and 55.

112. This was also the unequivocal stand of the instructive verdict in the Jamait Askhan affair, which restricts the considerations of the military commander to matters that benefit the occupied population and security issues only.

V. International Criminal Law: Exploitation of Natural Resources in an Occupied Territory and the Crime of Looting

113. The violation of Hague Regulations and the rules set in the Geneva Convention that ban the use of natural resources of an occupied territory might deteriorate to the level of the criminal act of pillage.

114. Pillage is an ancient crime and every legal codex that ever dealt with the laws of war banned it. The prohibition of pillage is found in the Libber Code (1863), the Brussels Declaration (1874), The Hague Convention (1907), the Geneva Convention (1949), and the Rome Constitution of the International Criminal Court (1998) that constitutes a basic foundation of the laws of warfare.

115. The Crimes of pillage and looting were the basis for criminal law even during the Nuremberg Trials (needless to say that there is no room for comparison, God forbid, between the practice addressed in this petition and the acts of which the defendants were accused there, and are only mentioned here for the sake of the deliberation of the judicial rule.) In the Krupp Trials, industrialists who were a part of the Nazi war machine were put on trial for the role they played in crimes of war and crimes against humanity perpetrated by the Nazi regime. One of the charges included in the charge sheets addressed the looting of natural resources that were found in areas the Nazis occupied. The Nuremberg prosecutor charged that the industrialists' use of the resources was meant to serve private bodies and had nothing to do with the war effort. The crime of looting was defined then as one of the crimes against humanity, and six of the 10 defendant were found guilty of it.

116. In its 1946 ruling, the tribunal established that the use of natural resources from an occupied territory for purposes other than security needs or the welfare of the occupied population is a crime against humanity (in the Rome Constitution, pillage is classified as a crime of war). The tribunal ruling was based on the instructions of humanitarian laws concerning the treatment of public property in occupied territories, which at the time comprised of only The Hague Regulations. That ruling teaches us that (our accentuation):

> *"[h]aving exploited, as principals or as accessories, in consequence of a deliberate design and policy, territories occupied by German armed forces in a ruthless way**, far beyond the needs of the army of occupation and in disregard of the needs of the local economy**."*
>
> *[…]*
>
> *"Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner."*

117. Indeed the currently customary legal view is that a combined violation of Regulations 23(7), 43, and 55 might establish an international, personal

criminal liability of war crime such as looting. In his article, scholar Lundberg claims:

> *"Three other articles of The Hague Convention also support the argument that resource plunder violates the laws of war and is thus prosecutable as a criminal offense under the ICC. First, Article 23(g) limits the justification of military necessity. Second, Article 43 requires an occupying power to enforce pre-existing local laws, which reasonably includes natural resource exploitation regulations and laws protecting private property rights. Third, Article 55 employs the principle of usufruct to severely restrict an occupying force's ability to exploit a territory's natural resources.* ***Taken together, these three articles help define the crime of resource plunder and set the stage for its prosecution in later tribunals."***
> (Accentuations added, M.S., S.Z., A.L.)
>
> Michael A. Lundberg, "The Plunder of Natural Resources During War: a War Crime (?)", 39 **Georgetown Journal of International Law** 495, Spring, 2008, at pp.513-514.

118. The constitution of the International Criminal Tribunal for the former Yugoslavia (ICTY) defines the felony of looting under Clause 3(E) and is interpreted as "the destruction or negation of private or public property that belongs to institutions or persons who belong to the other side of the conflict."

119. The ICTY clearly stated:

> *"In this connection, it is to be observed that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain,* ***and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory****"*
>
> (ICTY Judgment, *The Prosecutor v. Zeinil Delalic and Others*, IT-96-21-T, para 588)

120. The Rome Constitution, which established the International Criminal Court, included the destruction of enemy property within the framework of international crimes of war under Clause 8(2) (B), which states:

> *(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (ICC)*

121. The Rome Constituting further lists the felony of looting under Clause 8(2)(B)(XVI).

122. All of the above show that while the international law that bans the use of natural resources in an occupied territory by the occupier might lead to international liability, it also consists an international criminal felony that might be viewed as a crime of war.

VI. International Human Rights Law

123. Beyond violating the humanitarian law by the occupying power, continued quarrying also violates the international human rights law to which Israel is committed as an occupying power that exercises its powers in a territory that is under its effective domination.

124. As we shall soon see, the international human rights law states that every nation entitled to self-definition has the right to determine the manner in which it would use the national-natural resources found within its territory. The appellant maintains that the conduct of the respondents, as it emerges from this petition, raises a real fear of a fatal and irreversible infringement of these rights.

