Revealing Ignorance: The Judgment on Firing Zone 918 (Masafer Yata)

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In this post, Attorney Erlich highlights several significant flaws and shortcomings in the "Opinion" issued by international law experts, which was published following the Supreme Court's decision regarding evacuating illegal structures from Firing Zone 918 (also known as Masafer Yata).

Background

On May 4, 2022, the Supreme Court issued its judgment concerning Firing Zone 918 [1]; on May 8, 2022, a group of international law lecturers and researchers published an "Opinion" regarding the judgment. This post aims to shed light on several aspects, both in the judgment and the "Opinion."

The judgment addressed evacuation orders issued for structures built by Arabs from the area of the town of Yatta in Firing Zone 918—a training area in the southern Judean Desert—and dismissed the petitions filed in 2013 against the implementation of the evacuation orders. The firing zone was declared in 1980 and expanded in 1982. According to the judgment's findings, the Arab settlements began in the 1990s, contrary to the declaration orders and without a permit. The judgment also annulled the interim orders that had prevented the evacuation of the settlements since 2013.

The decision in the judgment is primarily based on threshold grounds. The petitions were filed many years after the order closing the area for IDF training was issued, and the court believed that this alone was sufficient to dismiss them. The petitioners' lack of clean hands was also found to justify the dismissal of their petition on threshold grounds. They continued to build

[1] HCJ 413/13 Abu Aram v. Minister of Defense (2022).

unauthorized structures within the area during the interim orders, contrary to the orders and procedural agreements.

However, Justice David Mintz, who wrote the main opinion, did not settle for the threshold grounds and clarified that he would have dismissed the petitions on their merits in any case. To this end, he presented his factual findings in great detail, concluding that the area closure orders were lawfully issued and there was no justification for violating them. The two other justices on the panel who joined Mintz's opinion did not refer to the threshold grounds. They devoted their brief opinions to emphasizing the factual findings that negate the basis for the petitioners' claims.

The Factual Finding – Rejection of the Claim of Population Transfer

The central legal basis for the petitions was the factual claim that the orders closing the area for military training dispossessed and expelled the petitioners from their inheritance. The petitioners claimed that this was a "forced transfer" of them from their residence, contrary to Article 49(1) of the Fourth Geneva Convention, which prohibits the forced transfer of a population from the occupied territory.[2] Therefore, the petitioners argued that implementing the orders now would be illegal.

This was, therefore, the factual question on which the petition revolved: did the petitioners or their ancestors have permanent residence in the villages within the area before the declaration, or did the permanent settlement begin only after the area was closed as a training area, and it is nothing more than an invasion carried out contrary to the order. The petitioners' legal argument relied on the factual claim that there was permanent settlement before the declaration of the area closure, as only in this way can one argue about "population transfer."

The court extensively and in detail addressed the multitude of evidence presented before it—dozens of aerial photographs from various dates over six decades; testimonies of inspectors from different periods; evidence of Air Force training; research literature and expert opinions—and

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[2] The prohibition is not motive-dependent and applies except in the circumstances detailed in Article 49(2), which concern the temporary transfer of a population for its security or for imperative military reasons.

based on all these, reached a clear conclusion: before 1980, the date of the issuance of the first order closing the area as a training area, there were no permanent settlements in the said area and no permanent structures. The presence in the area was seasonal, at most, without residences, for agricultural cultivation and grazing purposes. Therefore, the court believed that this was not a transfer of a population that resided in the area, but rather the imposition of restrictions on access to the area for seasonal cultivation or grazing after it was designated as an IDF training area.

Additional References to International Law and the Question of Authority

The judgment sees the negation of the factual basis for the "forced transfer" claim as a sufficient legal reason to dismiss the petitioners' claim on its merits. Preceding this determination, Justice Mintz conducted a brief discussion on the authority to issue area closure orders and the legality of exercising this authority in this case. For the sake of discussion, these remarks were written under the assumption that the military commander in Judea and Samaria is subject to the customary provisions of the Fourth Geneva Convention dealing with the laws of occupation.[3]

Justice Mintz clarified that there is authority for the authorities in Judea and Samaria to close areas for military training purposes under Regulation 125 of the Defense (Emergency) Regulations. The regulation applies both within Israel within the Green Line and in Judea and Samaria, has the status of law[4], and closing an area under the regulation may prohibit entry into it even to those with property rights. Another source of authority is Section 318 of the Order Regarding Security Provisions, a military order that applies only in Judea and Samaria.

Justice Mintz added that the provisions of international law incorporated into Israeli law, particularly the Fourth Geneva Convention, do not prevent the exercise of this authority. The argument in the petitions was that even in terms of authority, Article 49(1) of the Fourth Geneva Convention is relevant, as it negates the authority to issue closure orders.

