

[on official letterhead of the Ministry of Foreign Affairs Jerusalem, Office of the Director General]

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Jerusalem 13 Adar, 5728
13 March, 1968

To: Dr. Y. Herzog, Director General, Prime Minister's Office

From: Director General

I respectfully present you with the opinion of our legal advisor, which may be of interest to you and to the Prime Minister.

Sincerely,
[signed]
Gideon Refael

12 March 1968

Ministry of Foreign Affairs

Top Secret

classification

Urgent

Memo

To: Director General
From: Legal Advisor

To:
From:

Re: Geneva Convention: Blasting Homes and Deportation

You have requested my opinion as to whether the blasting of homes and deportation to the East Bank contravene the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

My presumption for the purpose of this opinion will, therefore, be that the Fourth Geneva Convention applies in full. However, as you are aware, our policy has been to avoid making statements regarding whether or not we are subject to the Fourth Geneva Convention for reasons which need not be detailed herein. This policy of avoiding the Convention was, in my opinion, correct, although, as a result of various allegations regarding violations of the Convention, pressure on us has mounted recently.

Blasting Homes

The blasting of homes relies on Regulation 119 of the Defence (Emergency) Regulations 1945, which stipulates, *inter alia*, that where a home has been used in the commission of a certain security offense, the military commander may order its seizure and destruction. No legal proceedings are required prior to the execution of the military commander's decision under this procedure. Regulation 119 has been passed down from the British Mandate, and has remained in effect in the Gaza Strip, Judea and Samaria and Israel. Since it is in effect inside Israel, it is valid in East Jerusalem as well. IDF authorities in all held territories had ordered that existing law shall remain in effect, subject to certain restrictions, and so, Regulation 119 has remained valid in the held territories. However, even if the regulation was formally valid in Jordan, I have been informed that the Military Advocate General's Corps (MAG Corps) is not aware of any use made of thereof. This fact clearly undermines the argument based on Regulation 119.

The MAG Corps explains the blasting of homes as follows:

Blasting a home is a punitive measure under the local law that was in effect in these territories prior to the entry of IDF forces. The power to use said regulation was assumed by the IDF under the rules of international law. In other words, this is not a military reprisal carried out by the military force as such, nor is it collective punishment, but rather, a personal penalty under local law and in its spirit, employed by the administrative authorities that replaced the previous regime, which used these powers prior to the occupation.

It appears to me that the MAG Corps' aforesaid line of argument has value in terms of public diplomacy, and may help shoulder the diplomatic burden associated with blasting homes. However, I believe it is unpersuasive from a legal standpoint.

While it is true that according to international law, a regime of occupation must uphold local law, this rule is not absolute. According to Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land of 1907, the requirement to uphold local law does not apply if the occupying power is "absolutely prevented" from doing so. The literature on international law notes that this reservation applies when local laws contravene certain humanitarian principles and it is known that the occupying

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forces in Germany revoked many Nazi laws. Article 46 of the Fourth Geneva Convention is clearer still, noting that while the occupying power must allow the penal laws of the occupied territory to remain in force, there are reservations to this rule, particularly when local penal laws constitute an “obstacle to the application of the present Convention”. In his book, *The Modern Law of Land Warfare*, Greenspan notes that, “Article 64 gives an occupant authority to do away with institutions, fundamental or not, in the occupied territory which conflict with the operation of such principles”.

Yet the official commentary of the Fourth Geneva Convention issued by the International Committee of the Red Cross (ICRC), known as the Jean Pictet Commentary, goes further still. According to the commentary on the aforesaid reservation included in Article 64, “when penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail”. In other words, the occupant has no discretion to choose whether to follow the Fourth Geneva Convention or local law that contradicts the Convention, but must follow the Geneva Convention only. This interpretation is, in my opinion, correct, and reflects one of the conventions of public international law, i.e, the primacy of the norms of public international law where these contradict domestic law.