1. Application of international human rights laws in territories under belligerent occupation

125. The international human rights law includes, among other things, the UN International Covenant of Civil and Political Rights (1966) and the UN Covenant of Economic and Social Rights (1966) which Israel co-signed and ratified in 1991. In the past, the State of Israel expressed its stand before international bodies and in this distinguished court, claiming that this legal field applies only within the boundaries of a state and only in peace times.

126. The appellant does not accept this stand, which does not coincide with the goal and purpose of the Human Rights Covenants ("goal and purpose" being a primary interpretational principle of international law -- see Article 31 of the Vienna Convention on the Law of Treaties). The international community also does not accept this stand of the State of Israel, and all the UN bodies that work for the enforcement of the Human Rights Covenant have reiterated this stand time and again in their reports.

127. The ICJ in The Hague -- which this honorable court has recently established that it serves as the supreme judicial body in international law -- which is why its interpretation of this law and its rules should be given their full appropriate weight (see HCJ 7957/04 **Zahran Yunes Mahmad Maraba et al. v. Israel's Prime Minister** et al. [verdict dating 15 September 2005, Clause 56 of the verdict of Court President (Ret.) Barak] -- established in two advisory opinions that human rights laws apply also within the laws of armed conflict in general and rules of occupation in particular:

> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ADVISORY OPINION OF 9 JULY 2004**, I. C. J. Reports 2004,* **p.** *136*, at pp. 177-181.
>
> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996**, I.C.J. Reports 1996***, p. 226, at p. 240.

128. These opinions established, beyond all doubt, that human rights laws are not suspended in a state of belligerency, but actually apply in full force, under the given circumstances. The ICJ's view on the separation fence particularly

examined the application of the covenants in the West Bank and the duties of the State of Israel in light of its international commitment, and reached the obligatory conclusion that being the sole sovereign power in the region, Israel is obligated to observe the international human rights of the Palestinian residents.

129. This unequivocal ruling joins a series of decisions by the European Human Rights Court, which established the test of "effective domination" as determining the geographic boundaries of the application of the European Covenant on Human Rights and Basic Liberties in terms of a sealed society. Those resolutions include, among other things:

> *Loizidou v. Turkey* (Preliminary Objections), Decision of the 23rd of February 1995, Paragraph 62.
>
> *Behrami v. France, Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01 (unreported), 2 May 2007)

130. On top of these, we should add verdicts recently issued by the British House of Lords, which determined that international human rights laws to which the United Kingdom is committed apply also within the boundaries of the occupied territory ruled by it and its soldiers, as in Iraq:

> **R (Al-Skeini) v Secretary of State for Defense** UKHL 26, [2007] 3 WLR 33 [13.6.2007] available at: http://www.parliament.the-stationery-office.com/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf
>
> **R (on the application of Al-Jedda) (FC) v Secretary of State for Defense** UKHL 58, [12.12.2007], available at: http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf

131. All of the above shows that the international human rights law applies in this petition as well, and the bans against impairing on the basic rights of the Palestinians follow from it. It should be noted that in the aforementioned **Maraba** affair, this honorable court did not reject the application of the covenants and determined that, for the purpose of the verdict there, the application of these covenants is assumed (see HCJ **Maraba**, ibid, Clause 75 of the verdict by (ret.) President Barak).

132. Furthermore, there is and there could not be any doubt that Israel has effective **unique and exclusive** dominance over Areas C where the Israeli quarries operate. We shall now examine the infringement of the rights and its scope.

2. The Principle of "Permanent Sovereignty" Re Natural Resources

133. The Principle of Permanent Sovereignty of Peoples and Nations over their Natural Resources started developing in the 1950's in the international law.

This principle constitutes a part of the right for development that has been acknowledged as a collective right of nations and communities.

134. The first document that defined this right was UN Resolution 523(VI) dated 12 January 1952, which was followed by Resolution 626(VII) from 21 December 1952, where it stated that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations."

135. In 1958, the United Nations established the Commission on Permanent Sovereignty over Natural Resources that, among other things, engaged in studying and promoting the issue. The Commission's work led to Resolution 1803(XVII), dated 14 December 1962, which is the Declaration on Permanent Sovereignty over Natural Resources, whose first clause states:

> *"The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned"*

136. Art. 7 of the declaration established that a violation of a nation's right to permanent sovereignty over its natural resources conflicts with the principles of the UN Charter.

