

*Expert Opinion:*

## Limits of the right of expropriation (requisition) and of movement restrictions in occupied territory

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### 1. The questions

On the occasion of the establishment of the so-called Fire Zone 918 for training purposes of the Israeli Defence Forces (IDF), to be used *inter alia* as a shooting range, the following questions have been put to me:

Can the expropriation and/or movement restrictions relating to an area of land in occupied territory for the purpose of operating a military training zone be justified under international law?

Does the protection provided by the rules referred to in the first question depend on the persons affected being permanent residents in the area, in particular in cases of forcible evictions or destruction of their property located in the area?

In order to give an answer to these questions, a short overview of the rights and duties of an occupying power (OP) will first be given. These rules will then be applied to the situation of the Fire Zone 918, particularly in the light of the State's reply dated 19 July 2012 to petitions submitted to the Israeli Supreme Court in IHCI 517/00 and IHCI 1199/00.<sup>1</sup>

### 2. The rights and duties of an occupying power

The powers of an OP are limited by international law. In particular, the OP may take measures only for certain purposes:

- measures to ensure the security of the OP and to satisfy the needs of the army of occupation,
- measures to ensure the wellbeing and safety of the population of the occupied territory.

The first type of measure is a right of the OP, the latter one also a duty.<sup>2</sup> In any case, the OP must respect certain rights of the population, which are formulated in the Hague Regulations and in the IVth Geneva Convention as well as in Human Rights instruments, which also apply in the relationship between an OP and the population of the occupied territory.<sup>3</sup>

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<sup>1</sup> <http://www.acri.org.il/en/wp-content/uploads/2012/05/Firing-Zone-918-Govt-Response-19July2012-ENG.pdf>

<sup>2</sup> See Supreme Court of Israel, *Beit Sourik Village Council v. Government of Israel*, Judgment of 30 June 2004, 43 ILM 1099 (2004), para. 35.

<sup>3</sup> International Court of Justice, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 May 2005, paras. 178 *et seq.*; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, paras. 106, 110, 112 *et seq.*; see also the General Comment No. 31 of the Commission established under the ICCPR, "Nature and General Legal Obligations Imposed on States Parties to the Covenant, 26 May 2004, Doc. CCPR/C/21/Rev.1/Add. 13.

The essential source of these rights and duties is customary international law. It is generally recognized that the relevant provisions of the Hague Regulations indeed constitute customary international law.<sup>4</sup> The same holds true for the IVth Geneva Convention. At least the basic content of the relevant humanitarian rules of the IVth Geneva Convention are generally recognized as forming part of customary international law. This has also been confirmed by the Supreme Court of Israel.<sup>5</sup> The latter rules include certain provisions contained in Part III, Section III on “Occupied Territories” (in particular Articles 55-58), but also of Section I of that Part (in particular Art. 27).<sup>6</sup>

The essential duties of an OP are aptly summarized by the International Court of Justice in the case DRC v. Uganda:<sup>7</sup>

(The Occupying Power is) under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the (occupied country). This obligation comprise(s) the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

This statement is briefly reiterated in the Wall case.<sup>8</sup>

On the other hand, the Court recognizes that the OP has the right to take measures to ensure its security, or more generally to take measures which are dictated by military exigencies. To determine the permissible scope of these measures, the Court analyses the relevant clauses of the said treaty provisions concerning the law of occupation, in particular articles 49 and 53 GC IV. This leads to a narrow definition of measures taken for reasons of military exigencies. As to human rights guarantees applicable in occupied territory, the Court states that permissible restrictions of those rights are defined by the limitation and derogation clauses of human rights treaties.<sup>9</sup>

The Hague Regulations contain two provisions concerning the protection of private property. Private property must be respected and it cannot be confiscated (Art. 46). Taking of property (requisitions in the terminology of the Hague Regulations) is possible under certain conditions (Art 52):

- They must be “for the needs of the army of occupation”;
- They shall be in proportion to the resources of the country;
- They may not be equivalent to a support of the military effort of the OP;
- They must be (adequately) compensated as soon as possible.

<sup>4</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 3, para. 89.

<sup>5</sup> *Beit Sourik*, above note 2, para. 23.

<sup>6</sup> *Beit Sourik*, above note 2, para. 35.

<sup>7</sup> International Court of Justice, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, above note 3 para. 178.

<sup>8</sup> Advisory Opinion, above note 4, para. 124.

<sup>9</sup> *Loc.cit.* paras. 135 et seq.

