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Separating Land, Separating People:

Legal Analysis of Access Restrictions
between Gaza and the West Bank

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For the past two and a half decades, Israel has increasingly restricted movement between Gaza and the West Bank down to its current level, where separation is the rule and access is the rare exception. The restrictions have devastated civilian life in both Gaza and the West Bank, separating families, restricting access to educational opportunities and health services and de-developing the Palestinian economy. While security considerations have played a role in the imposition of restrictions, as of 2015 many, many restrictions cannot be justified by security needs but rather serve political goals or reflect a parsimonious view of Israel's obligations toward Palestinian civilians. This position paper will analyze what Israel calls the "separation policy" in the context of Israeli control over the Palestinian territory, including Gaza, the West Bank and east Jerusalem, and in light of the applicable principles of international humanitarian law (IHL) and international human rights law (IHRL).

In Part One we describe the policy governing Gaza-West Bank access and situate it in the context of Israeli restrictions on movement throughout the Palestinian territory.

In Part Two we analyze the travel restrictions in light of Israel's obligations, under the law of occupation, to facilitate normal civilian life in the Palestinian territory, including analysis of the security and political goals that Israel has articulated as justifying the restrictions. We argue that the sweeping restrictions violate Israel's obligation to ensure public life in the Palestinian territory and to preserve the ability of the Palestinian people to realize their sovereignty at the conclusion of the occupation.

In Part Three we assess the policy under international human rights law. We argue that irrespective of whether or not Gaza and the West Bank constitute a state, the individual human right to freedom of movement applies to Palestinians wishing to travel between the two parts



Photo: Tanya Habjouqa

Two girls in a car on a road trip. October 2009

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of the territory, which have been recognized by Israel and the international community as a single territorial unit. We further argue that the restrictions violate Israel's obligations to allow Palestinians freely to pursue joint economic, social and cultural development, which constitute the basis for the enjoyment of human rights. We conclude with a series of recommendations for bringing Israel's policy into greater conformity with its international obligations and with its own strategic interests in facilitating normal life for Palestinian civilians, as has been recently recognized by senior Israeli security officials. ■

Start Here

1967 • Israel captures Gaza and the West Bank and annexes east Jerusalem. In the following years, it settles on a policy of open borders, giving Palestinians a general permit to travel between Israel, Gaza and the West Bank.

1987 • The first Intifada breaks out, first in Gaza and then in the West Bank, a popular uprising against the Israeli occupation. Over the years, the violence spreads and escalates.

1991 • Israel cancels the "general exit permit" that had allowed Palestinians to travel between Israel, Gaza and the West Bank and begins requiring Palestinians to obtain individual permits as a condition of traveling. Enforcement is stepped up gradually.

1993 • Oslo peace accords are signed. Violence intensifies over the next years, including clashes between Israeli soldiers and Palestinian demonstrators and stabbings and suicide bombings inside Israel. Israel institutionalizes a general closure on the occupied territory.

1995 • Israel redeploys in Gaza and West Bank cities, designating "Area A" to Palestinian security control. Israel builds a fence on its border with Gaza. In subsequent years, Palestinians whose addresses are listed in Gaza are prevented from entering the West Bank via the Allenby crossing with Jordan.

1998 • Gaza residents are barred from traveling via Ben Gurion Airport.

1999 • Safe Passage between Gaza and the West Bank is opened.

2000 • Second Intifada breaks out. Safe passage is closed. Travel via Erez is restricted significantly. Israel freezes the possibility of changing one's address from Gaza to the West Bank. Israel closes the airport in Gaza and later destroys it. Students from Gaza are

banned from traveling to the West Bank for university study.

2001 • First rocket is fired from Gaza on civilian communities in southern Israel. In subsequent years, militants from Gaza fire thousands of rockets at an increasingly large swath of Israeli territory. Israel destroys the site where the building of Gaza's seaport had begun. Israel begins to "assign the residence" of Palestinians suspected of militant activities, forcing them to move from the West Bank to Gaza.

2003 • Israel begins building the separation barrier in the West Bank.

2005 • Israel removes its permanent military ground presence and civilian settlements from Gaza. An area along the Israeli border and constituting 17% of Gaza's area is declared a "no-go" zone. The U.S-brokered Agreement on Movement and Access is reached, promising the opening of Rafah Crossing and bus and truck convoys between Gaza and the West Bank. Rafah is opened, but Israel does not allow convoys.

2006 • Hamas wins parliamentary elections held in the West Bank, including east Jerusalem, and Gaza. Israel bans laborers from Gaza from entering Israel. After an Israeli soldier is captured by militants from Gaza, Israel begins the first of four large scale military operations in Gaza. Rafah Crossing is closed, except for infrequent humanitarian openings. Fishermen in Gaza are limited to six nautical miles from the shore.

2007 • The Palestinian unity government collapses, and Hamas takes over Gaza by force. Israel declares Gaza to be "hostile territory". As part of a policy of "economic warfare", Israel closes Karni crossing, the main commercial crossing for goods into and out of Gaza and bans outgoing goods from leaving Gaza. Israel also restricts incoming goods to Gaza, restricting fuel supplies and using mathematical formulas to determine

how much food it will allow to enter Gaza. Travel to the West Bank and Israel is limited to "exceptional humanitarian cases".

2008 • Operation "Cast Lead" begins.

2009 • Israel publishes a procedure banning residents of Gaza from moving to the West Bank for family reunification.

2010 • In the wake of the Gaza flotilla incident, Israel cancels ban on most incoming civilian goods to Gaza and somewhat expands export abroad. Senior merchants from Gaza are permitted to travel to Israel and the West Bank, subject to quotas. Egypt opens Rafah crossing for regular travel that is expanded in subsequent years.

2011 • Israel announces that it will allow 5,000 Palestinians to change their address from Gaza to the West Bank, a promise that is implemented partially in subsequent years.

2012 • Operation "Pillar of Defense" begins.

2013 • With the ouster of the Morsi regime, Egypt closes tunnels between Gaza and Egypt used for goods transfer and keeps Rafah crossing mostly closed. Israel briefly allows construction materials to enter Gaza for the private sector.

2014 • In the wake of the military operation "Protective Edge", Israel allows limited transfer of goods from Gaza to the West Bank and expands permission for construction materials to enter Gaza. Family visits to the West Bank are somewhat expanded, and elderly Muslims are permitted to reach east Jerusalem for Friday prayers. Following an attack in Sinai, travel via Rafah is further restricted.

2015 • Israel allows limited transfer of produce from Gaza to Israel for religious Jews unable to eat Israeli produce during the "shmita" year.

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Background and context

Throughout most of modern history, the area known as historical Palestine or the Biblical land of Israel constituted an integrated political, social, economic and cultural unit, with freedom of movement between its various parts. The 1948 Arab-Israeli War temporarily fragmented that territorial unit, placing Gaza under Egyptian military rule and the West Bank under Jordanian annexation, while the rest of the territory became the newly formed State of Israel. The Israeli occupation of 1967 reunited those areas, bringing them under the sole control of Israel with freedom of movement between them.

Until 1991 Israel implemented a mostly open-border policy. Palestinians in Gaza and the West Bank were encouraged to enter Israel for work and, with some exceptions, permitted to travel freely between Gaza, Israel and the West Bank. Palestinians were a captive market for Israeli consumer products, and, lacking easy access to neighboring countries, Palestinian industry and agriculture developed to serve the Israeli and Palestinian markets.¹ Family ties were extensive, which is not surprising considering that 70% of those living in Gaza are refugees from what is now the State of Israel.²

The outbreak of the First Intifada (uprising) in 1987 brought rising violence and called into question the vision of an “enlightened occupation”, in which Israeli control would be accepted in exchange for improvements in living conditions.³ In its wake, in 1991, Israel canceled the “general exit permit” that had allowed Palestinians to



A Palestinian woman in Gaza speaks to her mother, who lives in the West Bank, via video call. April 2014

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travel freely between Israel, Gaza and the West Bank.⁴ Since then, movement has become increasingly restricted. While the Oslo peace process included a promise to allow “safe passage” between Gaza and the West Bank, in reality the land route allowing passage was open for just over a year, while the trend of restriction strengthened. Over the years and extending into the period of the Oslo peace process, Israel tightened limitations on freedom of movement, setting restrictive criteria for obtaining travel permits, building a fence around Gaza and a separation barrier in and around the West Bank and enforcing punitive measures against Palestinians found in Israel without a permit. The measures made it especially difficult for Gaza residents to travel to the West Bank and Israel or to remain there.⁵

1. On the development of Gaza's economy, see Sara Roy, *The Gaza Strip: The Political Economy of De-Development* (1995) (“The Political Economy of De-Development”); Physicians for Human Rights-Israel and Gisha, *Realizing Potential: Transitioning from preventing humanitarian crises to developing the Gaza Strip*, Chapt. 2 (February 2012), available at tinyurl.com/mhe65d9 (last visited Mar. 23, 2015) (“Realizing Potential”). See also Gisha, *A Costly Divide: Economic Repercussions of Dividing Gaza and the West Bank* (February 2015), available at tinyurl.com/ooh3wjn (last visited Mar. 23, 2015) (“A Costly Divide”).

2. United Nations Refugee Works Association, *UNRWA in Figures as of 1 July 2014* (July 2014), available at tinyurl.com/lerlxrw (last visited Mar. 27, 2015). A survey commissioned by Gisha in September 2013 shows that nearly a third of Gaza residents have relatives in Israel and the West Bank, including east Jerusalem. See Amira Hass, *Poll: Nearly a Third of Gazans Have Relatives in WB, e. JI'm and Israel*, *Haaretz*, Dec. 18, 2013, available at tinyurl.com/lus5jxf (“Family Ties Poll”).

3. See for example Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (2006); Ahron Bregman, *Cursed Victory: A History of Israel and the Occupied Territories* (2014); Don Peretz, *Intefadeh: the Palestinian Uprising*, 66 *Foreign Affairs*, available at tinyurl.com/p5fjeb1 (last visited Mar. 27, 2015); *The Political Economy of De-Development*, *supra* note 1.

4. Military Advocate General's Corps, *Order Regarding Suspension of the General Exit Permit (No.5) (Temporary Order) (Judea and Samaria)*, 1991 [West Bank]. A scanned copy of the order is published in Booklet 111 of “Ordinances, Orders and Appointments”, August, 1991, page 122, available at tinyurl.com/pgsjev9; Corresponding order for the Gaza Strip.

5. For a description of the pre-2007 restrictions on movement between Gaza and the West Bank, see Gisha, *Disengagement Danger: Israeli Attempts to Separate Gaza from the West Bank* (February 2006), available at tinyurl.com/plb86sb (last visited Mar. 20, 2015) (“Disengagement Danger”).

Fragmentation throughout the Palestinian Territory

The restrictions on travel between Gaza and the West Bank are part of a broader policy of fragmenting the Palestinian territory, ostensibly for security reasons but coinciding with Israeli political and demographic goals, far removed from security. That policy is achieved through physical barriers, including the fence around Gaza built in 1995 and the separation barrier cutting through the West Bank beginning in 2003⁶ as well as numerous, smaller walls and obstacles, a legal regime restricting Palestinian access to different parts of the Palestinian territory and checkpoints that prevent or discourage travel within the West Bank.⁷

This fragmentation is manifested on at least two levels:

The first level is geographic: travel restrictions split the Palestinian territory into seven major geographical units between which movement is restricted: northern West Bank, center West Bank, southern West Bank, the Jordan Valley and northern Dead Sea, the “seam zones” or enclaves resulting from the separation barrier, east Jerusalem, and the Gaza Strip. Between the north, center and southern West Bank, movement is subject to checkpoints which delay and sometimes prevent travel.⁸ Travel between the seam zones and the rest of the West Bank is subject to an individual permit regime and in some cases intermittently staffed gates to allow access to agricultural lands beyond the barrier.⁹ Israeli settlements which dot the region further restrict access, because unless granted special permission, Palestinians are

barred from entering settlements and the roads leading to them.¹⁰ Movement between east Jerusalem, which was annexed by Israel in 1967,¹¹ and the rest of the West Bank is subject to an individual permit regime; in general, Palestinians from the West Bank and Gaza are barred from entering the city. Movement between Gaza and all other areas – West Bank, east Jerusalem, Israel – is extremely restricted, as described above.¹²

Second, the fragmentation is enforced by a legal

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regime that categorizes Palestinians based on their residence, or lack thereof, as registered with the Israeli authorities (which may or may not reflect where they actually live) and restricts movement accordingly. Israel controls the Palestinian population registry and generally does not allow Palestinians from Gaza to change their address to the West Bank, even if they have been living in the West Bank for decades.¹³ Palestinians whose addresses are listed in Gaza are not allowed to enter the West Bank, even if they seek to do so via the Allenby border crossing with Jordan, without entering Israel. Palestinians whose addresses are listed in Gaza or the West Bank are generally not permitted to enter Israel or

6. See B'Tselem, *Arrested Development: The Long Term Impact of Israel's Separation Barrier in the West Bank* (October 2012), available at [tinyurl.com/qc33b9e](https://www.tinyurl.com/qc33b9e) (last visited Mar. 20, 2015) (“Arrested Development”); HaMoked: Center for the Defense of the Individual (HaMoked), *The Permit Regime: Human Rights Violations in West Bank Areas known as the “Seam Zone”* (March 2013) available at [tinyurl.com/qhnlqsq](https://www.tinyurl.com/qhnlqsq) (last visited Mar. 20, 2015) (“The Permit Regime”).

