



DISENGAGED OCCUPIERS:

OCCUPIERS:

THE LEGAL STATUS OF GAZA

JANUARY 2007



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EXECUTIVE SUMMARY

ISRAEL CLAIMS IT OWES NO OBLIGATIONS TO GAZA RESIDENTS

On September 12, 2005, Israel completed its disengagement plan by removing Israeli settlements and evacuating permanent military installations from Gaza. Upon that completion, Israel declared an end to the military government that had administered the Gaza Strip since Israel's capture of the territory in 1967. Three days later, in a speech before the United Nations General Assembly, Israeli Prime Minister Ariel Sharon declared **“the end of Israeli control over and responsibility for the Gaza Strip.”**

While at the time, Israel refrained from declaring an end to the occupation, since then, in a series of statements made in Hebrew before Israel's Supreme Court, the Government of Israel has expressed the position that “disengagement” extinguished its legal obligations towards Gaza, thus leaving the running of Gaza and the fulfillment of obligations vis à vis Gaza residents – to the sole responsibility of the Palestinian Authority.

8 Israel's position is based on defining “effective control”, the legal test for occupation in the international law, as dependent on a permanent ground troop presence in the territory.

This paper shows that in contrast to the rhetoric used to describe the disengagement plan, Israel has not relinquished control over Gaza but rather removed some elements of control while tightening other significant controls. Far from improving the economy and welfare of Gaza residents, Israeli actions since September 2005 – including severe restrictions on the movement of people and goods in and out of Gaza and an economic stronghold on the funding of civil services – have contributed to an economic and humanitarian crisis in Gaza not seen in the 38 years of Israeli control that preceded the withdrawal of permanent ground troops.

As will be explained, completion of the disengagement plan has not absolved Israel of its obligations to permit and to facilitate the proper functioning of civilian life in the Gaza Strip. Israel continues to owe legal obligations to residents of Gaza in the significant areas in which their lives are subject to

and affected by Israeli control. That responsibility exists under the international law of belligerent occupation, but it is also imposed by international human rights law and Israeli constitutional and administrative law. Israel is bound to respect the rights of Gaza residents in its control of Gaza's borders, population registry, tax system, and other areas, and it also owes positive duties to permit and to facilitate the proper functioning of civilian institutions in Gaza, pursuant to international humanitarian law.

Israel continues to control Gaza through an “invisible hand”: control over borders, airspace, territorial waters, population registry, the tax system, supply of goods, and others. Gaza residents know that their ability to use electric lights, to buy milk, or to have the garbage collected depends on decisions made by Israel. At times, soldiers operate in the streets of Gaza, but even after they leave, Israeli control over the lives of Gaza residents remains constant, as we will show.

Gisha pursues three goals in issuing this paper:

1. To make the international community aware of Israel's position that Gaza is no longer occupied and that Israel no longer considers itself bound by the provisions of the Geneva Conventions and Hague Regulations concerning occupied territory in its treatment of Gaza residents;
2. To describe the ways in which Israel continues to control Gaza and therefore continues to owe legal obligations to Gaza residents, obligations which must be fulfilled in order for civilian life in Gaza to be sustained and developed;
3. To provide a resource for scholars, lawyers, humanitarian aid workers, and policy-makers concerned about the humanitarian situation in Gaza and the rights of Gaza residents whose lives are influenced by Israeli control.

ISRAEL CONTINUES TO EXERCISE EFFECTIVE CONTROL OVER THE GAZA STRIP

Israel's withdrawal of settlements and its permanent military ground installations from the Gaza Strip did not end Israeli control of Gaza but rather

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changed the way in which such control is effectuated. These forms of control have contributed to an unprecedented deterioration in the economic and social welfare of Gaza residents.

Israel continues to control Gaza through:

- Substantial control of Gaza’s land crossings;
- Control on the ground through incursions and sporadic ground troop presence (“no-go zone”);
- Complete control of Gaza’s airspace;
- Complete control of Gaza’s territorial waters;
- Control of the Palestinian population registry (including who is a “resident” of Gaza);
- Control of tax policy and transfer of tax revenues;
- Control of the ability of the Palestinian Authority to exercise governmental functions;
- Control of the West Bank, which together with Gaza, constitute a single territorial unit.

A. Israel Controls Movement to and from Gaza via Land Crossings

Despite disengagement, Israel retains control over Gaza’s land crossings, including complete control over the entrance of foreigners and imports as well as ultimate control over the entrance and exit of all persons and goods by virtue of the ability to close all crossings into Gaza.

.....● Control over Movement of People

Under the terms of the Nov. 15, 2005 Agreement on Movement and Access, entered into by Israel and the Palestinian Authority, the Palestinian Authority operates Rafah Crossing under the supervision of European Union monitors present at the crossing and Israeli security officials who monitor the operations via live video footage and supervision of passenger lists. Travel into Gaza from Egypt via Rafah is restricted to Palestinians registered in the Israeli-controlled Palestinian population registry. Therefore, foreigners may

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Map of the Gaza Strip, UN-OCHA, November 2006



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enter Gaza only via Israeli-controlled crossings in the north.

Israel also exercises ultimate control over the entrance into and exit from Gaza of all persons, including Palestinian ID card holders, and has used that control periodically to close Gaza to the outside world. Israeli consent and cooperation are required for Rafah Crossing to open, because the agreement for opening the crossing requires the participation of Israeli, Palestinian, and European Union officials. Israel also controls whether EU monitors will reach Rafah by issuing security warnings, telling the EU monitors whether Rafah may open. Reports and internal military documents suggest that Israel has used the closure of the crossing to exercise pressure on Gaza residents, in order to bring about the return of the Israeli soldier captured on June 25, 2006. Indeed, in the first year following the completion of its disengagement program, Israel kept Rafah Crossing closed for 148 days, meaning that Gaza was cut off from the outside world 42% of the time.

.....● Control over Movement of Goods

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Israel completely controls the import of goods into Gaza and exercises substantial control over exports from Gaza to third countries and to the West Bank. Israel has imposed severe restrictions on imports which have, at various points, caused shortages of basic goods that threatened the health and welfare of Gaza residents.

B. Israel Exercises Complete Control of Gaza's Airspace and Territorial Waters

Since occupying Gaza in 1967, Israel has exercised complete and exclusive control of Gaza's air space and territorial waters. There is no airport or sea port in Gaza and no passage for people or goods into Gaza via the sea or air.

C. Israel Controls Movement Within Gaza through Periodic Incursions and a "No-Go Zone"

Israel controls movement within the Gaza Strip through sporadic troop

presence and artillery fire from positions along its borders with Gaza. Since June 2006, Israeli troops have operated continuously in Gaza, including along Gaza's border with Egypt.

Israel controls a northern section of the Gaza Strip where it declared, in December 2005, a “no-go” zone by warning residents that they will be shot if found in that area. Additional no-go zones within the Gaza Strip are occasionally declared by Israel.

D. Israel Controls the Palestinian Population Registry

The definition of who is “Palestinian” and who is a resident of Gaza and the West Bank is controlled by the Israeli military. Even when Rafah Crossing is open, only holders of Palestinian ID cards can enter Gaza through the crossing, therefore control over the Palestinian Population Registry is also control over who may enter and leave Gaza. Since 2000, with few exceptions, Israel has not permitted additions to the Palestinian Population Registry. As a result, tens of thousands of Gaza residents, including women who entered Gaza on visitors' permits and married Gaza residents, are living in Gaza but cannot receive Palestinian ID cards. Thus, they are trapped in Gaza – if they leave they will not be permitted to return.

E. Israel Exercises Control over Gaza's Tax System and Fiscal Policy

Israel controls the tax system in the territories of the Palestinian Authority, with the exception of direct taxes such as income tax and some kinds of value-added (“VAT”) and customs taxation. This system affects civilian life in Gaza, including the the ability of nonprofit organizations to receive tax-exempt donations of equipment or materials.

F. Israel Exercises Control over the Palestinian Authority and Its Ability to Provide Services to Gaza Residents

Israel exercises control over the ability of the PA to provide services to Gaza and West Bank residents and the functioning of its governmental institutions, including by control over the transfer of tax revenues which amount

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to 50% of the PA's operating income. Moreover, Gaza and the West Bank constitute two parts of a single territorial unit, with a unified and undifferentiated system of civilian institutions spread throughout Gaza and the West Bank, funded from the same central budget and run by the same undifferentiated central authority. Therefore, Israel's continued direct control over the West Bank is a form of indirect control over Gaza.

ISRAEL CONTINUES TO OWE OBLIGATIONS TO GAZA RESIDENTS UNDER THE INTERNATIONAL LAW OF OCCUPATION

Israel's contention that withdrawal marks the end of its obligations vis-à-vis residents of Gaza is founded upon an overly narrow understanding of occupation in the terms of international law as being defined exclusively by the continuous presence of troops in a given territory. Occupation, in fact, has long been understood in terms of the ability to exercise effective control over a territory, a concept that is intimately linked with, but not entirely dependent upon, military ground presence in the territory. The situation in Gaza indicates that Israel does exercise effective control over significant aspects of life in Gaza, and thus, in the areas in which it exercises such control, Israel owes obligations to Gaza residents under the international humanitarian law of occupation. Such responsibility will continue until Israel cedes effective control.

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Gisha takes the position that the essence of the term occupation lies in the notion of control, that is, military control of the occupied territory by a foreign power.

The critical question is "how much" actual control yields a situation of occupation – a situation in which the foreign power exercises sufficient control as to incur obligations to residents of the territory subject to its authority. There are probably no bright lines to deal with this question. But on a case-by-case basis, we can identify where control by a foreign government over a territory not part of its sovereign land rises to the level of occupation. The level of control over Gaza, as this Paper argues, is quite clearly a factual instance of occupation.

A secondary question is to what extent the obligations owed by the occupier are affected by the level of control exercised. Gisha's argument is that the withdrawal of settlers and permanent military installations from the Gaza Strip was a change in degree but not of kind: in some areas, the degree of Israeli control over life in Gaza diminished, without the kind of renunciation of control that would actually end Israel's obligations under international humanitarian law.

The development of technology has made it possible for Israel to assert effective control over significant aspects of civilian life in the Gaza Strip without a continuous military ground presence. Moreover, in evaluating Israeli control over Gaza, one should look not just at the military force, but also the administrative control created over the course of four decades of occupation, control which is nuanced but nonetheless tangible and significant. This administrative control of civilian life has intensified since the completion of Israel's disengagement plan.

The framework for interpreting Israel's obligations vis à vis Gaza residents must take into account the purpose of humanitarian law – to protect civilians – a purpose which tips the balance, in cases of doubt, in favor of applying protections for civilians. That purposive approach to questions of applicability of humanitarian protections is well-grounded in international humanitarian law and in Israeli law.

Furthermore, the purpose of humanitarian law argues against a binary, all-or-nothing approach to imposing humanitarian law duties and instead requires a careful look at the context in which control is exercised. Different levels of responsibility apply in various areas, commensurate with the scope of control. The fact that control may not be exercised in one area does not exempt the occupying power from responsibility in the area in which it does exercise control.

These legal and factual issues are explored in detail in the paper that follows.

CHAPTER 1



INTRODUCTION

On September 12, 2005, Israel completed what it called its “disengagement plan”, in which it withdrew settlements, army bases, and ground troops from the Gaza Strip, where it had maintained a permanent military presence since capturing Gaza from Egypt in the 1967 Mideast War.

In official government documents and in statements to the public, Israel said that its goal in carrying out the plan was to end the friction, violence, and loss of life resulting from conflicts between Israeli occupying troops and Palestinian residents of Gaza. Israel described the disengagement plan as a means of improving the economic and social welfare of Gaza residents by giving them an opportunity to run their own affairs.¹ Israel also expressed the position that disengagement would “serve to dispel the claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.”²

18 This paper shows that in contrast to the rhetoric used to describe the disengagement plan, Israel has not relinquished control over Gaza but rather removed some elements of control while tightening other significant controls. Far from improving the economy and welfare of Gaza residents, Israeli actions since September 2005 – including severe restrictions on the movement of people and goods in and out of Gaza and a stronghold on the funding of civil services – have contributed to an economic and humanitarian crisis in Gaza not seen in the 38 years of Israeli control that preceded the withdrawal of permanent ground troops.

Israel continues to control Gaza through an “invisible hand”: control over borders, airspace, territorial waters, population registry, the tax system, supply of goods, and others. Gaza residents know that their ability to use electric lights, to buy milk, or to have the garbage collected depends on decisions made by Israel. At times, soldiers operate in the streets of Gaza, but even after they leave, Israeli control over the lives of Gaza residents remains constant.

¹ PRIME MINISTER’S OFFICE, ADDENDUM A – REVISED DISENGAGEMENT PLAN – MAIN PRINCIPLES 2 (June 6, 2004), para. 1, *available at* <http://www.pmo.gov.il> or www.mfa.gov.il (follow “Addendum A -- Revised Disengagement Plan – Main Principles”).

² *Id.*

As will be explained, completion of the disengagement plan has not absolved Israel of its obligations to permit and to facilitate the proper functioning of civilian life in the Gaza Strip.³ Israel continues to owe legal obligations to residents of Gaza in the significant areas in which their lives are subject to and affected by Israeli control. That responsibility exists under the international law of belligerent occupation, but it is also imposed by international human rights law and Israeli constitutional and administrative law. Israel is bound to respect the rights of Gaza residents in its control of Gaza's borders, population registry, tax system, and other areas, and it also owes positive duties to permit and to facilitate the proper functioning of civilian institutions in Gaza, pursuant to international humanitarian law.

Gisha pursues three goals in issuing this paper:

1. To make the international community aware of Israel's position that Gaza is no longer occupied and that Israel no longer considers itself bound by the provisions of the Geneva Conventions and Hague Regulations concerning occupied territory in its treatment of Gaza residents;
2. To describe the ways in which Israel continues to control Gaza and therefore continues to owe legal obligations to Gaza residents, obligations which must be fulfilled in order for civilian life in Gaza to be sustained and developed;
3. To provide a resource for scholars, lawyers, humanitarian aid workers, and policy-makers concerned about the humanitarian situation in Gaza and the rights of Gaza residents whose lives are influenced by Israeli control.

Chapter 2 will outline Israel's position, as articulated in submissions to Israel's Supreme Court, that it no longer occupies Gaza and owes no legal obligations to Gaza residents. Chapter 3 will challenge the factual basis for Israel's position by showing that Israel continues to control significant aspects of life in Gaza, despite the lack of a continuous troop presence. Chapter

³ Disengagement has changed the nature of Israeli obligations in areas in which competencies have been genuinely transferred to the Palestinian Authority and the Palestinian Authority actually exercises those competencies. As will be discussed in this paper, such areas are far more limited than Israel claims.

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4 will describe Israel's obligations to Gaza residents under the international humanitarian law of occupation, arguing that Israel exercises effective control over Gaza in ways that trigger obligations under international humanitarian law, namely the Hague Regulations and the Fourth Geneva Convention. Chapter 5 will suggest a road map for addressing the legal status of Gaza, arguing that binary judgments concerning the question of the occupation of Gaza would be premature, inappropriately simplistic, and unhelpful to efforts to understand and regulate the complex relationship between Israel, the West Bank, and the Gaza Strip.

Chapter 4 is somewhat technical and will be most useful to jurists and to scholars interested in the legal grounding for the claim that Gisha makes in this paper: where control is exercised, responsibility attaches. So long as Israel controls life in Gaza, its exercise of control is bounded by laws whose purpose is to protect residents of a territory subject to foreign control. This claim is grounded in specific international conventions and domestic Israeli law, but it is also an intuitive principle, accepted as a matter of international custom and policy. Readers without a legal background may prefer to read chapters 2-3 and rely on the summary of the legal argument laid out in the preceding Executive Summary.

CHAPTER 2



**ISRAEL CLAIMS IT
OWES NO OBLIGATIONS
TO GAZA RESIDENTS**

Since capturing Gaza from Egypt in 1967, the laws of belligerent occupation have applied to Israeli actions in Gaza. These rules, laid out in the Fourth Geneva Convention⁴ and the Hague Regulations,⁵ grant powers to and impose duties on a foreign power that exercises effective control over a territory, order to protect and provide for the occupied population.

Indeed, the Israeli Supreme Court has held that Israel is a belligerent occupant in both Gaza and the West Bank and has applied the Fourth Geneva Convention and the Hague Regulations to evaluate Israel's conduct there⁶—a position that the international community almost uniformly shared.⁷

Immediately upon completing its disengagement plan on September 12, 2005, however, Israel adopted the position that it was no longer bound by these rules. As a first matter, Israel declared an end to the military government that had administered the Gaza Strip since Israel's capture of the territory in 1967, claiming that control over Gaza had been transferred to the Palestinian Council.⁸ While the applicability of the laws of occupation does not depend on the existence of a military administration, three days later, in a speech before the United Nations General Assembly, Israeli Prime Minister Ariel Sharon declared "the end of Israeli control over and responsibility for

⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter: Geneva IV]. Israel has never conceded that it is legally bound by the Fourth Geneva Convention with respect to its actions in the Palestinian Territories. Instead, it has declared that, as a matter of practice, it would honor the "humanitarian" provisions of the Fourth Geneva Convention with respect to these territories.

⁵ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter: Hague IV].

⁶ See HCJ 2056/05, Beit Sourik Village Council v. Israel [2004], para. 23 (Barak, J.), *translated in* 43 I.L.M. 1099 (2004) [hereinafter: Beit Sourik].

⁷ See G.A. Res. ES-10/2, GAOR, 10th Emergency Special Sess., U.N. Doc. A/RES/ES-10/2 (May 5, 1997); G.A. Res. ES-10/13, GAOR, 10th Emergency Special Sess., U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003); G.A. Res. ES-10/15, GAOR, 10th Emergency Special Sess., U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

⁸ Israel Defense Force, Order Regarding End of Military Government, Sept. 12, 2005 (on file).

the Gaza Strip."⁹

While the Israeli government has refrained from declaring an end to the occupation of Gaza in public international fora, in Hebrew language submissions before the Israeli High Court, the Government of Israel has taken the position that it no longer holds Gaza through belligerent occupation and that international humanitarian law governing occupied territory therefore no longer applies to its actions vis à vis Gaza residents.¹⁰

The State's argument, as set forth in detail before the High Court in a case challenging the practice of flying sonic booms over Gaza, is that the laws of occupation, according to which an occupying power owes legal duties to protected persons living in occupied territory, apply when the territory is under the authority of the enemy and such authority is "established and capable of being exercised."¹¹ These two conditions establish the test for effective control, which determines whether belligerent occupation exists. Effective control is the ability to exercise the powers that international law requires the occupier to exercise in the occupied territory, in order to restore public order, protect civilians, and fill the vacuum left by the former government which has been displaced by the occupier.

