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Transcript No. 126
of the Constitution, Law and Justice Committee session
held Wednesday, 27 Sivan 5727 – July 5, 1967 at 8:30

Present:

Committee members: M. Unna - Chair
Z. Abramov
B. Osnia
R. Arazi
M. Bibi
G. Cohen
Y. H. Klinghoffer
Y. Shofman

Guests: M. Ben-Zeev – Attorney General
O. Yadin – Deputy Attorney General
S. Guberman – Representing the Ministry of Justice
A. Savat - Representing the Ministry of Justice

Col. Shamgar – Military Advocate General
Judge Rosenfeld – Tel Aviv Magistrates Court

Committee secretary: R. Malhi

Stenographer: A. Atzmon

- Agenda:
1. Military Advocate General briefing on the legal and juridical problems in the territories of the military government pp. 2-8
 2. Laws to be referred to subcommittees: p. 9
 - a. Legal Procedure Ordinance (New Version)
 - b. Land Authorities Procedure Ordinance (New Version)
 - c. Miscellaneous
 3. Execution Law pp. 9-11
 4. Miscellaneous p. 12

Col. Shamgar:

I shall begin with background on our legal activity in the areas in question, and then get into some detail both with respect to the law in these areas and with respect to our actions there.

In terms of the legal background, our point of departure is that we have to respect both the fundamental pursuits of the State of Israel as its military forces begin to control an area that has been liberated by the IDF, and the rules of public international law that apply to the actions of any military in control of an area that was, until its entry, subject to the sovereignty of a foreign political entity.

The guiding rules in this realm are the rules of public international law, which are reflected in The Hague Regulations of 1907, which, Israel, of course, did not “make it in time” to sign, but do contain rules that are binding on any civilized country, and in the Geneva Convention of 1949, which we did have a chance to sign, and later ratify our accession.

In this context, I refer to the Fourth Geneva Convention on the Protection of Civilians in Time of War. I’ll focus only on the legal and juridical points in this convention. It has two basic provisions, which civilized countries usually respect during the early phases of military control over a territory, before any political developments take place.

The first rule is reflected in Article 43 of The Hague Regulations respecting the Laws and Customs of War on Land. The convention says that when a military entity takes control of a certain area, it must restore, to the extent possible, public order and safety, while respecting the laws in effect in the territory, unless absolutely prevented from doing so. The fundamental principle is that the law that was in place in a territory that comes under military control continues to apply under occupation, unless it is absolutely impossible to do so. And so, there is a continuity or continuation of the law that does not stop when the military enters the area. The logic for this is that the area has a sovereign that does not change, but is denied effective control over the area, and therefore, the administration of the area is passed over to a military entity which does not normally have to make substantive changes in the legal and governmental arrangements. Of course, there may be political developments, as happened with the addition of East Jerusalem [to Israel], but government officials handle that.

The second rule, which is reflected in Article 64 of the Fourth Geneva Convention provides that penal laws in the occupied territory remain in place, other than to the extent that the military official who takes control over the area has revoked them, either permanently or temporarily since they interfere with the effective control over the area, military interests or respect for the convention, since respecting the convention is one of the duties of the military.

In addition to the power to revoke existing law either permanently or temporarily, the top military official in the area also has the power to make legislation, pursuant to the control he has in the territory and his duty to run a proper administration in the area. He may also act as legislator in matters relating to proper administration, implementation of conventions, etc.

To sum up: The law in the area now held by the IDF consists of two elements: existing law plus military legislation made by the highest military official in control of the area, which is the commander of IDF forces in the area. As stated, this law can be independent, that is, newly created law, or it can be in relation to existing law, in other words, the revocation or suspension of laws existing in the territory.

A few words on the preparations military officials who have handled this issue – the Military Advocate General’s Corps [MAG Corps] - have made. Long before this war began, the MAG Corps saw the issue of control over the territories held by the military as one of the two areas it was particularly responsible for, which are: 1. Trying soldiers and providing legal counsel to the IDF; 2. The legal problems in the areas of the military government, anything to do with public international law in general and the laws of war in particular. We tried to study these problems and we prepared ourselves, particularly through special training courses and preparation of a manual, which served MAG Corps personnel for several years, in anticipation of this issue. This manual determined the legal principles I presented to you, and mostly, predetermined the legal courses of action to follow. One of the things we did was to prepare in advance the phrasing for the basic orders and proclamations we saw fit to issue at a later stage.

