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Analysis of the Masafer Yatta Ruling (HCJ 413/13)

For over two decades, the Association for Civil Rights in Israel (ACRI) has represented the residents of 12 Palestinian villages in the Masafer Yatta area of the southern Hebron Hills in legal proceedings intended to prevent their expulsion. Since 1999 the residents of these villages have lived under the threat of demolition, expulsion, and forced displacement after the IDF declared the area in which they live a firing zone and issued eviction notices claiming that they are not permanent residents in the area. This assertion was made while ignoring the residents' unique way of life and ancient agricultural culture, as well as clear historical documentation testifying to Palestinian settlement in these villages over many generations – in caves in the past, and over the years also outside the caves. This documentation can be found, inter alia, in a study on behalf of the Ministry of Defense (Yaacov Havakook, *Life in the Hebron Mountain Caves*, 1985, Ministry of Defense Publishers (Hebrew)), in aerial photographs, in the residents' testimonies, and even in the reports of inspectors who warned prior to the declaration of the firing zone that there was permanent settlement in the area, and accordingly swift action should be taken to close the area.

The eviction of the residents from the area means the demolition of these historic villages, leaving entire families (over 1,000 people), including children and elderly persons, without shelter. **ACRI's position is that such expulsion contradicts Israel's obligations toward the Palestinian population under its control in the area, both in accordance with international law and in accordance with Israeli law.**

This analysis is not the place elaborate on all the developments and details of the legal proceedings conducted over the past 25 years; the full detail and legal documents can be found on ACRI's website. The current petition (HCJ 413/13) was submitted by ACRI in January 2013 on behalf of 108 residents of these villages. Following the submission of the petition, the Supreme Court issued an interim order instructing the state to refrain from the forced transfer of the petitioners and their families from their homes pending the granting of another decision. The petition was unified with an additional petition submitted on behalf of a further 143 residents (HCJ 1039/13).

On 4 May 2022, on the eve of Independence Day and the last day of Id al-Fitr, the final judgment was published. **The ruling, written by Justice David Mintz, rejected the petitions both limine and on its merits.** Justices Yitzhak Amit and Ofer Grosskopf joined his ruling.

The ruling establishes a problematic and dangerous precedent regarding the status of international law, ignores key arguments presented by the petitioners, and laves other arguments unanswered. Its outcome is liable to be disastrous: the forced uprooting of more than one thousand women, men, and children with their property and livestock. The ruling may also have ramifications **for the cases of additional Palestinian communities** that may face decisions by the Military Commander that bring them under danger of expulsion.

We will comment briefly on the in limine rejection of the petition. When a court is of the opinion that a matter brought before it is flawed in a manner that does not justify or permit its substantive clarification, it is entitled to reject a petition in limine, without discussing its substance. Justice Mintz drew on two grounds permitting such a rejection:

The first grounds is laches. The Court accepted the prosecution's position that since the declaration of the area as a firing zone was first made in the early 1980s, and the first petitions were only submitted in 2000, they were submitted with unreasonable procrastination.

This assertion is problematic for several reasons. Firstly, the petition did not seek to nullify the order of 1980, as it was defined at that time and in the borders in which it was declared. Rather, it sought the nullification of the order closing the area reissued in 1999. This is the order on whose basis the eviction orders were issued and following which 700 residents of Masafer Yatta were expelled from their homes. Indeed, the closure order of 1980 to which Justice Mintz relates in his ruling is irrelevant to the area discussed by the petitions. Over the years, the borders and purpose of the zone have changed, and each time a new closure order was signed. In 1999, the army amended the borders of the firing zone following the signing of the Israeli-Palestinian Interim Agreements concerning the West Bank and Gaza Strip, and accordingly a new order was issued closing the firing zone. The 1999 order is the valid one, and is the order the petitioners sought to nullify.