7. See *Arrested Development*, *supra* note 6; B'Tselem, *Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank* (August 2007) available at [tinyurl.com/p8d6rhe](https://www.tinyurl.com/p8d6rhe) (last visited Mar. 20, 2015). The travel restrictions ebb and flow with political and geo-political developments. For a recent case study of the effects of the travel restrictions on a village in the West Bank, see B'Tselem, *The Invisible Walls of Occupation: Burqah, Ramallah District, a Case Study* (October 2014), available at [tinyurl.com/o9u9fsr](https://www.tinyurl.com/o9u9fsr) (last visited Mar. 20, 2015).

8. B'Tselem, *Background on the Restriction of Movement*, at [tinyurl.com/6jdkfox](https://www.tinyurl.com/6jdkfox) (Jan. 1, 2011).

9. See generally B'Tselem, *The Separation Barrier*, at [tinyurl.com/69lm5ms](https://www.tinyurl.com/69lm5ms) (Jan. 1, 2011).

10. B'Tselem, *Land Expropriation and Settlements*, at [tinyurl.com/6hvj5h2](https://www.tinyurl.com/6hvj5h2) (Jan. 1, 2011).

11. The annexation is considered invalid under international law. See Eyal Benvenisti, *The International Law of Occupation* 204–06 (2nd ed. 2012) (“International Law of Occupation”); Yoram Dinstein, *The International Law of Belligerent Occupation* 18–19 (2009) (“International Law of Belligerent Occupation”).

12. Ariel Handel has compiled a useful chronology of the various restrictions. See Ariel Handel, *Chronology of the Occupation Regime, 1967–2007*, at [tinyurl.com/moeyuns](https://www.tinyurl.com/moeyuns).

13. Gisha, *Restrictions and Removal: Israel's Double Bind Policy for Palestinian Holders of Gaza ID Cards in the West Bank* (November 2009), at [tinyurl.com/ok8hscy](https://www.tinyurl.com/ok8hscy) (last visited Mar. 22, 2015) (“Restrictions and Removal”); *Disengagement Danger*, *supra* note 5.

east Jerusalem. And Palestinians from the West Bank or east Jerusalem and Palestinian citizens of Israel are generally not permitted to enter Gaza.¹⁴ In addition, within the West Bank, certain areas, especially seam zone enclaves and the Jordan Valley, are off-limits except to those registered as living there, and those residents face difficulties accessing the rest of the West Bank.¹⁵ So the population itself is fragmented; Palestinians are cut off from other Palestinians.

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Naming the Separation Policy

While restrictions on movement between Gaza and the West Bank date back to the 1990s, they were tightened over the years, especially with the outbreak of the Second Intifada in 2000, the completion of the “disengagement plan” in 2005 and the 2007 collapse of the Palestinian unity government and takeover of the Gaza Strip by the Hamas movement. The primary restrictions that remain in place today are: (1) limiting travel via Erez Crossing to “exceptional humanitarian cases”; (2) restricting goods from Gaza from being sold in the West Bank and Israel, where most of Gaza’s markets had been; and (3) restrictions on construction materials entering Gaza, including those needed to rebuild the damage from the 2014 military operation.¹⁶

In 2010, Israeli officials began publicly calling this the “separation policy”, from the Hebrew word “bidul”, which means both separation and distinction.¹⁷ The few public statements that have been made about the policy describe it as having both security and political goals and being aimed at minimizing travel between Gaza and the West Bank. At times the political goals are described as pressuring the Hamas regime¹⁸, although many elements of the policy appeared well before Hamas took over the Gaza Strip.¹⁹ The policy especially prevents Palestinians in Gaza from being present in the West Bank for long periods of time, while encouraging and in some cases forcing Palestinians from the West Bank to move to Gaza.

Separating Gaza from the West Bank

The most extreme form of fragmentation is the separation of Gaza from the West Bank. Because of its geographical location – noncontiguous to the West Bank, bounded by the sea and guarded border fences with Israel and Egypt – enforcement of movement restrictions is highly effective. Israel exercises exclusive control over the movement of Palestinians between Gaza and the West Bank and limits travel to “exceptional humanitarian cases”.²⁰ In 2014, there were an average of 6,270 exits of Palestinians per month via Erez Crossing, 1.2% of the more than a half million exits recorded in September 2000.²¹ Travel is limited to medical patients and their companions, senior merchants and visits for close family members in cases of death, grave illness or wedding. The restrictions fracture the Palestinian education

14. See for example the criteria for travel determined periodically by the Coordinator of Government Activities in the Territories (COGAT), a branch of the Israeli Defense Ministry: COGAT, Status of Permits for Palestinians Wishing to Enter Israel, Travel Abroad or Cross From the Judea and Samaria Area into the Gaza Strip (Nov. 25, 2014), unofficial English translation available at tinyurl.com/m8pxwqt (last visited Mar. 22, 2015) (“COGAT Status of Permits”).

15. The Permit Regime, *supra* note 6; Arrested Development, *supra* note 6; Association for Civil Rights in Israel, One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank (October 2014), available at tinyurl.com/koaml76 (last visited Mar. 23, 2015). Some of the restrictions are intermittently applied. See for example Letter from Ruth Bar, Israeli Defense Ministry, to Maskit Bendel, Association for Civil Rights in Israel, announcing removal of categorical restrictions on entering Jordan Valley, Oct. 10, 2012, English translation available at tinyurl.com/ojoloccz (last visited Mar. 29, 2015).

16. Gisha, What Gaza Needs, Gaza Gateway (Feb. 26, 2015), at tinyurl.com/lbzxsm.

17. A description of the separation policy can be found in Gisha, What is the Separation Policy? (June 2012), available at tinyurl.com/mzaykqd (last visited Mar. 23, 2015) (“What is the Separation Policy?”). For a compilation of official statements about the separation policy, see Gisha, The Separation Policy: List of References Prepared by Gisha (July 2014), at tinyurl.com/pwk2515 (last visited Mar. 23, 2015) (“List of References”).

18. List of References, *Id.*, *supra* note 17.

19. See timeline, *supra* page 2.

20. Gisha, A Guide to the Gaza Closure: In Israel’s Own Words (September 2011), at tinyurl.com/koqv4do (last visited Mar. 23, 2015). Even when Palestinians manage to leave Gaza through Egypt – itself a difficult task, as mentioned above – they would still be barred from entering the West Bank via the Israeli-controlled Allenby Bridge.

21. Gisha, Gaza Access and Movement: 2014 Summary, at tinyurl.com/jvqmlr (Jan. 20, 2015) (“2014 Summary”).

system²² and civil society,²³ separate family members²⁴ and prevent Palestinians from knowing the different parts of the Palestinian territory. They block access to medical care²⁵ and to sites of religious worship in the West Bank, including east Jerusalem.²⁶

Since 2007, the Palestinian factional split has exacerbated that fragmentation by splitting the Palestinian government and official institutions too, including the legal system and government ministries. The closure of Rafah Crossing in the wake of the overthrow of the Morsi regime in Egypt closed the small loophole that, between 2010 and 2013, had intermittently allowed Palestinians from the West Bank to visit Gaza by traveling, via Jordan and Egypt, to the Rafah Crossing.²⁷

As noted above, Israel also restricts the transfer of goods from Gaza to markets in the West Bank and Israel, contributing to a split and overall downturn in the Palestinian economy.²⁸ Beginning in 1967, Gaza was cut off from Egypt and was not permitted to operate an airport or seaport. Instead, its industries were developed to serve the Israeli and West Bank markets, taking advantage of low-cost labor in Gaza to sell high volume and low profit-margin produce and manufactured goods. The closure of those markets effectively crippled Gaza's economy, contributing to high unemployment and a dip in GDP per capita – which is currently lower than it was



Photo: Gisha

In November 2014, Israel began allowing farmers in Gaza to sell some kinds of produce to the West Bank, subject to quotas. November 2014

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20 years ago.²⁹ As of 2014, outgoing goods from Gaza had fallen to less than 2% of their pre-June 2007 levels.³⁰ In late 2014 and early 2015, Israel began allowing some goods from Gaza to be sold in the West Bank and Israel, although quotas and other restrictions remain, and

22. Gisha, The Impact of the Separation Between the Gaza Strip and the West Bank on Higher Education (May 2010), at tinyurl.com/oywzjpn (last visited Mar. 28, 2015). See also Gisha, Frequently Asked Questions: Movement of Students from Gaza to the West Bank, at tinyurl.com/ld8o8kg (last visited Mar. 28, 2015); Gisha, Student Travel Between Gaza and the West Bank 101 (September 2012), available at tinyurl.com/n6emz5m (last visited Mar. 28, 2015) ("Student Travel").

23. Gisha, Harm to Palestinian Civil Society Due to the Separation Between the Gaza Strip and the West Bank (May 2010), at tinyurl.com/o5ed9hs (last visited Mar. 28, 2015).

24. Gisha, Separation of Families due to the Separation between the Gaza Strip and the West Bank (May 2010), at tinyurl.com/lgof48m (last visited Mar. 23, 2015). See also HaMoked and Gisha, New Procedure: Israel Bars Palestinians in Gaza from Moving to West Bank (June 2010), available at tinyurl.com/n3oczak (last visited Mar. 23, 2015); HaMoked and B'Tselem, So Near and Yet So Far: Implications of Israeli-Imposed Seclusion of Gaza Strip on the Palestinians' Right to Family Life (January 2014), available at tinyurl.com/lqfsdy6 (last visited Mar. 23, 2015). See also Family Ties Poll, *supra* note 2.

25. Travel from Gaza to hospitals in the West Bank, including east Jerusalem, Israel and Jordan is permitted for "urgent medical treatment", subject to security clearance. Non-emergency cases are limited to a quota of 80 per day, also subject to security clearance. COGAT Status of Permits, *supra* note 14, para. 23. Students from Gaza are not allowed to access the medical school at Al Quds University in the West Bank or train in hospitals in the West Bank, including east Jerusalem. *Supra* note 14, para. 30(d). Additional problems include delays in receiving answers to permit requests and pressure to collaborate with Israeli intelligence, as a condition of reaching medical treatment outside Gaza. See Realizing Potential, *supra* note 1, Chapt. 3, available at tinyurl.com/n92pjr5 (last visited Mar. 22, 2015).

26. At the time of writing these lines, the travel rules allow Muslims from Gaza aged 60+ to access the al Aqsa mosque in Jerusalem on Fridays, subject to a quota of 200 per week. Christian residents of Gaza under the age of 16 or over the age of 35 are generally permitted to travel to Israel and the West Bank during holidays, also subject to a quota. See COGAT Status of Permits, *supra* note 14, para. 35; News Release, Israel Defense Forces Spokesperson, Preparations for the Christmas Holidays (Hebrew) (Dec. 18, 2014), available at tinyurl.com/m3ryh8x (last visited Mar. 22, 2015).

27. While Egypt's actions in closing its border crossing are extremely unhelpful, as a matter of law, we distinguish between Israel, which exercises significant control over Gaza, including exclusive control over its territorial waters, air space and all the crossings between Gaza and the West Bank, and Egypt, which does not exercise such control and does not owe obligations under the law of occupation. See Gisha, Rafah Crossing-Who Holds the Keys? (March 2009), available at tinyurl.com/klbx5j (last visited Mar. 22, 2015) ("Who Holds the Keys?").

28. Gisha, Damage to Trade Between the Gaza Strip and the West Bank as a Result of the Separation Policy (May 2010), at tinyurl.com/o3bzy9c (last visited Mar. 28, 2015).

29. Realizing Potential, *supra* note 1, Chapt. 2; A Costly Divide, *supra* note 1.

30. 2014 Summary, *supra* note 21.

burdensome logistical requirements call into question the economic viability of the sale.³¹

Thus, in addition to their impact on freedom of movement, which will be addressed in the next section, the travel restrictions violate a host of other rights for which freedom of movement is a precondition, including the right to access education,³² the right to work³³ and earn a decent living,³⁴ the right to protection of the family unit,³⁵ the right to freedom of association,³⁶ the right to access health care,³⁷ and the right to freedom of religious worship.³⁸

The Israeli authorities intensified treatment of Palestinians listed as residing in Gaza as a separate population from Palestinians whose addresses were listed in the West Bank

The policy also creates a quasi-legal distinction between Palestinians, based on whether their addresses are listed in Gaza or the West Bank and irrespective of their actual place of residence. Beginning in the 1990s Israel prevented Palestinians whose addresses were listed in Gaza from entering the West Bank via the Allenby crossing with Jordan, a route chosen by those who were not able to get a permit to travel from Gaza

to the West Bank via Israel. While it was always difficult to change one's registered address from Gaza to the West Bank, after the outbreak of the Second Intifada in 2000, Israel froze the possibility of doing so.³⁹ The Israeli authorities intensified treatment of Palestinians listed as residing in Gaza as a separate population from Palestinians whose addresses were listed in the West Bank. The former were barred from entering the West Bank, and some already present in the West Bank were arrested and removed to Gaza by force.⁴⁰ Family reunification in the West Bank, even between spouses or minor children separated from their parents, is prohibited except in the most extreme and unusual humanitarian circumstances.⁴¹ Another practice, implemented inconsistently, is to "release" prisoners from the West Bank to Gaza at the end of their prison term, if their address is registered in Gaza, even if they have lived in the West Bank for years.

In essence, the Israeli government, which controls the Palestinian population registry, has created a quasi-legal distinction between Palestinians whom it lists as living in Gaza and those it lists as living in the West Bank. First, it refers to the West Bank as a closed military zone, under belligerent occupation, invoking the de facto Israeli sovereignty over the West Bank that the occupation creates.⁴² Second, it refers to the Gaza Strip as a hostile

31. At the time of writing, the policy is in flux. See Gisha, Update, Israel Bans Sale of Gaza Strawberries in the West Bank, at [tinyurl.com/odd3s5o](https://www.tinyurl.com/odd3s5o) (13 January 2015). Outgoing goods from Gaza remain at less than 10% of their pre-June 2007 level. See graphs showing current level of marketing, compared with 1,064 truckloads on average leaving Gaza per month before the restrictions: Gisha, Exit of Goods from Gaza via Kerem Shalom Crossing, at [tinyurl.com/lhrhvq3](https://www.tinyurl.com/lhrhvq3) (last visited Mar. 28, 2015).