According to the Government of Israel, once it removed its settlers and

.....●

⁹ Sept. 15, 2005 Speech by Israeli Prime Minister Ariel Sharon before the United Nations General Assembly. *Text available at* www.mfa.gov.il.

¹⁰ See e.g. HCJ 10265/05 Physicians for Human Rights v. Defense Minister, State's Submission of July 11, 2006 (on file) (petition brought by Physicians for Human Rights and the Gaza Community Mental Health Programme, challenging the practice of creating sonic booms over the skies of Gaza) (on file); HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, State's Submission of Dec. 5, 2005, para. 5 (brought by the Public Committee Against Torture in Israel and LAW, challenging the practice of targeted assassinations) (on file); HCJ 11120/05 Hamdan v. Southern Military Commander and related cases, State's Response of Jan. 19, 2006 (brought by ten occupational therapy students, Gaza Community Mental Health Programme, Bituna, Our Home for Community Development, and Gisha, challenging the ban on Gaza students studying in the West Bank) *available at* www.gisha.org; HCJ 2990/06 Mezan Center for Human Rights v. Southern Military Commander (brought by Mezan and Gisha, challenging the closure of Karni commercial crossing to imports and exports) [2006], *available at* www.gisha.org.

¹¹ HCJ 10265/05 Physicians for Human Rights v. Defense Minister, State's submission of

permanent military installations from the ground in Gaza, its occupation of Gaza ended. While the State of Israel admits to continuing ground troop activity in Gaza, it characterizes its military presence in Gaza as sporadic, limited to entering specific areas of Gaza in order to thwart attacks or stop the firing of Qassam rockets toward Israel.¹² The state also claims that control of the airspace or territorial waters do not meet the criteria for imposing the laws of occupation.

Israel's position is that its control of the crossings between Gaza and Israel does not constitute belligerent occupation, and that it does not control the Rafah Crossing between Gaza and Egypt, where its troops are not physically present. The state argues that the restrictions on passage of people and goods through Rafah Crossing are not imposed by military might but rather determined consensually by the Nov. 15, 2005 Agreement on Movement and Access,¹³ entered into by Israel and the Palestinian Authority (hereinafter also: PA). As stated in the State of Israel's submission before the High Court:

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“The restrictions on the passage of certain travelers and on importing goods through Rafah Crossing were not imposed by Israel but rather determined by agreement between Israel, the Palestinians, and the United States. Israel of course (like any state) continues to control the crossings between the Gaza Strip and the State of Israel, by virtue of its sovereign power to control its border and entrance to its territory. In any event, currently, with the opening of Rafah Crossing (with the agreement of Israel, but not under its control), one can no longer claim that Israel “controls the perimeter” of the Gaza Strip, both because the Gaza Strip’s southern border, on the part of the border between the Gaza Strip and Egypt, runs as a crossing without control by Israel, and also because the entire length of this [southern-ed] border of the Strip is under full Palestinian control, without any Israeli control”.¹⁴

The thrust of the State’s argument is that it no longer has the capability to exercise the powers – and thus to fulfill the obligations – imposed by the international law of occupation. This claim is based on defining “effective

July 11, 2006 (on file) (all translations of court documents into English are by Gisha). The brief contains a detailed position by the state on the legal status of Gaza.

¹² HCJ 10265/05, State Submission of July 11, 2006, Para. 34.

¹³ Agreement on Movement and Access, Isr.-P.A., Nov. 15, 2005, *available at* www.mfa.gov.il.

¹⁴ *Id* at para. 27.

control”, the legal test for occupation, as dependent on a permanent ground troop presence in the territory:

“The existence of belligerent occupation depends on the ability of the occupier effectively to exercise governmental powers in the territory. With the absence of forces, the occupier of the territory cannot exercise any governmental authorities whatsoever, and thus, in any event, the legal basis for the existence of belligerent occupation is extinguished”.¹⁵

Accordingly, Israel has made changes in its domestic law treating Gaza as a foreign territory, separated from the West Bank and subject neither to Israeli control nor Israeli duties. The State of Israel has issued administrative orders defining the Erez, Kerem Shalom, Sufa, and Karni crossings between Gaza and Israel as international border crossings.¹⁶ It has compared Gaza to Syria, claiming that it bears no obligation to permit the provision of humanitarian aid in Gaza and no obligation to permit people and goods to cross between Gaza and the West Bank.¹⁷

The implications of this position are far-reaching. In response to a series of legal claims brought by Palestinians seeking remedies that are under Israeli control – opening Gaza’s crossings to imports and exports¹⁸; permitting Gaza residents to enter the West Bank¹⁹; permitting patients from Gaza to enter

¹⁵ Id. At para. 25 (emphasis in original).

¹⁶ Entrance to Israel Order (Border Stations) (Amendment), 2005, K.T. 6425, 1011. For more on this issue, see Gisha, *Disengagement Danger: Israeli Efforts to Separate Gaza from the West Bank*, (February 2006), available at www.gisha.org. Israel has issued temporary orders exempting Gaza residents from the requirement of receiving a visa in order to enter Israel, including in order to cross to the West Bank. See Entrance to Israel Order (Exemption for Residents of the Gaza Strip) (Interim Order), 2005, K.T. 6425, 1010; Entrance to Israel Order (Exemption for Residents of the Gaza Strip) (Interim Order) (Amendment), 2006 K.T. 6499, 992.

¹⁷ HCJ 11120/05 Hamdan v. Southern Military Commander and related cases (pending), State's Response of Jan. 19, 2006.

¹⁸ HCJ 2990/06 Mezan Center for Human Rights v. Defense Minister (unpublished), State Response of April 26, 2006, available at www.gisha.org; HCJ 5841/06 Association for Civil Rights in Israel v. Defense Minister (pending), State Response of July 12, 2006, available at www.gisha.org.

¹⁹ HCJ 11120/05 Hamdan v. Southern Military Commander and related cases (pending), State's Response of Jan. 19, 2006.

the West Bank and Israel for medical treatment not available in Gaza²⁰ – the State of Israel's response has been that it owes no obligations to Gaza residents and that any relief it provides in terms of opening crossings or permitting passage, it provides as a policy choice, with no obligation to permit more freedom of movement than it chooses to provide.

For example, in response to a court petition asking that Israel permit the Karni Crossing to open for import and export, the state repudiated any obligation to do so but said it would voluntarily attempt to avoid a humanitarian crisis in Gaza:

“Beginning September 12th, at 24:00, the military administration of the Gaza Strip by the IDF ended, and with it ended the belligerent occupation of the Gaza Strip by the IDF, with all the accompanying political, security and legal ramifications.

Since the end of the military administration of the Gaza Strip, the IDF no longer exercises military administrative authority in the Gaza Strip. This includes authority pursuant to military legislation.

Despite all of the above, and without being bound by the laws of belligerent occupation, which, as aforementioned, no longer bind Israel in Gaza following the completion of the disengagement, the State of Israel, along with the international community, continues to examine the possibilities of preventing a humanitarian crisis in the Gaza Strip.”²¹

Israel's position is that responsibility for the civilian population of Gaza, including the functioning of Gaza's economy, is the sole responsibility of the Palestinian Authority.

As we shall see in the next section, Israel has kept Gaza's crossings mostly closed in the year following the completion of its disengagement plan, has withheld monies needed to pay the salaries of civil servants and to run civilian institutions in Gaza, and has severely restricted movement of people between Gaza and the West Bank, Gaza and Israel, and between Gaza and third

²⁰ See, e.g., HCJ 8840/06 Physicians for Human Rights v. Commander of Military Forces in Gaza and Southern Military Commander (unpublished).

²¹ HCJ 2990/06 Mezan Center for Human Rights v. Defense Minister, *supra* note 18, paras. 12, 20-21.

countries via the Egypt-Gaza border. The results of these controls have been devastating and have helped plunge Gaza into an economic and humanitarian crisis unprecedented in nearly four decades of occupation. Israel's position that it owes no legal obligations to Gaza residents, if accepted, could lead to the conclusion that should it desire, Israel could prevent all persons from entering and leaving Gaza, block all trade in and out of Gaza including the ability to export goods, withhold tax money including the revenues needed to maintain schools and hospitals – without violating any duties owed under humanitarian law. That conclusion would not only be dangerous as a policy matter – it is incorrect as a statement of law. It creates a framework in which the civilian population of Gaza is vulnerable to denial of basic humanitarian protections.

CHAPTER 3



ISRAEL CONTINUES TO
EXERCISE EFFECTIVE
CONTROL OVER GAZA

Israel's withdrawal of settlements and its permanent military ground installations from the Gaza Strip, while important steps in reducing friction between Gaza residents and Israeli soldiers and settlers, did not end Israeli control of Gaza but rather changed the way in which such control is effectuated. In the year following Israel's withdrawal, Israel has tightened external controls on Gaza, closing Gaza's crossings to passage of people and goods, restricting even further use of Gaza's coastline for fishing, and increasing its military activities along Gaza's shores, in Gaza's skies, and at various periods, on the ground in Gaza.

Gaza residents may not bring a crate of milk into the Gaza Strip without Israeli permission; A Gaza university cannot receive visits from a foreign lecturer unless Israel issues a visitor's permit; A Gaza mother cannot register her child in the Palestinian population registry without Israeli approval; A Gaza fisherman cannot fish off the coast of Gaza without permission from Israel; A Gaza nonprofit organization cannot receive a tax-exempt donation of goods without Israeli approval; A Gaza teacher cannot receive her salary unless Israel agrees to transfer tax revenues to the Palestinian Ministry of Education; A Gaza farmer cannot get his carnations and cherry tomatoes to market unless Israel permits the goods to exit Gaza; A Gaza student cannot study abroad without Israeli approval to open the Gaza-Egypt crossing.

This Chapter will review the ways in which Israel continues to control Gaza, including:

- Substantial control of Gaza's land crossings;
- Control on the ground through incursions and sporadic ground troop presence;
- Complete control of Gaza's airspace;
- Complete control of Gaza's territorial waters;
- Control of the Palestinian Population Registry (including who is a "resident" of Gaza);
- Control of tax policy and transfer of tax revenues;

- Control of the ability of the Palestinian Authority to exercise governmental functions;
- Control of the West Bank, which together with Gaza, constitute a single territorial unit.

Israeli control of Gaza which will be described below takes place against the backdrop of a complex set of relations between Israel and the Palestinian Authority, whose roots are in the Oslo Peace Process and the Interim Accords signed in 1995.²² As part of this process, Israel transferred to the Palestinian Authority certain powers that it held through its belligerent occupation of Gaza and the West Bank. Israel retained all powers not explicitly transferred to the Palestinian Authority and retained overall responsibility in the occupied territories, whose status was not to be changed during the interim period:

"Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred".²³

The transfer of certain enumerated powers to the Palestinian Authority changed the nature of Israel's responsibility to the civilian population in Gaza and the West Bank, without absolving Israel of its obligations under international and Israeli law, particularly in the areas in which it continued to exercise direct control.

Similarly, Israel's withdrawal of settlements and permanent military ground installations from the Gaza Strip changed the nature of its obligations toward Gaza residents, as concerning those areas in which power was genuinely transferred. However, the limited changes in control stemming from the completion of Israel's disengagement plan did not end Israeli responsibility toward Gaza residents, particularly in areas in which Gaza residents continue to be subject to significant Israeli-imposed restrictions. The principle is simple and

²² Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-P.L.O., art. 28, Sept. 28, 1995, 36 I.L.M. 551 (1997) [hereinafter: Interim Agreement].

²³ *Id.*, Article 1.

well-recognized in international and Israeli law: where there is control, there is responsibility.

A. Israel Controls Movement to and from Gaza via Land Crossings

Despite disengagement, Israel retains control over Gaza's land crossings, including:

- Complete control over the entrance of foreigners;
- Complete control over the entrance of Palestinians not listed in the Israeli-controlled population registry;
- Complete control over import of goods;
- Substantial control over export of goods;
- Limited control over the entrance of Palestinian residents listed in the Israeli-controlled population registry (Palestinian ID-card holders);
- Ultimate control over the entrance and exit of all persons and goods by virtue of the ability to close all crossings into and out of Gaza.

1. Control over Movement of People

The Gaza Strip has land crossings into two countries: Israel and Egypt. As would be expected, Israel controls movement into Israel from Gaza. However, Israel also controls the movement of people between Gaza and Egypt via Rafah Crossing, the only operational Egypt-Gaza Crossing.²⁴

In the two months following completion of Israel's disengagement plan, the Rafah Crossing between Gaza and Egypt remained closed pending a U.S.-

²⁴ In principle, Israel also controls movement of people via the Kerem Shalom Crossing located near the border between Israel, Egypt, and Gaza, but that crossing has yet to open to passengers.

brokered agreement providing for the opening of Gaza's crossings to Egypt and the West Bank.²⁵ Under the terms of that agreement, the Palestinian Authority operates Rafah Crossing under the supervision of European Union monitors present at the crossing and Israeli security officials who monitor the operations via video footage and supervision of passenger lists.

With few exceptions, travel via Rafah is restricted to Palestinians registered in the Israeli-controlled Palestinian Population Registry. Also, Israel reserves the right to block the entrance of holders of Palestinian ID cards whom it considers to be "terrorist activists".²⁶

In the excepted categories – diplomats, foreign investors, foreign representatives of recognized international organizations and humanitarian cases – the ability of a foreigner to cross is subject to veto by Israel, which has 48 hours to register its objection.²⁷

Israeli security officials monitor the crossing at Rafah via cameras which receive real-time video and data feed of operations.²⁸ An objection by Israel to the entrance of a foreigner in one of the exceptional categories triggers a

²⁵ Agreement on Movement and Access – Agreed Principles for Rafah Crossing, Isr.-P.A., Nov. 15, 2005, *available at* www.mfa.gov.il [hereinafter: Agreement on Movement and Access and Agreed Principles].

²⁶ Letter from Ron Roman, IDF Spokesman to Sari Bashi, from Jan. 29, 2006 (on file), detailing categories of persons permitted to cross via Rafah Crossing. According to the letter: "The Crossing is intended for movement by holders of Palestinian ID cards only. Passage through the Crossing by those who are not holders of Palestinian ID cards is permitted, according to the agreement, in a number of exceptional categories:

- A. Diplomats
- B. Foreign Investors
- C. Foreign Representatives of Recognized International Organizations
- D. Humanitarian Cases.

As a general matter, at Rafah Crossing, there is no prohibition on passage by holders of Palestinian ID cards, with the exception of terrorist activists."

See also Agreement on Movement and Access: "Use of the Rafah crossing will be restricted to Palestinian ID card holders and others by exception in agreed categories with prior notification to [Israel]".

²⁷ Agreed Principles, *supra* note 25, at 4.

²⁸ Agreed Principles, *supra* note 25, at 5.

process of consultation between Israeli, Palestinian, and EU representatives, during which time the person may not enter Gaza.²⁹

Israel makes the final decision whether a foreigner may enter Gaza, despite the fact that the language of the agreement suggests that Israel's role is advisory.³⁰ According to the Israeli Defense Ministry:

"In accordance with the Interim Agreements [Oslo Accord-ed], requests for the passage of foreigners who do not hold Palestinian documentation are brought to the Israeli side for approval after they have been approved by the Palestinian side ...

We do not know of cases in which residents who do not hold Palestinian documentation requested to cross, were refused, and crossed.

According to the APRC [Agreed Principles for Rafah Crossing-ed] there are four exceptional categories of foreigners (non-holders of Palestinian documentation) who can cross through Rafah Crossing. These are:

1. Diplomats.
2. Exceptional humanitarian cases.
3. Employees of international organizations.
4. Foreign investors.

Those who are not included in these populations may not cross through Rafah Crossing, according to the APRC ...³¹

Indeed, if Israel refuses to permit a foreigner to enter Gaza through the excepted categories, that person may not enter.³²

²⁹ *Id.*

³⁰ *Id.* The agreement states that after an objection is registered by Israel, "The PA will notify the GOI [Government of Israel] of their decision within 24 hours and will include the reasons for their decision".

³¹ Letter from Eyal Freiman, Public Affairs, Coordinator for Government Activities in the Territories, Defense Ministry, to Adv. Sari Bashi, Oct. 9, 2006 [emphasis added], *available at* www.gisha.org.

³² For example, the Palestinian Authority requested permission from Israel to permit a physician from an international humanitarian organization, a U.S. citizen of Palestinian origin, to enter Gaza via Rafah in order to offer health care aid. Israel refused, and the PA wrote, in a

The exercise of this control over Rafah has significant consequences for Gaza residents. Gazans may only receive foreigners via Israeli-controlled crossings, currently the Erez Crossing between Gaza and Israel, meaning that all visitors must not only receive a visa to enter Israel, they must also be granted a permit to enter Gaza.³³ The ability of Gaza residents to receive family members, visiting lecturers, professionals, businesspersons, and medical care workers is severely restricted, especially because of the requirement that foreigners be granted a visa to visit Israel.

For example, in A.P. 829/05 (Jerusalem) *Marayati v. Interior Minister* the petitioner, a physician seeking to provide medical care to the population of Gaza, was denied a visa to Israel, necessary to enter Gaza through Erez Crossing. She was also, however, denied permission to enter Gaza through Rafah Crossing, because of the twin requirement that Israel approve the entrance of non-Palestinian ID-card holders and that Israel control who is a Palestinian-ID card holder. In the words of Dr. Marayati:

“In response to my efforts to enter Gaza, I have been told that American citizens, even those of Palestinian origin, are not allowed to enter Gaza through the Rafah Crossing unless they have a local identity card proving that they are residents of the Gaza Strip.”³⁴

.....●
letter sent to the physician's attorney, that "According to the accepted and agreed upon procedures, a request was submitted to the Israeli Civil Affairs Office in order to permit [name redacted] to enter via Rafah Crossing, and the Israeli side refused, with the explanation that the refusal is due to security reasons." *See* Letter from Amin Siam, Deputy Official, Civil Affairs, Palestinian Authority, from May 20, 2006 (on file). The physician was not permitted to cross.