Since laches is claimed, another point must also be addressed: if the Court is of the opinion that the various petitions, including the current one, were submitted too late, and accordingly do not justify substantive discussion, why did the litigation in the petitions extend over more than two decades? Why was an interim order issued in the petition? Why did the Court see fit to continue the discussion over such a long period if the petitioners had not even managed to cross the threshold? To this, the Court offered no explanation.

The second threshold ground on which the petition was rejected is the petitioners' bed faith. The justices argued that during the course of the legal proceedings the petitioners undertook extensive construction on the site, and held this against them. However, the petition, as well as the interim order, did not discuss planning and construction. The petition seeks to prevent the residents' expulsion. Accordingly, it is unclear why a matter that is impertinent to the petition should lead to its rejection in limine.

In addition, and as noted, the Court also rejected petition on its merits.

The Court's decision in a nutshell: The Court determined that the Military Commander is entitled to declare closed areas and to prohibit unauthorized entry thereto. This is a broad authority intended to serve security and military interests, including the delineation of training zones for the purpose of training combat soldiers and maintaining their capability. The Court's ruling clarified that the owners or holders of land regarding which a closed area has been issued are required to turn to the Military Commander in order to obtain permits to enter the area; and, furthermore, that property rights in a closed area do not in themselves grant right of entry thereto.

Two determinations led the Court to these conclusions: Firstly, in the event of a clash between the provisions of a military order and those of the international law, the military order takes precedence. Secondly, section 49(1) of the Fourth Geneva Convention, which prohibits the forced transfer of a population from occupied territories, does not apply in the case of the eviction of residents from an area declared a close area for training purposes.

The Court's interpretation of international law on this matter is erroneous and creates a dangerous precedent.

It is the international law that grants the Military Commander in the occupied territories all his powers, defines these powers, and outlines the scope of protection of the rights of Palestinians in the area. Despite this, in the two paragraphs Justice Mintz devoted to the question whether the army's actions are consistent with the international law pertaining to the area, it was determined that international law is irrelevant. This interpretation, and particularly the interpretation of section 49(1) of the Geneva Convention, does not uphold legal examination.

The International law establishes restrictions on the authority and scope of legislation of the military commander in occupied territories: the Supreme Court has discussed this many times in the past; only recently, in the ruling on the subject of Mitzpe Kramim,[1] President Hayut clarified that although international law empowers the Military Commander to amend legislation applying in the occupied territory, such amendment must be compatible with the obligation imposed on the occupying power to protect the rights of the protected residents,

[1] In June 2021, ACRI and Yesh Din submitted an amicus curiae request in an appeal against a ruling by the Jerusalem District Court regarding Mitzpe Kramim. The District Court determined that the provisions of section 5 of the Order concerning Governmental and Abandoned Property (Market Propriety) could be imposed on the outpost Mitzpe Kramim, which was built on private Palestinian land, thereby approving the construction. The Supreme Court accepted both the petition to the Supreme Court and the appeal by Palestinian landowners from the West Bank, and ordered the eviction of the outpost Mitzpe Kramim constructed on their land.

and particularly to protect their private property (CA 7668/18 *Salha v Defense Minister* (27 Aug. 2020), para. 30). The ruling ignored this.

The Military Commander's orders cannot contradict or overrule international law. This is the ruling principle. If the Military Commander derives all his power from the international law, it is obvious that he cannot issue an order contradicting this law. These are basic principles.

A more serious error is the determination that the prohibition against the expulsion of protected residents[2] does not apply in an instance in which the Military Commander did not gave them authorization to live in a particular place. The fact that the Court ignored wealth of evidence showing that the petitioners were residing in the villages prior to the declaration of the firing zone (part of the evidence was provided by the respondents themselves) does not alter the basic fact that international law prohibits the forced transfer of a population under occupation.