In addition, we tried to study the legal situation in the territories that might become objects of military control for whatever period of time. Of course, we relied heavily on the experience gained in Operation Kadesh, when the IDF controlled the Gaza Strip and the Sinai. In 1956, we found that Gaza had kept Mandatory laws almost unchanged, while in the Sinai, we encountered Egyptian law. Though, by the way, and this is still true now, legally, the law in the Sinai is not completely identical to the law in Egypt.

In terms of existing law, I will speak mostly about the West Bank, then Gaza, and less about the Golan Heights, because in there, the issue is still rather new and it is more difficult to gauge the legal problems since the remaining population is sparse, there are no judges, lawyers or senior civil servants, but mostly villagers, and it is difficult to gain an understanding of legal and judicial problems from them.

In terms of the West Bank – excluding East Jerusalem – the legal situation is as follows: obviously, on May 14, 1948, the law in the State of Israel and the in area in question was identical. However, beginning on this date, a change began, with two main discernable phases: 1. Until 1950, when the official annexation to Jordan occurred. 2. After 1950, the process which is still going on in Jordan, is a process of unifying law in the West Bank and the East Bank. The law in the West Bank was not changed at the same time as the Jordanian annexation. In other words, when the annexation came, the law in effect in the West Bank remained as it was, and individual laws were gradually changed. For instance, the Criminal Law Ordinance of 1936 was left in effect until it was replaced with a new penal code several years ago. Until then, there were different penal codes in each of the two parts of Jordan. This legislative process is quite broad: It would be hard to find basic laws from Mandate times in the West Bank today.

Interestingly, local Palestinian lawyers with whom we have met, are usually nostalgic about Mandatory law, because all the new laws passed by Jordan are a departure from the British approach, for instance, on the issue of precedent. The main reason for this is that Jordan has no law schools, such that a person who wishes to study law must do so in one of the neighboring Arab countries, or in Europe. People who studied in Cairo and Damascus are influenced by the continental, French system. As part of the research we did a few years ago we came across a paper by a jurist (Mugant Mugant), in which he researched legislative changes in Jordan, and bemoans the departure from British evidence laws, common law, etc. This change is observed across the board, for instance, civil procedure law and criminal procedure law.

In terms of the structure of the judicial system, there were four instances in the West Bank: 1. The Magistrates Court; 2. A court of first instance similar to our District Court; 3. A Court of Appeals; 4. A Court of Cassation, an alternative of sorts to the Privy Council.

In terms of jurisdiction, the Magistrates Court rules on civil matters with a value of up to 250 Jordanian Dinar, all matters concerning evacuation and restoration of possession, and criminal offenses that carry a three-year prison sentence or a 200-Dinar fine. In other words, this court hears misdemeanors.

The Court of First Instance hears offenses that carry a 15-year prison sentence. There is a special panel for serious crimes that hears offenses that carry capital punishment, life sentences or more than 15-year sentences.

The Court of Appeals. There were two such courts, one in Jerusalem and the other in Amman. They heard appeals from judgments issued by the Court of First Instance and the Magistrates Court.

The Court of Cassation sits in Amman and hears appeals from the decisions of the Court of Appeals. The panel is usually made up of five or seven justices.

Magistrates Courts were located in Hebron, Bethlehem, Ramallah, Jericho, Tulkarm, Qalqiliya, Jenin and Nablus.

District Courts were located in Hebron, Nablus and Jerusalem.

In terms of staffing, most local judges who presided in the West Bank remained. Those of them who were East Bank residents – fled.

Our basic intention is to return the civil courts to operation, both because this is our general duty and because this is an integral part of restoring life.

The minister of justice, who has held a discussion on this issue has appointed Judge Zion Aluf to investigate the availability of judges, the structure of the courts etc. The first step has been completed in recent days, and I hope that this week, we will make a final decision on which courts and in what composition we restore to operation, such that early next week we can renew court activity, thereby adding an important step toward restoring life to what it was previously.

In this context, it is worth noting that the courts everywhere, with two exceptions – Qalqiliya and Jenin – remained in working order and have sustained no damage. The files are complete, all officials are available and there is no difficulty to resume legal proceedings. In Jenin, the court facility has been damaged, but the judge is available and the site exists, such that with some renovation, judicial activity can be restored. In Qalqiliya, the site has been damaged, but there is no impediment to resuming activity within a reasonable amount of time.