The obligation to respect private property in the occupied territory which flows from the Hague Regulations has been expressly recognized by the Supreme Court of Israel.<sup>10</sup> To requisition private property is permissible only if and to the extent that it is “for the needs of the army of occupation”. The sense of this provision is to allow an army of occupation to provide for its sustenance out of the resources of the occupied territory. Requisitions typically cover food and lodging. In the words of the UK Military Manual, the OP may requisition commodities and services “for its maintenance”.<sup>11</sup> “Only the direct requirements of the army of occupation may be satisfied through them.”<sup>12</sup>

As to destruction of property, a specific provision (*lex specialis*) is found in Art. 53 of the IVth Convention. Such destruction is prohibited except where it “is rendered absolutely necessary by military operations”. This necessity clearly refers to combat situations. It is to be narrowly construed, which is indicated by the word “absolutely”. As a minimum, the destruction needs to be proportional to the potential harm to the affected civilian and their property.<sup>13</sup> A violation of Art. 53 will be as a rule a grave breach according to Art. 147 of the IVth Convention.

Forcible removal of persons from their homes (whether or not relocating them somewhere else) constitutes a “forcible transfer” which is prohibited according to Art. 49 para. 1 of the IVth Convention and according to customary international law. The customary law prohibition applies both to deportations outside the borders of an occupied territory and to “transfers” within that territory. This has been convincingly stated by the ICTY,<sup>14</sup> the proof of the rule being a cumulative view of recent relevant treaty and other instruments.<sup>15</sup> “Forcible” is not to be interpreted restrictively. It is not limited to physical force. It also includes threat of force or coercion, or the use of a coercive environment. The prohibition does not only relate to permanent residents, it covers any person belonging to the population of the occupied territory and being present in the area in question. Exceptionally, evacuations are allowed, namely “if the security of the population or imperative military reasons so demand” (Art. 49 para. 2). That exception clearly refers to combat or similar situations. Therefore, forcible eviction allegedly for the enforcement of planning and construction laws do not fall under this exception and are therefore forbidden, whether or not the persons affected enjoy the status of “permanent residents”. As in the case of Art. 53, a violation of Art. 49 will as a rule constitute a grave breach according to Art. 147.

Art. 27 guarantees in a very general way personal rights. Freedom of movement is not mentioned as an absolute right, but it is to a certain extent implied in the rights mentioned in Art. 27.<sup>16</sup> In particular, the use of coercive measures to enforce relocation may constitute

<sup>10</sup> *Beit Sourik*, above note 2, para. 35.

<sup>11</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Rule 11.83.

<sup>12</sup> E. Castrén, *The Present Law of War and Neutrality*, Helsinki 1954, p. 238.

<sup>13</sup> J. Pictet (ed.), *The Geneva Conventions of 12 August 1949. Commentary* (Geneva: ICRC), vol IV (1956), Commentary to Art. 53, sec. 3.

<sup>14</sup> ICTY, *Prosecutor v. Radovan Krstić*, Case IT-98-33-T, Judgment of the Trial Chamber dated 2 August 2004, paras. 519 *et seq.* The holdings on the question of transfers were not challenged in the appeal.

<sup>15</sup> Art. 85 (4)(a) AP I, Art. 17 AP II, Art. 2(g) Statute of the ICTY, Art. 7(1)(d) and 8(2)(b)(viii) ICC Statute, Art. 18(g) ILC Draft Code of Crimes against the Peace and Security of Mankind (1996). In particular the provisions of the ICC Statute must be regarded as a proof of customary law, see M. Bothe, “War Crimes”, in A. Cassese/A. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, vol. I, at 396.

<sup>16</sup> See Pictet (ed.), *op.cit.* note 13, Commentary to Art. 27.

the threat of an act of violence against which protected persons must be protected according to Art. 27 para. 1, 2<sup>nd</sup> sentence. In respect to the freedom of movement, the explicit guarantee lacking in the IVth Convention is granted by Art. 12 of the International Covenant on Civil and Political Rights (ICCPR),<sup>17</sup> which thus fills a lacuna which may be found in the Geneva Convention.

On the other hand, Art. 27 of the IVth Convention allows certain restrictions to be imposed upon protected persons, which includes the population of an occupied territory:

“... the Parties to the conflict may take such measure of control and security in regard to protected persons as may be necessary as a result of the war.”

This provision must not be misunderstood as a kind of catch all justification of measures taken for alleged security reasons. First, it is a general rule over which special rules take precedence. Where the Convention itself regulates the exceptions to the rights it guarantees, these specific definitions and limitations of exceptions cannot be set aside by Art. 27. Furthermore, the term “necessary as a result of the war” is not unlimited, but is restricted to the security reasons of a particular situation in war. As the (American) Military Tribunal in Nuremberg stated:<sup>18</sup>

“General security needs of the occupying army that are not directly related to the current armed conflict and to threats arising from occupied territory cannot be used to justify restrictions on civilians in occupied territory. The balance between military necessity and humanity needs to be done within the local context, where the local civilian population resides.”