32. International Covenant on Economic, Social and Cultural Rights, Dec. 18, 1966, 993 UNTS 3 ("ICESC"), Art. 13.

33. ICESC, *supra* note 31, Art. 6.

34. ICESC, *supra* note 31, Arts. 7(a)(ii) and 11(1).

35. ICESC, *supra* note 31, Art. 10(1); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), Art. 17(1).

36. ICCPR, *supra* note 35, Art. 22.

37. ICESC, *supra* note 31, Art. 12.

38. ICCPR, *supra* note 35, Art. 18(1).

39. Over the years, limited exceptions have been made, and, notably, in February 2011 Israel agreed to allow 5,000 Palestinians to change their addresses from Gaza to the West Bank. See Restrictions and Removal, *supra* note 13; Office of the Quartet Representative Tony Blair, Package of Measures Agreed Between the Government of Israel and the Quartet Representative, at [tinyurl.com/3lk6zp8](https://www.tinyurl.com/3lk6zp8) (Feb. 4, 2011).

40. See for example West Bank Student Berlanty Azzim's Deportation Upheld, BBC, Dec. 9, 2009, at [tinyurl.com/lknybv3](https://www.tinyurl.com/lknybv3); H.C. 7015/02, Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352 (2002) ("Ajuri Case") (approving a policy to force West Bank residents accused of militant activities to move to Gaza). English translation available at [tinyurl.com/krtxztj](https://www.tinyurl.com/krtxztj); Restrictions and Removal, *supra* note 13.

41. COGAT, Procedure for Handling Applications by Gaza Strip Residents to Settle in the Judea and Samaria Area (Hebrew) (July 2013), available at [tinyurl.com/mpea68p](https://www.tinyurl.com/mpea68p) (last visited Mar. 26, 2015). An unofficial English translation of a previous version of the procedure is available at [tinyurl.com/mnlve6p](https://www.tinyurl.com/mnlve6p) (Mar. 8, 2009).

42. Israel Defense Forces, Order Regarding Closed Areas (West Bank area) (No. 34), 1967. A scanned copy of the order is published in Booklet One of "Ordinances, Orders and Appointments", Aug. 11, 1967, page 26, available at [tinyurl.com/k2rozh2](https://www.tinyurl.com/k2rozh2). An unofficial English translation of a later version of the order is available at: [tinyurl.com/n48mbll](https://www.tinyurl.com/n48mbll).

territory⁴³ no longer under belligerent occupation, whose residents are considered foreigners for purposes of entry to Israel or the West Bank.⁴⁴ The Israeli government compares Palestinian residents of Gaza to citizens of an enemy state⁴⁵ (although as a matter of Israeli law, Gaza is neither an enemy nor a state⁴⁶), and it treats entry into the West Bank like entry into Israel: “Entrance of Gaza residents to Judea and Samaria is conditioned upon lawful entry to Israel, by individual permit, similar to any foreigner wishing to do so”.⁴⁷

The Israeli government cites a desire to prevent "terrorist infrastructure" from being transferred from Gaza to the West Bank as the primary security rationale behind the policy

The Israeli government cites a desire to prevent “terrorist infrastructure” from being transferred from Gaza to the West Bank as the primary security rationale behind the policy. It has said very little about the political rationales. Still, two aspects of the political rationale are notable. First, Israeli government spokespersons and politicians have formally and informally cited a desire to distinguish between the way Israel treats the Hamas movement which controls the Palestinian government in Gaza and the way it treats the Fatah movement which controls the Palestinian government in the West Bank.⁴⁸ Second, the effect of the policy is to make it, on the one hand, difficult

for Palestinians from Gaza to be present in the West Bank, where Israel is pursuing territorial claims and of which Israel stated a desire to annex at least part, but on the other hand, to allow, encourage and in some cases force Palestinians to move to Gaza, where Israel formally abandoned its territorial claims with the withdrawal of its settlements in 2005. The overall context is a desire to maintain a Jewish majority in the areas that Israel sees as coming under its sovereignty, legal or de facto.⁴⁹ ■

43. Israeli Security Cabinet Decision of Sep. 19, 2007, English-language announcement of decision available at [tinyurl.com/k3bhv7l](https://www.tinyurl.com/k3bhv7l) (last visited Mar. 26, 2015).

44. See for example H.C. 11120/05, Hamdan v. Southern Military Commander and Related Cases (unpublished, decided Aug. 7, 2007) (Israel) State Affidavit of March 20, 2007 in Response to Order Nisi (Hebrew), paras. 31–32, available at [tinyurl.com/kuklapg](https://www.tinyurl.com/kuklapg) (last visited Mar. 26, 2015) (“Hamdan State Response”). Indeed, it is easier for foreigners from countries that have diplomatic relations with Israel to enter the West Bank than it is for Palestinians from Gaza to do so.

45. H.C. 495/12, Kafarne v. Defense Minister, State Response of August 16, 2012 (Hebrew), para. 21, available at [tinyurl.com/k3o8ckn](https://www.tinyurl.com/k3o8ckn) (last visited Mar. 26, 2015) (“Kafarne State Response”). An unofficial English translation of relevant excerpts is available at [tinyurl.com/p4jc9x9](https://www.tinyurl.com/p4jc9x9) (last visited Mar. 26, 2015).

46. In its 2007 designation of Gaza as “hostile territory”, the Israeli government was careful not to declare Gaza to be an “enemy”, a move which would have triggered a criminal law prohibition against various forms of contact, including selling goods to Gaza. Israel also insists that Gaza and the West Bank (individually or together) are not a state. See Gisha, Gaza Closure Defined: Collective Punishment, (December 2008), available at [tinyurl.com/kyl9gxb](https://www.tinyurl.com/kyl9gxb) (last visited Mar. 26, 2015). However, in 2014 Israel designated Gaza as an enemy for the limited purpose of giving the state immunity from damages claims brought by Gaza residents against the Israeli military. Civil Torts Ordinance (State Responsibility) (Declaration of Enemy Territory – The Gaza Strip), 2014-5775.

47. Hamdan State Response, *supra* note 44, para. 30. See also List of References, *supra* note 17.

48. Kafarne State Response, *supra* note 45, para. 27.

49. See for example comments by Israeli government officials on the desire to maintain a Jewish majority in the land under Israel’s control: Julie Stahl, Jewish Majority More Important than Biblical Land, Olmert Says, CNSNews.com, Jul. 7, 2008, at [tinyurl.com/ouu6tvo](https://www.tinyurl.com/ouu6tvo) (then-Prime Minister Ehud Olmert); Merav David, Livni: If We Don’t Give Up on Parts of Israel, We Will Lose the Jewish Majority (Hebrew), Walla!, Oct. 22, 2009, at [tinyurl.com/ykgpor7](https://www.tinyurl.com/ykgpor7) (former Foreign Minister Tzipi Livni); Ari Shavit, Barak to Haaretz: Israel Ready to Cede Parts of Jerusalem in a Peace Deal, Haaretz, Sep. 1, 2010, available at [tinyurl.com/239a48z](https://www.tinyurl.com/239a48z) (then-Defense Minister Ehud Barak advocating for “the demarcation of a border that will run inside the Land of Israel, and within that border will lie a solid Jewish majority for generations”); Shlomo Cesana, The Root of the Israeli-Palestinian Conflict, Yisrael Hayom, Jan. 24, 2014, available at [tinyurl.com/np57mfd](https://www.tinyurl.com/np57mfd) (then-President Shimon Peres). Sari Hanafi discusses the demographic motivation in Sari Hanafi, Explaining Spacio-Cide in the Palestinian Territory: Colonization, Separation, and State of Exception, 61 Current Sociology 190 (2012).

In this part, we analyze the legal implications of the separation policy in light of Israel's obligations toward Gaza residents under international humanitarian law. Because Israel continues to exercise significant control over the Palestinian territory, especially over the movement of people and goods, it owes obligations to Palestinian residents under the law of occupation, at least concerning the executive functions it continues to control. Those obligations include a duty to facilitate normal civilian life, subject only to restrictions necessary for security and balanced with the needs and rights of Palestinian residents. Freedom of movement is a precondition for normal civilian life, including economic development, the proper functioning of civil society, medical and educational services, infrastructure, arts and culture, family unity and religious practice. Movement between Gaza and the West Bank is also necessary to allow the Palestinian people to exercise sovereignty over the territory, now and in the future. Permitting freedom of movement between Gaza and the West Bank, subject to security needs, is therefore a duty Israel owes under IHL, as we will argue here.

Applying the law of occupation in the Palestinian territory

Gisha's position is that the law of occupation applies to Israeli actions in the Palestinian territory, including the Gaza Strip. The application is functional; in Gaza,



Employees of an international organization walk through Erez Crossing. August 2010

for example, where control over significant aspects of life has been relinquished, and other actors are able to exercise governmental functions, Israel owes obligations to civilians in those aspects of life in which it has not relinquished control and is not allowing other actors to exercise governmental functions.⁵⁰

Whereas the Israeli government agrees that the law of occupation governs its actions in the West Bank, with the exception of east Jerusalem, since 2005 it has argued that the law of occupation no longer applies to its actions vis-à-vis the Gaza Strip.⁵¹ That position is based on the reduction in Israeli control over Gaza, as a result of its withdrawal of permanent ground troops and civilian settlers as part of its “disengagement” in 2005.

The debate in the scholarly community is lively, with some arguing for the application of the law of occupation,⁵² others arguing that enhanced obligations

50. Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, forthcoming (draft manuscript on file with authors); Aeyal Gross, *Rethinking Occupation: A Functional Approach*, *Opinio Juris*, Symposium on the Functional Approach to the Law of Occupation, at tinyurl.com/luomuno (Apr. 23, 2012); Sari Bashi, *In Reluctant Defense of the Law of Occupation*, *Opinio Juris*, Symposium on the Functional Approach to the Law of Occupation, at tinyurl.com/lz5468g (Apr. 24, 2012); Gisha, *Scale of Control: Continued Israeli Responsibility In Gaza* (November 2011), available at tinyurl.com/mqcjb8u (last visited Mar. 26, 2015) (“Scale of Control”). See also Sari Bashi and Kenneth Mann, *Shlita Viahrayut: Maamada Hamishpati shel Ritzuat Aza Liahar “Hahitnatkut” [Control and Responsibility: The Legal Status of Gaza After the “Disengagement”]* (Hebrew), 14 *Hamishpat* 35 (2010); Sari Bashi and Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* 59 (January 2007), available at tinyurl.com/ma37a48 (last visited Mar. 26, 2015) (“Disengaged Occupiers”). On Israeli obligations to ensure provision of electricity to Gaza see also an opinion piece written by Israeli experts in international law: Letter from Orna Ben-Naftali et al. to Members of the Foreign Affairs and Defense Committee of the Israeli Knesset (Jul. 20, 2014), English translation available at tinyurl.com/njz6gm2 (last visited Mar. 26, 2015).

51. See for example H.C. 10265/05, *Physicians for Human Rights v. Defense Minister*, State's Submission of July 11, 2006 (on file with authors); H.C. 11120/05 *Hamdan v. Southern Military Commander* and Related Cases, State's Response of Jan. 19, 2006 (Hebrew), available at tinyurl.com/l9ourfg; H.C. 9132/07, *Al Bassiouni v. Prime Minister* (unpublished, decided Jan. 27, 2008) (“Al Bassiouni Case”), section 49 of the Preliminary Response on behalf of the Respondents (Hebrew), Nov. 1, 2007, available at tinyurl.com/nbeaejj. An English translation of the verdict in the case (not the state's response) is available at tinyurl.com/nhv86cd.

52. *International Law of Belligerent Occupation*, *supra* note 11, 277–80; Johan D. van der Vyver, *Legal Ramifications of the War in Gaza*, 21 *Fla. J. Int'l L.* 403, 411 (2009); Ian Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 *Y.B. Islamic & Middle Eastern L.* 3, 30–31 (2006). In addition, an article written by the ICRC legal division's thematic expert on the law of occupation suggests that the law of occupation remains applicable in situations such as the one existing in Gaza: Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 *Review of the International Red Cross* 133 (2012).

stem from other sources,⁵³ and yet others arguing that Israel's obligations toward residents of Gaza are minimal, stemming primarily from the law of armed conflict.⁵⁴

The Israeli Supreme Court has taken somewhat of a middle ground, ruling that the law of occupation no longer applies to Gaza but that heightened obligations exist, stemming from the law governing the conduct of hostilities, dependence on Israel fostered by decades of occupation and Israeli control of Gaza's crossings.⁵⁵ The Supreme Court holds that the law of occupation applies to Israeli actions in the West Bank, accepting a legal position put forward by successive Israeli governments.⁵⁶

While Israel has the authority to restrict freedom of movement for reasons of security, it must also protect freedom of movement

The prevailing view within the international community is that Israel continues to be bound by the law of occupation in relation to Gaza.⁵⁷

The analysis we present in this report is based on the functional approach to the continuing application of the law of occupation to Israel's actions toward residents of

Gaza, although we note that many of these obligations would also attach in the framework of "post-occupation" obligations that has been suggested by some in the scholarly debate.⁵⁸

Freedom of movement and obligations under the law of occupation

The law of belligerent occupation assigns to the occupying power the duty and authority to step into the shoes of the ousted sovereign and perform the government functions that it prevents the legitimate representative of the occupied population from fulfilling. The occupying power has twin obligations: to provide for security, including its own security and that of the civilian population, and to restore and ensure the functioning of public life or normal life, to the extent possible.⁵⁹ Furthermore, since the occupying power is not the de jure sovereign, it is prohibited from introducing significant changes in the territory, unless these are necessary for security considerations, for the promotion of the welfare of the protected population, or in order to fulfill its obligations under the IHL.⁶⁰ While Israel has the authority to restrict freedom of movement for reasons of security, it must also protect freedom of movement. This stems from Israel's fundamental obligations under the law of

53. Yuval Shany argues that human rights law applies. See Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel* 15 Int'l L. Forum of the Hebrew Univ. of Jerusalem Law Faculty Research Paper No. 13-09 (2009), available at ssrn.com/abstract=1350307 (last visited Mar. 23, 2015) ("Law Applicable to Non-Occupied Gaza"). See also Marko Milanovic, *Extraterritorial Application of Human Right Treaties: Law Principal, and Policy* 142-44 (2011) ("Extraterritorial Application of Human Right Treaties").

