State of Israel

Ministry of Foreign Affairs

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The legal status of the new territories recently occupied by the IDF

A. General Part

1. It is a rule of international law that a transfer sovereignty occurs only under subsequent diplomatic agreements. De jure, military occupation does not result in a change of sovereignty over the territory although, evidently, it results in a change in possession. This rule is based on the fairly clear distinction between sovereignty (ownership), namely, the overall rights over the territory, and possession, a term whose substance is factual.
2. A clear indication of imposition of sovereignty by a state over occupied territories is the application of the laws of the occupying state to the occupied territory and the revocation of the laws which applied previously and originate in the previous sovereign. According to international custom, as a general rule the laws of the occupying state are not applied before a political arrangement is reached.
3. This principle is clearly expressed in Articles 42 and 43 of the Regulations concerning the Laws and Customs of War on Land annexed to The Hague Convention IV of 1907, which state as follows:

Article 42

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 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 county.

It should be noted that the above regulations are based on the distinction between sovereignty and factual possession.

Attention is also drawn to Article 46 of the Fourth Geneva Convention of 1949 which states as follows:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said law.
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> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

4. Neither Israel nor Egypt are parties to the above Hague Convention. However, there is consensus among international law scholars that said convention, in fact, constitutes an acceptable codification of the rules of international customary law and that said customary rules are binding. Indeed, this was unequivocally held by the International Military Tribunal for the prosecution of major war criminals in Nuremberg after WWII.

5. The aforesaid Article 43 and all other Articles up to Article 56 grant the occupying power extensive authorities to establish rule over the occupied territories.

B. The Gaza Strip

6. Attention is drawn to the Areas of Jurisdiction and Powers Ordinance, 5708-1948, which stipulates in section 1 thereof as follows:

> Any law applying to the entire State of Israel shall be deemed to apply to the entire areas including both the area of the State of Israel and any part of the Land of Israel which the Minister of Defense has defined by proclamation as being held by the IDF.

7. The term "the State of Israel" is not defined, but it appears that what was meant was the State of Israel within the borders allocated to it in the UN resolution of November 29, 1947. On September 2, 1948, the Minister of Defense promulgated Proclamation No. 1 of IDF Rule in the Land of Israel (Official Gazette No. 19, page 114) where the term "held areas" was defined as follows: all areas in the Land of Israel included within the boundaries of the areas marked in red on the map of the Land of Israel…". It is expressly stated therein that the law of the state of Israel applies to the held areas. The above proclamation was ratified (if and to the extent required) by section 3 of the aforesaid Areas of Jurisdiction and Powers Ordinance which was enacted at the end of that month. The language of the Proclamation as well as the express language of section 1 of the above Ordinance make it clear that this special procedure is meant only for areas which previously formed part of Mandatory Palestine. According to information I have in my possession, changes in the red map mentioned in the proclamation were made and finally established following the territorial changes which were agreed upon in the armistice agreements. The armistice agreements were, therefore, accepted as the necessary diplomatic foundation of the arrangement on which domestic legal conclusions were made, allowing state sovereignty [of these areas], for both internal and external needs. It is interesting to note that perhaps other than the special issue of Jerusalem, this has never been seriously questioned by any third country despite the seemingly provisional nature of the armistice agreements, and the fact that

according to legal tradition, an armistice agreement cannot conclusively establish transfer of sovereignty. Third countries have, at the utmost, expressed implicit reservations regarding the borders of the State of Israel while recognizing it due to the fact that these were armistice lines. However, the above reservations were merely lip service.

8. The entire Gaza Strip area up to the previous Palestinian border is undoubtedly "part of the Land of Israel" according to the literal meaning of section 1 of the above Areas of Jurisdiction and Powers Ordinance. I understand that Strip, has thus far, been held under military Egyptian rule according to the spirit of The Hague Convention IV, and that the Egyptians were careful not to create the impression that they were annexing said area to their country.

