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The Israeli Law Professors' Forum
for Democracy

Position Paper No 24: Implications of the Agreement Subordinating the Civil Administration to the Additional Minister in the Ministry of Defense

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Abstract:

The Israeli Law Professors' Forum for Democracy, an ad hoc and voluntary group of experts on Israeli law and specifically Israeli public law, expresses its grave concern over the apparent intention to abolish the independence of the judiciary, to subordinate it to the government and to the partisan political considerations of the executive branch, to undermine the independent status of the attorney general and civil service legal counsels, and to violate human rights. **In this paper we examine the implications of the agreement subordinating the Civil Administration to the Additional Minister in the Ministry of Defense.**

We find that:

- **The power sharing agreement signed on 23 February 2023 between the Minister of Defense and the Additional Minister in the Ministry of Defense, transfers most of the powers of the Civil Administration, the military body charged with management of civil aspects of the military government in the West Bank, to MK Bezalel Smotrich, the Additional Minister.**
- **The transfer of responsibility for, and management of, the Territories to civilian hands (a minister in the Ministry of Defense, albeit in coordination with the Minister of Defense and subject to the approval of the Prime Minister) constitutes an explicit and public**

* We, members of the Israeli Law Professors' Forum for Democracy, hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. However, we are united in the opinion that the host of the government's proposals - which are an unprecedentedly severe attack on the independence of the judiciary, the Attorney General and government legal advisors, the police, the military, and public broadcasting - will seriously damage the rule of law and Israel's democratic character. Therefore, we joined this forum to make our professional opinion available to the public at this fateful time. The position papers or other professional materials produced by us reflect the prevailing position among the members, even if they are not unanimous. The list of Forum's members and all position papers on our behalf are available at <https://lawprofsforum.wixsite.com/english>. Follow us on Twitter: <https://twitter.com/lawprofsforum>. Contact us: lawprofessorsforum@gmail.com.

subordination of the West Bank's management to national and social interests of the state, in direct contravention of international law.

- **The agreement is an overt and formal measure that gives validity to claims that Israel's practices constitute apartheid, which is prohibited under international law.**

Full text:

The coalition deal signed between the Likud parliamentary faction and the Religious Zionism parliamentary faction, which is one of the founding instruments of Israel's 37th government, stipulates that the leader of the Religious Zionism faction, MK Bezael Smotrich, will be granted special authorities with respect to Judea and Samaria (i.e. the West Bank).¹ Upon establishment of the government, Basic Law: The Government was amended in order to allow MK Smotrich to become an "additional" minister in the Ministry of Defense.²

Following a few weeks of uncertainty regarding the powers to be transferred, **an agreement was signed on 23 February 2023 between Minister of Defense Yoav Galant and the Additional Minister Bezael Smotrich, on power sharing.**³ According to this agreement, most of the powers of the Civil Administration (the military body charged with management of civil aspects of the military government in the West Bank) were transferred to Smotrich in his capacity as Additional Minister. According to the agreement, the Additional Minister will establish a "Settlement Administration" within the Defense Ministry, which will "manage and direct" the activities of the Coordinator of Government Activities in the Territories (COGAT) and of the Civil Administration, and will be in charge of "administering the settlements". It will also initiate and implement an "equal citizenship" reform in Judea and Samaria (i.e. the West Bank), aimed at "improving and increasing efficiency of services provided in Judea and Samaria, inter alia through government ministries". According to the coalition deal, this reform will include applying in the settlements the same law that is applicable in Israel. The agreement further provides that while the Minister of Defense will have the power to change decisions of the Additional Minister, he will be able to do so only upon providing written reasons and after hearing the Additional Minister's position on the matter. Nonetheless, the Minister of Defense will not be able to instruct COGAT or the Civil Administration on such changes directly, but rather will have to inform the Additional Minister, who will forward the instruction. It was further agreed that legal advice regarding Israel's conduct in the West Bank will be divided. In areas falling within the authority of the "Additional" Minister, legal advice will be provided by the office of the legal advisor in the Ministry of Defense, who will be subordinate, with regard to these matters, exclusively to the "Additional" Minister.

The Civil Administration is the civilian arm of the military government. Under international law this is the only branch that is supposed to govern the West Bank. Subordinating the Civil Administration to a civilian authority (the Ministry of Defense) is a violation of international law, and specifically of the 1907 Hague Regulations, which Israel recognizes as applicable in the West Bank and on which

¹ Ronit Levine Schnur, Yael Berda, Tamar Megiddo, Itamar Mann, "[The Four Pages of the Deal Hide the Annexation de jure](#)" (Ha'aretz, Dec.5, 2022, in Hebrew).

² Basic Law: Government (Amendment No 11), Dec. 27, 2022.

³ For the agreement in Hebrew see [here](#).

Israel relies whenever it exercises powers over Palestinian residents in the territory.⁴ These regulations assume that management of territory under belligerent occupation is carried out by a military commander and not by the civilian institutions of the occupying power.⁵ This understanding is reflected in Proclamation No. 2 issued On June 6, 1967 by the Commander of IDF forces in the West Bank Region, regarding Regulation of Administration and Law (West Bank Region) (No. 2) 1967, which stipulates that the military commander assumes all governmental powers in the Territory. This proclamation was never rescinded and is in force today.⁶

Administration of the territory by the military commander rests on the requirement that such administration be based on two considerations only: the needs of the military forces in the territory, and the welfare of the local population. As the Israeli Supreme Court held some forty years ago, the occupying power may not manage the territory in accordance with its own national, economic or social needs.⁷ In order to ensure that the management of the territory is carried out in accordance with the two considerations noted, the military commander must enjoy functional independence in the day-to-day management of the territory, subject to the laws of belligerent occupation. To this end, the chain of command in charge of the territory must be separate from the civilian government of the occupying power. Merging military units into the state's civilian government undermines the military commander's independence, and renders administration of the territory subordinate to interests that are inimical to the laws of belligerent occupation.⁸