One problem that will arise and will have to be resolved by way of a commander's order is introducing an alternative to the Court of Cassation, that is, the fourth instance. This court sat in Amman, and the judges presided there. We will have to find an alternative as we are permitted to do when required for proper administration and when there is no other way to resume the operation of the court.

As for the Gaza Strip, the Egyptians considered it a separate territory from Egypt. It had a separate parliament, seated in Gaza City. Legislation in this area remained largely Mandatory, although here too, use was made of the powers vested in the military forces in control of the territory to change the law as needed. For instance, specific, more stringent laws were passed with respect to intoxicating drugs. The system of precedent was revoked in Gaza as well. We found no judgment reports. It may be the case that necessity created the justification and therefore, the precedent system was abolished, judicially as well, by way of legislation. Adjudication is predicated on Egyptian case law on issues of principle, but there is no reference to binding precedent. In other words, the material remained almost unchanged, but the interpretation, the approach has changed.

The legal system in Gaza remained more or less unchanged in terms of the courts. The following were in operation: 1. A Magistrates Court pursuant to the Adjudication of Magistrates Courts Ordinance of 1940 and the Regulations of 1947; 2. A District Court according to the usual Mandatory division of labor; 3. A Supreme Court, which sat in Gaza and heard appeals from decision made by the District Court. It also serves as a High Court of Justice. The Supreme Court had three justices, the president, who was Egyptian, an Egyptian justice and a local justice. The Egyptian justices have obviously left. The Gaza Strip also had military courts operating based on the Defence (Emergency) Regulations 1945. The president was an Egyptian colonel.

With respect to our legal activity, our premise is that the entry of military forces into an area that was removed from the control of a foreign state entity – in and of itself – gives the military forces the right to enact law in the area, even in the absence of a proclamation or written notice that articulates the assumption of such power. However, custom and order usually necessitate that the entry of the military forces is expressed in writing. There is always the issue of timing, that is, setting the date from which the military sees itself responsible for what takes place in the area. Therefore, we issued Proclamation No. 1, the substance of which is sort of an announcement regarding the assumption of responsibility, followed by various security directives.

A MAG spearhead force entered the area as the military forces were entering it. We realized that the sooner legal officials are present, the sooner we release the commanders from seeing to civilian issues, and the sooner we see to restoring normal life.

Proclamation No 2., which is the same in all areas, is very similar to our Administration and Legal Proceedings Order. It expresses our duties according to Article 43 of The Hague Regulations and Article 64 of the Fourth Geneva Convention. This proclamation states that the law in force in the area will remain in effect inasmuch as it does not

contradict the proclamation, or any other proclamation or order issued by me, with the necessary changes emanating from the establishment of IDF rule in the Area.

Proclamation No. 2 states that the Commander of the IDF in the Area becomes the sole authority with judicial or legislative power within the Area. It then establishes the seizure of possession of all property, real and moveable, belonging to government entities that have left the Area. In other words, there is no vacuum. This vesting makes any harm to this property an offense of theft of property from the military government. The proclamation also provides that taxes will be paid to the new military government. Implementation is a separate, more complicated phase.

This put the framework in place, and ever since, there has been rather extensive legislative activity.

Since it is extremely complicated to use local law, particularly in the early days, we made efforts to have military officials avoid using local law, and therefore, created our own legal tools for controlling the area. It is preferable for the military force to arrive with its own codex, which is what we have done. One of the first laws we put into operation in the area was the Order regarding Security Provisions – our own security law, which we prepared in advance. It contains more than 70 sections and was published in Hebrew and Arabic. It gave me the opportunity to train people in advance on the issues, and prepare in advance the forms, proclamations and orders that were issued. Secondly, it saved the trouble that comes the mistakes involved in using unfamiliar law.

The Order regarding Security Provisions is the main legal foundation for all security activity in the territory. The law provides for the establishment of military courts that try people in the area for offenses under the orders and proclamations issued by the military commander, as we are permitted to do under the Geneva Convention. This is the law under which arrests are performed, etc. This is part of the second layer of the law which is law enacted by the commander of the forces in the area. This is why we need not use Jordanian security legislation. This is a framework law and there are many more orders, up to 23 in the West Bank and 24 in the Gaza Strip, relating to the issue of closing zones, looting, sanitation enforcement, foreign currency, mail etc.