Justice Mintz rejected the argument, as in Israeli law, an explicit provision in law overrides the provisions of the Fourth Geneva Convention, including those that have been accepted as

[3] Paragraph 31 of Justice Mintz's opinion.
[4] On their status as part of Israeli law, see, for example, HCJ 10190/17 IDF Commander in Judea and Samaria v. Alian (2019).

customary. Mintz refers to the judgment in the Sajdiya case[5], where Justice Shamgar explained in detail that a domestic Israeli legal provision overrides a contractual provision in the Geneva Convention, even if it is a provision that has become customary. It is worth noting that in the Sajdiya case, the article from the Geneva Convention discussed is Article 49(1). The Supreme Court reiterated this determination in a judgment in 2010.[6] Therefore, even if we assume that Article 49(1) reflects customary law and that it applies to Israeli authorities in the West Bank, and even if we assume that it implies a prohibition on closing areas for military purposes when residents have property rights, the local law would still prevail over it. All the more so, Justice Mintz added, in light of the longstanding Supreme Court ruling that Article 49(1) is a contractual provision that does not reflect customary international law.[7] This is especially pertinent, Mintz continues, when considering that the provision aims to prevent mass deportations of populations in occupied territory for the purpose of their extermination. This issue has nothing to do with the closure of an area for military training purposes.

Justice Mintz did not elaborate on this interpretation of Article 49. It echoes the traditional interpretation of the Supreme Court regarding this provision. Still, it is worth noting that in the past, these remarks were made in the context of incarcerating criminals or terrorists in another territory[8], or expelling terrorist leaders for security reasons[9], which are different matters from the issue at hand. Given the clear factual finding in this case that there is no expulsion of people from their land but rather the removal of recent intruders as part of the enforcement of legal orders from the planning and construction field, this remark was not necessary for the ruling's conclusion and is therefore clearly considered an obiter dictum.

The "Opinion" of International Law Researchers and Academics

A few days after the publication of the ruling, on May 8, 2022, a "statement of opinion" was published by a group of academics in the field of international law. In this short document, the authors claim to "focus on those determinations in the judgment that deal with international law and its relationship with Israeli law... which are based on a misinterpretation of international

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[5] HCJ 253/88 Sajdiya v. Minister of Defense, P.D. 42(3) 801 (1988).
[6] HCJ 2690/09 Yesh Din v. IDF Commander (2010).
[7] Paragraph 32 of Justice Mintz's opinion, referring to HCJ precedent.
[8] As established by the majority opinion in Sajdiya, supra, and see also Yesh Din, supra.
[9] HCJ 785/87 Afu v. IDF Commander, P.D. 42(2) 4, 35 (1988).

law." I will preface by saying that court rulings should be criticized, and it is appropriate to express a reasoned opinion regarding incorrect legal determinations. It is certainly possible to criticize factual findings of courts, and it is clear that the policies adopted by authorities or the court itself are subject to criticism. However, the document's signatories declare at its outset that their concern is solely with international law. The problem is that their criticism is presented in a manner that is likely to mislead readers about the content of the ruling and the factual and legal findings of the court.

First, the "statement of opinion" ignores the central finding of the ruling—the absence of residence in the area before the order was issued. The document also assumes several factual and legal premises that contradict the ruling. The authors assume that a "significant portion" of the area is private land, that the petitioners are being "removed" from "their land," that the petitioners have a "right" to construct permanent buildings on this land, and that the ruling "prevents" them from continuing to maintain a traditional agricultural lifestyle. These assertions have no basis in the verdict, which, as noted, found that the petitioners' factual claims were untrue. There is also no basis in the ruling for property rights for the petitioners in the area. On the contrary, the ruling states that the petitioners "did not attach any document indicating that they have property rights in the lands within the firing zone."[10] Furthermore, even if they had property rights in the land, there is no recognized "right" to construct permanent buildings, as construction is also subject to planning and building laws. Regarding the preservation of their way of life, the ruling extensively details the efforts made by IDF authorities to accommodate the petitioners, allowing them extended periods of grazing and agricultural cultivation in the area according to agrarian seasons.

If the authors intended to criticize the court's factual findings, they should have stated this and engaged in a substantive discussion of the factual conclusions themselves; as mentioned, factual findings of courts are not immune to criticism. However, the authors did not do so. Instead, they presented the reader with factual assumptions without informing them that these assumptions contradict entirely the court's findings. The "statement of opinion" does not discuss these factual claims on their merits. It does not even acknowledge that they are disputed.