54. See Elizabeth Samson, *Is Gaza Occupied? Redefining the Legal Status of Gaza*, 83 Begin-Sadat Ctr. for Strategic Studies: Mideast Security and Policy Studies (2009), available at tinyurl.com/kosbmkh (last visited Mar. 23, 2015). This article reflects the position of the Israeli government.

55. *Al Bassiouni case*, *supra* note 51, para. 12.

56. See for example *Ajuri Case*, *supra* note 40, para. 13. Although at a political level, Israeli government spokespersons and politicians often refer to the West Bank as "disputed territory", within the Israeli legal system the official government position is that the West Bank is territory held under belligerent occupation, although the de jure application of the Fourth Geneva Convention is disputed.

57. See for example a news release issued by the International Committee of the Red Cross (ICRC) which defines the Gaza closure as "collective punishment": Press Release, ICRC, *Gaza Closure, Not Another Year!* (Jun. 14, 2010), at tinyurl.com/5rtzj58. See also posts on the ICRC website in which Gaza and the West Bank together are defined as the occupied Palestinian territory: ICRC, *Occupied Palestinian Territory – Funding Appeal in Response to Pressing Humanitarian Needs*, at tinyurl.com/m4jvfw (Sep. 23 2014); article written by the president of the ICRC: Peter Maurer, *Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond*, 47 *Isr. L. Rev.* 175, 177-78 (2014); G.A. Res. 64/94, U.N. GAOR, U.N. Doc. A/Res/64/94 (Dec. 10, 2009) (referring to Gaza as part of the "Occupied Palestinian territory"); see also e-mail from Yves Sorokobi, Office of the UN Secretary General Spokesperson, to Adv. Sari Bashi, Director of Gisha (Feb. 27, 2007) (on file with authors): "The UN welcomed the Israeli disengagement from Gaza in August 2005. However, there has been no change in our characterization of the Gaza Strip as occupied territory."; United Kingdom: Foreign and Commonwealth Office, *Israel and the Occupied Palestinian Territories – Country of Concern: Latest Update* 31 December 2014, at tinyurl.com/peqz65g (Jan. 21, 2015). The UN Human Rights Council also considers Gaza occupied, as does the ICC. See Report of the Int'l Fact Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attack on the Flotilla of Ships Carrying Humanitarian Assistance, Int'l Fact Finding Mission, Hum. Rts. Council, at paras. 63-64, U.N. Doc. A/HRC/15/21 (Sep. 27, 2010); Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Fact Finding Mission, Hum. Rts. Council, at paras. 72, 277-83, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009); The Office of the Prosecutor of the International Criminal Court, Art. 53(1) Report, *Situation on Registered Vessels of Comoros, Greece and Cambodia* 16-18 (Nov. 6, 2014), available at tinyurl.com/kt82ocf (last visited Mar. 23, 2015).

58. *International Law of Occupation*, *supra* note 11, 86-89; *Law Applicable to Non-Occupied Gaza*, *supra* note 53, 114-15; Benjamin Rubin, *Disengagement from Gaza and Post-Occupation Duties*, 42 *Isr. L. Rev.* 528, 555-60. The Israeli Supreme Court alludes to these duties in para. 12 of the *Al Bassiouni Case*, *supra* note 51.

59. *Hague Regulations Concerning the Laws and Customs of War on Land*, 18 Oct. 1907, 36 Stat. 2277, I Bevans 631 ("Hague Regulations").

60. H.C. 393/82, *Jam'iyat Iskan v. West Bank Military Commander*, 47(4) P.D. 785; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 135 ("Fourth Geneva Convention").

occupation both to respect the personal freedom of Palestinians and to ensure normal civilian life in the Palestinian territory.⁶¹ In addition, freedom of movement is a precondition for fulfilling the obligations of the occupying power to provide for specific needs of the civilian population.

It can be hard to understand the importance of freedom of movement for those who have never experienced its absence. For Palestinian residents of the occupied territory, restrictions on freedom of movement mean that basic activities necessary for normal civilian life – reaching a family member, getting to school, getting to work, accessing medical care, transferring goods for trade and consumption

It can be hard to understand the importance of freedom of movement for those who have never experienced its absence

– are infringed and in many cases prevented. Within the West Bank, the restrictions take the form of checkpoints, physical barriers and obstacles, areas that are off limits, and a permit regime. Within Gaza, the restrictions take the form of a closure of the perimeter, controlled by Israel, where movement of people and goods requires individualized permissions that are hard to obtain. As detailed above, Israel continues to control the movement of people and

goods into and out of Gaza and all crossings between Gaza and the West Bank. It does not allow Palestinians in Gaza to operate an airport or seaport. The Egyptian border is mostly closed. Movement of people primarily takes place via the Erez Crossing with Israel, and movement of goods takes place via the Kerem Shalom crossing in the south, once a small, alternative crossing and now the only commercial crossing left open. The travel restrictions affect almost every aspect of life – what goods are available on the market, which factories and farms will be able to get their goods to market and therefore produce and employ workers, whether the family unit will remain intact, what kinds of degrees young people will obtain, and much more. While Israeli control over Gaza has diminished significantly over the years, its control over movement continues to be substantial and thus it continues to owe obligations, under Article 43 of the Hague Regulations,⁶² to allow the kind of movement necessary for normal civilian life.⁶³

In addition, movement of people and goods is necessary to meet specific obligations that an occupying power owes to residents of an occupied territory, including the obligation to facilitate the proper working of educational⁶⁴ and medical⁶⁵ institutions and to supply food, medicine clothing, shelter and other items “essential to the survival of the civilian population”.⁶⁶

61. These obligations emanate from two core provisions of IHL that serve to delimit the authority of an occupying power. First, under Art. 27 of the Fourth Geneva Convention of 1949, said to express the ‘leitmotiv’ of the Geneva Conventions, Israel is obliged to respect the personal freedoms of Palestinians. Para. 4 thereto allows for such rights to be restricted, but only if and to the extent necessary for security purposes. See Geneva Conventions of August 12, 1949 – Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 199–207 (ICRC, J. S. Pictet, O. M. Uhler and H. Coursier eds., 1958) (“ICRC Commentary”).

The commentary notes that while freedom of movement may be restricted, if necessary for security, “that in no wise means that it is suspended in a general manner. Quite the contrary: the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on the idea of the personal freedom of civilians remaining in general unimpaired” (p. 202). Second, and as aforementioned, Art. 43 of the Hague Regulations of 1907, described as a “mini-constitution of the law of occupation”, obliges an occupying power to ensure the normal functioning of civilian life in the occupied territory to the extent possible.

62. *Supra* note 59.

63. Scale of Control, *supra* note 50.

64. Fourth Geneva Convention *supra* note 60.

65. Fourth Geneva Convention, *supra* note 60, Art. 56.

66. Fourth Geneva Convention, *supra* note 60, Art. 55; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 17512, Art. 69 (“First Protocol”). Art. 69 of the First Protocol expands the list of supplies enumerated in the Fourth Geneva Convention to all supplies essential to the survival of the civilian population. See also Art. 59 of the Fourth Geneva Convention requiring the occupying power to facilitate relief schemes undertaken by others, including the free passage of consignments.

Inadequate security rationale for restricting freedom of movement

These obligations are not absolute but rather subject to the means available and must be balanced with the security needs of the occupying power, including to protect the security of its soldiers, its civilians and residents of the occupied territory. However, many restrictions imposed in the context of the separation policy are either not necessary to meet concrete security needs or, where responsive to security needs, cause disproportionate harm to civilian life and are therefore unlawful.

The ban on traveling to the West Bank for long periods of time means that a resident of Gaza may be granted permission to travel through Israel to the West Bank for a three-day conference or to attend a sister's wedding but is banned from making the same trip in order to enroll in a university or get married herself.

Take for example Israel's restrictions on transferring goods from Gaza to the West Bank. Israel allows transfer of goods from Gaza to third countries. That transfer takes place through Israeli territory, complete with full security checks for transit inside Israel and through the Israeli airport and seaports. There is no security rationale behind not allowing those same trucks, which have cleared security, to unload in Ramallah or Nablus, where the goods would reap greater profits. Yet for seven years, such transfer was banned, and only limited permission for such transfer was granted in November 2014. Restrictions remain on the quantities and types of goods that may be sold. These limitations do not further security goals but rather political goals and are therefore unlawful.

Similarly, the ban on traveling to the West Bank for long periods of time means that a resident of Gaza may be granted permission to travel through Israel to the West Bank for a three-day conference or to attend a sister's wedding but is banned from making the same trip in order to enroll in a university or get married herself.⁶⁷ The Israeli Defense Ministry says that both security and political goals underlie the ban. First, Israel's obligations under the law of occupation bar it from restricting civilian life in order to further political goals. Second, the arguments made to justify the restrictions in the name of security – for example that a student wishing to study in the West Bank and having no ill intentions might later change her mind and decide to engage in hostile activity – fall short of the weighty and concrete security goals that could justify the harm that the restrictions cause to normal civilian life.⁶⁸

Fragmentation and Self-Determination

Israel's control over Gaza should not be viewed in isolation but rather considered within the overall framework of control over Palestinians and Palestinian territory. Gaza is, after all, but a part of the Palestinian territory, which is a single territorial unit with one rightful sovereign – the Palestinian people.⁶⁹ All of this territory is subject to Israeli occupation. As we have seen, however, Israel implements different models of control in different parts of the territory. In east Jerusalem, it operates as in its own sovereign territory. In the West Bank, control is exercised through on-the-ground military presence with governmental functions being “outsourced” to the PA in Area A and (to a lesser degree) in Area B. With respect to Gaza, while no longer maintaining regular on-the-ground presence, Israel retains comprehensive elements

67. See What is the Separation Policy?, *supra* note 17; List of References, *supra* note 17; Student Travel, *supra* note 22.

68. For additional information, see materials developed as part of a computer game on passage between Gaza and the West Bank: Gisha, Legal Framework: Higher Education (May 2010), available at tinyurl.com/mer4nqg (last visited Mar. 23, 2015); Gisha, Legal Framework: Family Separation (May 2010), available at tinyurl.com/npb22fx (last visited Mar. 22, 2015); Gisha, Legal Framework: Merchants and the Economy (May 2010), available at tinyurl.com/nvjvpa3 (last visited Mar. 22, 2015).

69. As a consequence of the Palestinian people's right to self-determination and since, in recognition of that right, both Egypt and Jordan renounced any claims to the Palestinian territory in their respective peace agreements with Israel – sovereignty over the territory is vested with the Palestinian people. See International Law of Occupation, *supra* note 11, 6–7, 272; International Law of Belligerent Occupation, *supra* note 11, 52; Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, Illegal Occupation: Framing the Occupied Palestinian Territory, 23 *Berkley J. Int'l Law* 551, 554–56 (2005); Antonio Cassese, Self-Determination of Peoples: A Legal Reprisal 238–39, 243–45 (1995) (“Self-Determination of Peoples”).

of control, including, inter alia, complete control over the airspace, over the territorial waters and over crucial land crossings. These enable it to dictate the flow of people, goods and resources that form the lifeblood of the area. The supply of water, food, fuel, electricity, money and communication services as well as the prospect of commerce and travel are largely in Israel's hands. Israel thus has the capacity to shape conditions of life in each of the dissected parts of the Palestinian territory. Even where Palestinians have acquired a modicum of self-rule, such as in Area A and in Gaza, Israel's ongoing domination of key areas of life limits the local authorities' capacity to discharge fundamental governmental functions ordinarily within the purview of the sovereign. This is so in part because of Israel's control over access to the outside world, but also because Israel has complete control over movement between the various parts of the Palestinian territory.

The fragmentation caused by decades of travel restrictions is re-shaping and even cantonizing Palestinian society in ways that will be difficult to reverse, even if and when the restrictions are lifted

Through the latter form of control, and particularly by enforcing the separation policy and other movement restrictions, the Israeli authorities have fragmented the Palestinian territory into virtual islands hemmed in by Israel. The fragmentation doesn't only upset normal civilian life at the individual level, but also at the communal level. With their territory divided into sequestered parts, Palestinians cannot pursue joint economic, social, and cultural enterprises that are crucial for the proper functioning of Palestinian public life. In so doing, Israel has failed to fulfill its obligation under Article 43 of the Hague Regulation of 1907 to ensure, as far as

possible, public life in the occupied territory.⁷⁰

After all, the term "public life" (*vie publics*) implies that the occupying power is obliged to facilitate normal life, not just for individual members of the population under occupation, but also for the population as a collective.