Jails are operating normally both in the West Bank and in the Gaza Strip. On this issue we got a lot of help from the Prison Commissioner who demonstrated a great deal of ability and willingness. His staff currently runs the jails, acting as staff appointed by the IDF commander, while the military guards from the outside.

Our aim is to minimize legislation on pure security and administrative matters, based on Article 64 of the Geneva Convention, help restore life to its previous course through our actions and enable the smooth operation of civil courts as soon as possible. All of this while maintaining the principle of ensuring the interests of military control over the area. This is expressed in practice via the security orders we have issued.

M. Bibi: What about the Golan Heights?

Col. Shamgar: These orders were promulgated there too.

In the Sinai, with the exception of el-Arish and Qantara, there is hardly any population. There are specific rules and orders there that do not apply in Egypt. There was also a need for a special permit to cross into Egypt. The law is, in essence, similar to Egyptian law, but there are certain differences.

Chair, M. Unna: What about military adjudication?

Col. Shamgar: The basis for the operation of the military courts is the Order regarding Security Provisions, which we issued. This order allows to set up military courts, appointed by the IDF commander in the Area, or by a military commander who is the commander of a specific sector.

The courts did not begin operating immediately since a fundamental condition for setting up courts is the ability to arrest and interrogate. We waited for several days for military police officials to begin investigations. Currently, courts are operating both in the West Bank and the Gaza Strip. There is a military court for Nablus and Jenin, sitting in Nablus. There is a military court for Ramallah and Jericho and a military court for Hebron and Bethlehem. There was a military court in Jerusalem, until it was joined to West Jerusalem. There is a military court for Gaza, Khan Yunis and el-Arish and

one for the Golan Heights, sitting in Quneitra. These courts adjudicate offenses under military orders and proclamations. We did give them jurisdiction to try criminal offenses, but we have not implemented this in practice. I hope that the civilian courts begin routine operations in the West Bank next week.

We decided that the military court would have only one instance, but a judgment made by a full panel requires the approval of the commander of the area, who can overturn the conviction and have the defendant acquitted. With respect to a single judge, the commander will also have mitigation and revocation powers. We highlighted the defendant's right to turn to the commander with appeals and requests in a special provision. We did not see a need to put in place an appellate instance, because it puts too much strain on the system, it is unnecessary and there is no known example of it anywhere in the world. Local lawyers sometimes appeared in the defense of defendants. The procedure for running trials was also nicely preserved – the defendant being served with an indictment in advance indicating the offenses attributed to him in brief. The legal advisors, who shadowed the commanders, showed a great deal of knowledge and were very helpful to the commanders on site. This mechanism is certainly nothing to be ashamed of, in terms of fulfilling obligations both under Israeli rules and under international rules.

S.Z. Abramov: When the IDF forces came to the territories that were liberated, were the prisoners in the prisons there or had they been released?

Col. Shamgar: All the prisons everywhere were empty.

M. Bibi: Should the government decide to apply Israeli law to the entire liberated territories, will the local judges be able to adjudicate according to Israel law, or will it be necessary to replace the entire system?

Col. Shamgar: I don't think the local judges who worked under a completely different system could continue working, unless there is a transition period during which they learn the new laws. I don't think judges can be automatically assimilated.

B. Osnia: Are the prison guards Israeli?

Col. Shamgar: The command and the professional personnel are Israeli. We also accepted local prison guard as support staff.

B. Osnia: With respect to East Jerusalem, what does it mean that we apply Israeli law there? Does that cancel local law?

Col. Shamgar: Yes.

B. Osnia: I'm a little disappointed that adjudication is liberal. Is this not going to have a negative effect?

Col. Shamgar: I didn't say adjudication was too liberal. If we're used to certain legal norms, we cannot use other norms to adjudicate in a different place. It's an illusion to think that through preaching or rhetoric a jurist could forego rules he thinks must be safeguarded, such as letting the defendant speak his mind, making sure he has defense council, etc. I don't think the soldiers think adjudication is too liberal. Adjudication is neither an alternative nor a solution for immediate security problems.

Y.H. Klinghoffer: Can the person who approves the sentence make it harsher?

Col. Shamgar: No.

Y. Shofman: Were the courts-martial very busy during the fighting or not?

Col. Shamgar: They hardly operated at all. There were no trials for draft dodging. There were trials regarding property issues.

Chair. M. Unna: I thank Col. Shamgar for his interesting presentation.