³³ After receiving a visa to enter Israel, visitors must go to the offices of Israeli military officials at the Erez checkpoint and request a permit to enter Gaza, which may or may not be granted. It is noted that under the Oslo Accords, the Palestinian Authority may request that a visitors permit be granted to those wishing to enter Gaza and the West Bank, but since September 2000, Israel has refused to grant visitors permits or to add people (with the exception of minor children of ID card holders) to the Palestinian Population Registry. *See* Center for the Legal Defence of the Individual & Btselem, "Perpetual limbo – Israel freeze on unification of Palestinian Families in the Occupied Territories" (July 2006) (hereinafter: *Freeze on Family Unification*), page 17-26, *available at* www.btselem.org.

³⁴ A.P. 829/05 (Jerusalem) *Marayati v. Interior Minister* (unpublished).

ISRAEL STILL CONTROLS GAZA

Dr. Marayati has not been permitted to enter Gaza in order to provide medical care to Gaza residents.

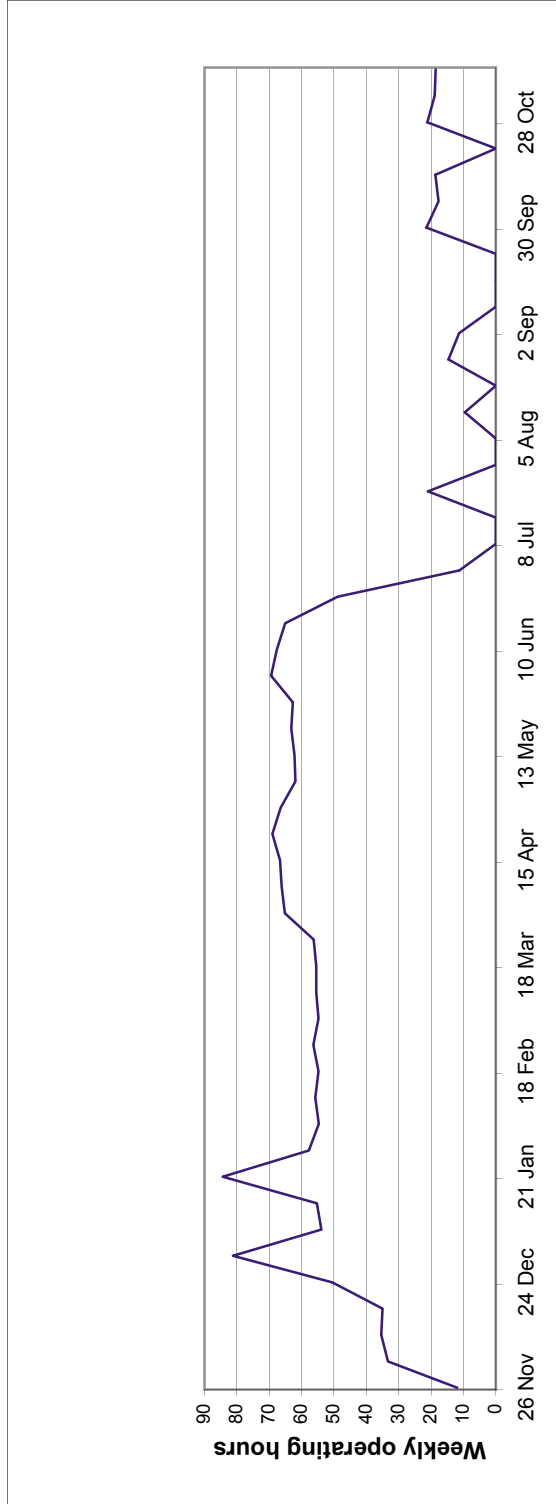
Israel exercises ultimate control over the opening of Rafah Crossing and has used that control periodically to close Gaza to the outside world. In order for Rafah Crossing to open, EU monitors and PA officials must be present at the crossing, and Israeli security officials must staff the situation room which monitors the crossing through cameras. Israeli consent and cooperation are required for Rafah Crossing to open, because the agreement for opening the crossing requires the participation of Israeli, Palestinian, and European officials and because Israel controls whether EU monitors will reach Rafah by issuing security warnings, telling the EU monitors whether or not they may staff their positions at Rafah on a given day.³⁵ Between June 25, 2006 and Nov. 14, 2006, Rafah Crossing was open for just 21 days, and on each day, for an average of less than two hours, instead of the 12 hours regularly scheduled.³⁶

Israel says that it decides whether to permit Rafah Crossing to open based on security considerations, and it has noted incidents in which fighting broke

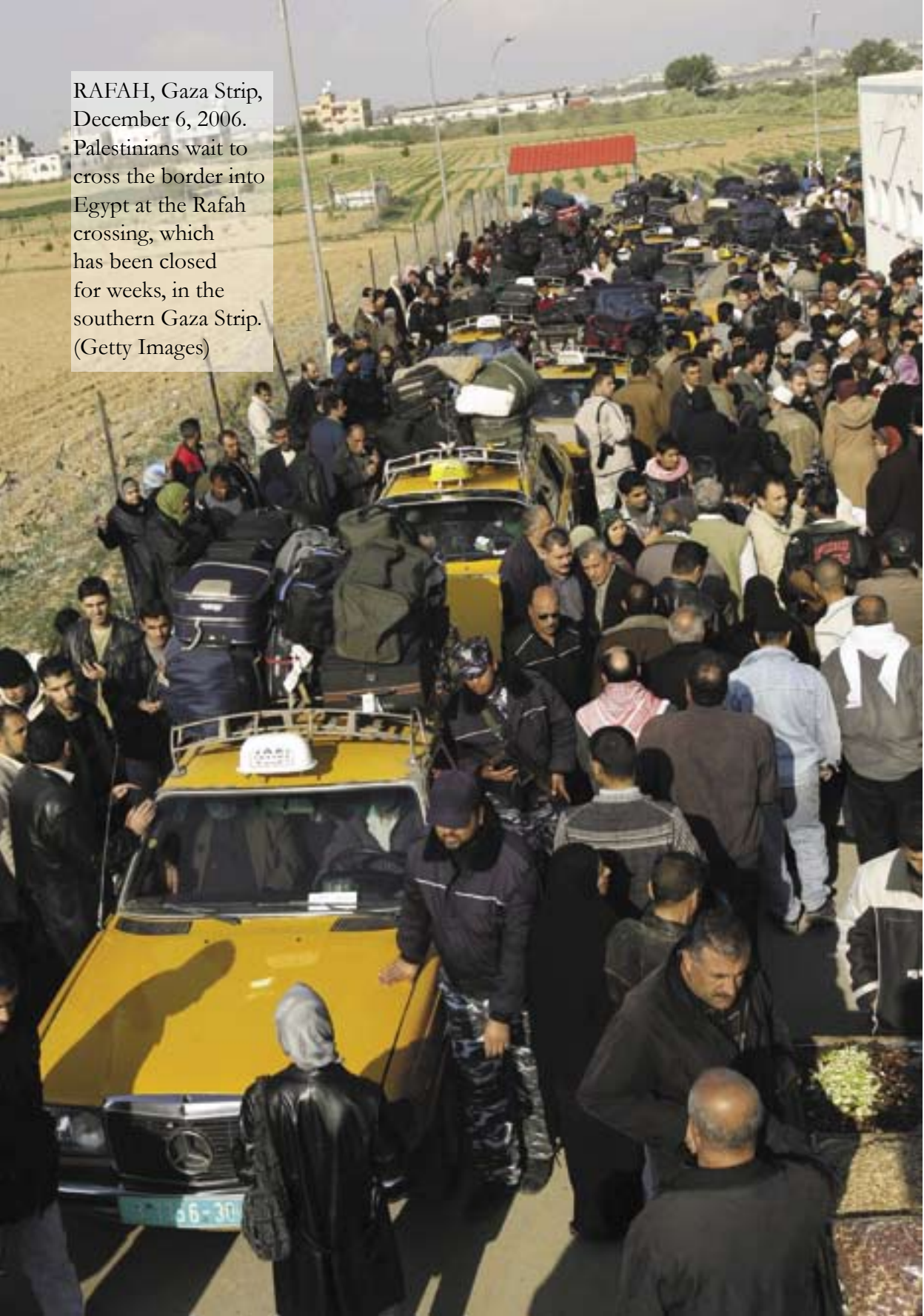
³⁵ In order to reach the Rafah Crossing, EU monitors must cross through the Israeli-operated Kerem Shalom crossing, which has been closed almost continuously since June 25, 2006. Israel also issues security warnings to EU monitors, informing them that Rafah Crossing may not open due to security concerns and that Israeli security officials will therefore not staff the "situation room". These security warnings prevent Rafah from opening, because the presence of the EU monitors is a condition for the operation of Rafah Crossing. The spokeswoman for the EU Monitors in charge of Rafah (EU Border Assistance Mission or EUBAM) confirmed this in an interview with Gisha and subsequent e-mail correspondence. As Ms. Telleria wrote in an e-mail to Attorney Noam Peleg of Gisha, following an in-person interview, all three parties, Palestinian, Israeli, and EU, must take their positions in order for Rafah to open: "When Israel says Rafah Crossing Point (RCP) would be not open because of security reasons we should accept this position. Remember that as we told you during our interview, our mandate is to monitor, verify and evaluate PA performance with regard to the implementation of the Agreed Principles for RCP, and EUBAM has not any executive power which allows us to open the border if the other parts are not present." E-mail from Maria Telleria to Adv. Noam Peleg of Gisha, Nov. 21, 2006 (on file) and interview with Maria Telleria and EU monitors, conducted by Adv. Peleg on Nov. 6, 2006.

³⁶ United Nations Office for the Coordination of Humanitarian Affairs, *The Agreement on Movement and Access One Year On* available at www.ochaopt.org.

**Weekly Operation Hours, Rafah Crossing,
Nov. 26, 2006 - Nov. 4, 2006 (UN-OCHA)**



RAFAH, Gaza Strip,
December 6, 2006.
Palestinians wait to
cross the border into
Egypt at the Rafah
crossing, which
has been closed
for weeks, in the
southern Gaza Strip.
(Getty Images)



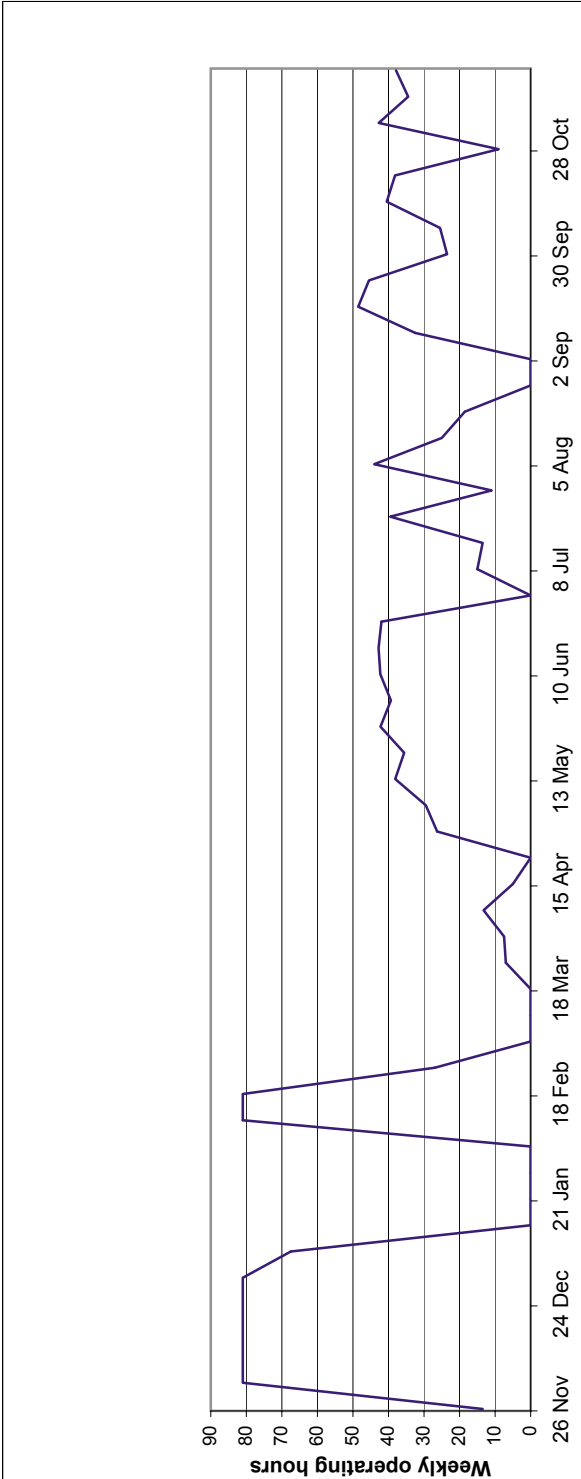
out near Rafah Crossing.³⁷ Reports and internal military documents, however, suggest that Israel has used the closure of the crossing to exercise pressure on Gaza residents, in order to bring about the return of the Israeli soldier captured on June 25, 2006.³⁸ Indeed, in the first year following the completion of its disengagement program, Israel kept Rafah Crossing closed for 148 days, meaning that Gaza was cut off from the outside world 42% of the time.³⁹ Between June 25, 2006 and the writing of these lines, Rafah has been closed, except for sporadic days in which movement in one or both directions was permitted. In this sense, disengagement has actually led to greater restrictions on the ability of most residents of Gaza to enter and leave the Strip.

³⁷ See letter from Eyal Freiman to Sari Bashi, September 25, 2006, *supra* note 31.

³⁸ According to an internal military document, the Government of Israel, on the advice of security officials, has been keeping Rafah closed until progress is made in arranging the return of the captured soldier, and it has been opening Rafah occasionally to relieve some of the pressure, including to allow patients to travel back and forth for medical care not available in Gaza. See Avi Issacharof, *Israel Using Rafah Crossing to Pressure PA on Shalit Release*, HAARETZ, Aug. 31, 2006, available at Haaretz archives: <http://www.haaretz.com>. The internal protocol on which the Haaretz article is based is translated and reproduced at the end of this chapter. The Defense Ministry's response to Gisha's inquiries concerning its closure of Rafah Crossing was received just prior to printing and is reproduced as an attachment, on page 102.

³⁹ Figures taken from U.N. Office for Coordination of Humanitarian Affairs, Occupied Palestinian Territories, *The Agreement on Movement and Access One Year On and additional reports*, available at www.ochaopt.org. Year following disengagement is measured from September 12, 2005 to September 11, 2006.

Weekly Operation Hours, Karni Crossing, Nov. 26, 2005 - Nov. 4, 2006 (UN-OCHA)



2. Control over Movement of Goods

Israel completely controls the import of goods into Gaza and exercises substantial control over exports from Gaza to third countries and to the West Bank.

●.....● Imports

With the exception of personal effects brought by travelers, imports through Rafah, the only crossing into Gaza not directly controlled by Israel, are not permitted.⁴⁰ Israel has said it will allow imports to Gaza from Egypt through the Israeli-controlled Kerem Shalom Crossing, located near the meeting point of Israel, Egypt, and Gaza.⁴¹ Thus far, imports from Egypt have been limited to sporadic shipments of humanitarian supplies.

The Karni Crossing between Israel and Gaza is the lifeline through which commercial goods enter the Gaza Strip. Because imports to Gaza are not permitted via air, sea, or Rafah Crossing, only goods arriving first in Israel and inspected there can be brought into Gaza. During the first year following the signing of the Agreement on Movement and Access, Karni was open for just 222 days, and for 166 of the days in which it was open, it was open partially, for limited hours and using only a small number of available commercial lanes.⁴²

The restrictions on imports via Karni Crossing have, at various points, caused severe shortages of basic goods that threatened the health and welfare of Gaza residents, especially in March 2006 and during the military operations that ensued following the capture of an Israeli soldier on June 25, 2006.⁴³ In the course of those operations, Israel destroyed Gaza's only power


.....●
⁴⁰ Jan. 29, 2006 Letter from IDF Spokesman, *supra* note 26; Agreed Principles, *supra* note 25, Rule 1(E) of Heading 7 of the Annex of the Israeli Customs Tariff.

⁴¹ IDF letter, *supra* note 40.

⁴² Data provided by United Nations Office for the Coordination of Humanitarian Affairs, on file.

⁴³ See Paltrade, "Karni Terminal Movement Monitoring – August 2006" [http://www.paltrade.org/Publications/World_Bank_Monthly_Report_August_2006.pdf].



A security officer in black clothing and a balaclava is walking past a line of large trucks at the Karni crossing. The trucks are parked in a row, and the officer is walking along the side of the road. The scene is outdoors, and the trucks are the primary focus of the image. The officer is holding a rifle and is walking towards the left side of the frame. The trucks are of various colors, including red and yellow. The background shows a clear sky and some distant structures.

KARNI, Gaza Strip, July 2,
2006. A security officer walks
past waiting lorries at the Karni
crossing which leads out of the
Gaza Strip into Israel (Getty
Images)

plant by bombing six transformers that provided 43% of the electricity to Gaza. The remainder of the electricity is purchased from Israel. Gaza was plunged into darkness, and the functioning of critical institutions such as the medical and water systems was crippled by the lack of electricity and restrictions on the supply of fuel and spare parts through Karni Crossing and the fuel crossing at Nahal Oz, which was closed by the Israeli military in late June and early July 2006.

Among other things, the sewage and water systems broke down because of the lack of electricity and the shortages of fuel and spare parts needed to operate generators and repair pipes. The director of the Gaza Coastal Municipal Water Utility, Maher Najjar, explains how water supply and the functioning of Gaza's sanitation system depend on Israel's willingness to permit goods and supplies to enter Gaza:

"We do not have enough spare parts to repair pipes and other equipment. We were trying to get spare parts to repair pipes through Karni Crossing, but we have yet to receive them. We are waiting to hear whether the Israeli side has let them in ...

