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10 Years 10 Judgments

How Israel's courts sanctioned
the closure of Gaza

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Introduction

In the ten years that have passed since Israel tightened its closure on the Gaza Strip, Israeli courts have heard hundreds of petitions filed by Gaza residents and human rights organizations. These petitions challenged numerous aspects of Israel's policies in relation to Gaza, the organizing principle of which has been severe restrictions on movement of people and goods into and out of the Strip. Most of the petitions were dismissed by the court without judgment, but several interesting and significant judgments were handed down over the years on the legal status of Gaza residents and their relationship with Israel, relating to Israel's policies regarding movement and access. These judgments went generally unnoticed by the Israeli public at large. To a certain extent, they were also overlooked by the legal community itself, as the legal discourse on Gaza since the implementation of the "disengagement plan" in 2005 has tended to revolve around whether or not Gaza can still be considered occupied by Israel, rather than the question of Gaza residents' legal status and rights.

The following compilation of jurisprudence by the Israeli

court system is meant to acquaint readers with the principles established by the courts with respect to the rights and legal status of Gaza residents. A review of the jurisprudence presented here reveals that these principles are based almost entirely on the legal positions presented to the court by the state of Israel. The collection is intended to serve as a practical and informative tool of research for academics and other individuals working on issues related to Gaza, or on other issues that raise similar questions and dilemmas. To this end, Gisha has provided synopses and analyses of each of the ten judgments, given over the past ten years of Gaza's closure.

The judgments presented in this document have been chosen by Gisha due to their importance in terms of the critical impact they have had on the scope and depth of Israel's access policy, and as a result, their influence on the lives of Gaza's two million residents. They paint a bleak picture, one in which Palestinians in Gaza have virtually no clear legal status in the post-disengagement era and no specific system of law that applies to them, that as such, would grant them rights. The judgments indicate clearly that the courts in Israel, led by the High Court of Justice, have accepted the state's legal positions almost unquestioningly, and upheld the decisions it has made in relation to residents of Gaza. In so doing, the courts sanctioned severe violations of Gaza residents' fundamental rights, primarily, the right to freedom of movement.

Though there are several systems of law that could provide a basis for the legal discussion of the rights of Gaza's residents,

the courts chose repeatedly to highlight how “unique” the circumstances are, a singularity that seemingly suggests these circumstances are located outside the realm of law. Hence, for instance, in the first significant judgment issued after the disengagement (Hamdan, 2007), the court noted that the circumstances in the Gaza Strip were “unique” and that “the law, therefore, is not at the core of the matter,” and that it was preferable to look for “practical” solutions for the issue at hand, rather than making clear judicial rulings.

The understanding of the circumstances in Gaza as “unique” and therefore precluding legal adjudication, may have informed the High Court’s tendency to accept the state’s position, almost blindly, while limiting itself to mild recommendations that have no impact on the judgment’s outcome. In that regard, for instance, the High Court accepted Israel’s policy of separation between Gaza and the West Bank (HaMoked: Center for the Defence of the Individual, 2012), despite the severe harm it causes to Palestinians in both parts of the territory. As a side note, the court recommended that the state mitigate some of the restrictions included in the procedure for relocation from Gaza to the West Bank. As might have been expected, in the time since the judgment was given, Israel’s separation policy has only worsened; relocation from the Gaza Strip to the West Bank is virtually impossible.

As a matter of course, the court in Israel has discussed Gaza’s legal status post-disengagement. The state held that the disengagement spelled the end of Israel’s occupation of Gaza,



and the High Court adopted this position in its judgment in the case of al Bassiouni (2008), ruling that since the occupation had ended, the laws of occupation no longer apply to Gaza in their entirety. The court ruled that Israel only bore humanitarian obligations toward Gaza residents, partly due to its control over the crossings. The High Court failed to identify the sources for these obligations under international law.

A reading of this collection of judgments reveals that abandoning a clear system of law in favor of a vague humanitarian rhetoric framework has given the state unlimited discretion, leaving Gaza residents exposed to an exceedingly flimsy basis for the protection of their human rights.