Thus, transferring responsibility for, and administration of, the territory to civilian hands (a minister in the Ministry of Defense, albeit in accordance with the Minister of Defense and subject to the approval of the Prime Minister) explicitly subordinates the territory's administration to the national and social interests of the state, in direct contravention of international law. To a significant extent this subordination is hardly new, since even today the military commander of the West Bank is subordinate to the Government of Israel and acts in accordance with its interests, in a manner contrary to the law of occupation and the obligations under international law.⁹ The undertaking in the coalition deal and the recently signed agreement based upon it, constitute a public admission by Israel that it is violating international law. This is exacerbated by the transfer of the legal advisor's functions from the military branch to the Ministry of Defense, which is less likely to insist that the legal advisors act within the limits permitted under the law of occupation.¹⁰

⁴ Hague Regulations 1907, art. 43.

⁵ Hague Regulations art. 42 provides: "Territory is considered occupied when it is actually placed **under the authority of the hostile army**" (emphasis added); Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, CUP 2019) chapter 1, para. 183: "the government of an occupied territory is military *per definitionem*"

⁶ See also [Proclamation regarding the Implementation of the Interim Agreement \(Judea and Samaria\) No. 7, 1995](#) (Nov. 23, 1995).

⁷ HCJ 393/ 82 Jam'iyat Iskan v IDF Commander in Judea and Samaria (Dec. 18, 1983).

⁸ ELIAV LIEBLICH AND EYAL BENVENISTI, OCCUPATION IN INTERNATIONAL LAW 31-32 (2022); Tamar Megiddo, Ronit Levine-Schnur, Yael Berda, "[Israel is Annexing the West Bank. Don't be Misled by its Gaslighting](#)", Just Security (Feb. 9, 2023) 3.

⁹ The clearest example of this, to which the public in Israel is so accustomed that it no longer notices it, is the establishment of the settlements themselves and the taking of land for that purpose. This policy serves a pure political interest that is neither a military need nor is beneficial to the local population, and moreover creates a security burden and is detrimental to the local population.

¹⁰ Ronit Levine-Schnur, Tamar Megiddo, Yael Berda, "[A Theory of Annexation](#)" (Feb. 5, 2023).

Establishment of a “Settlement Administration” in charge of regulating the status of Israelis residing in the West Bank, together with the transfer of civilian aspects of the management of their lives from the IDF to the Minister of Defense further exacerbates the situation already existing whereby Israelis and Palestinians are governed by different legal orders,¹¹ and constitutes a repudiation of the commitment to the normative framework of the law of occupation. As explained below, these measures have far-reaching consequences for Israel’s responsibility towards the Palestinian residents of the territory, for Israel’s status there, and for the international criminal responsibility of Israeli leaders.

It should be emphasized that the “equal citizenship” that the agreement purports to promote is discriminatory: it deepens the differences that already exist between Israelis residing in the West Bank and Palestinians residing there, insofar as concerns the legal frameworks and applicable law governing them, and intensifies the discrimination between these populations. The agreement is an overt and formal measure that validates claims that Israel practices apartheid, which is prohibited under international law. It exposes Israeli nationals to claims relating to the crime of apartheid, which is indictable in the International Criminal Court (ICC).¹²

The agreement provides that “Nothing in this document alters the legal status of the Judea and Samaria area, the law applied in it, and the authority of the political echelons and Ministry of Defense relating to it”. Insofar as this statement is intended to fend off claims that Israel is annexing the territory, it is meaningless.¹³ Denial of the facts does not change them: once the military commander ceases to be the supreme authority in the territory, and the territory’s administration is conducted by the civilian government of Israel, the distinction between the territory of the West Bank and the sovereign territory of Israel is formally and institutionally blurred. This process, which has been in place for over half a century, is now being accelerated.

Moreover, the Government of Israel’s repudiation of the obligations imposed upon it in administering the West Bank under the law of belligerent occupation, including the new agreement to transfer authority to the government, **undermines the legal basis for Israel’s control over the territory even according to the State of Israel’s own approach.** This move exacerbates the violation of international law. Not only does it support the perception that Israel is annexing the territory in violation of international law, but it may amount to an act of aggression, which affects both the responsibility of the state and the criminal responsibility of its leaders. Characterizing Israel’s actions as an act of aggression may bring about severe responses from the international community - from a demand for unconditional withdrawal from the territory to a refusal to cooperate with Israel in any manner that might lend support to its control of the territory.¹⁴ We should note that a question relating to Israel’s status in the West Bank is currently pending before the International Court of Justice (ICJ),

¹¹ Association of Civil Rights in Israel, “[One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank](#)” (Nov. 24, 2014).

¹² Yaël Ronen, “[The Masks are Off](#)” Seventh Eye, (Jan. 1, 2023, in Hebrew)

¹³ Tamar Hostovsky Brandes, “[Annexation is in the Details](#)”, Verfassungsblog, (Jan. 3, 2023); Ronit Levine-Schnur, Tamar Megiddo, Yael Berda, “[A Theory of Annexation](#)” (Feb. 5, 2023).

¹⁴ Yaël Ronen, “[Will History Repeat Itself? Anticipating the ICJ Advisory Opinion on the Legal Status of Israel’s Occupation and Its Consequences](#)” EJIL: *Talk!*, (Jan. 30, 2023).

following a request by the UN General Assembly for an advisory opinion on the matter. The ICJ will undoubtedly take the agreement into account in formulating its opinion.

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