137. This declaration has been extensively cited in international rulings and arbitrations. See for example:

- Texaco overseas petroleum company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Arbitration Award), International Legal Materials, vol. 17 (1978), p. 1 at pp. 27-30
- Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic (Arbitration Award), International-Legal Materials, vol. 20 (1981), p. 1 at pp. 100-1-03
- Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F. 2d 875 (1981) at pp. 889-892;
- Sociedad Minera el Teniente S.A. v. Aktiengesellschaft Norddeutsche Affinerie, 19 Aussenwirtschaftsdienst des Betriebs-Beraters [AID] 163 (1963)

3. Collective Rights Pertaining to Use of Natural Resources

138. The principle of permanent sovereignty over natural resources found its way into the two most central covenants pertaining to international human rights law, which were signed in 1966 (The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights) which share an article that establishes the following (our accentuation):

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

139. This article covers several layers, two of which are pivotal for us: **The first** is that all nations have the right to hold and decide what is to be done with their wealth and natural resources, and that peoples must not be deprived of their means of subsistence, which naturally include resources and ore in their territory. **The second** layer, found in the third clause, says that it is the duty of states that govern territories they hold in trust (including occupied territories) to promote the realization of this right to hold and administer those resources.

140. The fundamental rationale of this article is clear: Without an economic ability, nations would not be able to realize the other rights contained within these covenants. The realization of economic resources found on the territories of the native residents was meant for them, not for colonialist exploitation. With them, they would be able to shape their economic image as part of their self-determination, which is a fundamental right in international law.

4. Violation of the Permanent Sovereignty Principle and the Communal Right to Exploit Natural Resources

141. As we have seen, the international human rights law views the sovereignty of a nation that occupies a territory over its natural resources, the right to shape its future, economic, and employment shape, as permanent basic right. The international law orders the foreign occupier of a territory, who holds it in trust, to respect that right and assist in its realization. This view is repeated in numerous UN General Assembly and Security Council resolutions (after the declaration in UNGA Resolution 1803):

UNGA Resolution 3016 (XXVII), 18 December 1972, § 1;

UNGA Resolution 3175 (XXVIII) 17 December 1973, § 1;

UNSC Resolution 330, 21 March 1973;

UNGA Resolution 3336 (XXIV) 17 December 1974

142. The Palestinian people has a communal right to the natural resources in the West Bank. This is not truly disputed by international law experts. A detailed report of the UN secretary general established already in 1938:

> *"In the light of the foregoing, the following are some of the implications of United Nations resolutions on permanent sovereignty over natural resources on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in those territories which might be considered:*
>
> *(a) The primary right of peoples and nations to permanent sovereignty over their natural resources is a right freely to use, control and dispose of such resources. The full exercise of this right can only take place with the restoration of control over the occupied territories to the States and peoples concerned. Such restoration is the first implication of the resolutions on permanent sovereignty over natural resources.*
>
> *(b) A second implication derived directly from the primary right would be that in any interim pending full implementation of the foregoing, control over land, water and other natural resources should be restored to the local population. This would include allowing municipalities and other local Palestinian and Arab authorities to control the natural resources for which they had had responsibility prior to the occupation.* *104*
>
> *(c) A third implication would be that the occupying Power is under an obligation not to interfere with the exercise of permanent sovereignty by the local population*."
>
> (Implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories", para. 51 **Report of the Secretary-General**, A/38/265, E/1983/85, 21 June 1983), available at:
>
> http://domino.un.org/unispal.nsf/db942872b9eae454852560f6005a76fb/6d55c7f840e6da06052567c9004b75de!OpenDocument

Several UNGA resolutions supported this stand; see details in Clause 16 of the report.

143. In summary: the international human rights law acknowledges the exclusive right of nations to use their natural resources and obligates foreign rulers to respect that right, which follows from the principle of "permanent sovereignty over natural resources," which is a rooted communal right.

144. The State of Israel -- by allowing and granting quarrying licenses to Israeli companies that remove the quarried product from the Palestinian territory that it holds in trust -- is thereby denying the Palestinian nation's collective right to hold to natural resources it owns, which deprives the residents of that territory of the right to shape their economic future as they sees fit, and denies them the option of producing the potential profits from its territory, profits that benefit the corporations of the occupying power.

145. Furthermore, there are long-term plans of the State of Israel's planning authorities, which aspire to exhaust through the quarrying potential for the next 30 years, thus leaving the territory to its natural inhabitants empty and devoid of natural resources they possess and which Israel holds in trust.

VII. Deduction

146. Respondents 1 and 2 grant concessions for quarrying in an occupied territory that they hold and administer in trust.

147. The vast majority of the quarried product -- millions tons of rocks, gravel, and dolomite, the fruit of the West Bank land -- is taken into the State of Israel, by Israeli companies, for the purpose of construction works **within Israel.**

148. All the principles we reviewed above are brutally infringed upon:

    1. The quarries do not meet the rules of *continuity*: The quarries opened after the West Bank was conquered, quarrying is performed at an immense pace and is dozens of times bigger than the quarrying activity that existed there before 1967. Even if it were claimed that the quarries had been active prior to 1967, clearly they were not operated then by Israeli companies; hence, there is no continuity even here.