Indeed, the rupture that the separation policy creates undermines Israel's forward-looking obligation not to create circumstances that might sabotage the Palestinians' capacity to attain self-determination and realize their sovereignty over the territory in the future. These obligations stem from the fact that the Israeli occupation of the Palestinian territory – like all occupations – is, by definition, a provisional situation, and Israel's authority over the territory is transitory.⁷¹ The law of occupation requires the occupier, which has de facto control but no sovereign rights over the territory, to refrain from taking steps that would prejudice the ability of the de jure sovereign to re-assert sovereignty at the conclusion of the occupation. The Palestinian people are recognized as the de jure sovereign, and the fragmentation of the Palestinian territory threatens their ability to re-assert sovereignty in the future.

The fragmentation caused by decades of travel restrictions is re-shaping and even cantonizing Palestinian society in ways that will be difficult to reverse, even if and when the restrictions are lifted.

The ramifications of the forced divide between Gaza and the rest of the Palestinian territory include the following illustrative examples:

(a) Beginning in 2000, Israel barred students from Gaza from studying at the Palestinian faculty of medicine at Al Quds University in the West Bank town of Abu Dis. Four years later, the Islamic University in Gaza opened a faculty of medicine that is training medical students with divergent standards and practices than those in the West Bank. These students do their practical training in Gaza hospitals only, while their counterparts in the West Bank train there,

70. This obligation stems from the provision of Art. 43 of the Hague regulations of 1907 requiring the occupant to "ensure, as far as possible, public order and civil life" ("l'ordre et la vie publics"). See Marco Sassòli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers 16(4) Eur. J. Int'l L 661, 663-64 (2005).

71. See for example Gerhard von Glahn, The Occupation of Enemy Territory: A Commentary on The Law and Practice of Belligerent Occupation 31-33 (1957).



Photo: Gisha

Workers at a biscuit factory in Gaza that used to sell to the West Bank. March 2015

deepening the divide in the Palestinian health care system.

(b) Since 2007, Israel has mostly barred marketing goods from Gaza to the West Bank and to a much lesser extent has interfered with the transfer of goods from the West Bank to Gaza, effectively splitting the Palestinian economy into two. At the time of the writing of these lines, farmers and manufacturers in Gaza who obtained a rare permit to sell to the West Bank are scrambling to re-establish ties with a market they no longer know and purchasers who have found alternatives to the trade relationships they once had with Palestinians in Gaza.

(c) No comprehensive data is available on the effects of the travel restrictions on decisions to marry and have children, but one can only assume that a policy that categorically bans a bride in Gaza from traveling to the West Bank to marry – reduces the number of unions between families in Gaza and the West Bank.

The restrictions on travel between West Bank cities have produced similar, if more moderate, results, disrupting commercial ties, isolating cities and regions and preventing Palestinians from knowing the cities and villages that lay on the other side of military checkpoints. The divide between east Jerusalem and the rest of the Palestinian territory creates a more extreme disruption; social, cultural and economic institutions in east

Jerusalem are virtually off limits for most Palestinians, creating a deep divide.

These social, economic, cultural and familial ties – which will be addressed in the discussion of collective rights in Part 3 – are necessary for the successful exercise of the Palestinian people's right to self-determination. The "people-hood" that is the basis for self-determination has deep social and economic roots, and their unravelling undermines the ability of the Palestinian people to exercise sovereignty in the future.

Whether or not the Israeli government is deliberately acting to undermine Palestinian sovereignty, this effect of the separation policy cannot have escaped the notice of the Israeli military establishment and its units dedicated to intelligence and studying Palestinian society. Occupation involves the displacement of the lawful sovereign, but such displacement must be temporary. Israel's forward-looking obligations to refrain from measures that would prejudice the restoration of sovereignty in the hands of the Palestinian people are not being met.

We note, of course, that the Palestinian factional split is also undermining the social cohesion that is a precondition for self-determination by taking official institutions, since 2007, on divergent developmental paths. We address this issue in the next part. ■

Freedom of movement within the Palestinian territory is grounded not just in Israel's IHL obligations but also in its international obligations to protect human rights in territory subject to its jurisdiction.⁷² Part Three analyzes the effect of the separation policy on the right to freedom of movement that individuals have within the Palestinian territory and on aspects of the right to self-determination.

A. Freedom of movement as an individual right

In addition to its necessity as a precondition for meeting obligations to civilians living under occupation, freedom of movement has been recognized throughout history as a right in itself whose expression is a realization of human autonomy and dignity. As early as ancient Greek times, freedom of movement was one of the features that distinguished a free person from a slave.⁷³ It was protected, to varying degrees, in early codifications of rights such as the English Magna Carta⁷⁴ and the French revolutionary constitution of 1791.⁷⁵ Freedom of movement was seen as necessary for human and economic development,⁷⁶ and its denial was viewed as a tool of subjugation. In modern times, it was enshrined in the Universal Declaration of Human Rights⁷⁷ and eventually in the International Covenant on Civil and



Students outside the College of Applied Sciences of Gaza. April 2013

Political Rights,⁷⁸ which Israel ratified. It is recognized as a right of customary international law.⁷⁹ It is also a precondition for the realization of additional human rights, as noted in the previous part.

The right to freedom of movement includes three related rights: (1) the right to move, travel and choose one's place of residence within a country in which one is lawfully present; (2) the right to leave any country, including one's own and; (3) the right to enter one's country free of arbitrary restrictions. These rights may be restricted in order to protect national security, morality, public order or

72. On the extra-territorial application of human rights law, see generally Extraterritorial Application of Human Right Treaties, *supra* note 53. For a discussion as to the meaning of the term "jurisdiction" for the purpose of human rights treaties and for the view that it is linked to de facto control, see Id. Chapt. 2, in particular 52–53. See also Orna Ben-Naftali & Yuval Shany, Living in Denial: The Application of Human Rights in the Occupied Territories 37 Israel L. Rev. 17 (2003). For the most recent comments of the Human Rights Committee, see Concluding Observations on the Fourth Periodic Report of Israel, U.N. Doc CCPR/C/ISR/CO/4 (Nov. 21, 2014) para. 5, available at tinyurl.com/ouyzb15 (last visited Mar. 29, 2015). The Committee called on Israel to ensure that any restrictions on freedom of movement of people and goods be consistent with Israel's obligations under the ICCPR (para. 12). For case law, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. (Jul. 9, 2004), 136, paras. 106–13 ("Wall Opinion"); Armed Activities on the Territory of the Congo (Congo v. Uganda) Judgment, 2005 I.C.J. Rep. 168, at ¶ 216 (Dec. 19). In a number of judgments, the ECtHR held that the geographic applicability of the European Convention on Human Rights is determined by the "effective control" test rather than by the territorial borders of the State party: *Loizidou v. Turkey* (Merits), Dec. 18, 1996, ¶ 52, Reports of Judgments and Decisions 1996–VI; *Behrami v. France, Saramati v. France, Germany and Norway* (Application Nos. 71412/01 and 78166/01 [unreported], May 2, 2007). The Israeli Supreme Court has expressed willingness to presume that international human rights law applies to the actions of a military commander in a territory held under belligerent occupation and/or during armed conflict. H.C. 10356/02, *Haas v. IDF Commander in the West Bank* (unreported, Mar. 4, 2004); H.C. 1890/03, *Bethlehem Municipality v. State of Israel* (unreported, Feb. 3, 2005) ("Bethlehem Municipality"); H.C. 3969/06, *Head of Deir Samit Village Council al-Harub v. IDF Commander in the West Bank* (unreported, Oct. 22, 2009). It is noteworthy that the judgment in H.C. 769/02, *Public Committee Against Torture in Israel v. Government of Israel*, 57(6) P.D. 285, known as the targeted killings case and applying to the Gaza Strip, was delivered after the "disengagement". In that case, too, the Supreme Court was willing to presume that human rights law applies in the Palestinian territory parallel to international humanitarian law, without ruling on the issue.

73. Jane McAdam, An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty, 12 Melbourne J. of Int'l Law 27 (2011).

74. Magna Carta, Art. 42 (1215), available at tinyurl.com/cbznbd (last visited Mar. 29, 2015).

75. French Constitution of 1791, available at tinyurl.com/lp8zyod (last visited March 21, 2015).

76. See John Torpey, The Invention of the Passport: Surveillance, Citizenship and the State 79 (2000), available at from tinyurl.com/khpwv4 (last visited Mar. 21, 2015).

77. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Art. 13 (Dec. 10, 1948) ("UDHR").

78. ICCPR, *supra* note 35, Art. 12.

79. See for example Henry J Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals (2nd ed. 2000), addressing the customary nature of the UDHR.

health, or the rights and freedoms of others.⁸⁰

In the context of the *lex specialis* of the law of occupation, certain restrictions on freedom of movement are authorized, if militarily necessary, while others are specifically prohibited.⁸¹ For reasons of security, for example, an occupying power may detain, assign the residence of a protected person and/or prevent him or her from leaving the occupied territory.⁸² In addition, as part of an occupying power's general authorization under Article 43 of the Hague Regulations,⁸³ the ability to move freely is subject to security needs, where the occupying power must balance its obligations toward protected persons with its authority to take restrictive measures that are militarily necessary. Deportation and forced transfer, however, are strictly prohibited.⁸⁴

At least since 1978, Israel has recognized Gaza and the West Bank as a single territorial unit

B. Applying the right to freedom of movement in the Palestinian territory

How might we understand the right to freedom of movement in the context of Gaza and the West Bank, a noncontiguous territory whose status remains a subject of controversy? What is the relevant "country" in which freedom of movement is to be respected? Who is considered a resident? We argue here that the Israeli and international recognition of Gaza and the West Bank as a single territorial unit applies to protections for the right to move and travel within that unit. We further argue that at the very least, those whom Israel has recognized as residents of the territory, by including them in the

Palestinian population registry that it controls, have the right to freedom of movement within the Palestinian territory, including Gaza and the West Bank.

Gaza and the West Bank as a single territorial unit

At least since 1978, Israel has recognized Gaza and the West Bank as a single territorial unit. This recognition was implicit in the Camp David Accords ending the state of war between Israel and Egypt, in which Israel committed to establishing "a single self-governing authority (administrative council) in the West Bank and Gaza".⁸⁵ The commitment to establish such authority was reiterated in the Declaration of Principles,⁸⁶ signed between Israel and the Palestine Liberation Organization (PLO) in September 1993 in the framework of the Oslo peace accords. In that agreement, Israel explicitly recognized Gaza and the West Bank as a single territorial unit:

"The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period".⁸⁷

Israel later committed to opening a land route between Gaza and the West Bank, called a "safe passage"⁸⁸ and made clear, in the preamble to the 1995 Interim Agreement, its approval for establishing a self-governing authority whose jurisdiction would extend to Gaza and the West Bank:

"RECOGNIZING that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a *Palestinian Interim Self-Government Authority*, i.e. the elected Council (hereinafter "the Council" or "the Palestinian Council"), and the elected Ra'ees of the

80. ICCPR, *supra* note 35, Art. 12(3).

81. Fourth Geneva Convention, *supra* note 60, Art. 27, which the ICRC Commentary to the Fourth Geneva Convention refers to as "the basis of the convention", is a key provision in this regard. For specific reference to the freedom of movement and restrictions thereto see ICRC Commentary, *supra* note 61, 202 and 207.

82. Fourth Geneva Convention, *supra* note 60, Art. 78.

83. *Supra* note 59.

84. Fourth Geneva Convention, *supra* note 60, Art. 49.

85. The Camp David Accords: The Framework for Peace in the Middle East, Sep. 17, 1978, available at tinyurl.com/kjzb6x4 (last visited Mar. 21, 2015) ("The Camp David Accords").

86. Oslo I Accords, "Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993 ("Oslo I"), available at tinyurl.com/mrmt64w (last visited Mar. 21, 2015).

87. Art. IV. Oslo I, *supra* note 86.

88. Gaza-Jericho Agreement of 1994, Art. XI, available at tinyurl.com/kdncygp (last visited Mar. 23, 2015).

Executive Authority, for the *Palestinian people in the West Bank and the Gaza Strip* for a transitional period not exceeding five years from the date of signing the Agreement on the Gaza Strip and the Jericho Area (hereinafter “the Gaza-Jericho Agreement”) on May 4, 1994, leading to a permanent settlement based on Security Council Resolutions 242 and 338.” (Emphasis added-sb.)⁸⁹

The peace process essentially established a framework in which historical Palestine would be divided between a Jewish state based on the 1949 armistice lines and a Palestinian entity in Gaza and the West Bank, without (yet) determining final borders. The accords included provisions for continued Israeli regulation of the Palestinian population registry (created by Israel in 1967), with coordination by the Palestinian Authority, including residents of both Gaza and the West Bank.

Even after the expiration of the interim period set out in the Oslo accords, the collapse of the Oslo process and outbreak of the Second Intifada in September 2000, Israel continued to treat Gaza and the West Bank as a single territorial unit. In 2002, citing security risks, the Israeli military decided to forcibly transfer to Gaza a number of Palestinians residing in the West Bank and accused of militant activities. The military claimed the authority, under Article 78 of the Fourth Geneva Convention, to “assign the residence” of those it sought to transfer to Gaza. The would-be transferees challenged the transfer in court, claiming that it violated Articles 49 and 78 of the Fourth Geneva Convention which permit assigned residence within the occupied territory but prohibit deportations of protected persons outside the occupied territory. The Israeli Supreme Court rejected that argument, accepting the position of the State of Israel that Gaza and the West Bank are a single territorial unit, and that therefore the transfer constituted assigning residence within the same territory:

“The two areas are part of mandatory Palestine. They

are subject to a belligerent occupation by the State of Israel. *From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content...*

... Moreover, counsel for the Respondent pointed out to us that ‘not only does the State of Israel administer the two areas in a coordinated fashion, but the Palestinian side also regards the two areas as one entity, and the leadership of these two areas is a combined one’. Indeed, the purpose underlying the provisions of art. 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, *social and political unity of the territory*, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, *the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory.* (Emphasis added-sb.)”⁹⁰

Israel’s recognition of Gaza and the West Bank as a single territorial unit creates legally binding obligations, including the duty to respect the right to freedom of movement within that unit

Legal ramifications of Israel’s recognition

Israel’s recognition of Gaza and the West Bank as a single territorial unit creates legally binding obligations, including the duty to respect the right to freedom of movement within that unit. The separation policy, which by definition seeks to prevent Palestinians in one part of the territory from traveling to the other and especially to prevent Palestinians in Gaza from choosing to reside in the West Bank – violates Israel’s obligations to respect Palestinians’ right to freedom of movement. In other words, the restrictions on travel by people,⁹¹ in

89. Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-P.L.O., Preamble, Sept. 28, 1995, 36 I.L.M. 551 (1997) (“Interim Agreement”).

