Diakonia International Humanitarian Law Centre Jerusalem

The Israeli Supreme Court decision permitting eviction of Palestinian communities in Masafer Yatta:

A failed account of international law

Brief facts

On 4 May 2022, the Supreme Court of Israel sitting in its capacity as High Court of Justice ("the Court") issued a decision permitting the Israeli army to evict Palestinian communities in Masafer Yatta.[1] Masafer Yatta is located in the South Hebron Hills in Area C of the West Bank, over which Israel retains full civil and security control.[2] The area was declared by the military commander of the West Bank as a "closed military zone", more specifically a "firing zone" (Firing Zone 918) in 1980.[3] Over 1000 people reside in eight villages in the Masafer Yatta area, and these communities have faced the threat of home demolitions, evictions, and dispossession for over twenty years. In its decision, the Court rejected the petition against the eviction orders on both procedural and substantive grounds. This decision has been met with swift criticism.[4]

This note will not discuss the Court's assessment of the factual claims that were brought before it and will instead highlight some key legal issues that are relevant to the Court's decision, focusing on international law.[5]

[1] Supreme Court of Israel sitting as the High Court of Justice, HCJ 413/13 *Abu Aram v. Minister of Defense* (4 May 2022).

[2] Following the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as "Oslo II"), the West Bank was divided into three areas – Areas A, B, and C. Area A is under full civil and security control of the Palestinian Authority. Area B is under Palestinian civil control and joint Israeli-Palestinian security control. Area C, which covers more than 60% of the West Bank, is under full civil and security control of Israel.

[3] Area Closure Order Nos. S/2/80 (8 June 1980), S/5/82 (12 November 1982) and S/6/99 (5 May 1999).

[4] See, e.g., United Nations Office for the Coordination of Humanitarian Affairs, Statement by United Nations Resident and Humanitarian Coordinator in the Occupied Palestinian Territory, Lynn Hastings, available at: https://www.ochaopt.org/content/statement-united-nations-resident-and-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings; The Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), Israel/Palestine: Statement by the Spokesperson on evictions in Masafer Yatta, 10 May 2022, available at: https://www.eeas.europa.eu/eeas/israelpalestine-statement-spokesperson-evictions-masafer-yatta_en?s=206; Eliav Lieblich, "Wrong to the Core: The Supreme Court of Israel's Ruling on Masafer Yatta", Verfassungsblog, 8 May 2022, available at: https://verfassungsblog.de/wrong-to-the-core/; Joint Opinion of Israeli international law scholars, 8 May 2022.

[5] For more background on the case see, e.g., High Court of Justice, *The Association for Civil Rights in Israel v. Minister of Defense*, Executive Summary of Appellants' Petition for Conditional Order and Request for Interim Injunction, 16 January 2013, available at: https://law.acri.org.il/en/wp-content/uploads/2013/02/918-petition-summary.pdf; The Association for Civil Rights in Israel, Prevent Expulsion of Palestinians from Hebron Hills, 8 March 2022, available at: https://www.english.acri.org.il/post/__205.

Key legal issues

1. Use of land in occupied territory for military training purposes

The Court began its assessment of the merits of the petition with the assertion that the military commander has broad authority to order the closure of areas in the occupied territory, to serve military security interests.[6] The Court further observed that such authority derives from the law of occupation including, among other things, the duty it imposes on the occupying power to ensure the safety and security of residents.[7]

An occupying power is indeed bound by, inter alia, the international humanitarian law ("IHL") rules comprising the law of occupation. However, the occupying power is not the sovereign of the occupied territory, and the law of occupation only authorizes it to act as a temporary administrator of the territory where it is expected to serve as a trustee. Accordingly, the occupying power is required to discharge certain administrative functions, with a view to ensuring public order and civil life, as well as the basic needs and well-being of the civilian population.[8]

In discharging its administrative functions, the occupying power is indeed permitted to consider its security needs; however, it is obliged to balance these needs with the interests of the local population and the displaced sovereign. The occupying power is consequently prohibited from pursuing its security goals in a manner which unduly or excessively compromises the interests of the local population. It is also only permitted to pursue security interests that are linked to the occupied territory and may not exploit its authority in the occupied territory to advance other security objectives such as training troops for a conflict elsewhere. Furthermore, private property specifically must be respected and may not be confiscated by the occupying power, and may be destroyed or seized only under tightly constrained circumstances of imperative military necessity.[9]

In this case, there is no indication that there is an imperative military necessity for the occupying power to use the Masafer Yatta area specifically for training purposes, given the presence of alternatives, including the proximity of its sovereign territory and the possibility of training grounds there. Nor is there any indication that training troops in the area serves to advance a security interest linked to the occupied Palestinian territory ("oPt"). On the other hand, the military commander's decision to close the area clearly runs contrary to Israel's duty as an occupying power to ensure the safety and security of the local population as the decision compromises their protection in multiple ways.