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If we do not get more fuel in the next few days, we will be facing a catastrophe. There is not enough fuel in the local market to provide for our needs ...

The chlorine and chemicals for water wells and desalination have not entered Gaza, and their absence endangers the life of the population. We are awaiting the approval of Israeli side."⁴⁴

.....●Exports

Israel exercises substantial control over the ability to export from the Gaza Strip, crucial for industries in Gaza seeking access to external consumer markets and to the Palestinian market in the West Bank.

Export from Gaza takes place through Karni Crossing, through which goods are trucked and then shipped abroad via Israel's airport or seaport.

⁴⁴ Affidavit of Maher Najjar of July 9, 2006, on file and submitted to the Israeli High Court in HCJ 5841/06 Association for Civil Rights v. Defense Minister, *available at* www.gisha.org.

Israel, which controls Gaza's airspace and territorial waters, does not permit export directly from Gaza via sea or air. In principle, the Agreement on Movement and Access provided for the possibility of export taking place through Rafah Crossing to Egypt, but an export route via Egypt has not been established. The control that Israel exercises over Rafah Crossing, especially in the form of blocking imports, plays a role in hindering the development of an export route through Rafah,⁴⁵ although there are also details which await resolution between Egypt and the Palestinian Authority in establishing an export route. The current closure of Rafah (since June 2006) makes the development of an export route impossible.

Citing security warnings, Israel has closed Karni Crossing to exports for most of 2006, causing severe damage to Gaza's economy and rendering export crops virtually worthless. During the 2006 winter agricultural season (Jan. 1- May 2, 2006), in which Gaza farmers were to export strawberries, cherry tomatoes, flowers, and other high end produce to Israel, the West Bank, and Europe, Karni Crossing was closed 47% of the time.⁴⁶ The closures caused an estimated \$30 million in losses in the first quarter of 2006 alone.⁴⁷ During that time, farmers destroyed their crops, donated them, or left them to rot in the fields, because they could not get them out of Gaza and to export markets.⁴⁸

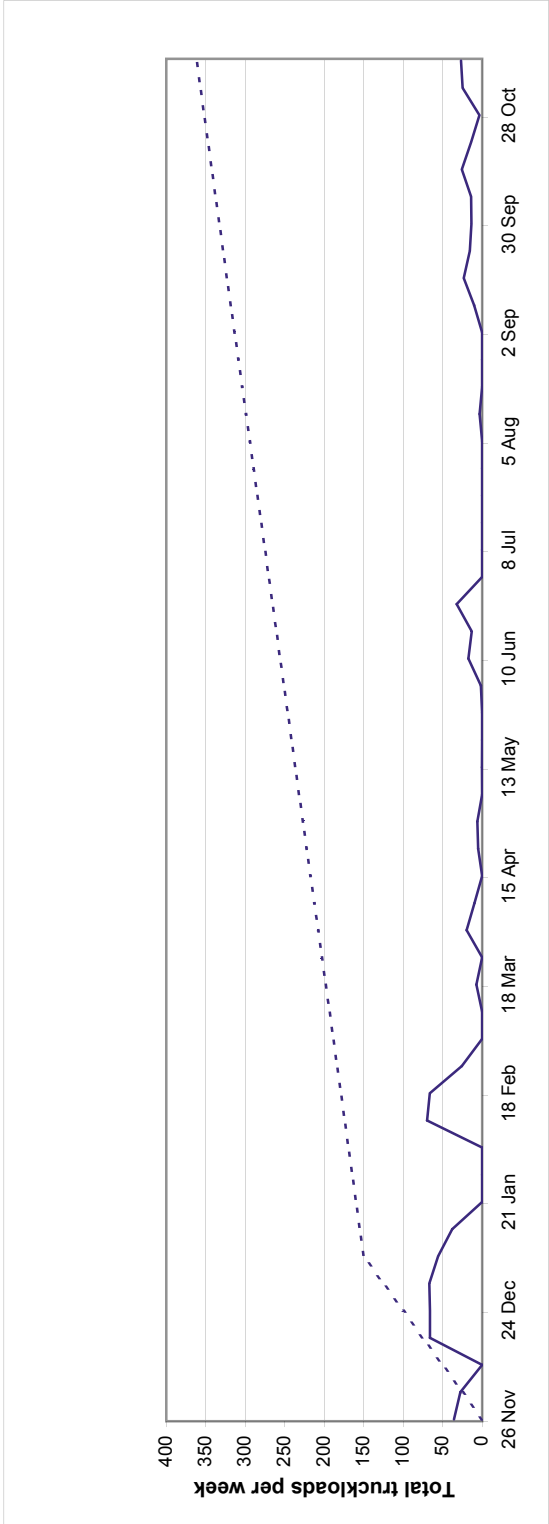
⁴⁵ For example, because imports are not permitted via Rafah, a Palestinian truck laden with exports could leave Gaza via Rafah but could not return to Gaza. Negotiations were held to come to an agreement in which Egyptian trucks could enter Rafah to load cargo and take it to Egypt, but arrangements have yet to be made. See "An Update of Palestinian movement, Access and Trade in the West Bank and Gaza" (August 2006) page 8-9.

⁴⁶ United Nations Office for the Coordination of Humanitarian Affairs, *Gaza Strip: Situation Report*, March 29, 2006, available at www.ochaopt.org.

⁴⁷ *The Agreement on Movement and Access One Year On 2*, *supra* note 36.

⁴⁸ Israel's position is that it has no obligation to keep Karni open but that it chooses to do so as a matter of policy and that it closes Karni, which has been attacked in the past by militants, only when security conditions do not permit the crossing to open. See State's Response of April 26, 2006 in HCJ 2990/06 *Mezan Center for Human Rights v. Defense Minister* (unpublished), available at www.gisha.org. Gisha's position, as will be elaborated below, is that Israel is legally obligated to keep Gaza's crossings open in order to maintain a properly functioning economy in Gaza, including the obligation to permit export via Israeli ports, particularly in light of Israeli prohibitions on exports via air or sea. See petition of April 4, 2006 in HCJ 2990/06 *Mezan Center for Human Rights v. Defense Minister*.

Truckloads Exiting Gaza via Karni Crossing,
Nov. 26, 2005 - Nov. 4, 2006 (UN-OCHA)



One such farmer, Yunis Abu Shabana, who exports cherry tomatoes and sweet peppers to Europe from Gaza, describes the impact of Israel's closing of Karni on his business and on the 370 workers he employs:

"Last January, I had 40 tons of produce waiting to be transported at Karni Crossing. In addition, there were more than 100 tons waiting for export in the factory and an additional estimated 220 tons still in the greenhouses ... Once the vegetables are sorted and packed in cartons, they cannot wait long for market. Every delay in export means the produce rots and must be destroyed. Therefore, after 20 days of waiting, the produce was destroyed ... Right now, my workers are not working, and I am supposed to destroy the produce that remains in the factories and greenhouses."⁴⁹

Even when Karni has been open, it has been open for limited hours using limited lanes. In the first year following the signing of the Agreement on Movement and Access, the average number of trucks leaving Gaza daily was 18.5, rather than the 400 trucks daily called for in the agreement, necessary for Gaza to engage in the level of commerce required to support its 1.4 million residents.⁵⁰

B. Israel Exercises Complete Control of Gaza's Airspace and Territorial Waters

Since occupying Gaza in 1967, Israel has exercised complete and exclusive control of Gaza's air space and territorial waters.⁵¹ There is no passage for people or goods into Gaza via the sea or air. Although the November 2005 Agreement on Movement and Access anticipated negotiations over building ports in Gaza,⁵² Israel has not provided assurances to donors that it would not interfere in seaport operations and no negotiations have begun over trans-

⁴⁹ Affidavit of Younis Abu Shabana from March 15, 2006, on file and submitted to the Israeli High Court under HCJ 2906/06 *Mezan Center v. Defense Minister*.

⁵⁰ *The Agreement on Movement and Access One Year On 2*, *supra* note 36, and accompanying chart.

⁵¹ The Interim Agreement preserved that control, although it and subsequently signed agreements foresaw the construction of a seaport and airport, the latter of which operated briefly between 1999 and 2000. *See* Articles 13 and 14 of the Interim Agreement; Agreement on Movement and Access.

⁵² Agreement on Movement and Access, *supra* note 25.

ISRAEL STILL CONTROLS GAZA



GAZA CITY, Gaza Strip, January 30, 2006. Palestinian farmers destroy vegetables and flowers grown in the Gaza Strip to protest Israel's closure of the Karni crossing, which prevents the export of their products. (Getty Images)

ferring Israel's exclusive control over Gaza's airspace and territorial waters.⁵³

Israeli control of Gaza's territorial waters limits Gaza's fishing industry and more recently has brought it to a halt. Palestinian fisherman must request and receive licenses to fish off Gaza's coast.⁵⁴ Since June 25, 2006, Israel has mostly banned fishing boats, effectively decimating Gaza's fishing industry and removing an important source of protein from Gaza markets.⁵⁵

Israeli naval vessels patrol Gaza's coast, interdicting sea vessels attempting to land and confiscating contraband such as weapons or narcotics.⁵⁶ Israeli warplanes and drones regularly patrol the skies of Gaza, using cameras to observe activity and periodically firing missiles aimed at assassinating militants but often hitting civilians, too.

C. Israel Controls Movement within Gaza through Periodic Incursions and a "No-Go Zone"

Israel controls movement within the Gaza Strip through sporadic troop presence and artillery fire from positions along its borders with Gaza.

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Israel controls a northern section of the Gaza Strip where it declared, in December 2005, a "no-go" zone by warning residents that they will be shot if found in that area. The restrictions on movement in the no-go zone are enforced by artillery positions stacked along Israel's borders with Gaza. Additional no-go zones, especially near the fence that bounds the Gaza Strip, are declared by Israel and communicated to residents via instructions given by Israel to Palestinian security officials.⁵⁷

⁵³ *Agreement on Movement and Access One Year On*, *supra* note 36.

⁵⁴ According to the Interim Agreement, *supra* note 22, with the exception of certain "no-go zones", fishing is to be permitted up to 20 nautical miles off Gaza's coast. Article 14 of the Interim Agreement. However, as a matter of practice, Israel's navy permits fishing only up to six or ten nautical miles from the coast.

⁵⁵ See UN OCHA Humanitarian Update (June/July 2006), p.10, available at www.ochaopt.org.

⁵⁶ Interim Agreement, *supra* note 22, Annex 1 Art XIV (1)(b).

⁵⁷ See, e.g. United Nations Office of Coordination for Humanitarian Affairs, *Protection of Civilians*, Weekly Briefing Notes, for the period Feb. 2, 2006 to Feb. 21, 2006, available at www.ochaopt.org.

Since June 28, 2006, Israeli ground troops have conducted extensive military operations in Gaza, especially in the Beit Hanoun (north) and Rafah (south) areas of Gaza.

For example: In the early morning hours of June 28, 2006, Israeli fighter planes destroyed Gaza's electricity transformers, which provided 43% of the electricity used by residents, and bombed a number of bridges and roads. Artillery, engineering, and infantry divisions of the Israeli military entered the Gaza Strip. Ten days later, Israeli tanks entered Gaza, in the area of the former settlements and existing towns in Beit Lahiya, and by morning they reached seven kilometers inside Gaza. On July 8, tanks and engineering forces entered the central part of the Gaza Strip, through the Karni commercial crossing, and set up camp near the residential neighborhoods of Sajia and Zaitoon.

Since that time, ground forces have been operating throughout Gaza, destroying weapons and rocket launchers, closing areas to travel, forcing families out of their homes, cutting electricity lines to afford cover of darkness, and issuing orders to the civilian population to stay away from areas of fighting.⁵⁸

These forces have also at various points taken control of the Philadelphi corridor, along the border between Gaza and Egypt, and they report having found and destroyed tunnels along the Gaza-Egypt border.⁵⁹

D. Israel Controls the Palestinian Population Registry

The definition of who is "Palestinian" and who is a resident of Gaza and the West Bank, for purposes of entering and leaving Gaza and the West Bank

⁵⁸ Details of Israeli military activities in Gaza can be found at the IDF web site (in Hebrew): <http://www1.idf.il/DOVER/site/mainpage.asp?sl=HE&id=7&doid=53616.HE> (last visited 11 October 2006).

⁵⁹ See IDF announcement at: <http://www1.idf.il/dover/site/mainpage.asp?sl=HE&id=7&doid=58116&Pos=15&last=1&bScope=True> (last visited 30 Oct. 2006).

● DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA



RAFAH, Gaza Strip, July 5, 2006. Palestinian families walk down the pitch black streets of the southern Gaza Strip town of Rafah, as citizens struggle for the ninth day running with barely any electricity following the destruction of Gaza's main power station during an Israeli military strike. (Getty Images)

“In the early morning hours of June 28, 2006, Israeli fighter planes destroyed Gaza's electricity transformers, which provided 43% of the electricity used by residents”.

and for every other purpose, is controlled by the Israeli military. While the Interim Agreement was to have given the Palestinian Authority "the power to keep and administer registers and records of the population,"⁶⁰ such power was limited to printing changes in the Palestinian Population Registry, common to the West Bank and Gaza, that Israel had already approved. Even when Rafah is open, only holders of Palestinian ID cards can enter Gaza through the crossing, so control over the Palestinian Population Registry is also control over who may enter and leave Gaza. Since 2000, Israel has not permitted additions to the Palestinian Population Registry, with the exception of minor children of Palestinian ID-card holders.⁶¹

Indeed, some Gaza residents who have lived in Gaza for years and who have no other home but Gaza, are trapped in Gaza because of Israel's control over the borders and the Population Registry. Estimated tens of thousands of residents, including women who entered Gaza on visitor permits and married Gaza residents, are living in Gaza but cannot receive Palestinian ID cards. As a result, they cannot leave Gaza – because they will not be permitted to return.

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For example, Mirvat Alnahal, a 31-year old lawyer and mother of three, entered Gaza on a visitor's permit in 1994. Her requests to extend the permit and/or to receive a Palestinian ID card were refused because of an Israeli policy not to permit additions to the Palestinian Population Registry.⁶²

Officially, Mirvat does not exist. She cannot leave Gaza, because without an ID card, she would not be allowed through Rafah to return to her family, her home, and her place of work. She cannot open a bank account in her own name, because she has no identification. Her ability to receive international food and cash aid is limited by the fact that she does not have official identification. In Mirvat's words:

"Since I came to Gaza, I am trapped here. I cannot leave, for fear that I won't be allowed to return ...

⁶⁰ Interim Agreement, *supra* note 22.

⁶¹ See Freeze on Family Unification, *supra* note 33, page 17-26, available at www.btselem.org.

⁶² *Id.*

Mirvat Alnahal, a 31-year old lawyer and mother of three, entered Gaza in 1994 on a visitor's permit, but has not received a Palestinian ID card due to an Israeli policy not to permit additions to the Palestinian Population Registry.

Officially, Mirvat does not exist. She cannot leave Gaza, because without an ID card, she would not be allowed to return. In Mirvat's words:

"I was born in Libya. My father is a Palestinian refugee who left the Gaza Strip in 1966 and could not return until 1994.

I came to Gaza with my family in 1994. Since then, I have failed in my attempts to receive a Palestinian ID card as part of the Palestinian Population Registry administered by Israel.

Until 1994, I had an Egyptian document that constituted a kind of passport, but since the age of 19, I have not been able to renew the document because I have been in Gaza. Since then, I am without an ID card and without a passport.

As a result, since I came to Gaza, I am trapped here. I cannot leave, for fear that I won't be allowed to return.

I am a lawyer by profession, but unfortunately, the fact that I cannot leave Gaza prevents me from developing professionally and advancing the career that I dreamed of. I cannot participate in conferences and workshops. I cannot participate in trainings outside of Gaza, and I cannot travel abroad.

... The things that are considered easy for others – for me are very difficult. For example, when I tried to open a bank account to deposit my salary, the clerks asked me to bring two witnesses who could attest to my identity ...

My husband's ID card says he is married, but the box for 'spouse's name' is blank. My children were born in Gaza to a mother who, officially, does not exist.

I want to be able to travel abroad, in order to develop professionally. I want to open my own bank account. I want to exist in the eyes of the authorities. I don't want to be an empty box on my husband's ID card."

My husband's ID card says he is married, but the box for "spouse's name" is blank. My children were born in Gaza to a mother who, officially, does not exist."

While as a technical matter, the Palestinian Authority prints and issues ID cards, it does not print ID cards that contradict the registration in the Israeli computers, because of Israeli control of the borders of Gaza and the West Bank; for purposes of crossing through checkpoints and crossings, the Israeli population records determine who is Palestinian and who may enter and leave Gaza.

E. Israel Exercises Control over Gaza's Tax System and Fiscal Policy

54 According to the Paris Protocol of 1994, Israel controls the tax system in the territories of the Palestinian Authority, including Gaza and the West Bank, with the exception of direct taxes such as income tax and some kinds of value-added ("VAT") and customs taxation.⁶³ Israel, which controls all imports into Gaza and the West Bank, collects VAT and customs duties imposed on imports on behalf of the Palestinian Authority and is to transfer them to the PA each month. This system gives Israel control not just over tax policy and the provision of humanitarian goods to Gaza, but it also gives Israel control over the Palestinian Authority, particularly its civil services, funded by tax revenues.

Israeli control over tax policies affects civilian life in Gaza, including the delivery of humanitarian services. For example, the ability of nonprofit organizations to receive tax-exempt donations of equipment or materials is dependent on approval from the Israeli authorities. If such approval is not forthcoming, groups in Gaza must pay taxes that can be as high as 100%, making it impossible for them to receive the donations. The director of the National Center for Community Rehabilitation ("NCCR"), a nonprofit rehabilitation center in Gaza, explains the meaning of Israel's control over import policies:

⁶³ See Interim Agreement, *supra* note 22, Annex 5.

"NCCR needs Israeli approval in order to receive exemptions from taxes on donated goods ...

