



## Disengagement from Gaza - Legal Issues

A summary of points raised at a discussion group meeting of the International Law Programme and the Middle East Programme at Chatham House on 20 June 2005. This summary is issued on the understanding that if any extract is used, Chatham House should be credited, preferably with the date of the meeting.

### Essentials of Disengagement Plan From Cabinet Resolution of June 6, 2004

The Gaza Strip

- "1) The State of Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") ...
- 2) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated. "

### Legal Issues

- Legal Status of Settlements and Settlers
- Power of Government to Order Settlers to Leave their Homes and Relocate in Israel
- Recourse of Settlers – Refusal to Leave and Right to Compensation
- Status of Gaza after Disengagement

### Status of Settlements in International Law

- External Perspective

#### How are settlements viewed by other states, international tribunals/organizations and experts in international law?

- Territories beyond the 1967 armistice-line borders have the status of occupied territory
- All settlements in the Occupied Territory are established in violation of article 49 (6) of Geneva Convention IV, which prohibits an occupying power from transferring part of its civilian population into the occupied territory

- Internal Perspective

#### How are the settlements viewed by Israeli institutions, especially the Supreme Court of Israel?

### Traditional *Political/Legal* Position of Government of Israel

- Questions whether Gaza and West Bank should be regarded as occupied territory
- Geneva Convention IV does not apply *de iure* to the specific situation in Gaza and West Bank, but Israel will respect the "humanitarian" provisions of the Convention

- Article 49 (6) of the Geneva Convention does not apply to civilians who relocate to territories of their own free will

## **Politics and Law**

- There have been many government statements regarding the permanency of the settlements
- In the Elon Moreh case the statement of Begin on permanency was crucial to the result of the case.
- But the Government in the recent case before the Supreme Court of Israel had to argue on the basis that customary international law did not allow the settlements to be permanent, since this was an occupied territory.

## **Supreme Court of Israel**

- In a recent case (HCJ 1661/05, Regional Council of Gaza Beach v. Knesset) the Court went along with the attempt to separate politics and law
- It confirmed that the legal situation on the West Bank and Gaza was one of Belligerent Occupation
- It affirmed that Customary International Law relating to occupied territories will be enforced by the domestic courts of Israel

## **Supreme Court on Settlements**

- The Court however refused to rule on the application of article 49 (6) of Geneva Convention IV, which it said did not reflect customary law. Like the UK and many other countries, the law of Israel does not allow the courts to apply directly the provisions of treaties unless they have been incorporated into domestic law.
- The Court stated that the military government does not have the power to create facts that are designed to be permanent
- Therefore, in the decision of the Court, the settlements may remain only as long as the military government retains control

## **Domestic Legal Basis for Evacuation of Settlements**

- In theory, an order by the military commander would have been sufficient, but would have lacked political legitimacy in Israel
- A Knesset statute creates the obligation for all settlers to leave on signing of executive order
- The statute provides for compensation

## **Judicial Review of Knesset Law**

- Settlers and companies who were affected by the law challenged it in the courts
- The basis of the challenge was that fundamental rights guaranteed under Israel's Basic Laws on human rights have been violated by the Knesset statute.
- The response of the government was that the settlements were temporary, as they were established in territory under belligerent occupation

## **Supreme Court Judgment**

- Majority of 10-1 upheld Knesset law, subject to some changes on issue of compensation
- Judgment rests on Israel's status as an occupying power

- The Court accepted that the rights of settlers were restricted but held that the restrictions were compatible with the limitations clause in Basic Laws

### **West Bank**

- The legal position of the West Bank is no different.

### **Human Rights**

- Israel's position is that the human rights Covenants do not apply to the Occupied Territory

### **Status of Gaza After Evacuation**

- Will it remain occupied territory?
- No Israeli civilians or military forces will remain in Gaza
- BUT: Israel will retain control over borders and airspace (see below)
- Will this amount to effective control required for territory to be regarded as occupied?
- Is military presence in territory a requirement for occupation?
- Will it be a separate territory from the West Bank in law?

### **Situation after Disengagement**

#### **Security Situation Following the Relocation**

##### **One. The Gaza Strip:**

"1) The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.

2) The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.

3) The State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip."

##### **Border Area with Egypt**

- The Border Area Between the Gaza Strip and Egypt (Philadelphi Route)

"The State of Israel will continue to maintain a military presence along the border between the Gaza Strip and Egypt (Philadelphi Route). This presence is an essential security requirement. At certain locations, security considerations may require some widening of the area in which the military activity is conducted.

Subsequently, the evacuation of this area will be considered. Evacuation of the area will be dependent, inter alia, on the security situation and the extent of cooperation with Egypt in establishing a reliable alternative arrangement.

If and when conditions permit the evacuation of this area, the State of Israel will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel. "