2. The prohibition of forcible transfers in occupied territory

According to Article 49(1) of the Fourth Geneva Convention ("GC IV"), "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their

[6] *Abu Aram v. Minister of Defense*, para. 30.
[7] *Abu Aram v. Minister of Defense*, para. 31.
[8] 1907 Hague Regulations, Art. 43.
[9] 1907 Hague Regulations, Arts. 46, 53.

motive". The petitioners argued, inter alia, that the evictions from the area declared as a "firing zone" constitute a violation of Article 49(1) of GC IV.[10]

In the decision, the Court held that Article 49(1) of GC IV is only a "treaty norm", and "does not reflect customary international law", and therefore cannot be invoked in a domestic court, asserting as well that Israeli law takes precedence over international law in proceedings before Israeli courts.[11] The Court also asserted that Article 49(1) has no bearing on the case before it because it was only meant to prevent "acts of mass deportation of a population in occupied territory for the purpose of its destruction, forced labour or to attain certain political objectives".[12]

The prohibition of forcible transfer is widely accepted as reflective of customary international law.[13] In its Study on Customary International Humanitarian Law, the International Committee of the Red Cross ("ICRC") has found that this norm has been codified in various international instruments, included in military manuals and legislation of many States, and this customary rule is reflected in case law and other sources.[14] The position of the Supreme Court of Israel on Article 49(1) is contrary to and in disregard of this wide consensus.

Regardless of the position of the Court on whether Article 49(1) is of customary nature or not, Israel is a party to the Geneva Conventions and bound by its treaty obligations contained in GC IV, including Article 49(1). Even if according to Israeli law an international treaty norm which has not reached customary status may not be directly invoked in domestic courts, this does not relieve Israel from its international obligations or constitute a circumstance precluding the wrongfulness of its acts.

As for the scope of Article 49(1), the text of GC IV states clearly that the prohibition applies to both individual and mass forcible transfers, and "regardless of motive". The element of purpose introduced by the Court, that the forcible transfer must take place for the population's "destruction, forced labour or to attain certain political objectives", simply has no foundation in law. The Court's reading that this prohibition is meant to apply only to mass deportations and for a narrower set of purposes is thus simply incorrect, as the text of this provision demonstrates plainly and explicitly. Furthermore, this stark contrast between the clear wording of Article 49(1) and the Court's reading of it casts doubt as to the Court's impartiality.

3. Failure to consider international human rights law ("IHRL")

While the Supreme Court engaged (albeit inadequately) with some aspects of relevant provisions under IHL, it did not even consider IHRL. Israel has also generally rejected, or accepted only to a limited extent, that it is bound by IHRL in the oPt. Despite the absence of this consideration by the Court in this case and Israel's position on the matter, as the occupying power, Israel is not only bound by IHL, but its IHRL

[10] HCJ 413/13 *Abu Aram v. Minister of Defense*, Petition (16.1.2013), para. 119.
[11] *Abu Aram v. Minister of Defense*, para. 32.
[12] *Abu Aram v. Minister of Defense*, para. 32.
[13] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 ("ICRC Customary Law Study"), Rule 129.
[14] ICRC Customary Law Study, Rule 129.

obligations also extend to the oPt.[15] In this case, access to land, the right to adequate housing and other related rights codified in the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which Israel has ratified, are of direct relevance.