One particularly interesting question arising from these judgments is that of the legal status of Gaza residents, as distinct from Gaza itself, in the eyes of Israel. In the Anbar case (2009), the High Court adopted the state's position, ruling that Gaza residents were foreign nationals for all intents and purposes and had no vested right to enter Israel. The High Court later adopted the state's contradictory position in the case of A. (2011), whereby residents of Gaza were not ordinary foreign nationals but "special" foreign nationals who come under special law. A reading of this judgment shows that the adjusted definition of Gaza residents' legal status was again intended to serve Israeli interests and provide residents with minimal protection.

International law – the laws of belligerent occupation and human rights law – is almost entirely absent from all ten of the

judgments included in this collection, as well as many others. Though the petitioners often referred to obligations arising from international law which they believe still apply to Israel's treatment of Gaza residents, the courts persistently ignored this branch of law. In fact, based on the High Court's early rulings on the status of Gaza residents as foreign nationals, giving Israel extensive discretion on how to treat them, Israel's legal system does not recognize the fundamental rights of Gaza residents to date, despite the fact that the realization of these rights depends entirely on Israel.

This outcome is incongruous with Israel's continuous control over countless aspects of life in Gaza. Certainly, the physical disengagement from Gaza in 2005 and the tightening of the closure two years later did not lead to the removal of Israel's control over the Strip. On the contrary, the extent of Israel's control has only increased in recent years. Where such control should have led to comprehensive legal responsibility toward Gaza residents, Israel has been nearly absolved of all such obligations by the workings of its own legal system.

The analysis drawn from these judgments indicates the court's inclination to provide unmitigated approval for the actions of the state when it comes to Gaza, supplying ample cover for Israel's violation of human rights. Given this conclusion, one might question the wisdom of continuing to employ litigation in those same courts. Indeed, this issue has been continuously deliberated on by the human rights community in Israel.

Despite Israel's vast influence on their day-to-day lives,

residents of Gaza have no means of direct representation in Israel's parliament and little other recourse for engaging Israeli authorities directly. In this sense, courts in Israel serve in many ways as the only platform from which residents of Gaza can challenge the policies that impact their lives, and from which Israeli human rights organization can demand accountability for the state's actions.

Petitions to the court can function as requests for individual remedy or, absent all other means, as a form of objecting to de-facto policy. Litigation compels the state, through its legal representation, to stand before the court, and with it the court of public opinion, and provide explanations for its actions. In some instances, the state prefers not to defend its decisions and avoid legal critique, thus opting to make available the remedy sought by the petitioners before a case is heard in court. In litigation based on the Freedom of Information Act, the state has been forced to release information that would have otherwise remained concealed from the public eye. In addition to the documentation that emerges in FOIA proceedings, state submissions, hearing protocols, and eventually the judgments that are handed down also provide records for posterity. It is in this spirit that we provide the following collection of judgments, many of them published for the first time in translation to English, and our accompanying analysis, so that our readers can judge the state of affairs for themselves.

Analysis of Judgments

HCJ 11120/05 Asma Mahmoud Hamdan et al. v. GOC Southern Command et al. (August 7, 2007)

Synopsis:

In December 2005, Gisha petitioned the High Court of Justice along with ten occupational therapy students from the Gaza Strip against the state's refusal to allow the students to travel through Israel for the purpose of attending university in the West Bank. The state had denied their request outright, arguing that students constitute a particular risk group. During the proceedings, the court issued an order nisi, ordering the state to explain its refusal, but dismissed the petition in August 2007, after hearing the state's arguments. The court ruled that Israel's policy on travel from Gaza, on which the refusal was based, was justified given the current security conditions, despite the fact that it was based on a blanket ban rather than an examination of individual applications.

Analysis:

Hamdan is one of the first judgments on an issue of principle concerning the Gaza Strip after Israel's implementation of the disengagement plan from Gaza. As such, it lays out the principles for legal intervention (or lack thereof) in Israel's policy toward Gaza residents. The judgment illustrates how the court adopted the state's position almost completely, avoiding deliberation over the status of the Strip and its residents and circumventing the question of Israel's obligations toward them. This judicial stance led the court to uphold a blanket ban, imposed to this day, on travel from Gaza to the West Bank for higher education. Gisha holds that this ban is extremely injurious and violates Gaza residents' rights to freedom of movement and access to education, employment and opportunities. The ban undermines the recognition that the West Bank and the Gaza Strip form a single territorial unit, established in the Oslo Accords, impeding the ability of Palestinians from both parts of the Palestinian territory to maintain the cultural, social and economic ties between them.