The question before us is, therefore, whether there is a clear contradiction between Regulation 119 and the provisions of the Fourth Geneva Convention. I believe that such a contradiction does exist, mainly with the clear and specific rule set forth in Article 53 of the Geneva Convention, as follows:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Since the reservation that concerns recognition of military operations does not apply, the blasting of homes is prohibited under this article. This holds true both with respect to a blasting of a home ordered by judicial decree and one ordered by administrative decree. The *lex specialis* in Article 53 is sufficient to provide a clear answer to the question at hand. Incidentally, Article 23(g) of the Hague Regulations, which reflect customary international law, similarly stipulates that it is forbidden to “destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

To this we can add, without going into too many details, that the blasting of homes can be criticized from a different angle, that of Article 33 of the Geneva Convention, which stipulates that:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited... Reprisals against protected persons and their property are prohibited.

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Our argument that the measure is a personal rather than collective punishment under the law in force prior to the occupation may be countered by our detractors with the salient argument that the military commander's orders are issued without a trial conducted in accordance with the rules of proper penal law stipulated in specific articles in the Geneva Convention.

Incidentally, the ICRC has sent a communiqué to the Ministry of Foreign Affairs, noting the illegality of the blasts under Articles 33 and 53 of the Geneva Convention. The ICRC also threatened that it may be obliged to publicize its objection in this matter.

And now for a few words on the issue of Jerusalem. Our position on the status of Jerusalem is clear and need not be detailed herein. It is, however, noted, that Article 47 of the Geneva Convention stipulates that persons protected under the Convention may not be deprived of their Convention rights "by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor ... by any annexation by the latter of the whole or part of the occupied territory".

Our policy with respect to Jerusalem has been to refrain from getting into "legalistic" arguments and to try to prevent clear contradictions with the Geneva Convention, so as to preclude the question whether the Convention applies or not from arising. As a result of certain developments, concerning land seizures and the issue of blasting [homes], the American Administration has recently expressed its opinion that the Fourth Geneva Convention and the Hague Regulations do apply in Jerusalem and that our status in the city is that of an occupier. This has caused us diplomatic damage. Indeed, when we did use Regulation 119 in East Jerusalem, we followed Israeli law, which we have applied to East Jerusalem, but, as noted, Article 47 does present a problem. Moreover, as far as I am aware, Regulation 119 has not been employed in the State of Israel, and therefore, its use in East Jerusalem may give the impression we are trying to prevent, which is that the regime in East Jerusalem is different from the regime in the rest of the State of Israel.

Deportation

Here too, Regulation 112 of the Defence (Emergency) Regulations 1945 vests the Minister of Defence (and formerly the High Commissioner), with powers to deport certain individuals. This regulation is valid in Judea and Samaria and in Israel, including in the united city of Jerusalem. As explained above, relying on domestic law does not absolve us from obligations under the Geneva Convention when domestic law contradicts specific provisions therein. The Geneva Convention provisions relevant to the matter at hand are found in Article 49, which stipulates, *inter alia*:

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 motive.

The MAG Corps explains deportations as follows:

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The provisions of Article 49 of the Geneva Convention are designed to prevent expulsions from the occupied territory into the territory of the occupying power, or to another country. Article 49 does not address situations in which residents of an occupied territory engage in subversive activities against the military on behalf of the regime that ruled the territory prior to the occupation, and following said subversive activities, are slated to be transferred to the hands of the regime on behalf of which they acted. Incidentally, it is doubtful that the Jordanians would consider transferring a resident of the West Bank to the East Bank as a transfer to "another country".

While the aforesaid interpretation may be beneficial in certain circumstances from a public or official diplomacy standpoint, when it comes to deportation from Judea and Samaria, the matter is not at all simple. The Geneva Convention is a humanitarian convention that aims to protect the rights of the civilian population, and I am doubtful that this sort of narrow, literal interpretation for such a convention would be accepted by third parties, such that would absolve an occupying power from the absolute duty to refrain from deportations, whatever the reason.

As for Gaza, the question has not arisen as of yet, as apparently no one has been deported from Gaza to date.

My conclusion is that while given the issues noted above, the Jordanians chose not to base their grievance with respect to deportations on Article 49 of the Geneva Convention, should this question arise from the legal standpoint, I do not believe our position would be legally accepted by third parties.

Respectfully,
[signed]
T. Meron