90. Ajuri Case, *supra* note 40, para. 22.

91. As opposed to the movement of goods, which is not protected as an independent right.

addition to violating Israel's IHL obligations to facilitate normal life, violate an independent right to freedom of movement, to which Palestinians are entitled irrespective of the reason they wish to travel and the ramifications of being prevented from doing so. This obligation to respect the right to freedom of movement within the Palestinian territory as a whole stems from Israel's treaty obligations and the position it has taken, to its benefit, recognizing Gaza and the West Bank as such through the doctrine of estoppel.

Treaty obligations

Israel's recognition of Gaza and the West Bank as a single territorial unity in treaties signed with Egypt and the PLO is legally binding. Israel's commitment, within the Camp David Accords, to establish a self-governing authority in Gaza and the West Bank was a cornerstone of the treaty and a condition of Egypt's agreement to make peace. Egypt agreed to end the state of war that had existed between it and Israel since 1948 based on Israel's commitment to resolve the core of the dispute – the fate of the Palestinians – through unified Palestinian self-rule in Gaza and the West Bank as a single entity.⁹²

Israel also committed to such recognition in its accords with the PLO. Israel's entering into the Oslo Accords constituted recognition, at the very least, of the Palestinian people, and the PLO as their representative. As such, the Oslo Accords are a legally binding agreement, not between two states

but between two equal subjects of international law.⁹³ There are important questions regarding the continued applicability of the accords, although these do not affect the aforementioned recognition. The accords themselves are interim accords whose end date expired 15 years ago, and many of their provisions have since been abandoned by either or both sides. On the other hand, they have not been repudiated by either side, and both sides continue to implement parts of them, especially those concerning coordination between Israel and the Palestinian Authority on behalf of both Gaza and the West Bank. Indeed, Israel periodically insists on the continued validity of at least some provisions of the Oslo Accords.⁹⁴ Irrespective of the present status of the accords or the possibility of their future termination, termination would not affect any legal situation created by the treaty – including the recognition of Gaza and the West Bank as a single territorial unit.⁹⁵ Because termination of a treaty terminates the duty to continue to perform – but not a legal situation created prior to termination – termination of the Oslo Accords could only terminate a specific duty to perform, such as the duty to operate the Safe Passage, but it would not terminate the status of Gaza and the West Bank as a single territorial unit. So even if Israel were to be released from its specific treaty obligations by termination, it would still be bound to respect the right of Palestinians to freedom of movement within Gaza and the West Bank.

92. The Camp David Accords, *supra* note 85, begin with the commitment that the treaty is intended by the parties "to constitute a basis for peace not only between Egypt and Israel, but also between Israel and each of its other neighbors which is prepared to negotiate peace with Israel on this basis". The basis includes, as noted above, "a self-governing authority in Gaza and the West Bank". For more on the Egyptian position regarding the unity of Gaza and the West Bank, see *Who Holds the Keys?*, *supra* note 27, 128–29.

93. Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement* 4 EJIL 542–54, 543–44 (1993), available at tinyurl.com/lmy7cfx (last visited Mar. 26, 2015) ("Benvenisti, Declaration of Principles"). See also Geoffrey Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (2000). Watson argues, *inter alia*, that the PLO has been recognized as a subject of international law by entering into legally binding treaties with other states, as well. Presumably that argument would be strengthened by the 2012 UN General Assembly decision to accept Palestine as a nonmember observer state (G.A. Res. 67/19, U.N. GAOR, 67th Sess., U.N. Doc. A/Res/67/19 (Dec. 4, 2012) ("GA Resolution 67/19")) and Palestine's 2014 accession to a number of international treaties.

94. For example, in response to a question regarding Israeli authority to approve the entrance of foreigners into Gaza, the Israeli Defense Ministry said that it considers these requests "in accordance with the Interim Agreements". See letter from Eyal Freiman, Public Affairs Officer, COGAT, to Adv. Sari Bashi, Director of Gisha (Oct. 9, 2006) (Hebrew, on file with authors). In response to a complaint about refusal to consider travel requests submitted by human rights organizations, the Israeli Defense Ministry said that "the work of Israeli coordination officials will be conducted only vis a vis the authorized officials in the Palestinian Authority, as was agreed upon in the Interim Agreements". See letter from Brig. Gen. Moshe Levy, Head of Gaza DCO, to Hadas Ziv, Director of Physicians for Human Rights-Israel, Adv. Sari Bashi, Director of Gisha and Dalia Kerstein, Director of HaMoked (Sept. 13, 2009) (Hebrew, on file with authors). The State's position on preserving the Oslo mechanism of coordination has been repeatedly upheld by Israel's Supreme Court. See for example H.C. 5429/07, *Physicians for Human Rights-Israel v. Defense Minister* (unpublished, decided Jun. 28, 2007); H.C. 8881/06, *Najah v. Civil Affairs Administration in the West Bank, Population Registrar* (unpublished, decided Mar. 1, 2007).

95. For a discussion of the legal obligations that outlast the termination of a treaty, see Benvenisti, *Declaration of Principles*, 545. The argument is based on Art. 70(1)(b) of the Vienna Convention, which reflects customary law and therefore would apply to the Oslo Accords even though they are not agreements between states. The relevant part states that termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". See Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF 39/27 at 289 (1969), 1155 U.N.T.S., Art. 70. See also I.C.J. *Northern Cameroons (Cameroon v. United Kingdom)* (Preliminary Objections) [1963] I.C.J. Rep. 15 at 34, available at tinyurl.com/m8o3by9 (last visited Mar. 24, 2015).

Estoppel

A related source of Israel's obligation to respect the legal status of Gaza and the West Bank as a single territorial unit is the doctrine of estoppel. Estoppel in international law promotes consistency and good faith relations between states. While some of the doctrine's finer points remain topics of discussion, the International Court of Justice (ICJ) has consistently applied the doctrine to prevent a state from benefiting from its own inconsistency, to the detriment of another state.⁹⁶ Once a state has consented to a situation, either explicitly or by its failure to protest, and once it has benefited from such situation, it cannot later deny its consent and take an opposing legal position.⁹⁷

In the case of Gaza and the West Bank, Israel first committed to recognizing them as a single territorial unit as part of the Camp David Accords that gave it the substantial benefit of peace with Egypt and significant financial assistance from the United States,⁹⁸ which brokered the deal. It reaffirmed that recognition in the Oslo accords, which afforded it diplomatic benefits of closer ties to the United States⁹⁹ and Europe and an implicit recognition, by the PLO as the representative of the Palestinian people, of Israel's borders within the 1949 Armistice lines. Within its domestic legal system, it insisted on the territorial unity of Gaza and the West Bank in order to assert the scope of Israel's authority under the law of belligerent occupation. Relying on that recognition, Palestinian institutions, governmental and nongovernmental, were established in both parts of the territory, including government offices, programs of higher education, civil society organizations and businesses with branches in both Gaza and the West Bank and serving Palestinians throughout the Palestinian territory. Donor countries funded programs and institutions designed to serve Palestinians in both Gaza



Fishermen in Gaza. Israel limits fishing to six nautical miles from the shore. October 2010
Photo: Eman-Mohammed

It would be strange indeed if Gaza and the West Bank were considered one societal, linguistic, cultural, social and political unit for purposes of forcibly transferring a Palestinian resident from the West Bank to Gaza – but two separate entities for purposes of the right to freedom of movement

and the West Bank. Such inconsistency of state positions and detrimental reliance are precisely what the doctrine of estoppel is designed to prevent. It would be strange indeed if Gaza and the West Bank were considered one societal, linguistic, cultural, social and political unit for purposes of forcibly transferring a Palestinian resident from the West Bank to Gaza – but two separate entities for purposes of the right to freedom of movement.

Estoppel is usually applied to relations between states. Israel's representations were made, inter alia, to the PLO, which it recognized as the representative of the Palestinian people, a recognition that has been bolstered by the 2012 recognition of Palestine as a nonmember UN observer state. It is the Palestinian people who seek to exercise their right to freedom of

96. See Case concerning the temple of Preah Vihear (Cambodia v. Thailand) (Separate Opinion Judge Alfaro) 40, available at tinyurl.com/nht32bp (last visited Mar. 24, 2015).

97. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of Jun. 15, 1962: I.C.J. Reports 1962, p. 6, at 32, available at tinyurl.com/p2btoms (last visited Mar. 24, 2015).

98. See for example Rhonda L. Callaway et. al., Strategic US Foreign Assistance: The Battle Between Human Rights and National Security 45-52 (2013).

99. For example, the United States agreed (in principle) to move its embassy from Tel Aviv to Jerusalem, implying recognition of Jerusalem as Israel's capital. See Jerusalem Embassy Act of 1995, Pub.L. 104-45, Nov. 8, 1995, 109 Stat. 398. Implementation has been repeatedly delayed by successive U.S. administrations.

movement within Gaza and the West Bank, and they are the most adversely affected by Israel's subsequent refusal to respect the unity of the territory. In addition, and detrimental reliance notwithstanding, Israel's declaration of its recognition of Gaza and the West Bank as a single territorial unit appears to contain the requisite intent to render it a unilateral and binding declaration.¹⁰⁰

Israeli Ambivalence regarding Gaza and the West Bank

We note that the inconsistency between Israel's recognition of Gaza and the West Bank as a single territorial unit and the separation policy currently pursued is not just historical but also contemporaneous and simultaneous. Israel continues to treat Gaza and the West Bank as a single unit for purposes of controlling the Palestinian population registry, which is common to both Gaza and the West Bank,¹⁰¹ for purposes of collecting taxes from purchase of goods in Gaza and the West Bank and turning the revenues over to the Palestinian Authority, and for additional administrative arrangements such as coordinating the entry of people and goods between Gaza, the West Bank, Israel and third countries, selling water and electricity for use by Palestinian consumers and authorizing telecommunications frequencies. Today, as has been the case for the past 20 years, when a child is born to Palestinian parents in either Gaza or the West Bank, a Palestinian Authority clerk reports the birth to Israel, which adds her to the Palestinian population registry according to numbers it has pre-approved for Palestinian births. When a Palestinian resident of either

Gaza or the West Bank dies, a Palestinian Authority clerk reports the death to Israel, which then removes that person from the registry.¹⁰² When a Palestinian importer from Gaza or the West Bank buys a washing machine from Germany, the customs tax is collected by Israel at the rate it sets and (at least eventually) turned over to the Palestinian Authority, which uses it to fund services in Gaza and the West Bank. Israel is careful not

Today, as has been the case for the past 20 years, when a child is born to Palestinian parents in either Gaza or the West Bank, a Palestinian Authority clerk reports the birth to Israel, which adds her to the Palestinian population registry according to numbers it has pre-approved for Palestinian births

to repudiate the recognition of Gaza and the West Bank as a single territorial unit and continues to engage in a U.S.-brokered peace process based on establishing a Palestinian state in Gaza and the West Bank, a move that assures continued and generous financial support from the United States and significant additional diplomatic benefits from other countries, including close ties to the European Union.¹⁰³ Thus Israel continues to benefit from its recognition of Gaza and the West Bank as a single territorial unit.

International recognition of the Palestinian-ness of Gaza and the West Bank

Israel is not alone in its recognition. While there are divergent views regarding whether Gaza and

100. For a discussion of the binding nature of unilateral declarations by states, see *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, at 457, available at tinyurl.com/ojlaopj (last visited Mar. 26, 2015); *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, at 253, available at tinyurl.com/ob6qkmy (last visited Mar. 26, 2015). The court notes: "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration" (p. 267). The court goes on to note that the binding nature of such declarations applies to those not party to the circumstances in which they were made: "... interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected" (p. 268).

101. Disengaged Occupiers, *supra* note 50, 50–54; Human Rights Watch, *Forget About Him, He's Not Here: Israel's Control of Palestinian Residency in the West Bank and Gaza* (2012), available at tinyurl.com/osrjsgw (last visited Mar. 27, 2015) ("HRW, Forget About Him").

102. Examples on file with the authors.

103. See for example Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the State of Israel, of the Other Part, L. 147/3 Official Journal of the European Communities (Jun. 21, 2000), available at tinyurl.com/nomxel6 (last visited Mar. 22, 2015).

the West Bank meet the requirements for statehood, there is international consensus that they constitute Palestinian territory, or the territory in which Palestinians are to exercise their right to self-determination. The International Court of Justice has recognized the Palestinian right to self-determination and implied that such a right would be realized in the territory occupied in 1967, including the West Bank, east Jerusalem and the Gaza Strip, which it refers to as the “Occupied Palestinian Territory”.¹⁰⁴ While declining to recognize the existence of a Palestinian state, the UN Security Council has repeatedly passed resolutions affirming the Israeli-Palestinian peace process, including its provisions for ending the occupation of Gaza and the West Bank and establishing a Palestinian state there.¹⁰⁵ A 2009 resolution affirmed that “the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state”.¹⁰⁶ The UN General Assembly affirmed the “territorial unity, contiguity, and integrity of all of the OPT”¹⁰⁷ in 2007 and in 2012 voted to accept “Palestine” as a non-member observer state, affirming the right of the Palestinian people to self-determination “in the Palestinian territory occupied since 1967”.¹⁰⁸ The international recognition of Gaza and the West Bank as Palestinian territory arises from these resolutions. Numerous countries have affirmed the territorial unity of Gaza and the West Bank, including the United States.¹⁰⁹ Whatever legal status Gaza and the West Bank enjoy – they are considered Palestinian.