Contrary to the Court's determination, the prohibition against forced transfer is an absolute one and is part of the international customary law; accordingly, it has a binding validity. This is an absolute prohibition with no exceptions. It prohibits forced transfer, whether this is committed by physical force or through bureaucratic and administrative abuse, such as the demolition of homes and disconnection of infrastructures. The International law is clear: transfer is prohibited within an occupied area and residents must not be expelled from an occupied area. Moreover, in the international law forced displacement is an offense for which there is no need to show intention to expel; knowledge of the consequences of the act is sufficient. **Contrary to the Court's determination, the prohibition is not conditioned on any particular motive on the part of the occupying army**.

The state claims that the firing zone is vital since it facilitate the capacity maintenance of the IDF forces. However, in accordance with the international law, the occupying power cannot turn the occupied territory into its training ground and is not entitled to use it for general military needs, such as maintaining forces capacity. It certainly cannot displace or expel protected residents from their homes in order to train on their land. The Military Commander is required to refrain from violating the rights or harm the resources of the local residents unless this is vital for essential and specific security needs relating to the military operations in the territory. Throughout all the years of litigation, the state was unable to explain the

[2] The International law defines principles and rules applying to a state of occupation and binding the occupying state. These principles are trusteeship, non-application of sovereignty, and temporariness. In the framework of the obligation of trusteeship, the occupied territory constitutes a deposit held by the occupier, which it must manage as a trustee in accordance with the interests of the local population, referred to as a "protected population," while balancing these interests with security needs. Further discussion of the legal definition of occupation may be found on ACRI's website.

necessity of the area. The state argues that the use of the area will facilitate logistics and cut the costs of training due to its proximity to the base of the Nachal Brigade. This is not an adequate reason.

The prohibition against forced displacement is enshrined both in the Geneva Convention and in the Treaty of Rome. It is not conditioned on the status of persons as residents, let alone permanent residents. In fact, the residents do not have to prove anything. The occupying power can only evacuate a population temporarily from its homes when battles occur in a specific area. The purpose of such evacuation is to protect their wellbeing, solely until the removal of the threat they face; or when there is an essential and immediate military need. Regular training for the purpose of preparing new recruits certainly cannot be considered such a need.

Throughout the years of litigation in the petition, the army never claimed that an essential military need exists in this particular area. The need for the area was due to considerations of efficiency and budget: the area is close to the Nachal training base, and the need justifying the expulsion of the Palestinians living there is the "resource of time." However, efficiency and money cannot justify a war crime.

The restrictions the international law imposes in this matter were completely clear to the military authorities from the beginning of the occupation. Contrary to Justices Mintz, Amit, and Grosskopf, the military prosecutor at the time, Meir Shamgar, clarified as early as 11 July 1967 that the eviction of a population for the purpose of closing training areas constitutes a violation of section 49 of the Geneva Convention:

> *A civilian population is not to be evicted from the territories in order to create training areas for the IDF, both for political and humanitarian reasons and for reasons involving the provisions of the international law. Section 49 of the Convention on the Protection of Civilian Persons in Time of War, to which Israel is a party, explicitly prohibits the forced transfer of citizens in occupied territories, except in instances when this is required due to immediate combat needs. In our case it cannot be stated that combat needs explicitly require the evacuation of the areas intended to serve as training areas, and accordingly the forced eviction of a population from these areas will constitute a violation of the provisions of the above-mentioned convention.*[3]

Thus the Court's interpretation on this matter is inconsistent neither with the law nor with the army's instructions concerning training in the occupied territory. It fails to consider the

[3] https://www.akevot.org.il/article/firing-zone-918-case-1967-legal-opinion-presented-high-court/

developments in the international criminal law and the customary interpretation of the Conventions.