The rights of the OP and those of the population of the occupied territory have indeed to be seen as a balanced special regime within the law of armed conflict. Neither right is absolute. The rights of the OP cannot be determined without taking the rights of the population duly into account. The yardstick of this balancing process is the principle of proportionality, well recognized by the Supreme Court of Israel.<sup>19</sup> As shown by the Nuremberg Tribunal, that proportionality argument must not be misunderstood as opening the door wide open to limitless security arguments.

The rights of personal protection are granted to any victim which is affected, in particular to any person prevented from using his or her property or from using his or her freedom of movement. That definition of an entitlement under international law may not be reduced by legislative acts of the OP, such as reserving these rights for permanent residents only. Similar restrictions are irrelevant under international law. International law takes precedence over legislative enactments of the OP.

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<sup>17</sup> See below.

<sup>18</sup> *United States v. List (Hostage Case)*, Case no. 7, 19 Feb. 1948, 11 *Trials of war Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 1253.

<sup>19</sup> *Beit Shourik*, above note 2, paragraphs 36 *et seq.*

### 3. Application to the present case

For the purposes of the concrete questions which are the object of this expert opinion, these considerations mean the following:

As it appears from the documentation placed at my disposal, the use of the area in question as a fire zone, including a shooting range for IDF training purposes entails the need that no civilian are present therein. Thus, protected persons, residents of the eight villages in the area, who are present therein, are prevented from using their homes situated in the area and from engaging in their habitual agricultural activities therein (farming and husbandry of sheep and goats). They will be forced to leave and denied access to the area, except for very short periods which do not allow a meaningful use of the land and the homes. The beneficial uses which these persons have enjoyed before since many decades constitute private property in the sense of the Hague Regulations. Thus, denying that use to these persons means a taking of property, a requisition in the sense of the Hague Regulations.

It must be noted that these measures also have an impact on the use of properties outside the area where there will be live firing. The use of property in the entire area, comprising 12 villages, is restricted. These restrictions may well be considered as equivalent to a taking of property.

The OP justifies its measure by the need for training of its armed forces. But the training needs of the armed forces of a State which also happens to be an OP have no connection with the specific needs of an army of occupation. General training needs are not, as such, a “direct requirement” of the army of occupation. This becomes clear from the Statement of the State Attorney in the present case. She justifies the “need” for increased training by the lessons learned from the Lebanon conflict in 2006.<sup>20</sup> This perceived general need bears no direct relation with the occupation. The reference to the special topography of the said area, which allows specific training methods, is not able to justify a different view. The added value of the topography of the occupied territory for training purposes is not a lawful consideration for restricting property rights as the military needs in question are of a general nature. The same holds true for the alleged usefulness of being able to train the soldiers in the use of specific weapons. There may be specific training needs for measures to be taken locally in the occupied territory, but no such needs result from the arguments put forward in the State Reply. Thus, the measures taken are unlawful because they are for a purpose not permitted under the Hague Regulations.

Furthermore, the extensive harm caused to the inhabitants of all the twelve villages is out of proportion to the advantage in terms of training conditions. That harm does not only consist of the current loss of the homes and agricultural land. It is the future use of the whole area for the purpose of securing the very existence of the protected population which is in jeopardy. On the other hand, it is stated in the State Reply that at present, as long as there are civilians in the planned Firing Zone, no training involving shooting can take place therein. Thus, alternative solutions for training had to be found and indeed have been found. These solutions have met some military requirements, though not all. For the application of the proportionality principle, it is important that respect of the rights of the affected persons does not mean that the military needs are completely disregarded. There is thus a fair

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<sup>20</sup> Section 12 of the State Reply.

balance of interests, which is the essence of proportionality. The measures are thus unlawful as being disproportionate.

As to the prohibition of destruction of property (Art. 53 of the IVth Convention), this can be justified only “where such destruction is rendered absolutely necessary by military operations”. Military training is not a “military operation” in this sense, nor is it, as already explained, “absolutely necessary” to conduct the training at this particular location. The destruction is therefore unlawful.

As to the prohibition of forcible transfers (Art. 49 of the IVth Convention), the only exception permitted by that rule is an evacuation if “the security of the population or imperative military reasons so demand” (Art. 49 para.2). It clearly results from the last phrase of the paragraph that only the risks involved in, and the conditions imposed by hostilities justify of even require an evacuation. After these hostilities have ceased, the persons evacuated have to be brought back to the location where they came from. Thus, the permanent training needs of an army of occupation cannot justify forced transfers. These transfers are therefore unlawful.