The Kerem Shalom Crossing between Gaza and Israel has become Gaza's sole commercial crossing. March 2015

The Palestinian Factional Split

Does the Palestinian factional split affect the integrity of Gaza and the West Bank? Since 2007, rival Palestinian factions, Hamas and Fatah, have exercised internal control over Gaza and the West Bank respectively. We suggest that the factional split does not negate the Palestinian position regarding the one-ness of the territory but rather represents an internal power struggle over control of that territory. First, the PLO is still recognized as the representative of the Palestinian people, and the PLO is the party to whom Israel committed to recognize the unity of the Palestinian territory. Second, both factions, Hamas and Fatah, continue to operate in Gaza and the West Bank and declare their intention to reconcile, most recently with the creation of a consensus government.¹¹⁰ Third, the Palestinian Authority, as the agent or buffer between Israel and individuals living in Gaza and the West Bank, continues to operate in Gaza

104. Wall Opinion, *supra* note 72. Para. 77 of the opinion, for example, refers to Gaza and the West Bank as “occupied Palestinian Territory”, and para. 118 recognizes the Palestinian right to self-determination.

105. See G.A. Res. 1850, U.N. SCOR, U.N. Doc. S/RES/1850 (2008); G.A. Res. 1515, U.N. SCOR, U.N. Doc S/RES/1515 (2003); G.A. Res. 1403, U.N. SCOR, U.N. Doc S/RES/1403 (2002); G.A. Res. 1397, U.N. SCOR, U.N. Doc S/RES/1397 (2002); available at tinyurl.com/ovl795d (last visited Mar. 27, 2015).

106. S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009).

107. G.A. Res. 62/146, U.N. GAOR, 62nd Sess., U.N. Doc. A/Res/62/146 (Dec. 18, 2007).

108. GA Resolution 67/19, *supra* note 93. The resolution was passed following individual recognitions by a majority of UN member states of the “State of Palestine”. While statehood is not directly at issue here, it is worthwhile to note that the recognition was based on a declaration by the PLO that Gaza and the West Bank, including east Jerusalem, are the territorial location of the Palestinian state. See for example PLO Negotiations Office, Recognizing the Palestinian State on the 1967 Border & Admission of Palestine and a Full Member of the United Nations (July 2011), available at tinyurl.com/3g4z78n (last visited Mar. 27, 2015).

109. A 1997 customs notice regarding marking Palestinian goods in the U.S. Federal Register notes that “The Department of State further advised that it considers the West Bank and Gaza Strip to be one area for political, economic, legal and other purposes”. TD 97–16 Country of Origin Marking of Products From the West Bank and Gaza, 62(50) Fed. Reg. 12,269 (Mar. 14, 1997), available at tinyurl.com/porvhhy (last visited Mar. 27, 2015). See also the entry for “Palestine” in the European Commission trade section, referring to “the continuing occupation”, available at tinyurl.com/qznq7se (last visited Apr. 2, 2015).

110. The consensus government is purported to govern both Gaza and the West Bank, but at the time of publication, the Fatah-controlled Palestinian Authority continues to exercise governmental and security functions in the West Bank, while the Hamas government continues to control Gaza.

as an intermediary between its residents and the Israeli military and to coordinate access between Gaza and the West Bank. Israel requires that almost every request from Palestinians seeking to travel between Gaza and the West Bank be submitted via the Palestinian Authority, which collects them from individuals and forwards them to Israeli military officials.

That is not to say that the Palestinian factional split does not exacerbate the fragmentation of the Palestinian territory – it does. Since 2007, government institutions have been duplicated, with Hamas operating ministries in Gaza and Fatah operating ministries in the West Bank, the legal system has been split, with precedent in Gaza not recognized in the West Bank after June 2007 and vice versa, and various quasi-legislative orders have created inconsistent “laws” in each part of the territory.¹¹¹ Institutional fragmentation reinforces the geographic, social, familial and economic fragmentation.

Palestinian residents

If Gaza and the West Bank are the territory in which Palestinians enjoy the right to freedom of movement, who should be considered a Palestinian resident, for purposes of enjoying that right?

The right to freedom of movement depends on a person being “lawfully present within a country” and protects his or her right to enter “his own country”.¹¹² The Human Rights Committee has determined that the phrase “own country” is broader than formal nationality and applies to “an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien”.¹¹³ Yet Israel treats Palestinians whose addresses it lists in Gaza as well as Palestinians not listed

in its population registry as foreigners with respect to the right to enter and remain in the West Bank.

Here we might look, at the very least, to the arrangements to which Israel agreed to in Oslo Accords regarding the Palestinian population registry. The agreement gave Israel veto power over new entries to the registry (other than minor children of registered residents) while giving the PA authority to introduce other changes (such as personal status and changes of address), so long as it notified Israel.¹¹⁴ From this we might conclude that Israel's recognition of Gaza and the West Bank as a single territorial unit included recognition of the

Since 2007, government institutions have been duplicated, with Hamas operating ministries in Gaza and Fatah operating ministries in the West Bank, the legal system has been split, with precedent in Gaza not recognized in the West Bank after June 2007 and vice versa

residency of those listed in the population registry and their offspring in that territorial unit but did not necessarily include recognizing the residence of other Palestinians, including those born in the West Bank or Gaza, who were not listed in the Israeli-controlled population registry.¹¹⁵ At the very least, then, Israel's recognition of Gaza and the West Bank as a single territorial unit includes recognition of the residence there of those listed in the Palestinian population registry it controls, who can in no way be considered “a mere alien” with respect to the right to enter the West Bank.¹¹⁶ We would therefore argue that, at the very least, Palestinians holding Israeli-approved ID cards have been recognized by Israel as residing in the

111. Palestinian Centre for Human Rights, 2013 Annual Report 74–79 (2013), available at tinyurl.com/o6ce8jr (last visited Mar. 21, 2015).

112. ICCPR, *supra* note 35, Art. 12.

113. Human Rights Committee, General Comment 27, Freedom of Movement (Art.12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 20.

114. “Interim Agreement,” *supra* note 89, Annex C, Civil Affairs, Art. 28. See also Restrictions and Removal, *supra* note 13; HRW, Forget About Him, *supra* note 101.

115. The registry was created by Israel in 1967 based on a census of those in the area at the time. Significantly, it did not include those who fled the fighting or were simply away from home at the time. HRW, Forget About Him, *supra* note 101, 17–19. In addition, between 1967 and 1994, Israel removed 240,000 people from the population registry, because they traveled or did not re-register. HaMoked, “Ceased Residency”: Between 1967 and 1994 Israel Revoked the Residency of Some Quarter Million Palestinians from the West Bank and the Gaza Strip, at tinyurl.com/o5fc6mq (Jun. 12, 2012).

116. The international recognition of Gaza and the West Bank as a single territorial unit is not restricted to those listed in the Palestinian population registry, although a discussion of who else might be considered Palestinian for purposes of enjoying free movement in Gaza and the West Bank is beyond the scope of this position paper.

territorial unit of the West Bank and Gaza and have the right to enter either the West Bank or Gaza, irrespective of where Israel lists their addresses.

C. Palestinians' right to pursue economic, social and cultural development

The restrictions that Israel imposes on movement between Gaza and the West Bank undermine Palestinians' human rights not only by compromising the freedom of movement and related rights of individual residents of the Palestinian territory, as discussed above, but also by depriving Palestinians of their right to pursue common social, economic and cultural endeavors. The separation policy has had devastating consequences for Palestinians' collective interests, threatening to unravel the fabric of communal life in the Palestinian territory and to stunt development.

Right freely to pursue economic, social and cultural development

In order to safeguard and promote human rights, international human rights law intervenes not only in the relations between states and individual persons under their control, but also in the relations between States and groups of people in territory within state jurisdiction (i.e. in territory over which the state has de facto control).¹¹⁷ Groups constituting a people are afforded particular protection. In fact, the very first section of the first article common to both 1966 International

Covenants on Human Rights recognizes that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹¹⁸

The right of self-determination is given such prominent place in the conventions because of the understanding that individual human rights cannot genuinely be exercised when the collective to which the individual right holders belong is subjugated and oppressed by a state power.¹¹⁹ The right to self-determination shared by the members of the people thus underpins their individual rights.¹²⁰

The right establishes a corresponding duty on the part of states to allow the members of a people subject to state control to realize self-determination and certainly to refrain from preventing them from doing so. In situations of occupation, this obligation is limited by the contrasting right and indeed duty of the occupying power to administer the occupied territory in place of the ousted sovereign. Nevertheless, within those inherent limits, an occupying power must allow the people of the occupied territory the maximum possible expression of the right to free exercise of self-determination and is enjoined not to forcibly deny them that right.¹²¹

Literature addressing the provision of Common Article 1(1) of the human rights conventions is predominantly focused on its political dimension, namely on the right of peoples "freely [to] determine their political status".¹²² For present purposes, attention will instead be focused on the

117. See for example James Crawford, *The Rights of Peoples* 164 (1988), stating that "the primary impact of [the right to self-determination of peoples] is against the government of the State in question, and one of its main effects is to internationalize key aspects of the relationship between the people concerned and that State". For detailed discussion of the meaning of the term "jurisdiction" for the purpose of human right treaties, see *Extraterritorial Application of Human Right Treaties*, *supra* note 53, Chapt. 2, in particular 52–53.

118. Art. 1(1) common to the ICCPR and ICESCR, *supra* notes 32 and 35 respectively ("Common Article 1(1)").

119. "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights", Human Rights Committee, General Comment 12, Art. 1 (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

120. See James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in *People's Rights* 7, 21 (Philip Alston ed., 2001) ("Crawford, Right of Self-Determination"). The plain language of Common Article 1(1) suggests that the people, as a group, hold the right. However, there are those who insist that it is conceptually wrong to maintain that a group as such can be the bearer of a human right, because "only human beings have human rights". On this view, only the individual members of the group have rights, not the group as an independent entity. See Jack Donnelly, *Universal Human Rights in Theory & Practice*, 25 and Chapt. 12 (2nd ed., 2003) ("*Universal Human Rights in Theory & Practice*"). An interpretation of Common Article 1(1) that may serve to overcome this objection is one that takes group rights, such as the right of self-determination, to be rights that the individuals forming the group possess together, while none of them possesses them singly. See Peter Jones, *Human Rights, Group Rights and People's Rights* 80 (1999); Peter Jones, *Groups and Human Rights*, in *Human Rights: The Hard Questions* 100–14 (Cindy Holder and David Reidy eds., 2013).

121. See Antonio Cassese, *International Law* 62 (2nd ed., 2005).

122. The political dimension of the right to self-determination consists of a right of the people to be independent and free of interference by outside States (the external aspect of the right) or by the State in whose jurisdiction the people is located (the internal aspect). See for example *Self-Determination of Peoples*, *supra* note 69, 5.

latter part of the provision recognizing peoples' conjunctive right "freely to pursue their economic, social and cultural development".¹²³ This implies that states wielding control over a people – such as occupying powers – must allow the members of the people in question to pursue their common economic, social and cultural development. Such obligation applies in addition to and independently of any obligations that may exist with respect to facilitating the political autonomy of the people in question.¹²⁴ Whereas political autonomy is, unavoidably and by definition, constrained in situations of occupation, the same is not true of the economic, social and cultural dimensions of self-determination which the occupying power can and should allow the occupied population to pursue to the fullest extent possible and without undue intervention.

Respect for the right of members of a people jointly to pursue such communal enterprises overlaps considerably with the effective realization of individual rights that they possess.¹²⁵ Thus, failure to respect the former will inevitably compromise individual rights such as freedom of association¹²⁶ and the right to take part in cultural life.¹²⁷ Conversely, when a state acts in violation of individual rights it may, in so doing, also undermine the right to pursue collective endeavors. For example, a people's capacity to pursue its economic, social and cultural development is likely to be compromised when the members of the group are denied access to educational opportunities in their community in violation of their individual right to education.¹²⁸ Similarly, when a state



Women selling embroidery at an exhibition in Gaza. Marketing to the West Bank and Israel is blocked. March 2013

acts in violation of its duty to secure and protect the family rights of the individual members of a group constituting a people,¹²⁹ including, in particular, their right to maintain family contacts, it may thereby contribute to an erosion of familial ties that bind them together as a people and facilitate their collective social development. Violation of the right to work held by individual members of a group constituting a people,¹³⁰ such that they are prevented from working with fellow group members or in endeavors associated with the group, could likewise undermine the group's ability to pursue its economic development.

At a more general level, the right to self-determination, and particularly the right freely to pursue economic, social and cultural development, is intimately linked to the right to development that has been recognized to be an inalienable human right of "every human person and all peoples".¹³¹

123. Common Article 1 of the conventions also recognizes peoples' rights freely to dispose of their natural wealth and resources and not to be deprived of their own means of subsistence. These aspects of the right to self-determination are not explored here.

124. The Canadian Supreme Court's judgment in relation to the secession of Quebec is instructive on this point. See Reference re: Secession of Quebec, DLR 161 (1998) 4th Series, para. 126.

125. See Universal Human Rights in Theory & Practice, *supra* note 120, 222.

126. ICCPR, *supra* note 35, Art. 22.

127. ICESCR, *supra* note 32, Art. 15(1). See also ICCPR, *supra* note 35, Art. 27; Laura Reidel, What are Cultural Rights? Protecting Groups with Individual Rights, 9 Journal of Human Rights 65 (2010).