In the past, when the Israeli authorities have refused to issue the customs exemption, NCCR has had to return equipment to the European donors who sent it, because NCCR does not have the money to pay the customs duties."⁶⁴

Israel retains full control over Gaza's "customs envelope." Israel controls and monitors what goods are allowed into and out of Gaza and collects duties and VAT, based on Israel's rates, on behalf of the Palestinian Authority.⁶⁵ These elements of control give Israel substantial power over economic and fiscal policy in Gaza:

"Palestinian policy makers do not have any instruments for monetary, exchange rate and trade policies or even a complete set of fiscal policy instruments. The PA retains only limited control over tax and budgetary management, since the largest part of public revenue is determined by Israeli rates . . . [T]he clearance of such revenue from the Israeli side to the PA is subject to Israeli political decisions."⁶⁶

The Israeli Supreme Court has also recognized the importance of tax policy in controlling the economy in Gaza and the West Bank, noting that an occupier's duty to restore public order includes providing for a working economy.⁶⁷

⁶⁴ Affidavit of Khaled Abu Zaid, director of National Center for Community Rehabilitation, of February 2, 2006, on file with Gisha.

⁶⁵ See Protocol on Economic Relations, Isr.-P.L.O., Apr. 29, 1994. The Protocol appears as Annex IV in Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., May 4, 2004, 33 I.L.M. 622 (1994) [hereinafter: Gaza-Jericho Agreement].

⁶⁶ United Nations Conference on Trade and Development, *The Palestinian War-Torn Economy: Aid, Development and State Formation* 17, UNCTAD/GDS/APP/2006/1 (2006).

⁶⁷ HCJ 69/81 Abu Ita v. Regional Authority of Judea and Samaria, PD 36(2) 197, 228.

F. Israel Exercises Control over the Palestinian Authority and Its Ability to Provide Services to Gaza Residents

The State of Israel claims that it has (unilaterally) transferred control over Gaza to the Palestinian Authority, and that any claims regarding conditions or services in the Gaza Strip should be directed to the PA.⁶⁸ That claim, however, disregards the control that Israel exercises over the Palestinian Authority, including its ability to provide services to Gaza and West Bank residents.

In 2005, tax revenues collected by Israel on behalf of the PA amounted to roughly 50% of the PA's operating income.⁶⁹ Following the Hamas victory in the January 2006 Palestinian Legislative Council elections, and as of March 2006, Israel stopped transferring these tax revenues to the PA.⁷⁰ The PA also stopped receiving money from most donor countries as a response to the Hamas election victory. As a result of these twin policies, most PA employees have not received their salaries since February 2006.⁷¹

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The nonpayment affects an estimated 172,000 civil servants in Gaza and the West Bank and the one million residents who are dependent on these salaries for their basic needs.⁷² Beginning September 2, 2006, Palestinian teachers and health care workers throughout Gaza and the West Bank have struck, periodically shutting down schools, municipal services, and government offices in protest of nonpayment of salaries.⁷³

Control over the finances that are the lifeblood of the Palestinian Authority

⁶⁸ HCJ 11120/05, State's Submission of Jan. 19, 2006, para. 28.

⁶⁹ United Nations Office for the Coordination of Humanitarian Affairs, *Assessment of the Future Humanitarian Risks in the Occupied Palestinian Territory* 1 (2006).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Numbers of civil servants according to World Bank Report, "The Palestinian Fiscal Crisis," May 7, 2006, n.13 on pp 3-4.

⁷³ See e.g. United Nations Office of Coordination of Humanitarian Affairs, *Protection of Civilians – Weekly Briefing Notes*, 13-19 September 2006, available at www.ochaopt.org, <http://www.humanitarianinfo.org/opt/docs/UN/OCHA>.

is not just control over the Palestinian Authority as an entity, but also control over the livelihoods of Gaza residents and the provision of civilian services, including health care and education. Responsibility for these services may have formally been transferred to the authority of the PA, but by withholding the budget needed by the PA to exercise that responsibility, Israel hinders the provision of those services.⁷⁴ In the words of a resident of Gaza, whose father is employed as a health supervisor by the Palestinian Ministry of Health, failure to transfer the tax revenues endangers the ability of civil servants to provide health services to Gaza residents:

“My father’s salary is paid by the Palestinian Authority, which is funded by donation and revenues, including taxes and customs duties which Israel collects on behalf of the Palestinian Authority ... My father believes in his work protecting the health and well-being of Gaza residents, but my family needs a source of income.”⁷⁵

Israel controls even the make-up of the Palestinian Authority, by virtue of its control over Palestinian elections and the functioning of Palestinian institutions of government. Israel determines who may vote in Palestinian elections through its control over the Palestinian Population Registry and its power to permit or disallow residents of east Jerusalem to participate in elections. Israel also controls the identity of the candidates for Palestinian offices, through its control over the entrance of non-Palestinian ID-card holders into Gaza and the West Bank.

Israel also controls the ability of Palestinian governmental offices to function properly. In addition to control over finances, Israel controls movement between Gaza and the West Bank and has recently prevented officials in the Hamas government from crossing between Gaza and the West Bank in order to participate in legislative and governmental meetings. In late June 2006,

⁷⁴ Since March 2006, Palestinian civil servants, including teachers, garbage collectors, and others have struck intermittently to protest nonpayment of salaries, shutting down schools and interrupting the provision of basic services. Other workers have been unable to carry out their jobs for lack of funding; for example, health supervisors have not been able to travel to inspection sites for lack of funding to pay fuel costs. *See generally* www.ochaopt.org for reports outlining interruptions in the provision of civil services in Gaza and the West Bank.

⁷⁵ *See* HCJ 11120/05 Hamdan v. Southern Military Commander, Petitioners’ Response of March 5, 2006, Affidavit of Mohammed Abu Riala, Appendix P-10 (on file).

ISRAEL STILL CONTROLS GAZA

Israel conducted a round-up in which it arrested senior government officials in the Palestinian Authority on charges of terrorism. Israel continues to hold these PA ministers, limiting their ability to govern.

Indeed, continued direct Israeli control over the West Bank is a form of indirect control over Gaza, because Gaza and the West Bank constitute two parts of a single territorial unit,⁷⁶ with a unified and undifferentiated system of civilian institutions spread throughout Gaza and the West Bank, funded from the same central budget and run by the same undifferentiated central authority. For example, the Palestinian educational system operates schools and universities in Gaza and the West Bank. Israeli control over West Bank institutions (exclusive control over entrance into the West Bank and access to West Bank universities; control over the budget of the Palestinian Education Ministry, the identity of its officials and its ability to operate schools) is a significant form of control over the Palestinian educational system in both Gaza and the West Bank. Preventing Gaza residents from entering the West Bank to attend university, as Israel has done since 2000, strains the Palestinian higher educational system in both Gaza and the West Bank by requiring duplication of resources and academic faculties throughout the system.

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While each of these elements of control might not be enough, by itself, to constitute effective control, the cumulative effect, as will be described in the next chapter, meets the conditions for applying international humanitarian law protections.

⁷⁶ Interim Agreement, *supra* note 22, Article 11.

Translation of protocol from a meeting among Israeli security authorities regarding whether to open Rafah Crossing. The Defense Ministry's response to Gisha's inquiries concerning the protocol was received just prior to printing and is reproduced as an attachment.

Please turn to page 102 to read the Defense Ministry's response.

Reserved

Adviser to the Defense Minister

Tel: [redacted]

Fax: [redacted]

24 August 2006

Reference: Minister General – 386-220806

Distribution List

Subject: Rafah Crossing Status – Summary of Discussion

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Background

1. The question of Rafah Crossing is familiar and known, and the crossing is closed, while in the background are various issues including: customs, smuggling, movement of Hamas activists, transportation of explosive material, etc.
2. ... there is no change in status, and that is in addition to the decision of the Defense Minister to open the crossing, which was closed shortly thereafter.
3. A discussion of the subject took place on August 22, 2006, headed by the undersigned.

[...]

Issues for Discussion

6. The positions of the various entities regarding the status of the mandate, its extension and upgrade.

Legal Issues

7. Issues for discussion are:

- Opening the Crossing – in the short and long term.
- Continuation of the mandate – its meaning and positions.
- Categories of exceptions at the crossing.
- Security and customs arrangements.

8. Positions of the participants:

● Planning Department:

- To permit the opening of the crossing from time to time only after the return of the captured soldier and cessation of the firing from the Strip (the crossing as a means of pressure).

[...]

- Requires a discussion of the overall perspective regarding the crossings – policy and implementation.

● International Law Department:

[...]

- Israel does not have a mandate to close the crossing which is operated through a Palestinian, Egyptian agreement, with European assistance.

● Foreign Ministry:

- The Europeans are pressing to open the crossing and therefore it should be opened even “immediately” for a number of days, to release the pressure.

[...]

● General Security Services:

- Oppose opening the crossing even for a few hours (so long as the issue of the captured soldier remains unchanged and the pressure should be continued at this point).

- Assembling data to determine position regarding the long-term.

[...]

● Coordinator for Government Activities in the Territories:

- In the immediate term to permit movement through the crossing against the background of summer visitors to the area.

- In the medium term there is opposition to opening until the captured soldier is released.

[...]

● Adviser to Minister of Defense [name redacted]

- The crossing is not a means for pressure.

[...]

- In the evaluation of the entirety of considerations, the crossing should be opened and it should be closed only subject to direct and pinpointed warnings.

9. Summary

10. In the short term, there is a need to open the crossing and release the existing pressure (25 buses at the crossing), and the issue will be brought for approval by the Defense Minister.

[...]

16. Recommend to continue work at the staff level vis a vis the Europeans/Americans and the Palestinians to evaluate the status of the crossing and its continued operation, for the short, medium, and long term.

17. Regards,

[name redacted]

Advisor to the Defense Minister

CHAPTER 4



**ISRAEL CONTINUES
TO OWE OBLIGATIONS
TO GAZA RESIDENTS
UNDER THE LAW OF
OCCUPATION**

I srael's contention that withdrawal marks the end of its obligations vis-à-vis residents of Gaza is founded upon an overly narrow understanding of occupation as being defined exclusively by the continuous presence of troops in a given territory. Occupation, in fact, has long been understood in terms of the ability to exercise effective control over a territory, a concept that is intimately linked with, but not entirely dependent upon, a permanent military ground presence in the territory. As we have shown, Israel exercises effective control over significant aspects of life in Gaza, and thus, in the areas in which it exercises such control, Israel owes obligations to Gaza residents under the international humanitarian law of occupation. Such responsibility will continue until Israel cedes effective control.

A. The Definition of Occupation

64 The literature on occupation law discusses the definitional question, when does a state of occupation exist? Article 42 of the Hague Regulations defines occupation as beginning when territory "is actually placed under the authority of the hostile army", a notion known in the literature as "effective control". It is not at all clear from this literature that the occupant's troops must be on the ground in the occupied territory at all times in order to exercise military control from within that territory. Nevertheless, some commentators on the subject have singled out this factor – permanent ground presence of the occupant's military in the occupied territory – as a *sine qua non* of the status known as occupation. Troops in, occupation; troops out, occupation terminates.

Gisha takes the position that the latter view is incorrect and in fact incorrectly characterizes the conventions themselves and the essence of the concept of occupation as it has developed in international law. In Gisha's view, which is supported by the case law and commentary on the subject, the essence of the term occupation lays in the notion of control, that is, military control of the occupied territory by a foreign power. This shifts the discussion away from physical military ground presence to the definition of control.

What is meant by control? Control means the use of power to affect peo-

ple's lives. Power can be exercised by the actual use of coercive force, as when jet planes patrol the skies, using cameras to observe activity and firing missiles at suspected militants, when military commanders set up zones along the coast in which fishermen can fish and then use gunships to fire on those who stray from the designated zones, or when ground troops enter a neighborhood, sweeping the streets and buildings for weapons and destroying homes. It can be exercised through the threat of force, as when the commanders of a military say that they will send in troops to close a border crossing or will fire artillery at anyone found in designated "no go" zones throughout Gaza – and can do so, at will.

The critical question is "how much" actual control yields a situation of occupation – a situation in which the foreign power exercises sufficient control as to incur obligations to residents of the territory subject to its authority.

There are probably no bright lines to deal with this question. But on a case-by-case basis, we can identify where control by a foreign government over a territory not part of its sovereign land rises to the level of occupation. The level of control over Gaza, as will be argued below, is clearly a factual instance of occupation.

A secondary question is to what extent the obligations owed by the occupier are affected by the level of control exercised. This important question has been asked since the beginning of the Oslo Peace process, through which some competencies and responsibilities, formerly held by Israel, were transferred to the Palestinian Authority, with Israel retaining overall responsibility in the territories. This secondary question should be considered in the context of specific disputes about the scope of Israel's obligations in Gaza.

Gisha's argument is that the withdrawal of settlers and permanent military installations from the Gaza Strip was a change in degree but not of kind: in some areas, the degree of Israeli control over life in Gaza diminished, but Israel did not release control and did not extinguish its obligations under the international law of occupation.

B. Israel Continues to Bear Responsibility under the International Law of Occupation Even If the Occupation of Gaza is Effected through Nontraditional Means.

1. Under the Martens Clause and Israeli Law, Humanitarian Obligations Should be Interpreted Expansively and Purposively

The framework for interpreting Israel's obligations vis à vis Gaza residents must take into account the purpose of international law – to protect civilians – a purpose which tips the balance, in cases of doubt, in favor of applying protections for civilians. That purposive approach to questions of applicability of humanitarian protections is well-grounded in international humanitarian law and in Israeli law.

The Hague Convention of 1899 includes a provision commonly called the Martens Clause, which adds a residual clause of applicability to the enumerated tests in the Convention.⁷⁷ The Martens Clause has developed into a background rule of international humanitarian law, filling in the gaps between enumerated protections, according to the principle that humanitarian law protects civilians and belligerents, even in situations arising from armed conflict that were not or could not have been anticipated by the drafters of humanitarian treaties.⁷⁸ The original wording of the clause in the 1899 Hague Convention is as follows:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and

⁷⁷ Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000).

⁷⁸ Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 390.

the requirements of the public conscience."⁷⁹

While originally proposed to solve a dispute over the status of civilians who take up arms in defense of their country, the Martens Clause has been used to apply the principles of humanitarian law to situations and practices not mentioned or anticipated by specific treaty provisions.⁸⁰

The Martens Clause, in one form or another, has appeared in every major humanitarian treaty since 1899.⁸¹ It was included in the 1907 Hague Convention, in almost identical form to the clause in the 1899 Convention. In the context of denunciations, the 1949 Geneva Conventions also affirm the Martens Clause and the obligations of states to honor "the usages established among civilized peoples, [] the laws of humanity and the dictates of the public conscience."⁸²

In the Nuremberg Trials, the Martens Clause was defined as the "legal yardstick" by which to judge any military acts not governed by specific provisions of the Conventions:

"The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Conventions and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare".⁸³

⁷⁹ Hague Convention with Respect to the Laws and Customs of War on Land art. 23(e), July 29, 1899, 32 Stat. 1803 [hereinafter: Hague II of 1899].

⁸⁰ Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. OF THE RED CROSS 125 (1997).

⁸¹ Meron, *supra* note 77, at 78.

⁸² Geneva IV, *supra* note 4, art. 158 (This article is common to all four Geneva Conventions of 1949, as article 63/62/142/158).

⁸³ Meron, *supra* note 77, at 80 (quoting *In re Krupp*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948)).

The Nuremberg Court also noted that the Martens Clause originally was meant to give additional protections specifically to "belligerently occupied territory."⁸⁴

According to former ICTY President Theodor Meron, the Martens Clause establishes an interpretive presumption in favor of applying the protections of humanitarian law:

"It [The Martens Clause] argues for interpreting international humanitarian law, in case of doubt, consistently with the principles of humanity and the dictates of public conscience."⁸⁵

The principles of international humanitarian law listed in the clause continue to bind nations even in situations arising from armed conflict that were not anticipated by specific treaty provisions.⁸⁶

In its Advisory Opinion on the Threat or Use of Nuclear Weapons⁸⁷, the International Court of Justice (hereinafter: ICJ) addressed the Martens Clause in the context of the purpose of humanitarian law. It stated that the two main principles of humanitarian law are, first, the "protection of the civilian population and civilian objects" and second, the prohibition against "cause[ing] unnecessary suffering to combatants."⁸⁸ The Martens Clause protects these two aims, insisting on "the continuing relevance of humanitarian law regardless of subsequent developments of types of situation or technology."⁸⁹ Furthermore, the Martens Clause supports the idea "that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code" which is established by the opinion of the world community.⁹⁰

⁸⁴ *Id.*

⁸⁵ Meron, *supra* note 77, 87- 88.

⁸⁶ *Id.*

⁸⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 78 (July 8) [hereinafter: Nuclear Weapons Opinion].

⁸⁸ Nuclear Weapons Opinion, para. 78.

⁸⁹ Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARV. INT'L L.J. 301, 306 (2003) (internal citations omitted).

⁹⁰ Ticehurst, *supra* note 80.

In other words, the proper interpretation of Article 42 of the Hague Convention is an evolutive interpretation that takes into account changes in the way control is exercised. As Judge Shahabuddeen noted in his separate opinion in the Nuclear Weapons Case:

"the Declarations in the Hague Conventions ... by virtue of the de Martens Clause, imported into humanitarian law principles that went much further than the written convention; it thus gave them a dynamic dimension that was not limited by time".⁹¹

This approach to understanding humanitarian obligations is well-grounded in Israeli law, which adopts a purposive approach to legal interpretation, especially interpreting older documents in light of their objective purpose – the principles and values they were designed to promote.⁹²

2. Technological Advances Have Reduced the Dependence on Ground Troops

In particular, the humanitarian law of occupation should be interpreted in light of changes in technology and in the use of force.⁹³

.....●
⁹¹ Separate Opinion of Judge Mohammed Shahabuddeen in the *Nuclear Weapons Opinion*, *supra* note 87, citing Sean McBride, "The Legality of Weapons for Societal Destruction", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 402.

⁹² See, e.g. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005).

⁹³ International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, paras. 44, 56 (2000) [hereinafter: NATO Bombing]. The ICTY special committee noted the change in the understanding of humanitarian law due to the development of new technologies, such as precision guided munitions; See also Stuart Walters Belt, *Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 116 (2000) (arguing that a new norm of customary international law has emerged, due to the development of precision-guided munitions, requiring their use in attacks on urban areas); J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT'L L. 64, 75 (2000) (describing how the general use of encryption for all communication at sea has effectively negated the prohibition in the Second Geneva Convention against the use of encryption by hospital ships).