According to the Committee on Economic, Social and Cultural Rights ("the Committee"), which has the mandate for the authoritative interpretation of the ICESCR, and the International Court of Justice, Israel is bound by its obligations stemming from the ICESCR in the oPt,[16] including that of taking appropriate steps to ensure the realization of the right to an adequate standard of living as enshrined in Article 11. The right to an adequate standard of living encompasses other rights, including food, clothing, housing and water. According to the Committee, the human right to adequate housing, derived from this right, is of "central importance for the enjoyment of all economic, social, and cultural rights".[17]

The protection of the right to adequate housing is interpreted as the right to live somewhere in security, peace and dignity, not just shelter. The concept of adequacy in the protection of this right is multi-faceted. It includes, inter alia, legal security in tenure, notably legal protection against forced eviction.[18] The protection of this right applies to different forms of tenure, and legal protection against forced eviction should be guaranteed regardless of the type of tenure.[19] Since the Committee has not imposed a temporal requirement to define tenure, seasonal accommodation is another form of tenure that could be reasonably included in the Committee's wide interpretation. In the Court's decision, however, it determined that permanency of residence was the central issue, and concluded that the petitioners did not establish permanent residence before the declaration of the closure of the area, in its rejection of the merits of the petition.[20]

The secure access to land is also a "precondition for the realization of […] the rights to adequate food, water and housing as part of the right to an adequate standard of living".[21] The livelihoods of individuals, groups and communities may also depend on access to and control over land, in particular for rural and pastoral communities for which access to land is also crucial access to productive resources. In the case of Masafer Yatta, the threat of eviction is not only a threat to their right to adequate housing and associated rights; the threat of eviction from this land that these communities rely on for productivity critically endangers their rights to food and work as well.

By authorizing the military commander to carry out evictions, the Court's decision in effect facilitates the violation of a range of human rights of the members of the communities residing in Masafer Yatta. This

[15] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ("The Wall Opinion"), 9 July 2004, ICJ Rep 136, para. 114.
[16] The Wall Opinion, para. 112; Committee on Economic, Social and Cultural Rights ("CESCR"), Concluding observations on the fourth periodic report of Israel, E/C.12/ISR/CO/4, 12 November 2019, para. 9.
[17] CESCR, General Comment 4: The Right to Adequate Housing (Art. 11(1)) of the Covenant), E/1992/23, 13 December 1991 ("General Comment 4"), para 1.
[18] CESCR, General Comment 4, para 8.
[19] CESCR, General Comment 4, para. 8(a).
[20] *Abu Aram v. Minister of Defense,* para. 33.
[21] CESCR, Draft General Comment 26 on land and economic, social and cultural rights, E/C.12/69/R.2, 3 May 2021, para. 1.

includes, but is not limited to, their right to an adequate standard of living, including rights to housing, food and water, and their right to work. In this regard, the Committee has considered that forced evictions are prima facie incompatible with the ICESCR, and can only be justified in the most exceptional of circumstances. In this case, this assessment is not simply a consideration under IHRL. IHL, which regulates the governance of occupied territory, has a more specific rule in occupied territory, and this rule explicitly prohibits forcible transfers.[22] The only exception to this rule concerns evacuations,[23] and is not relevant or applicable in this case. Falling outside the exceptions to the prohibition established in IHL, the Masafer Yatta evictions are also incompatible with – and in violation of – the ICESCR.

Lastly, Israel must ensure that all rights enshrined in the ICESCR are enjoyed by everyone under its jurisdiction without discrimination of any kind (Article 2(2)). The latest decision of the Court is problematic in two aspects in relation to the principle of non-discrimination. The first aspect is not a novel one; the decision is yet another addition to its long list of case law which applies double standards to the Palestinian population and Israeli settlers (who live in settlements which are always illegal under international law and at times even under Israeli law), including when it comes to evictions, destruction of property, or (forcible) transfers. The second aspect relates to the specific communities involved in the case. The Court's interpretation of the meaning of residence (tenure) as requiring permanence instead of regularity (if this latter is at all required) is inherently discriminatory against the communities in Masafer Yatta who have resided seasonally in the area for generations. The interpretation completely and without any plausible justification (or an attempt thereto) disregards the traditional lifestyles and practices of rural and pastoral communities.

In conclusion, the Court's decision on the Masafer Yatta case is based on an incorrect interpretation and application of IHL, and a complete disregard of IHRL. The decision does not only risk the protection of over 1000 residents in this case, it also sets a dangerous precedent in providing judicial support for Israel's violation of its international legal obligations as an occupying power. Any evictions on the basis of the Court's wholly erroneous interpretation of international law would be in clear violation of IHL and IHRL, and the Israeli authorities must not implement them. If carried out nonetheless, such evictions and related measures should be met with strong condemnation and concrete action by the international community.

Jerusalem, 13 May 2022

[22] ICRC Customary Law Study, Rule 129. See also CESCR, General Comment 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions, E/1998/22, 20 May 1997, para. 12.
[23] 1949 Geneva Convention (IV), Art. 49(2).

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