9. It is correct that since the termination of the British Mandate the issue of sovereignty over the Gaza Strip remains in a deadlock. The sweeping application of Israeli law to the Strip points to an intention to finally resolve this problem while annexing the Strip to Israel. However, other than that, attention is drawn to the immediate legal ramifications arising of same with respect to the status of the residents of the area. Indeed, according to section 3 of the Citizenship Law 5712, the former will not automatically become Israeli citizens (although with 200,000 more Arabs subject to Israeli law, the issue of their citizenship will most certainly have to be addressed). In any event, they will be subject to the population registration laws and will enjoy the same civil rights that any resident is entitled to and will be entitled to turn to the High Court of Justice for the realization thereof.

10. Although I have no doubt that the Minister of Defense has the power to define, in a proclamation, that the entire Gaza Strip, up to the previous international border is held by the IDF, it must be clear that in so doing he annexes the Strip to the State of Israel. If there is a political decision to annex the Strip to Israel, then using powers pursuant to the above Ordinance can be a convenient way to achieve said goal.

11. However, in the absence of any diplomatic agreement concerning the future of the Gaza Strip and its fate, it should be noted that using the powers granted by domestic Israeli law neither adds nor detracts from the international validity of the act, and in view of the overall circumstances, I am of the opinion that any country in the world will have the right to regard the annexation of the Gaza Strip to the State of Israel at this time as a step which contravenes international customary law, and draw whatever conclusions from same. It is not for me to express an opinion regarding the political implications of the annexation of the Strip to Israel precisely at this time.

C. Sinai Peninsula

12. The situation is completely different with respect to the Sinai Peninsula, namely, beyond the previous international border between Mandatory Palestine and Egypt. The application of Israeli law to said area, either by emergency regulations or in any other legal way cannot be reconciled with the above quoted articles of The Hague Convention of 1907, and the Geneva Convention of 1949. In practice, the application of Israeli law in its entirety to the Sinai peninsula amounts to an actual annexation of the area to Israel. Clearly it is a step of a great political significance.

    Whereas with respect to the Gaza Strip, the conclusion is, as aforesaid, clarification of the situation which deliberately remained vague since 1948, with respect to the Sinai Peninsula the situation is different and the application of Israeli law thereto in any way or manner whatsoever is an explicit demonstration of transfer of sovereignty from Egypt to Israel.

13. In my opinion, not one of the ministers is authorized to act on his own initiative in a bid to create such a legal situation by using his power to promulgate emergency regulations. In view of the fact that there is no dispute that

the area in question is located beyond the borders of Israel, I am of the opinion that the correct way to annex the area to Israel, if a political decision to that effect is made, would be by a governmental proclamation which would be published in the official gazette as was the case with the proclamation regarding the annexation of the underwater plateau. It is a step that carries significant international implications and only after it is taken will it be possible, if necessary, to make adaptations to the domestic laws of the state. I deliberately say "if necessary", since, if this area is annexed in the above manner it will form part of the State of Israel and it is doubtful whether any special adaptation of the laws shall be required.

D. Conclusion

14. Legally, I have came to the conclusion that in a bid to establish a military regime in the new territories – and the term military regime is used as distinct from the military administration used for special and limited needs within the state – no proclamation or any other enactment by the minister of defense or any other minister is required. In my opinion, the chief of staff has the power, either personally or through the local command, by virtue of the powers vested in the military commander by international law, to issue proclamations, orders and directives as may be required to establish a military regime which will govern these areas until the situation is clarified. In exercising said powers (which are ultimately the responsibility of the government) the chief of staff or the local commander will have to take into consideration certain limitations which arise from The Hague Convention IV of 1907, and from other obligations incumbent upon the State of Israel in its relations with Egypt, the most important of which arise from the Geneva Convention of 1949 relative to the protection of civilian persons in occupied territories.

S.R.

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