128. The right to education includes a freedom to pursue an education without undue interference by the State in an educational institution of one's choice and guarantees the autonomy of educational institutions. See ICESCR, *supra* note 32, Art. 13(3) and Art. 13(4). See also Manfred Nowak, The Right to Education, in Economic Social and Cultural Rights: A Textbook 197–98 (Asbjørn Eide, Catarina Krause and Allan Rosas eds., 1995).

129. Rights protected, *inter alia*, in ICCPR, *supra* note 35, Art. 17 and Art. 23(1), and in ICESCR, *supra* note 32, Art 10(1).

130. ICESCR, *supra* note 32, Art. 6(1).

131. Art. 1.1 of the UN General Assembly's 1986 Declaration on the Right to Development (GAR 41/128) establishes that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Art. 1.2 thereto provides that "The human right to development also implies the full realization of the right of peoples to self-determination...". G.A. Res. 41/128, U.N. GAOR, U.N. Doc. A/RES/41/128 (1986).

These examples of complementarity and inter-reliance notwithstanding, a peoples' right of self-determination will at times also contrast with other rights and interests, such as those of groups and individuals who are not part of the people in question. Indeed, even while couched in absolute terms in the provision of Common Article 1(1), the right of self-determination – including the right to pursue economic, social and cultural development – ought to be restricted when and to the extent necessary to attain an equitable balance with competing rights and interests.¹³² Accordingly, it would be justified to impose restrictions limiting the capacity of members of a people jointly to pursue their collective economic, social and cultural development, when necessary and to the minimal extent required in order to preserve the vital interests of others, such as their security, and to safeguard their individual human rights.¹³³ However, such restrictions would be permissible only if the harm they prevent is sufficiently significant as to merit infringement of a right as weighty as the right to self-determination, not to mention all the other rights that may be at stake, such as economic, social and cultural rights and the right to development.

Application to Gaza and the West Bank

The fragmentation of the Palestinian territory caused by the separation policy prevents Palestinian residents of Gaza and the West Bank from pursuing common social, economic and cultural endeavors, thereby affecting a rupture within Palestinian society.

As noted above,¹³⁴ the harmful effects of the forced separation have included, inter alia, violating individual human rights by fracturing the Palestinian education system and civil society, severing family contacts and

disrupting employment opportunities, commerce and contacts crucially needed for the development of a unified Palestinian economy.¹³⁵ Our contention here is that in so doing Israel also violates its duty to respect the right of the Palestinian residents of the Palestinian territory freely to pursue their economic, social and cultural development.

Palestinian runners from Gaza who wished to partake in the joint Palestinian event were denied the requisite permit by the Israeli military authorities

A particularly revealing example of such violation occurred when Palestinians sought to celebrate freedom of movement – to which they are entitled, but which they are so often denied – and organized the Palestine Marathon held under the banner “right to movement” and symbolically taking place along the route of the separation barrier in the West Bank. Palestinian runners from Gaza who wished to partake in the joint Palestinian event were denied the requisite permit by the Israeli military authorities. The request for a permit was submitted by the Palestinian Authority, which sponsored the marathon. One of these runners, a former Palestinian Olympian who had been invited to participate in the marathon by the Palestinian Olympic Committee, petitioned the Israeli High Court of Justice, but the court upheld the decision to prevent him from participating in the event with his fellow nationals.¹³⁶ This decision, which the authorities based on the separation policy, clearly undermined the individual rights of the runners who were prevented from participating in the marathon even while there was no indication or contention that their

132. See for example *Self-Determination of Peoples*, *supra* note 69, 53–54.

133. See *Self-Determination in Relation to Individual Human Rights, Democracy and The Protection of the Environment*, Conference Report, Unrepresented Nations and Peoples Organization International, Conference held in The Hague, The Netherlands, January 22–23, 1993, Rapporteurs: Manon Olsthoorn and Gerry Simpson, Published by UNPO, The Hague, 1993 [UNPO] GA/1993/CR/1, available at tinyurl.com/nhzn7h5 (last visited Mar. 21, 2015).

134. *Supra* at p. 5.

135. For elaboration on the harmful effect of the separation policy on the Palestinian economy see *A Costly Divide*, *supra* note 1.

136. H.C. 2486/14, Masri v. Defense Minister (unpublished, decided Jul. 4, 2014).

participation would have posed any security or other threat. But beyond the violation of the rights of individual runners, it also undermined the right that Palestinians hold as a group to engage in joint social and cultural enterprises involving participants from both parts of the Palestinian territory.¹³⁷

The right of the Palestinian people to self-determination on the Palestinian territory that came under Israeli occupation in 1967 has been affirmed repeatedly in resolutions of the General Assembly of the United Nations

The argument that Israel has violated its obligation to respect Palestinians' right to pursue such joint enterprises rests on two propositions: first, that the Palestinians constitute a people for the purposes of international law and are acknowledged to have a right to self-determination within the Palestinian territory; and second, that there are no sufficiently weighty counter considerations that justify the restrictions.

Palestinians are a people

Determining whether a group constitutes a "people" for the purpose of the right of self-determination can pose a significant challenge for the implementation of the right, as a clear and authoritative legal definition of the term is yet to be established.¹³⁸ However, no such problem arises in the case of the Palestinians whose status as a people with a right to self-determination is

overwhelmingly accepted both in legal doctrine and in diplomatic practice, as is the view that the territorial ambit of the right is in the Palestinian territory.¹³⁹

The right of the Palestinian people to self-determination on the Palestinian territory that came under Israeli occupation in 1967 has been affirmed repeatedly in resolutions of the General Assembly of the United Nations.¹⁴⁰ It has also been confirmed by the ICJ, which has observed that 'the existence of a "Palestinian people" is no longer in issue' and that '[s]uch existence has moreover been recognized by Israel', and noting further that the rights of the Palestinian people include the right to self-determination.¹⁴¹ Like the UN General Assembly, the ICJ evidently accepts that the territorial sphere in which the Palestinian people is entitled to exercise this right is the Palestinian territory, encompassing both Gaza and the West Bank.¹⁴² This means that Palestinian residents of Gaza and the West Bank should be allowed to pursue economic, social and cultural endeavors that shape their communal life without undue intervention by the Israeli authorities.

The restrictions are not justified by security

The forced disconnect that the Israeli authorities have affected between the two parts of the Palestinian territory would be unlawful unless necessary to realize a worthy and sufficiently weighty purpose, such as safeguarding vital public interests or furthering human dignity. No such purpose is apparent.

As we have observed, official statements by the Israeli authorities have not provided a clear and consistent

137. For an extended analysis of this case see Eitan Diamond, *Mihutz Legeder Hashikulim: Zehuyot, Hovot Ve-Ekronot She-Lo Nilkehu Be-Heshbon Ba-Hahlata Limnoa Mi-Atzan Azati Le-Hishtatef Be-Maraton Phalestin [Left Out of Consideration: Rights, Obligations and Principles that were Not Taken into Consideration in the Decision to Prevent a Runner from Gaza from Participating in the Palestine Marathon]* (Hebrew), 28 *Mivzakei Hearot Psika, Hamishpat Ba-Reshet* 6 (2014) available at tinyurl.com/pgz9t85 (last visited Mar. 23, 2015).

138. See Crawford, *Right of Self-Determination*, *supra* note 120, at 18, noting that "people" has been considered a "radically indeterminate" notion.

139. See *Id.*, 14 (noting that the Palestinians are "recognized as having the right to self-determination in respect of the remaining (post-1949) territory of Palestine"). See also Virginia Tilley (ed.), *Beyond Occupation: Apartheid Colonialism and International Law in the Occupied Palestinian Territories* 28–36 (2012).

140. UN General Assembly Resolution 67/19 of 29 November 2012 "Reaffirms the right of the Palestinian people to self-determination... on the Palestinian territory occupied since 1967", *supra* note 93. Other relevant UN General Assembly resolutions include, *inter alia*, G.A. Res. 3236 (XXIX), U.N. GAOR, U.N. Doc. A/RES/3236 (1974); G.A. Res. 43/176, U.N. GAOR, U.N. Doc. A/RES/43/176 (1988); G.A. Res. 58/292, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/292 (2004).

G.A. Res. 66/146, U.N. GAOR, 66th Sess., U.N. Doc. A/RES/66/146 (2011).

141. See *Wall Opinion*, *supra* note 72, para. 118.

142. See *Id.*, paras. 115–22. See also Jean-François Gareau, *Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 18 *Leiden J. Int'l L.* 489, 509–12 (2005). See also *supra* at p. 21.

articulation of the objective of the separation policy, saying only that the policy serves mostly unspecified “political-security” goals.¹⁴³ In many cases, the security goals do not meet the specific and concrete requirements that would justify the restrictions, and the political goals are simply not objectives that international human rights law sanctions as justification for violating right to pursue joint enterprises across the Palestinian territory.

To be sure, Israel has a right and indeed a duty to restrict movement between Gaza and the West Bank when and to the extent necessary and appropriate to protect itself, its population and the protected persons residing in the occupied territory from security threats as well as other threats to the public interest. However, the restrictions imposed as part of the separation policy are too extensive to be justified on such grounds. As already noted, the separation policy establishes a general prohibition on the movement of people between the two parts of the Palestinian territory as well as comprehensive restrictions on the movement of goods from Gaza to Israel and, to a lesser extent today, to the West Bank. Such wholesale restrictions extend over and beyond any legitimate need there may be to respond to specific threats to security.

As for the political goals that have been alluded to, these have been described in such vague terms that it is difficult to decipher what they are. There are, however, troubling indications that, far from constituting a worthy purpose that might justify infringement of Palestinians’ rights, the political goal that is being sought is itself unlawful.

For one thing, some official statements indicate that the separation policy is designed in part to pressure Hamas and undermine public support for it by

imposing harsh conditions of life in Gaza that compare unfavorably to conditions existing in the West Bank.¹⁴⁴ The infliction of harm on all civilians residing in Gaza as well as the disruption of common endeavors across the two parts of the Palestinian territory are thus not inadvertent side effects but rather the intended outcome of the separation policy. Hundreds of thousands of people are intentionally made to suffer in order to pressure or punish the Hamas authorities in Gaza. Such instrumentalization of people who are subject to Israeli control and in relation to whom Israel has corresponding responsibilities amounts to a breach of Israel’s obligations under international law, in particular the prohibition on collective punishment established in Article 33 of the Fourth Geneva Convention of 1949.¹⁴⁵

Hundreds of thousands of people are intentionally made to suffer in order to pressure or punish the Hamas authorities in Gaza

Moreover and as aforementioned, the separation policy is pursued in the context of an overarching political goal of ensuring a Jewish majority in areas over which Israel intends to maintain control, including parts of the West Bank, in clear contradiction with Israel’s duties under the law of occupation. A policy that limits the ability of Palestinians to travel to and/or remain in the West Bank serves this goal by limiting the expansion of the Palestinian population in the West Bank or even reducing it by inducing Palestinians from the West Bank to move to Gaza (because only there can they reunite with family members) or forcing them to do so (by refusing to record their change in address and then removing them from the West Bank because their addresses are listed in Gaza).¹⁴⁶ ■

143. See *supra* at p. 5, 8; List of References, *supra* note 8.

144. List of References, *supra* note 17.

145. Art. 33 of the Fourth Geneva Convention applies in relation to all people protected by the convention. Art. 4 thereto clarifies that such protected persons include both residents of occupied territory and other persons who find themselves in the hands of a party to an armed conflict with whom their State does not have diplomatic relations. The Palestinian residents of Gaza and the West Bank are protected persons in this sense in their relations with Israel. See discussion on the applicability of the law of occupation *supra*, at p. 9.

146. See *supra* p. 7.



Children from Gaza get a rare permit to participate in a music summer camp in the West Bank. July 2012

This position paper is written at a dynamic time in the implementation of the separation policy. Since the end of the 2014 wide-scale military operation, Israel has expanded the flow of goods into and out of Gaza and to a lesser extent has expanded travel via Erez Crossing for short-term purposes.¹⁴⁷ Senior military officials, including the defense minister and the outgoing army chief of staff, have said that they view economic development in Gaza as promoting stability and ultimately security for Israelis.¹⁴⁸

And yet the changes thus far remain minor, and the restrictions that prevent long-term ties between Gaza and the West Bank – travel bans for students and family members seeking to reunite, for example – remain unchanged. We therefore offer recommendations that, in Gisha's view, would bring Israel's policies into conformity with its international law obligations and would be immensely beneficial for both Palestinian and Israeli societies. Gisha asks the government of Israel to:

1. End the "separation policy". Allow Palestinians to travel between Gaza and the West Bank, subject to appropriate procedures for individual security screenings prior to entry into Israel.
2. Allow the transfer of goods between Gaza, the West Bank and Israel, subject to inspections and logistical arrangements that balance between security needs and commercial viability.

As an Israeli organization, Gisha does not advocate before the Palestinian authorities, but we note that the ongoing factional split is exacerbating the fragmentation created by the separation policy. We therefore remind the Palestinian authorities of their responsibilities to the residents of Gaza and the West Bank whose lives are gravely impacted by their political dispute. ■

147. 2014 Summary, *supra* note 21.

148. Amos Harel, Outgoing IDF Chief Gantz: Now is the Time to Offer Gazans Hope, Haaretz, Oct. 3, 2014, available at tinyurl.com/q3nukgx; Yinon Magal and Amir Buhbut, Ya'alon: Occupy Gaza? We'd Still be Bringing Back Soldiers in Coffins (Hebrew), Walla!, Oct. 15, 2014, at tinyurl.com/jwq6kr4.

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