This was the holding of the ICJ in the Nuclear Weapons Case, which affirmed that the principles of humanitarian law must apply to new methods of exercising force, made possible by advancements in military technology.⁹⁴ To leave these situations outside the realm of humanitarian law would be, in the Court's words:

"[I]ncompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future."⁹⁵

The court cited to a submission by New Zealand, which stated,

"International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons."⁹⁶

On this doctrine, the relevant subject of analysis is not the means by which military control is exercised but rather the extent of the control and the effects it has on the civilian population. In other words, so long as Israel maintains effective control over Gaza, humanitarian law protections continue to apply, even if that control is facilitated by means not contemplated by the Geneva Conventions and Hague Regulations, using technology not in existence at the time they were drafted and through agreements delegating certain responsibilities to representatives of the local population.

Technological developments have made it possible for Israel to assert effective control over significant aspects of civilian life in the Gaza Strip without a permanent ground troop presence. While in the past, scholars had discussed

⁹⁴ Nuclear Weapons Opinion, *supra* note 87, at para 78.

⁹⁵ *Id.* at para. 86.

⁹⁶ *Id.* (citing Written Statement of New Zealand, Nuclear Weapons Opinion, *supra* note 87, paras. 63, 64).

the control element of occupation as likely being effected by a continuous presence of ground troops,⁹⁷ the substantive test was and remains effective control and the ability to exercise authority. This test is consistent with the purpose of humanitarian law: to protect civilians who are under the control of a foreign military power, irrespective of how such control is exercised.

For example, in the Gaza Strip, Israel exercises "police functions" through the use of image technology and drone planes which allow it to identify a suspected militant from the air and to kill that person using missiles fired from the air—without sending ground troops to attack or arrest that person. The ability to fire artillery from the Israeli-Gaza border and to fire from gun boats along Gaza's coast permits Israel to maintain a "no go" buffer zone in northern Gaza without keeping ground troops there on a permanent basis. The use of closed circuit cameras at Rafah Crossing, together with the agreements concerning EU monitors, allows Israel to monitor those entering and exiting Rafah and to ensure that only those individuals fitting into the specific categories of approved persons enter the Gaza Strip and that no goods (other than personal items) pass through that crossing. Israel can ensure compliance with these agreements without the need to be physically present at the crossing. And of course, Israel exercises its ability to restore its physical ground presence in Gaza at will.

To be clear: the basis for this control is military superiority, whether exercised in fact, as when compliance is assured by the use of force, for example by Israeli ground troops operating along the Philadelphi route between Gaza and Egypt,⁹⁸ or whether control is exercised by the threat of use of force, as when Israeli security officials communicate to EU monitors and the Palestinian Authority when Rafah Crossing may or may not open, and those instructions are followed, where all concerned know that Israel has the ability to enforce those instructions through its military superiority.

Gaza residents know that significant aspects of their lives – the ability to

⁹⁷ JEAN S. PICTET, COMMENTARY: IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 60 (International Committee of the Red Cross, 1958).

⁹⁸ IDF Spokesman, *supra* note 58.

exit or enter Gaza, the supply of medicine, fuel, and other basic goods, the possibility to transport crops to export markets, the ability to use electric lights and refrigerated goods – depend on decisions made by Israel's military. Israel does not need to maintain ground troops to exercise this form of control.

3. Interpreting Humanitarian Law Requires a Contextual Analysis

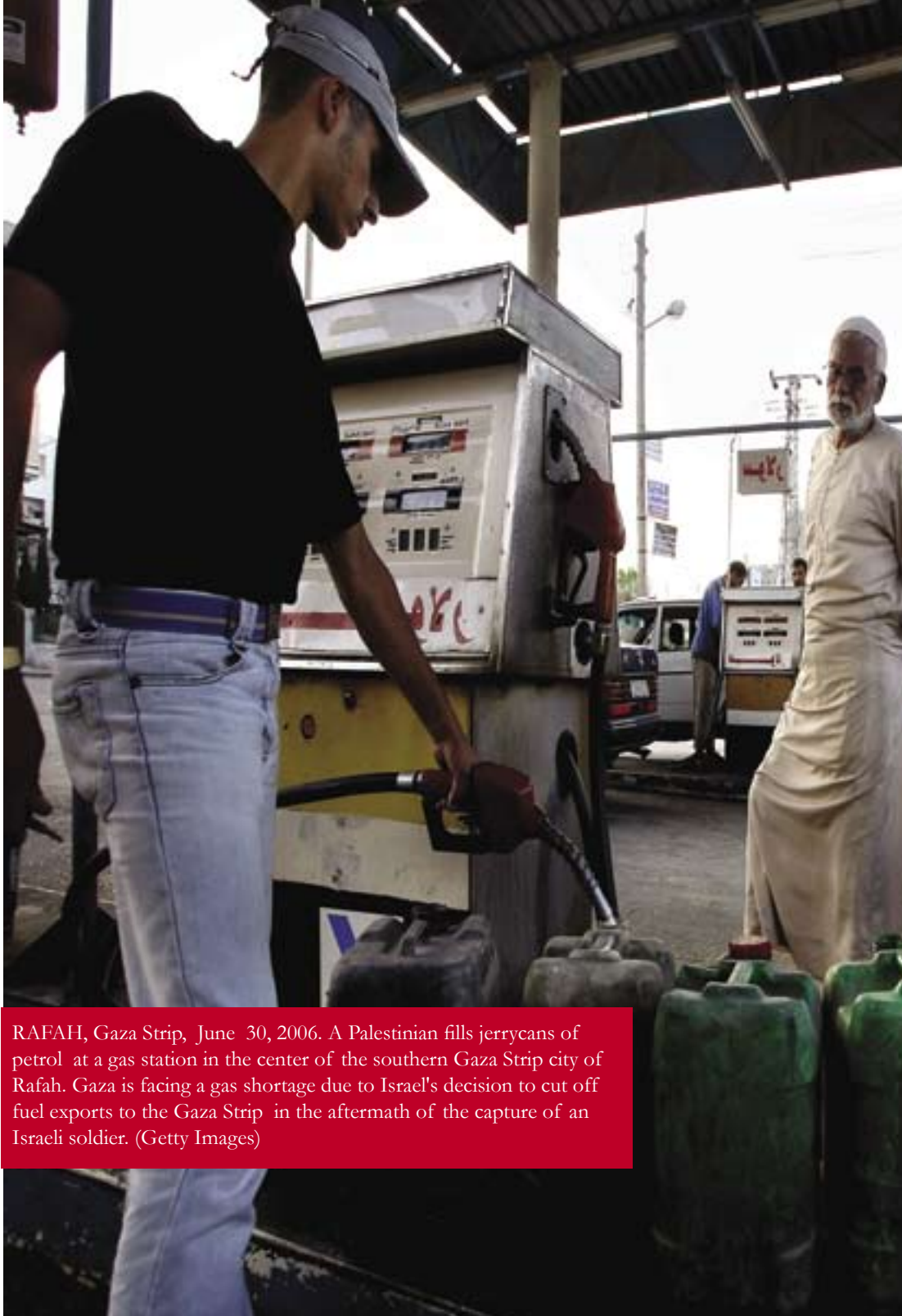
In evaluating Israeli control over Gaza, one should look not just at the military force, but also the administrative control created during four decades of occupation and maintained by force and threat of force.

In the first 28 years of the occupation, the Israeli military directly ruled Gaza and the West Bank. Beginning in 1995, the Israel effectuated its control through a coordination process with the Palestinian Authority. In the first nine months following completion of the disengagement plan, Israel's control over Gaza was primarily effectuated through its control of Gaza's air, land, and sea borders, population registry, and tax system, as well as its veto power over the Palestinian Authority's exercise of governmental powers. Beginning in June 2006, Israeli control has also been exercised by a direct ground troop presence in Gaza, sporadically placed in various locations. The means by which the control is exercised may shift, but the ability to exercise control – and the exercise of it as a matter of fact – have remained constant.

In its advisory opinion finding Israel responsible to the Palestinian population for obligations under the International Covenant on Economic, Social and Cultural Rights, the ICJ recognized the extent to which decades of occupation have extended Israeli control to broad swaths of civilian life.⁹⁹ The Israeli Supreme Court has also noted the extent to which, during a long term occupation, control is exercised not just in troops patrolling the streets but also in the dependence of the occupied territory on the policies of the occupier.¹⁰⁰

⁹⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion para. 112, July 9, 2004, 43 I.L.M. 1009 [hereinafter: Wall Opinion].

¹⁰⁰ HCJ 69/81 Abu Ita v. West Bank Military Commander; HCJ 493/81 Kanzil v. Customs Tax Official, Gaza Strip Command, 37(2) PD 197, 210; Beit Sourik, *supra* note 6.



RAFAH, Gaza Strip, June 30, 2006. A Palestinian fills jerrycans of petrol at a gas station in the center of the southern Gaza Strip city of Rafah. Gaza is facing a gas shortage due to Israel's decision to cut off fuel exports to the Gaza Strip in the aftermath of the capture of an Israeli soldier. (Getty Images)

Consistent with the principles of the Martens Clause and as reflected by the practical experience in the Palestinian territories in the wake of the Oslo process, the application of humanitarian law is not an all-or-nothing proposition. Different levels of responsibility apply in various areas, commensurate with scope of control. The fact that control in one area of life may have been delegated to representatives of the local population does not exempt the occupying power from overall responsibility for the territory and from direct responsibility in the areas in which it does exercise control. In the words of Adam Roberts:

"One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable ... Courts, too, have sometimes been guided by aspects of the laws of war, including the law on occupations, even in cases where the de jure applicability of the relevant convention was in doubt".¹⁰¹

74 A rigid, binary interpretation of legal obligations would be inconsistent with the spirit and purpose of humanitarian law. Humanitarian law is intended to protect civilians, and where civilians are subject to the authority of a foreign power, at least some elements of humanitarian law apply. In addressing Israel's official position that the Fourth Geneva Convention does not apply to the West Bank and Gaza Strip, as articulated by then-Attorney General Meir Shamgar, Roberts rejects formalism as the relevant approach to determining the applicability of the law of occupation:

"The weakness of his argument on this point is that he nowhere mentions the existence of a custom of viewing the laws of war, including the law on occupations, as formally applicable even in cases which differ in some respect from the conditions of application as spelt out in the Hague and Geneva Conventions."¹⁰²

The Israeli High Court and eventually the State of Israel also came to reject this formalist position on the law of occupation. Since 1967, Israel's High

¹⁰¹ Adam Roberts, *What is a Military Occupation*, in OCCUPATION, RESISTANCE AND LAW: INTERNATIONAL LAW ON MILITARY OCCUPATIONS AND RESISTANCE 249 (1985) [hereinafter: Roberts, Occupation] at 250-251.

¹⁰² Roberts, *Occupation*, *supra* note 101, at 282.

Court has set aside the question of whether the Fourth Geneva Convention applies to the West Bank and Gaza Strip de jure, consistent with Israel's commitment to abide by the humanitarian provisions of the Convention.¹⁰³ The State of Israel made this commitment out of recognition that in asking whether the Fourth Geneva Convention applies, the dominant consideration is how to actualize the purpose of the Convention: to protect civilians for whom significant aspects of their lives are controlled by a foreign power.

The alternative – that Israel could prevent all persons and goods¹⁰⁴ from entering or leaving Gaza, that it could withhold supplies of electricity and water, that it could withhold all tax moneys needed to fund critical civilian services and not provide those services itself – without violating any legal obligation – is a conclusion intolerable to the spirit and the letter of international humanitarian law.

C. Israeli Control of Gaza Meets the Criteria for Applying the Hague Regulations and Fourth Geneva Convention Regarding Occupation

1. Occupation for Purposes of Humanitarian Law Is Determined By Effective Control and Does Not Require the Continuous Presence of Ground Troops

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How then to interpret the absence of permanent ground troops in Gaza? And why do some scholars consider a permanent ground presence to be determinative of the question of occupation?

Any discussion of legal obligations in Gaza must consider the traditional approach of commentators, who have looked to the existence of a foreign military ground presence in determining whether effective control over a

¹⁰³ See e.g. HCJ 1661/05 Gaza Beach Regional Council v. Israeli Knesset [2005] (unpublished) para. 5 and citations therein, *available at* www.court.gov.il (in Hebrew).

¹⁰⁴ Under the Geneva Convention, Israel would always bear an obligation to permit the passage of humanitarian goods into Gaza, regardless of whether it owed duties under the law of occupation, but the laws of occupation would require Israel to permit the entrance and exit of persons, the import of non-humanitarian supplies, the export of goods, and other activities necessary for civilian life.

territory is established.¹⁰⁵ However, commentators have considered ground troops as an evidentiary test only, because ground troops have historically been the means by which occupiers exercised effective control and an indicator of whether the military power is in a position to execute the duties imposed on an occupying power. The legal test for occupation has always been the fact of control – not the means by which it is exercised.

Article 42 of the Hague Convention of 1907 states that “[t]erritory is occupied when it has actually been placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.”¹⁰⁶ In discussing an occupying power’s obligations, Article 43 emphasizes the transfer or taking of authority by the occupying power, rather than permanent military ground presence: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety”¹⁰⁷

76 Although the source of the occupying power’s authority is military superiority,¹⁰⁸ it is not the continuous physical presence of armed forces in all parts of the territory but rather the ability to exercise authority that determines when a territory is occupied. The reason is clear; international law seeks to impose duties on those who have the capacity to fulfill them.

This understanding of the Hague Convention predates the Geneva Conventions of 1949 and was clearly articulated in the Nuremberg case, *United States v. Wilhelm List*.¹⁰⁹ In *Wilhelm List*, the U.S. Military Tribunal at Nurem-

¹⁰⁵ See JEAN S. PICTET, COMMENTARY: IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 60 (International Committee of the Red Cross, 1958).

¹⁰⁶ Hague IV, *supra* note 5, art. 42 (emphasis added).

¹⁰⁷ *Id.* art. 43. This statement of the responsibilities of the occupant has been broadly construed by the Israeli Supreme Court.

¹⁰⁸ See Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 250 (Emma Playfair ed., 1992) (“Unlike the administering authority in a mandated or trust territory, the belligerent occupant derives its authority not from international law, but from the successful exercise of military power.”).

burg defined the beginning of German occupation as that moment when control over territory passed from the Yugoslav or Greek government to Germany:

“The evidence shows that the invasion of Yugoslavia was commenced on 6th April, 1941. Nine days later the Yugoslav government capitulated The powers of government passed into the hands of the German armed forces and Yugoslavia became an occupied country.”¹¹⁰ The court continued, “While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of the country. The control of the resistance forces was temporary only and not such as would deprive the German armed forces of its status of an occupant.”¹¹¹

Commentators, writing contemporaneously with the drafting of the Geneva Conventions, also noted that the way in which effective control is exercised is not determinative of whether occupation exists. As Gerhard von Glahn noted, “international law does not contain a rule prescribing the military arm through which an effective belligerent occupation is to be exercised.”¹¹²

The International Court of Justice has recently reiterated the Nuremberg Tribunal’s understanding of occupation as dependent on the ability to assert authority over territory. In *Democratic Republic of the Congo v. Uganda*,¹¹³ the parties argued whether the Democratic Republic of Congo (DRC) was an occupying power in the areas of Uganda in which it maintained a ground troop presence. The ICJ held that what determined whether Uganda could be considered a belligerent occupant was the establishment and exercise of authority. The Court focused on control, rather than a particular troop configuration, in determining whether the law of occupation applied, noting that the “territorial limits of any zone of occupation by Uganda in the DRC cannot

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¹⁰⁹ *USA v. Wilhelm List* [The Hostages Case], reprinted in 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 56 (1949).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY . . . A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 28 (1957).

¹¹³ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* 2005 I.C.J. 116 (Dec. 19) [hereinafter: *Armed Activities Case*].

be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present.”¹¹⁴ Rather the court looked to whether “the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.”¹¹⁵

The trigger for the application of the law of occupation is effective control, and while that control is generally obtained by use of permanent ground troop presence, the legal test remains the fact of control and not how it is exercised.

Israeli jurisprudence has also recognized that occupation and the duties derived therefrom are premised upon control. In *Affo v. Commander of the IDF Forces in the West Bank*, the Israeli High Court held:

“[A]s long as the military force effectively exercises control in the territory, the powers granted it and the limitations imposed upon it by virtue of the laws of war, remain in effect.”¹¹⁶

In the *Affo* case, three Palestinian residents, two living in the West Bank and one in Gaza, challenged a deportation order issued against them by the Israeli military. They argued that Article 49 of the Fourth Geneva Convention prohibited deportation of residents of an occupied territory. In the above passage, the court uses the term “laws of war,” but it specifically addresses the applicability of the laws of occupation to the West Bank and Gaza, finding that they depend on the exercise of effective control by a foreign military.

According to Eyal Benvenisti, the holding in *Affo* established that “the law of occupation did apply to the Gaza Strip, simply because Israel continued to control the area. The necessary and sufficient condition for that law’s applicability, according to the holding written by Justice Shamgar, was effective control over the territory.”¹¹⁷

¹¹⁴ *Id.* para. 174.

¹¹⁵ *Id.* para. 173 (emphasis added).

¹¹⁶ HJC 785/87 *Affo v. Commander of the IDF Forces in the West Bank* [1988] PD 42(2) 4, 49-50, translated in 29 I.L.M. 140 (1990).

The Israeli High Court reached a similar conclusion in *Tsemel v. Defense Minister*, where it held that the laws of occupation apply wherever effective control is exercised, irrespective of whether a military administration has been established.