Moreover, it is puzzling why the authors felt the need to assert that "the true purpose of the order when it was issued was to restrict the petitioners' access to the area." This serious accusation—

[10] Paragraph 26 of Justice Mintz's opinion.



that in 1980, an order declaring the area a training zone was issued solely to expel the petitioners from their land—appears to be a claim even the petitioners themselves did not dare to make. It is unclear what basis the authors have in the ruling they purport to critique for making such an accusation. On the contrary, the ruling clearly shows that over the years, there was dialogue between the military authorities and the petitioners (in their various incarnations), attempting to maximize their access to the area and minimize harm to their livelihoods. More than once, the parties reached agreements on this matter, which the court explicitly describes as "beyond the letter of the law." Justice Amit does not hold back his criticism, particularly of the petitioners (or those representing them): the attempts at compromise since the 1980s, in which practical proposals were made to allow the petitioners to remain in the area as much as possible, "were repeatedly rejected by the petitioners, and one must wonder whether practical considerations of minimizing harm guide the petitioners, or a 'all or nothing' approach."[11]

The authors claim that an occupying army may use land in occupied territory for military purposes only if balanced against the rights of the local population. The ruling (which, as noted, is prepared to assume the applicability of these laws in this context) repeatedly emphasizes that such a balance was carried out, and the IDF limited its training to allow for grazing and farming in the area as much as possible and beyond that.[12] Criticism of the balance is possible, and as is well known, Israeli administrative law has developed an expansive doctrine of judicial review over balances and their reasonableness. The authors can hold a different opinion from the judges regarding the reasonableness of the balance. Still, it is difficult to see how this critique fits into an argument about "a misinterpretation of international law." The authors further attack the issuance of the order because "the state did not provide conclusive evidence of the necessity and proportionality of the order." This, too, is an unreliable presentation of the facts, as the ruling explicitly states that the necessity issue was examined to the court's satisfaction.[13]

Most troubling is that the "statement of opinion" authors ignore the central and unequivocal factual finding. There were no permanent residences in the area before the order was issued. The petitioners' residence in the area began only after the order was issued, and long after it, in violation of it, and contrary to agreements made occasionally. The authors ignore this. Despite

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[11] Paragraph 2 of Justice Amit's opinion.
[12] See, for example, Paragraph 47 of Justice Mintz's opinion, as well as Justice Amit's statements, supra.
[13] See Paragraphs 23 and 46 of Justice Mintz's opinion.

their declaration that they intend to focus on "legal determinations," they repeatedly assert that the case involves "the removal of residents from their homes for military needs," reinforcing the factual presentation of the petitioners, which the court rejected after examining the evidence. The avoidance of presenting the facts as they are likely stems from the desire to argue that this violates Article 49(1) of the Fourth Geneva Convention. This claim cannot be made concerning the eviction of intruders who settled in an area after it was declared closed. This eagerness has led to a distorted presentation.

Even if the facts and findings of the judgment aligned with the portrayal created by the authors, the legal criticism in the "statement of opinion" suffers from several inaccuracies. We will touch on a few of them. The authors seek to reject the court's determination that Israeli legislation takes precedence over international law and argue extensively why the military commander's security legislation is subject to the limitations imposed by international law. However, the court recognized the authority to declare areas as training zones based on the Defense (Emergency) Regulations, which hold the status of law both in Israeli law and in local law in Judea and Samaria. These regulations are not the creation of the military commander. Therefore, they constitute local law in Judea and Samaria, and the court rightly determined that they serve as a solid source of authority for the declaration.

Additionally, the "statement of opinion" asserts that all provisions of the Fourth Geneva Convention have become customary due to the time elapsed since its adoption, the accession of all states to it, and the formation of practice supporting its provisions. Without delving into the question, one would expect the lecturers to accurately present the prevailing classical position in international law regarding the methodology for recognizing customary law. A practice is recognized as customary (i.e., as binding international law) when states follow it while expressing that their behavior is legally required.[14] There is no consensus that the popularity or longevity of a treaty turns its provisions into customary law, and examples can illustrate this.[15]

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[14] See, for example, Hanckaerts and Doswald-Beck, Customary International Humanitarian Law (2005), p. XXXVIII (hereinafter – ICRC Guide to Customary International Humanitarian Law).
[15] The ICRC Guide to Customary International Humanitarian Law, on which the authors of the "statement of opinion" rely, does not claim that all provisions of the Fourth Geneva Convention have become customary. See pages XXV-XXXVI in the introduction section. This study itself

Conclusion

The judgment is not lengthy—about twenty-four pages, including the opinions of all the justices. One would assume that the lecturers and researchers who signed the "statement of opinion" read it thoroughly before drafting and signing the document, as they indeed expect their students to do, and noticed the guiding factual finding throughout: there were no residences in the firing zone until many years after the declaration orders were issued. Therefore, it is puzzling how they overlooked the severe distortion in the "statement of opinion." Perhaps, in the future (especially before releasing an English version), it would be better to set aside the zeal to support the petitioners at any cost, the tendency to depict the IDF as an immoral army, and the fashionable temptation to portray Israel as a state deliberately violating international law.

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also notes the Supreme Court's position regarding the non-customary nature of Article 49 of the Convention, a matter the authors chose to downplay (see Rule 129, p. 459).