    2. The quarried products are not meant to serve the occupied population, but the conqueror's economy.

    3. The mining activities impair on the rights of the community of protected civilians, which is anchored in the international human rights law, to full exploitation and benefit from natural resources found within their territory.

    These three arguments, each separately and the combination thereof, show that the respondents fail to meet their legal obligation to safeguard public property.

149. The appellants maintain that no legal or judicial option exists to condone this phenomenon, which takes place in broad daylight and while all the relevant bodies responsible for administering the occupied territories are aware of it.

D. Summation - the Requested Relief

150. Therefore, and in view of the above, the honorable court is hereby requested to order the respondents to cease and desist the quarrying operations, avoid issuing licenses or concessions for the said mining by Israeli companies and/or such or other Israeli bodies, and to stop renewing existing licenses or rights, immediately and without delay.

151. Additionally, the court is asked to order the respondents to pay the appellants' expenses, plus lawyers' fee, plus VAT.

152. This petition is supported by the affidavit of Mr. Dror Atkes, coordinator of Land Project for the appellant.

Argumentation for the Petition for an Interim Injunction

1. This petition addresses the extensive practice of removing natural resources from the West Bank by quarrying them from the earth in quarries and transferring them to Israel, where they are used in the Israeli construction business.

2. This practice constitutes a clear and blunt violation of the principles of international law pertaining to belligerent occupation because it violates the occupier's duties concerning the properties of the public under its administration. Under certain circumstances, such practice might be even considered as the crime of **pillage**.

3. Despite its complexity, this petition is submitted urgently, due to the response of the Judea and Samaria legal adviser, dated 8 February 2009, where it was stated that the respondent sees no need to freeze the quarrying operations, even though he acknowledged that the issue gives rise to "not simple questions" and calls for "legal examination" that we can only wonder why it has never been performed in the past.

4. This means that for the time being, the respondents allow the continued quarrying and transfer of West Bank natural resources to Israel, for the exclusive use of Israeli companies and its construction business, despite the tangible possibility that this is a gross violation of the international law that restricts the rights to manage public property by an occupying government, and bans their exploitation for the economic benefit of the occupying power.

5. The systematic nature of the practice that this petition deals with, its scope, **the fact that no legal inspection has been conducted, certainly not one that is sufficient, before the permits to quarry were issued,** and the real possibility that this is a grave violation of humanitarian law, necessitate freezing the situation pending a peremptory rule concerning the legality of that practice.

6. The purpose of the requested interim injunction, therefore, is to prevent further, **irreversible** damage to the natural resources of the occupied territory, prevent violations of humanitarian and human rights laws, and keep things as they are. **Every truckload of gravel or rocks that crosses the Green Line and unloads the cargo that was excavated from the occupied territory in Israeli construction sites is violating the protected rights of the residents of that occupied territory, which are well anchored in international law.** Should the appellant's petition be endorsed -- and in view of the existing judicial consensus, it stands high chances -- the situation may not be restored because quarrying is an irreversible process both in terms of the fate of the resources removed from the territory and in terms of the changes caused to the territory itself due to the expansion of quarrying and mining activities.

7. In view of the data presented in this petition, including the imaginary datum according to which, quarries owned by Israelis in Area C remove some **9 tons** of gravel annually (this, regardless of other quarried products), in view of the gravity of the alleged deed, and in view of the fact that a ruling on the petition may still take time (during which it is not inevitable that additional dozens of millions of tons would be quarried and taken to Israel), there is no other option

but to stop the activity mentioned in this petition pending a peremptory rule on it.

8. This is twice as true when it comes to the issuance of new quarrying licenses, and/or their renewal or extending the validity of existing licenses because, when it comes to these cases, no expectant body may be harmed by this interim injunction.

9. The appellants maintain, therefore, that the issuance of an interim injunction could minimize the damage that might be sustained by the public of protected civilians and to the State of Israel due to its liability for the deeds under discussion.

10. Thus it may be seen that the balance of convenience clearly leans in favor of the appellant and obligates, under the special circumstances of the matter, the issuance of the interim injunction as requested in the opening of this petition.

In view of the above, the honorable court is asked to issue an order nisi and an interim injunction as requested in the beginning of this petition and, after receiving the respondents' reaction and a deliberation, to make it absolute.

The court is also asked to order the respondents to pay the appellants' their rightful legal expenses, lawyers' fees, VAT, and interest.

Date: 9.3.2009

_____ _____ _____

Attorney Michael Sfrad Attorney Shlomy Zachary Attorney Avisar Lev

The Appellants' Representatives