In the *Tsemel* case, the court was asked to order the Israeli military to permit meetings between attorneys and their clients, Lebanese citizens arrested in Lebanon and detained in the custody of the Israeli military. The court held that the laws of occupation apply to an area in which Israeli troops had entered but over which they had not established a military government:

"[T]he application of the Third Part of the Hague Regulations and the parallel provisions of the Fourth Geneva Convention are not dependent on the establishment of any special organizational system which takes the form of a military government."¹¹⁸

This point is noteworthy in light of the Government of Israel's position that dissolving the military government in Gaza has absolved the military of its responsibility.¹¹⁹ Quoting the British Military Manual from 1958, the *Tsemel* Court held that the test for occupation is whether the legitimate government has been prevented from exercising its authority and whether the foreign power is in a position to substitute its authority for that of the legitimate government.¹²⁰

Finally, the trial chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY), in *Prosecutor v. Naletilic*, set out guidelines for determining "whether the authority of the occupying power has been actually established":

¹¹⁷ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 111 (1993).

¹¹⁸ HCJ 102/82 *Tsemel v. Defense Minister* [1982] PD 37(3) 365, 373. *See also* pp. 374 and 380 of the decision.

¹¹⁹ *See, e.g.* State Submission of July 11, 2006 in HCJ 10265/05, para. 30.

¹²⁰ HCJ 102/82, *supra* note 118 at 369; UK MINISTRY OF DEFENSE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* § 11.3 (2004).

- "the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
- the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory; [and]
- the occupying power has issued and enforced directions to the civilian population."¹²¹

These requisite conditions for determining that a particular territory is occupied – taken directly from the language of Article 42 of the Hague Regulations – can be satisfied without ground troops being continuously present in all parts of the territory. It is enough that the occupying power exercises authority over the local population, prevents the legitimate government from exercising authority, and has the capacity to bring its military forces to bear in a manner that makes its authority felt by population of the territory. A continuous presence of troops on the ground is, of course, strong evidence of effective control, but it is not the only way in which such control can be established. That is particularly true in light of the cumulative effect of the elements of control outlined in Chapter Three.

Some legal scholars have argued that without a permanent ground presence in Gaza, Israel is not capable of exercising its obligations under the law of occupation. As Dr. Yuval Shani has argued:

"[I]t is hard to conceive of the manner in which an occupier with no ground presence could realistically be expected to execute its obligations under *ius in bello* (i.e. maintenance of law and order, provision of basic services, etc.).

¹²¹ Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment in Trial Chamber, P 217 (Mar. 31, 2003) (emphasis added); *see also* HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 137 (2004).

Thus, despite Israel's power to influence to some degree events in Gaza, its ability to enforce day-to-day law and order in Gaza is minimal to non-existent (e.g., Israeli soldiers have not patrolled the streets of Gaza City since the mid 1990s)."¹²²

This position paper does not seek to hold Israel responsible for patrolling the streets of Gaza, any more than Israel was responsible for patrolling the streets of Gaza between 1995 and 2005, after it transferred some powers to the Palestinian Authority, including responsibility for internal security, after signing the Interim Agreement but prior to executing the disengagement plan.

Just as after the signing of the Interim Agreement, Israel continued to be bound by the laws of occupation in the fields in which it continued to exercise control, so too does Israel continue to be bound by the laws of occupation now, in the areas in which it continues to exercise control. In areas in which competencies have genuinely been transferred to the Palestinian Authority, and the Palestinian Authority is exercising those competencies, Israeli duties are limited, such that the level of obligation is determined commensurate with the level of control.¹²³

Indeed, some legal scholars argued that the signing of the Interim Agree-

¹²² Yuval Shani, *Far Away, So Close: The Legal Status of Gaza After Israel's Disengagement*, International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 12-06, Aug. 6, 2006, available at www.ssrn.com/abstract=923151.

¹²³ For example, the ICJ recognized that Israeli responsibility for human rights in areas that had been transferred to Palestinian competence was limited to the obligation "not to raise any obstacle to the exercise of such rights." Wall Opinion, *supra* note 99, para. 112. In the specific context of humanitarian law duties, Israel's High Court has drawn distinctions between areas in which Israel continues to owe direct responsibilities to the population living under occupation and areas in which the degree of Israeli responsibility is modified, commensurate with changes in the extent of control. For example, the High Court has continued to impose duties under Article 43 of the Hague Regulations to assure that protected persons are provided with health, education, and welfare services and are permitted to engage in economic and human development. See HCJ 10356/02 Hess v. West Bank Military Commander, 58(3) PD 443, 460. However, in areas which competencies were transferred to the Palestinian Authority, for example the running of schools and hospitals, the High Court has held that the nature of Israeli duties changed, commensurate with the transfer of certain competencies to the Palestinian Authority.

ment put an end to Israel's responsibilities in the West Bank and Gaza under the law of occupation, at least in areas where security control had been transferred to the Palestinian Authority.¹²⁴ That view was not accepted by Israeli¹²⁵ or international courts,¹²⁶ which continued to apply the law of occupation in considering Israeli responsibility for activities in the Palestinian areas, even if the nature of that responsibility changed with the transfer of some competencies to the Palestinian Authority.¹²⁷

2. Ending Occupation Requires Transfer Of Sovereign Authority – Or At Least Refraining from Interfering with Exercise of Governmental Authority

While occupation is a state whose existence depends on the facts on the ground at a given time, understanding those facts cannot take place in a vacuum. The inquiry as to whether Gaza is occupied, in the year 2007, must take into account whether the control that has been exercised since 1967 has actually been relinquished. Throughout the course of an occupation, particularly an occupation spanning four decades and including the changes inaugurated by the Oslo Peace Process, specific controls may shift, and powers may be delegated, without ending the effective control that triggers the application of the laws of occupation.

¹²⁴ Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Israeli-Palestinian Agreement* 28 *Isr. L. Rev.* 297, 312 (1995).

¹²⁵ Beit Sourik, *supra* note 6, 827-829.

¹²⁶ Wall Opinion, para. 78: "The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power".

¹²⁷ See note 10, *supra*, for a partial list of High Court petitions seeking to apply the law of occupation to Israel's actions vis a vis Gaza residents in areas that remain under its control, including demanding that Israel permit exports and imports into Gaza, allow the provision of humanitarian services, cease flying sonic booms over the skies of Gaza, and allow Gaza residents who need medical treatment not available in Gaza to enter Israel to receive medical care.

The most obvious way in which an occupation can end is when the occupying force is defeated and evicted from the territory or when control over the territory is transferred from the occupying power to another sovereign by virtue of a peace agreement.¹²⁸ However, in the absence of such clear signs, the question of whether an occupation has ended requires an evaluation of whether the occupying power has lost its ability to exercise control and authority in the area, and whether such control and authority have been transferred to another sovereign.¹²⁹ As Roberts notes:

"[T]he question of when an occupation can be said to have begun, or ended, is sometimes easy to answer but is by no means always so. Even when it can be answered with confidence, there may still be many gradations between direct foreign military control on the one hand and complete independence and freedom from foreign military forces on the other."¹³⁰

Indeed, under humanitarian law, the relevant inquiry is not only the extent of control exercised by the foreign power but also the extent of the lack of control exercised by someone else, most obviously the representatives of the occupied population. Roberts, for example, notes that even if the foreign power continues to exercise some control, the occupation could end if there has been a "legitimate transfer of sovereignty."¹³¹ Conversely, even if an occupying force has withdrawn, the occupation might continue if sovereignty has not been transferred:

"The withdrawal of occupying forces is not the sole criterion of the ending of an occupation; and the occupant has not necessarily withdrawn at the end of all occupations. The essential feature of the ending of an occupation is often, though not always, an act of self-determination involving the inhabitants of the occupied territory" (emphasis added).¹³²

The de facto locus of sovereignty is central to the question of whether occupation has terminated. Ending an occupation requires that the occupier transfer the sovereign authority that it has been exercising in the place of

¹²⁸ Roberts, *Occupation*, *supra* note 101, 257.

¹²⁹ *Id.* at 257.

¹³⁰ *Id.* at 259.

¹³¹ *Id.* at 259.

¹³² Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27, 28 (2005) [hereinafter: Roberts, *End of Occupation*].

the local or legitimate government or at least genuinely relinquish it and allow others to take up the mantle. Writing contemporaneously with Pictet's authoritative commentary on the Fourth Geneva Convention, Gerhard von Glahn links the end of occupation with a restoration of sovereignty:

"The belligerent occupation of enemy territory may come to an end in a number of different ways: the area can be reconquered by forces of the legitimate sovereign or of his allies; it can be set free by a successful uprising of its own inhabitants; it can be liberated under the terms of a treaty of peace. In all cases mentioned, it can be assumed that the legitimate sovereign will be in control of the territory in question as soon as the occupation ends."¹³³

Of course, if another foreign power captures the territory, occupation by the previous power would be terminated.¹³⁴

The definition of occupation found in the British Military Manual reflects the importance of the inability to exercise authority by the former or legitimate government. Occupation requires: "[f]irst that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government."¹³⁵

The classical and authoritative definition of sovereignty (coterminous with independence) is found in the *Isle of Palmas* decision, in which the International Court of Arbitration held: "Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."¹³⁶ The court elaborated that sovereignty involves two elements: First, "within a State, a sovereign power makes law with the assertion that this law is supreme and ultimate, i.e. that its validity does not depend on the will of any other, or 'higher', authority. ...[Second, e]xternally,

¹³³ Gerhard von Glahn, *THE OCCUPATION OF ENEMY TERRITORY ... A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 257 (1957).

¹³⁴ Roberts, *End of Occupation*, *supra* note 132, at 27, 28.

¹³⁵ UK MINISTRY OF DEFENSE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* § 11.3 (2004).

¹³⁶ *The Isle of Palmas (U.S. v. Neth.)*, 22 AM. J. INT'L L. 867, 875 (Perm. Ct. Arb. 1928); *see also* Roberts, *End of Occupation*, *supra* note 132, at 39.

a sovereign power obeys no other authority."¹³⁷

For an occupation to end, the occupying power must transfer sovereignty to an independent entity, not subject to the authority of the occupying power, and the transfer of control must be real. As noted by ICRC Member Daniel Thürer, an occupying power cannot escape its obligations by setting up local administrative structures in occupied territory, unless those structures are in fact truly independent and in control of the territory:

"The devolution of the governmental authority to a national government must be sufficiently effective. . . . Situations must be avoided where the protections to be granted to persons and property under the law of occupation are circumvented. The occupying power cannot discard its obligations by installing a puppet government or by pressuring an existing one to act on its behalf. In all these cases, the occupying power maintains *de facto* – albeit indirectly – full control over the territory."¹³⁸

In considering, for example, whether the United States and the United Kingdom remain occupying powers in Iraq, despite the formal transfer of sovereignty, ICRC officials evaluated the ability of the local administration actually to control sovereign functions as a determinant of whether the occupation had ended.

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"[I]t is the reality and not the label that matters. As a matter of law, though, a formal proclamation of the end of occupation would be of limited importance if the facts on the ground indicate otherwise. The test remains whether, despite any labeling . . . a territory or part of a territory is “actually placed under the authority of the hostile army.”¹³⁹

The principle that occupation comes to an end with the transfer of obligations from one competent authority to another is also reflected in the Oslo Accords, which outline a process whereby the increased exercise of authority

¹³⁷ Roberts, *End of Occupation*, *supra* note 132, at 40.

¹³⁸ Daniel Thürer, Speech at Sixth Bruges Colloquium: Current Challenges to the Law of Occupation (Oct. 20–21, 2005), <http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument> [hereinafter: Thürer Speech], 22 (emphasis added).

¹³⁹ *Id.*

by the Palestinians over a given sector entails a proportionate reduction in Israel's obligations in that sector, with Israel retaining overall responsibility as the occupying power in the Gaza Strip and the West Bank.¹⁴⁰ The accords also note that the status of the Gaza Strip and West Bank will not be changed in the interim period.¹⁴¹

The transfer of certain powers to the Palestinian Authority did not and does not deprive Gaza residents of the protections of international humanitarian law, as determined by Article 47 of the Fourth Geneva Convention:

"Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention 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 agreement concluded between the authorities of the occupied territory and the Occupying Power."¹⁴²

Similarly, Article 7 of the Fourth Geneva Convention notes that "no special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."¹⁴³

Indeed, events that have taken place in the year since completion of the disengagement plan suggest that in many areas, Israel's responsibility to the civilian population in Gaza has been heightened, rather than reduced.

In controlling (and withholding) so significant a portion of the PA's operating income, Israel controls the PA's ability to function effectively. Israeli refusal to transfer tax revenues, combined with a halt in international aid, has undermined PA operations in the security, health, and education sectors. It has also meant that the PA is unable to pay for basic necessities such as fuel, electricity and water, although Israel has been using the customs revenues that

¹⁴⁰ See Interim Agreement, *supra* note 22, art. 1.

¹⁴¹ See *Id.* at art. 31 (7). The Interim Agreement was meant to cover a five-year transitional period pending a final status arrangement – which has not been reached.

¹⁴² Geneva IV, *supra* note 4, art. 47.

¹⁴³ *Id.*, art. 7.

it collects to pay some of the Israeli companies directly for these resources. Israel's destruction of Gaza's power station, and the continuing shortages of electricity it has caused create greater obligations on Israel to provide for the needs of Gaza's civilian population, whose ability to provide for its own needs, for example its own electrical needs, has been directly hindered by Israel.

The transfer of certain competencies to the PA through the Oslo Process did not constitute a transfer of sovereign powers, and sovereign powers have still not been transferred to the PA following the completion of Israel's disengagement plan from Gaza. Israel exercises sovereign functions such as policing Gaza's airspace and territorial waters, inspecting its imports, issuing permits for foreigners to enter, setting its tax rates and collecting its taxes, deciding when the Egypt-Gaza border will open and under what conditions, approving fishing licenses, and other governmental functions. On the other hand, the ability of the Palestinian Authority to exercise the functions delegated to it is subject to Israeli approval or disapproval.

To illustrate this point: The Palestinian Authority can decide that it wishes to issue a 'visa' or permit to a visiting foreigner, but that foreigner's ability to enter Gaza is subject to approval by Israel, which controls the entrance of foreigners into Gaza, whether they do so by way of the Israel-Gaza crossing at Erez or by the Egypt-Gaza border at Rafah.¹⁴⁴ The Palestinian Authority can decide that it wishes to grant residency rights to a Palestinian refugee, but adding someone to the Palestinian Population Registry requires Israeli approval.¹⁴⁵ The PA can hold elections to determine who will represent the Palestinian people, but the voter registration list is controlled by Israel through its control of the population registry and its ability to decide whether east Jerusalem residents will be permitted to vote.¹⁴⁶ While in principle, the

¹⁴⁴ Agreement on Movement and Access, *supra* note 25, at 4. After giving 48 hours prior notice to Israel, the PA may allow entrance through Rafah for four categories of non-Palestinian individuals: diplomats, foreign investors, foreign representatives of recognized international organizations and humanitarian cases. The PA's ability to allow these foreigners to enter, however, is limited by Israeli security objections. *Id.* All other foreigners may enter through Israeli-controlled crossings only. *Id.*

¹⁴⁵ Interim Agreement, *supra* note 22, Annex 3, art. 28 (12).

PA can decide how to spend its customs duties, those monies are collected by Israel, and Israel has the power to decide whether or not to transfer them to the PA.¹⁴⁷ The PA can establish a trade route via Egypt, but its ability to export goods is dependent on Israeli approval to open the Rafah border crossing and the restrictions placed on travel through it.

Israel also issues orders to the PA, as part of directives issued to the civilian population in Gaza, which is a criterion noted by the ICTY in evaluating whether a local government is independent.¹⁴⁸ For example, Israel notifies the PA when crossings may be opened and uses the PA to inform Gaza residents that certain areas are off-limits to civilian movement.¹⁴⁹

The Palestinian Authority is also limited in its ability to conduct foreign relations, by international agreement¹⁵⁰ and as a matter of fact, because of Israeli control of the functions necessary to conduct those relations, for example traveling abroad or entering into and enforcing commercial and other agreements. Indeed, neither of the sides views the Palestinian Authority as a sovereign body, but rather as an interim authority that does not have sovereign status, whose authority in Gaza and the West Bank does not give those territories the status of statehood. The State of Israel continues to insist, in representations before international bodies and internally, in its submissions to the Israeli High Court, that the PA is not a sovereign body.¹⁵¹

The difference between the power exercised by the PA and sovereign power

¹⁴⁶ *Id.* at Annex 3, Art 23; Annex 2, Art VI.

¹⁴⁷ See Executive Summary, Revised Emergency Appeal, United Nations Office for the Coordination of Humanitarian Affairs 1, May 31, 2006, available at www.ochaopt.org.

¹⁴⁸ Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment in Trial Chamber, P 217 (Mar. 31, 2003).

¹⁴⁹ See e.g. United Nations Office of Coordination of Humanitarian Affairs, *Protection of Civilians – Weekly Briefing Notes*, 13-19 September 2006, available at www.ochaopt.org (Israeli orders, issued to Palestinian security officials, warning civilians that areas inside Gaza, along its perimeter fence, are off-limits).

¹⁵⁰ See e.g. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Annex II, Art. 3(b).

¹⁵¹ Brief of Respondent at para. 73, HCJ 7052/03 Adalah-the Legal Center for Arab Minority Rights in Israel v. Minister of Interior (Feb. 7, 2006) (on file).

is not academic or inconsequential. Significant power is located in the interstices between the authorities exercised by the Palestinian Authority and the residual, de facto sovereign authorities exercised by Israel. The exercise of these government powers must be bounded by law – the law of occupation.