The measures in question can, for a number of reasons, also not be justified under the general exception clause of Art. 27 of the IVth Convention. As this is a general clause, it could only be applied where there are no applicable special exception clauses, which however is the case here. Second, the exception is limited to measures “necessary as a result of the war”. Training is not necessary in this sense. Under the standards developed by the Nuremberg Tribunal,<sup>21</sup> training would not qualify as a justification of measures restricting the rights of protected persons. Third, a measure is also unlawful under Art. 27 para. 4 if it is disproportionate.

The case under review must be distinguished from those cases where the Supreme Court has upheld evictions of Palestinians from their land or homes for security reasons. In those cases, the measures taken were justified by the OP as being protective in nature.<sup>22</sup> It was claimed that they were necessary as a means of defense against terrorist activities. This justification, whatever its merits, is not comparable to the training needs put forward in the present case. Thus, the jurisprudence of the Supreme Court of Israel on the justification of evictions or demolitions for security reasons cannot serve as a basis for the measure taken to facilitate the operation of an IDF shooting range.

Furthermore, the measures under review violate a number of fundamental rights of the affected inhabitants. They violate the guarantee of private property (Art. 46 Hague Regulations). They violate humanitarian guarantees contained in the IVth Geneva Convention (Art. 27). As to Human Rights treaties, they violate the freedom of movement (Art. 12 ICCPR) and the right to an adequate standard of living (Art. 11 of ICESCR).

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<sup>21</sup> See above text accompanying note 18.

<sup>22</sup> See, *inter alia*, *Ayub et al. v. Minister of Defence et al.*, H.C. 606/78; *Matawa et al. v. Minister of Defence et al.*, H.C. 610/78, reproduced in M. Sassòli/A.A. Bouvier/A. Quintin (eds), *How Does Law Protect in War?*, 3<sup>rd</sup> ed. Geneva 2011, vol. II, pp. 1076 *et seq.*

The violation of the guarantee of private property cannot be justified under the Hague Regulations as it violates the specific provision dealing with a limitation of the right of private property.

Art. 27 of the IVth Convention provides, *inter alia*:

Protected persons are entitled, in all circumstances, to respect for their persons ... and their manners and customs...

The evictions and denial of access to land prevent the persons affected from pursuing gainful activities in the way they have done for centuries. This forms part of their “manners and customs”. Art. 27 is, thus, violated at least in this respect.

Respect for human rights enshrined in a treaty is, as stated by the ICJ,<sup>23</sup> part of “public order and safety” which the OP is obligated to ensure (Art. 43 Hague Regulations). The guarantee of the freedom of movement (Art. 12 ICCPR) has a limitation clause (para. 3). Measures restricting the freedom of movement are permissible if they are, *inter alia*, necessary in a democratic society “to protect national security, public order” etc. But in the context of an occupation, the purposes allowing a restriction pursuant to Art. 12 para. 3 ICCPR) are themselves restricted by the Hague Regulations. Thus, a purpose which is in violation of the Hague Regulations and the Geneva Conventions cannot be a lawful purpose justifying a restriction under art. 12 para. 3 ICCPR. Art. 12 is violated.

Like other rights guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 11 constitutes a promotional obligation. States do not guarantee a specific standard of living, but must take measures to promote that standard. But that obligation implies also a prohibition, namely a prohibition of measures preventing the beneficiary of that right to pursue activities for ensuring his or her livelihood. Therefore, Art. 11 ICESCR is violated.

A similar line of argument applies to the duties of the OP to provide for the wellbeing of the population which are implied the IVth Convention (Articles 55 and 56). Preventing inhabitants of an occupied territory to engage in activities for the purpose of producing their food is a violation of Art. 55 of the IVth Convention.

Even if it could be shown that there are specific training needs for measures to be taken under local conditions (*quod non*), the restrictions to be imposed for the purpose of operating the Fire Zone 918 would still be unlawful as they would be disproportionate. They would result in extensive destructions, especially due to the use of live fire without military necessity. They deny a most fundamental right, deeply embedded in the concept of human dignity, namely the right to engage in a meaningful pursuit of one’s livelihood. Such a deep cut into the basics of a human existence could be proportionate only in situations of extreme necessity. Such justifying reasons are simply absent in the case under review.

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<sup>23</sup> See above quote accompanying note 7.

#### **4. Conclusion**

The measures under review in the present expert opinion constitute violations of

- Art. 46, 52 of the Hague Regulations;
- Art. 27 of Geneva Convention IV;
- Art. 49 para. 1 of Geneva Convention IV;
- Art. 53 of Geneva Convention IV;
- Art. 55 of Geneva Convention IV;
- Art. 12 ICCPR;
- Art. 11 ICESCR.

As forcible transfers and extensive destruction, they also constitute grave breaches according to Art. 147 Geneva Convention IV.

The measures also violate the corresponding rules of customary international law.

Frankfurt/Main, 2<sup>nd</sup> of August 2012