

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

April 21, 1978

Dear Chairmen Fraser and Hamilton:

Secretary Vance has asked me to reply to your request for a statement of legal considerations underlying the United States view that the establishment of the Israeli civilian settlements in the territories occupied by Israel is inconsistent with international law. Accordingly, I am providing the following in response to that request:

The Territories Involved

The Sinai Peninsula, Gaza, the West Bank and the Golan Heights were ruled by the Ottoman Empire before World War I. following World War I, Sinai was part of Egypt; the Gaza Strip and the West Bank (as well as the area east of the Jordan) were part of the British Mandate for Palestine; and the Golan Heights were part of the French Mandate for Syria. Syria and Jordan later became independent. The West Bank and Gaza continued under British Mandate until May, 1948.

The Honorable

Donald M. Fraser, Chairman  
Subcommittee on International  
Organizations,  
Committee on International Relations  
House of Representatives.

The Honorable

Lee H. Hamilton, Chairman  
Subcommittee on Europe and the  
Middle East,  
Committee on International Relations  
House of Representatives.

In 1947, the United Nations recommended a plan of partition, never effectuated, that allocated some territory to a Jewish state and other territory (including the West Bank and Gaza) to an Arab state. On May 14, 1948, immediately prior to British termination of the Mandate, a provisional government of Israel proclaimed the establishment of a Jewish state in the areas allocated to it under the partition plan. The Arab League rejected partition and commenced hostilities. When the hostilities ceased, Egypt occupied Gaza, and Jordan occupied the West Bank. These territorial lines of demarcation were incorporated, with minor changes, in the armistice agreement concluded in 1949. The armistice agreements expressly denied political significance to the new lines, but they were de facto boundaries until June, 1967.

During the June, 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights. Egypt regained some territory in Sinai during the October, 1973 war and in subsequent disengagement agreements, but Israeli control of the other occupied territories was not affected, except for minor changes on the Golan Heights through a disengagement agreement with Syria.

### The Settlements

Some seventy-five Israeli settlements have been established in the above territories (excluding military camps on the West Bank into which small groups of civilians have recently moved). Israel established its first settlements in the occupied territories in 1967 as para-military "nahals." A number of "nahals" have become civilian settlements as they have become economically viable.

Israel began establishing civilian settlements in 1968. Civilian settlements are supported by the government, and also by non-governmental settlement movements affiliated in most cases with political parties. Most are reportedly built on public lands outside the boundaries of any municipality, but some are built on private or municipal lands expropriated for the purpose.

## Legal Considerations

1. As noted above, Israeli armed forces entered Gaza, the West Bank, Sinai and the Golan Heights in June, 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel thus became a belligerent occupant of these territories.

Territory coming under the control of a belligerent occupant does not thereby become its sovereign territory. International law confers upon the occupying state authority to undertake interim military administration over the territory and its inhabitants; that authority is not unlimited. The governing rules are designed to permit pursuit of its military needs by the occupying power, to protect the security of the occupying forces, to provide for orderly government, to protect the rights and interests of the inhabitants and to reserve questions of territorial change and sovereignty to a later stage when the war is ended. See L. Oppenheim, 2 International Law 432-438 (7th ed., H. Lauterpacht ed., 1952); E. Feilchenfeld, The International Economic Law of Belligerent Occupation 4-5, 11-12, 15-17, 87 (1942); M. McDougal & F. Feliciano, Law and Minimum World Public Order 734-46, 751-7 (1961); Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, Articles 42-56, 1 Bevans 643; Department of the Army, The Law of Land Warfare, Chapter 6 (1956) (FM-27-10).

In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, within the limits of what is required for the army of occupation and the needs of the local population.

But beyond the limits of quality, quantum and duration thus implied, the Occupant's acts will not have legal effect, although they may in fact be unchallengeable until the territory is liberated. He is not entitled to treat the country as his own territory or its inhabitants as his own subjects, ...and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of de facto rule. J. Stone, Legal Controls of International Conflict, 697 (1959).

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.

2. Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 UST 3516, provides, in paragraph 6:

The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population whatever the objective and whether involuntary or voluntary.\* It seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation. And the paragraph

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\*Paragraph 1 of Article 49, prohibits "forcible" transfers of protected persons out of occupied territory; paragraph 6 is not so limited.

appears applicable whether or not harm is done by a particular transfer. The language and history of the provision lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.

The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves the displacement of the local population. Although one respected authority, Lauterpacht, evidently took this view, it is otherwise unsupported in the literature, in the rules of international law or in the language and negotiating history of the Convention, and it clearly seems not correct. Displacement of protected persons is dealt with separately in the Convention and paragraph 6 would be redundant if limited to cases of displacement. Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in World War II for political, racial or colonization ends; but there is no apparent support or reason for limiting its application to such cases.

The Israeli civilian settlements thus appear to constitute a "transfer of parts of its own civilian population into the territory it occupies" within the scope of paragraph 6.

3. Under Article 6 of the Fourth Geneva Convention, paragraph 6 of Article 49 would cease to be applicable to Israel in the territories occupied by it if and when it discontinues the exercise of governmental functions in those territories. The laws of belligerent occupation generally would continue to apply with respect to particular occupied territory until Israel leaves it or the war ends between Israel and its neighbors concerned with the particular territory. The war can end in many ways, including by express agreement or by de facto acceptance of the status quo by the belligerents.

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Geneva Convention, may not apply in the

West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, bind signatories with respect to their territories and the territory of other contracting parties, and "in all circumstances" (Article 1), in "all cases" of armed conflict among them (Article 2) and with respect to all persons who "in any manner whatsoever" find themselves under the control of the party of which they are not nationals (Article 4).

#### Conclusion

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for the reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law.

Very truly yours,

Herbert J. Hansell