D. Israel Would Owe Post-Occupation Obligations to Palestinians in Gaza

In addition to the question of what ends an occupation, there is a further question of whether an end to occupation would immediately extinguish all responsibilities to the population in the formerly occupied areas. While as a general matter, the obligations placed on an occupying power end with the cessation of occupation, some scholars have argued that responsibility for protected persons who had been living under occupation may terminate gradually, such that the end of occupation may not immediately relieve the former occupier of all responsibility vis-à-vis the formerly occupied areas. Furthermore, based on the principle of state responsibility, an occupier that failed to discharge its obligations as occupying power under international law while occupying another state's sovereign territory may have continuing obligations even after the end of occupation. According to one legal scholar:

"Any state having chosen to intervene forcibly in another country and occupy its territory, by the very fact of the occupation, assumes interim responsibility for maintaining order and stability. However the legal responsibility so assumed may not end abruptly when the occupying forces leave. A continuing post-war burden of legal responsibilities for the intervening state is both necessary and appropriate to discourage destabilizing acts of intervention."¹⁵²

The imposition of residual responsibilities on a former occupying power may be required in some cases by the international law principle of state responsibility.¹⁵³ A state that commits an internationally wrongful act is re-

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¹⁵² Bartram S. Brown, Intervention, *Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 45 (2004).

quired to give reparation for the injury caused. An internationally wrongful act is defined in the draft rules on State Responsibility, adopted by the International Law Commission and the General Assembly, as follows:

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- a) Is attributable to the State under international law; and
- b) Constitutes a breach of an international obligation of the State."¹⁵⁴

International obligations include both treaty and non-treaty obligations.¹⁵⁵ A breach of an international obligation also "has often been equated with conduct contrary to the rights of others."¹⁵⁶ Where a state has committed an internationally wrongful act, it is responsible to "make full reparation for the injury."¹⁵⁷ A state is responsible for all acts by its armed forces, as well as for all acts in territories under its effective control.¹⁵⁸ Insofar as an occupying power does not fulfill its obligations under international humanitarian and human rights law, it should be held responsible for making reparations for the breach of its obligations to the occupied population.¹⁵⁹ The beneficiary of the reparation may be not simply the state that is occupied but also private persons, in this case the protected persons to whom duties were owed.¹⁶⁰ That is particularly true where such persons are not represented by a state that has standing and can represent their rights in international fora.

¹⁵³ Marco Sassoli, State Responsibility for Violations of International Humanitarian Law, 846 INT'L REV. OF THE RED CROSS 401, 404 (June 2002).

¹⁵⁴ Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, at Annex art. 2, U.N. Doc. A/56/10 (Dec. 12, 2001) [hereinafter: Draft Rules].

¹⁵⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, International Law Commission 71, available at <http://untreaty.un.org>.

¹⁵⁶ *Id.* at 72.

¹⁵⁷ Draft Rules, *supra* note 154, art. 31 (1). "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a state." *Id.* at Art. 31 (2).

¹⁵⁸ Sassoli, *supra* note 153, at 405-407. In wartime, members of the armed forces never act as purely private persons, and thus every action is attributable to the state. "As private person, they would never have entered into contact with enemy nationals or acted on enemy territory." *Id.* at 406.

¹⁵⁹ *See Id.* at 418-33.

¹⁶⁰ *Id.* at 418.

This principle is particularly relevant where the reparations sought relate directly to the harm inflicted by the breach of international obligations. For example, if Israel breaches its obligation under Article 43 of the Hague Regulations to permit and ensure "la vie publique" or public order in Gaza by forbidding the construction of an airport, seaport, and land-based trade routes through Egypt, even if it did relinquish control of the air space and territorial waters, it may be required to facilitate the movement of people and goods to and from Gaza via Israeli ports, even after it relinquishes control, until such time as a seaport and airport can be built.¹⁶¹ That obligation comes in light of the fact that infrastructure, which had been the responsibility of the occupying power, takes time to construct, even after control over such infrastructure is genuinely ceded.

Because Israel has not fulfilled its duties as belligerent occupier under international humanitarian law, even if and when the occupation of Gaza comes to an end, Israel would likely continue to owe certain duties to the occupied population, until such reasonable time as Gaza residents can build the structures and systems that should have been provided by the occupying power. As an occupying power beginning in 1967, Israel was obligated to ensure "la vie publique" as well as to ensure that the population was adequately supplied.¹⁶² If Gaza is inadequately supplied and public order has not been adequately established, Israel would continue to owe duties to the population of Gaza for a transitional period that would allow Gaza residents to rehabilitate their society.

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¹⁶¹ Of course, so long as Israel continues to prevent Gaza from constructing and operating an airport and seaport, the obligation to permit access to Israeli ports arises directly from humanitarian law and not as a post-occupation obligation, because Israel is preventing Gaza from creating its own ports for commerce and travel. For more on Israel's continued control over Gaza's imports/exports, see the Petition and state response submitted in HCJ 2990/06 Mezan Center for Human Rights v. Southern Military Commander [2006], available at www.gisha.org.

¹⁶² Hague IV, *supra* note 5, art. 42; Geneva IV, *supra* note 4, art. 55.

E. Israel Owes Obligations to Gaza Residents under Human Rights Law and Israeli Law

1. Obligations under International Human Rights Law

In addition to and irrespective of the specific obligations owed under humanitarian law, Israeli actions vis a vis Gaza residents are bound by international commitments to respect human rights.

As a general matter, human rights law applies parallel to humanitarian law¹⁶³, and it also applies independently of humanitarian law. As is the case under humanitarian law, responsibility under human rights law is linked to control, although responsibility under human rights law can attach not just because of territorial control¹⁶⁴ but also because of control over persons, including when an action has an effect on persons beyond a state's territorial jurisdiction. A full discussion of the extraterritorial jurisdiction of human rights conventions is beyond the scope of this paper, but we note that the inseparable link between control and responsibility exists not only under humanitarian law but also under human rights law.

Irrespective of the question of whether a state exercises effective control over a territory, it is always responsible for the human rights of individuals who are subject to its control and authority, wherever they may be. The state is still bound by human rights law where it exercises control over persons or where its actions have effects on persons in a foreign territory. In other

¹⁶³ See e.g. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at para. 25 (July 8); *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/ser. L/V/II.106, doc. 3 rev. 39 (1999); Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 485, 490 (2005); Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 24 (2003-2004); Wall Opinion, *supra* note 99 at 106; Armed Activities Case, *supra* note 113. For Israeli case law, see HCJ 8990/02 Physicians for Human Rights v. Southern Military Commander, 57(4) PD 193; HCJ 4764/04 Physicians for Human Rights v. Commander of Military Forces in Gaza, 58(5) PD 385; HJC 3799/02 Adalah v. Central Military Commander (unpublished, reported Oct. 6, 2005).

¹⁶⁴ Wall Opinion, *supra* note 99, at para 110-113.

words, even if Israel did not exercise effective control over the territory of Gaza, it would still be bound by human rights law in the actions of its officials vis a vis Gaza residents.

In some important areas, Israel and the Palestinian Authority share responsibility for human rights protections in both Gaza and the West Bank, in fields in which competencies genuinely have been transferred to the Palestinian Authority. So, if Israel genuinely does not exercise control over family law courts in Gaza, and those courts genuinely act independently of Israel, then Israel would not be responsible, for example, for guaranteeing the rights of women in family court proceedings in Gaza.

On the other hand, where Israel exercises control over the movement of Gaza residents, especially their movement to the West Bank,¹⁶⁵ it is bound by protections for freedom of movement delineated in the International Convention on Civil and Political Rights.¹⁶⁶ Where Israel exercises control over the economic well-being of Gaza residents through control over the passage of goods in and out of Gaza,¹⁶⁷ that control is subject to the requirements of the International Covenant on Economic, Social, and Cultural Rights. Where Israel exercises control over the ability of a non-Palestinian ID-holder to re-join her family in Gaza¹⁶⁸ or controls the tax revenues needed to pay teacher salaries, it is bound by the obligations of the International Convention on the Protection of the Rights of the Child. These human rights protections apply in addition to – and irrespective of – Israeli obligations under the international humanitarian law of occupation.

¹⁶⁵ See HCJ 11120/05 Hamdan v. Southern Military Commander.

¹⁶⁶ HCJ 1890/03 Bethlehem Municipality v. State of Israel (unpublished), para. 15 (applying the protection of the International Covenant on Civil and Political Rights for freedom of movement to Israeli obligations in the West Bank); Wall Opinion, para. 134.

¹⁶⁷ HCJ 2906/06 Mezan Center v. Defense Minister; HCJ 5841/06 Association for Civil Rights in Israel v. Defense Minister, *available at* www.gisha.org.

¹⁶⁸ Freeze on Family Unification, *supra* note 33, page 17-26, *available at* www.btselem.org.

2. Obligations under Israeli Law

This linkage – of power with responsibility – has been recognized in Israeli law, too, as a fundamental principle of democracy and rule of law. No Israeli state actor is beyond the limits of Israeli law, even when his or her activities take place beyond the borders of the state of Israel. No Israeli agent is above the law, as Israel's Supreme Court has affirmed:

"The rules of administrative law obligate the state authorities in all their governmental actions, regarding both Israelis and foreigners. This is the law when the authority – including the military commander of territory held through military occupation – acts outside the borders of Israel."¹⁶⁹

When Israel's military exercises power over a foreign population, there are no legal black holes. There is no normative vacuum. The role of law in a democratic system is to rein in and limit the use of force.

Indeed, the Israeli Supreme Court has repeatedly emphasized that domestic human rights protections and administrative law apply to the activities of agents of the state, irrespective of where they exercise authority:

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"An Israeli working in the territory carries with him the obligation to behave according to the additional standards which obligate him based on his position as an Israeli authority, regardless of where his activities take place."¹⁷⁰

Israel's Supreme Court has also noted that Israeli soldiers carry with them, where ever they operate, duties imposed by the code and values of Israeli law:

"While performing his job, an Israeli official carries with him the duty to act according to additional standards, due to the fact that he is an Israeli official, irrespective of where he takes action. This imposes an additional, cumulative obligation, because the obligation to act according the norms of Israeli

¹⁶⁹ HCJ 5627/02 Saif v. Government Press Agency, PD 58(5) 70, 75.

¹⁷⁰ HCJ 69/81 Abu Ita v. Regional Authority of Judea and Samaria, PD 36(2) 197, 228. *See also* HCJ 1661/05 Gaza Regional Council v. Knesset of Israel.

administrative law does not exempt him from the obligation to act according to the laws of war.”¹⁷¹

The alternative – that Israeli security powers can wield power and authority at will, devoid of any normative framework and without concern for the people so affected by their exercise of power - is a possibility intolerable to Israeli law and Israeli democracy.

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¹⁷¹ HCJ 358/88 Association of Civil Rights v. Central Commander, PD 43(2) 529, 537.

CHAPTER 5

CONCLUSION

More than a year has passed since Israel withdrew settlers and permanent military installations from the Gaza Strip, and in that time, its control over the ability of Gaza residents to engage in commerce, to travel to the West Bank and abroad, to receive visitors, and to receive humanitarian goods – has tightened in ways that have crippled civilian life. Rather than bring about an improvement in the welfare of Gaza residents, disengagement – and the choking restrictions on passage of people and goods that have followed in its wake – have contributed to an unprecedented deterioration in the economic and social well-being of Gaza residents.

Between 2005 and 2006, unemployment has risen from 33.1% to 41.8%,¹⁷² Gross Domestic Product has declined by an estimated 30%, and Gazans have experienced a drastic deterioration in their ability to lead normal lives, including severe electricity shortages, periodic shortages of basic goods such as foodstuffs, medicines, and building materials, and frequent inability to export or engage in commerce. Israeli restrictions on the passage of people and goods in and out of Gaza, as well as its withholding of the majority of the Palestinian Authority's operating budget, have contributed significantly to this dismal state of affairs.

Humanitarian law, whose goal is to mitigate the harsh effects of armed conflict, especially on civilians, links control with responsibility. Should Israel wish to be released from responsibility for life in Gaza – it must genuinely relinquish control, especially over the movement of people and goods. However, so long as Israel exercises control over civilian life in Gaza, it will continue to owe obligations to those civilians whose lives depend on the decisions of a foreign military power.

Those responsibilities are nuanced. The occupation of the Palestinian territories has many exceptional aspects, including its length (nearly 40 years), which has increased Israeli obligations under Article 43 to permit the development and proper functioning of civilian life, and on the other hand,

¹⁷² United Nations Office for the Coordination of Humanitarian Affairs, *The Agreement on Movement and Access One Year On* 1 (Nov. 2006).

the transfer of certain competencies to the Palestinian Authority, which has changed the nature of Israeli obligations in areas in which the PA is genuinely exercising authority.

It would be a mistake to ignore this exceptional context in considering whether to impose duties under humanitarian law. Since the transfer of some competencies to the Palestinian Authority in the mid-1990s, the relevant legal actors: the ICJ, Israel's High Court, the International Committee of the Red Cross – have eschewed rigid, binary approaches to the question of who is responsible for the Palestinian territories. Rather, they have imposed responsibility commensurate with control – and both parties, Israel and the Palestinians, have continued to accept the framework of the laws of occupation. That very acceptance of practice has a binding effect on attempts to claim an all-or-nothing approach to responsibility under humanitarian law.¹⁷³

In Gaza, Israeli responsibility includes a duty to allow adequate supplies of humanitarian and economic goods, including electricity, building equipment, medicines, and the raw materials needed for industry.¹⁷⁴ It includes a duty to allow Gaza residents to export crops and finished industrial and other goods.¹⁷⁵ It includes a duty to allow people to enter and leave Gaza through its land, sea, and air borders. It includes a duty to transfer tax monies collected from Palestinian residents, including Gaza residents, for use by the Palestinian civilian population, including Gazans. It includes a duty to allow Gaza residents to travel to the West Bank, to receive training in health professions and to use their training to provide those services to Gaza residents.¹⁷⁶ Only Israel can fulfill these duties – because Israel controls these crucial aspects of life in Gaza.

¹⁷³ North Sea Continental Shelf Cases (W. Ger./Den.; W. Ger./Neth.), 1969 I.C.J. 3, 231 (Feb. 20) (holding that even recently-adhered to rules of conduct may become binding, according to the principle that international law can evolve quickly).

¹⁷⁴ HCJ 5841/06 Association for Civil Rights in Israel v. Defense Minister, *available at* www.gisha.org.

¹⁷⁵ HCJ 2990/06 Mezan Center for Human Rights v. Southern Military Commander, *available at* www.gisha.org.

¹⁷⁶ HCJ 11120/05 Hamdan v. Southern Military Commander, *available at* www.gisha.org.

CONCLUSION

Gisha calls upon Israel to fulfill its obligations toward the people of Gaza under the Fourth Geneva Convention, the Hague Regulations, and Israeli and international human rights law, namely:

-• To open Gaza's borders to the free passage of people and goods;
-• To permit Gaza to build an airport and seaport for the passage of people and goods;
-• To transfer the tax money it collects on behalf of the Palestinian Authority to the use and benefit of Palestinian civil society;
-• To permit adequate supply of goods – humanitarian and commercial – to Gaza;
-• To allow the free movement of people and goods between Gaza and the West Bank, which constitute a single territorial unit under internationally-recognized agreements;
-• To refrain from inflicting damage on Gaza's infrastructure, including sources of water, electricity, fuel, and transportation;
-• To uphold its responsibilities, under the Fourth Geneva Convention and Article 43 of the Hague Regulations, to allow the people of Gaza to conduct normal lives, including the ability to engage in commerce, to travel abroad, and to access humanitarian goods and supplies.

Fulfilling these duties is not only required by international law – it promotes the common interest of Israelis and Palestinians, in allowing civilian life in Gaza to function and succeed.



APPENDIX

Ministry of Defense

Office of the Minister of Defense

Hakiryia

14 January 2007

To: Attorney Sari Bashi

“Gisha”– Legal Center for Freedom of Movement

Shaul Hamelech 8

TA 64733

Subject: The closure of Rafah Crossing and avoiding collective punishment
of Gaza residents

Your reference from 20.12.06

In your letter you state that the frequent closure of the Rafah Crossing between Gaza and Egypt constitutes collective punishment of Gaza residents.

1. I shall reply as follows:

Since the kidnapping of the IDF soldier Gilad Shalit in that area, the Rafah Crossing has been open for 30 days.

2. Unfortunately, the Rafah Crossing constitutes a passageway in and out of Gaza for those instigating terror in the Gaza strip. The Crossing is exploited by terror elements for transferring knowledge and technology that enable terrorists, to this day, to fire curved trajectory weapons at towns near the border with Gaza. In addition, we witness attempts by terror elements to use the Crossing in order to exit Gaza for Sinai and from there to infiltrate into Israel with the aim of attacking Israelis.

3. In addition, tens of millions of dollars were smuggled through the Rafah Crossing in order to finance terrorists; the incumbent government in the [Palestinian] Authority does not honor previous signed agreements and is not willing to give up the armed struggle. These are the conditions that the international community, headed by the US, the UN and the EU, accepted

as basic preconditions for normalization in the area and of the international community's relations with the PA.

4. Notwithstanding, Israel is acting according to humanitarian standards and allows the opening of the Rafah Crossing periodically in order to provide a response to the humanitarian needs of the population. Furthermore, the movement of pilgrims out to Mecca was made possible during Id El-Fitter as well as today in advance of Id El-Adha. It is worth noting that since June of this year [sic] more than 65,000 passengers passed through the crossing. Furthermore, on more than one occasion, during which Rafah Crossing was closed, we offered to open the Kerem Shalom Crossing to allow humanitarian cases to cross, but we were met with opposition.

5. It should be noted the unbridled and wild behavior of Hamas persons in the Crossing on 14.12.06, who destroyed a lot of property. In addition, we emphasize the issue of money trafficking into Gaza by senior Hamas officials, which is contrary to the protocol.

6. According to these data one can clearly see that Israel acts in order to respond to the needs of the population in cooperation with the European and Palestinian delegations. Nevertheless, the terror elements spare no effort to exploit the humanitarian platform in order to carry out terror attacks against Israel and its citizens.

Sincerely,

Ruth Bar

Assistant for the Minister of Defense

Gisha

Legal Center for Freedom of Movement

Gisha is an Israeli not-for-profit organization, founded in 2005, whose goal is to protect the freedom of movement of Palestinians, especially Gaza residents. Gisha promotes rights guaranteed by international and Israeli law.

Since Israel's 1967 occupation of the West Bank and Gaza Strip, its military has developed a complex system of rules and sanctions to control the movement of the 3.4 million Palestinians who live there. The restrictions violate the fundamental right of Palestinians to freedom of movement. As a result, additional basic rights are violated, including the right to life, the right to access medical care, the right to education, the right to livelihood, and the right to family unity.

Gisha, whose name means both "access" and "approach," uses legal assistance and public advocacy to protect the rights of Palestinian residents. Because freedom of movement is a precondition for exercising other basic rights, Gisha's work has a multiplier effect in helping residents of the occupied territories access education, jobs, family members, and medical care.



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