It is important to note that the discussion of the binding provisions of the international law in the occupied territories was confined in the judgment to just two paragraphs. This is no coincidence. A study published two years ago establishes that the practice of the Supreme Court to ignore the international law in its rulings concerning the Occupied Territories constitutes an alarming trend that has been going on for more than a decade. The status of the international law in petitions concerning the Occupied Territories has been eroded, the Green Line is increasingly being blurred, and key principles as to what is prohibited and permitted in the framework of the laws of belligerent occupation are translated into the principles of Israeli administrative law.[4]

A further point to be addressed is that in the dispute between the parties regarding the question of the Military Commander's authority to close the area, the Court determined, as noted, that the Military Commander is empowered to do so, and that there is no need to discuss the international law and the restrictions it imposes both on the use of the resources of the occupied territory and its prohibition against the expulsion of protected residents. Accordingly, the ruling focused on the question whether, immediately prior to the declaration of the firing zone – i.e. before 1980 – the residents lived permanently within the area of the firing zone – this despite the fact that the eviction orders were issued in 1999. The Court accepted the state's claim that there were only seasonal residences in the area for a few months a year, for the purposes of grazing and agriculture, and that these residences were not permanent. The importance of the discussion on the question of permanent residence is due to the wording of the military order, which establishes that the Military Commander is entitled to evict persons from a firing zone or restrict their movement in the area, unless these persons are permanent residents. The Court determined that the residents have failed to prove permanent residence on the site, and accordingly the Military Commander is entitled to evict them.

However, the justices formulated the factual determinations while ignoring clear historical documentation, including in publications of the Ministry of Defense, testifying to Palestinian settlement over generations in the villages in question – in the past in caves alone, and over time also outside the caves. Throughout the legal proceeding, the residents presented a factual infrastructure that dealt with the army's claims and proved that in the area defined as

[4] Tamar Hostovsky Brandes, "The diminishing status of international law in the decisions of the Israeli Supreme Court concerning the Occupied Territories," *International Journal of Constitutional Law*, Volume 18(3), October 2020, Pages 767–787.

"Firing Zone 918" there was continuous settlement throughout the years prior to the declaration of the firing zone and even prior to the beginning of the occupation in 1967.[5]

The judgment determined that although the Court is not the appropriate framework for a profound examination of complex factual questions, the question of the permanent residency of the residents of Masafer Yatta is not a complex factual question and may be determined, in part since *"a review of the aerial photographs, both those submitted by the respondents and those submitted by the petitioners, even with an untrained and unprofessional eye of a layman , reveals an unequivocal and clear conclusion that the respondents are in the right."*[6] Thus without examining all the evidence, or adequately addressing the evidence included in the ruling, the settlement history of the residents of Masafer Yatta was deleted in a stroke of the pen, based on a superficial examination of part of the evidence submitted to the Court.

One final comment. What is lacking in the legal analysis in the judgment is more notable than what it contains. The justices chose not to address the petitioners' claims concerning the prohibition to use the occupied area in general, and private land in particular, for training purposes. They completely failed to address the issues raised by the petitioners concerning the use of the private property of protected residents without a seizure or confiscation order – orders that include restrictions intended to protect their rights. **An army is not entitled to turn an occupied area into its training ground**. The failure of the army to seize the area is intended to circumvent the restrictions imposed by the international law on the use of seized private land.

The ruling has grave and disastrous ramifications for over 1,000 people, including women, children, and elderly persons among the residents of Masafer Yatta who now face the danger of eviction from their homes.

In addition, **the ongoing erosion of the status of the international law, strongly reflected in this ruling, and the interpretation it grants to section 49 of the Geneva Convention are liable to seal the fate of additional Palestinian communities** whose cases have come before the Court or will do so, in instances wen these communities face decisions by the Military Commander that place them in danger of expulsion.

The ruling of The High Court of Justice cannot remain intact. Accordingly, we intend to petition for a additional hearing before an expanded panel of justices that can reexamine the erroneous determinations it includes.

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[5] For further details about the historical documentation, see the ACRI website.

[6] Para. 34 of the ruling in HCJ 413/13 and HCJ 1039/13, published 4 May 2022.