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Though the parties presented their positions on Gaza's legal status post-disengagement, the court avoided discussing the issue and ruling on it, holding instead that: "The law is not the focus of the circumstances, which are unique, sui generis in the full sense of the term, and therefore call for more practical and creative solutions than for a legal discussion on shifting sands. Even if profound questions of international law could be

analyzed in these unusual conditions, it is not necessary to do so at this time.” The court added that “it would be a mistake to give a “full” judicial decision regarding Israel’s legal situation vis-à-vis Gaza at this time, given the fluidity of the situation,” and that preference should be given to “the lowest common denominator of looking for opportunities to lend a hand in the humanitarian field, using a pragmatic approach rather than a literal one.”

The expressed preference of “practical and creative solutions” over judicial deliberation that would result in the formation of binding legal norms creates substantive problems. It generates ambiguity and lack of clarity regarding Israel’s obligations toward residents of the Gaza Strip, resulting in a normative vacuum, where Israel can treat Gaza residents entirely as it pleases, without having to justify its actions. In reality, rather than leading to a positive, compassionate attitude toward Gaza residents, adopting a “pragmatic approach rather than a literal one” has done nothing but legitimize Israel’s injurious policy on movement.

The judgment demonstrates the court’s complete acceptance of the state’s position that the security situation at the time precluded the possibility of conducting individual examination of applications made by students from Gaza, and therefore, travel by students to the West Bank via Israel should be denied wholesale. Justice Rubinstein noted that inasmuch as “avenues for individual screening may be explored, it would be appropriate and helpful” for the state to do so. He suggested that the state consider instituting “an exceptions committee,” which would examine individual cases that have “positive human ramifications.” He also expressed sorrow over the students’ predicament, adding that “in a better world [...] individual screening is the tool that yields a more

just result.” However, these remarks were voiced merely as recommendations, with no impact on the judgment’s outcome.

» *Full translation of the judgment.*

For further reading, see:

- Gisha, [Limitations on Access to Higher Education for Palestinian Students](#), December 2006.
- Gisha, [The Impact of the Separation between the Gaza Strip and the West Bank on Higher Education](#), May 2010.
- Gisha, [Legal framework: Higher Education – Rights and Obligations under International and Israeli Law](#) , May 2010.
- Gisha, [Student travel from Gaza to the West Bank 101](#), September 2012.

HCJ 9132/07 Jaber al-Bassiouni et 11 al. v. Prime Minister (January 30, 2008)

Synopsis:

In September 2007, Israel decided to deliberately decrease the amount of electricity and fuel supplied to the Strip. It had already been imposing severe restrictions on travel into and out of Gaza following Hamas's takeover in June that year. Together with two residents of Gaza and nine Israeli and Palestinian human rights organizations, Gisha filed a petition against Israel's decision to decrease the supply of fuel and electricity. In the judgment, which is considered the central and most important judgment on the question of the legal status of Gaza following Israel's withdrawal of its physical presence from the Strip, the court held that Israel's occupation of the Gaza Strip had ended, and therefore, the laws of occupation, as a whole, cease to apply. However, the court did rule that Israel bears "humanitarian obligations" toward Gaza residents, arising from the state of war between Hamas and Israel, the extent of Israel's control over Gaza's border crossings, and the dependence of the population on commodities from Israel created during the many years of direct rule. Given all this, the court found that Israel was obligated to supply fuel and electricity to the Gaza Strip to a degree that meets the essential humanitarian needs of its residents.

Analysis:

The judgment given in the al-Bassiouni case was the first to discuss the question of Gaza's legal status after the implementation of the disengagement plan in August 2005. The court adopted the state's position, ruling that without effective control over what transpires in Gaza, the Strip is no longer under Israeli occupation. This finding, subsequently quoted in

many judgments, remains in effect to this day, ten years after the tightening of the closure of Gaza and despite Israel's direct and continuous control over countless aspects of life there.

Like much of the international community (international organizations, tribunals, states, human rights organizations and jurists), Gisha objects to the court's finding and believes that Israel still exerts control over the lives of Gaza residents to a significant degree. The legal test for gauging effective control does not necessarily rely only on physical control, but rather is based on an assessment of the state's ability to exercise governmental authorities over a foreign territory. Israel clearly has the power to exercise governmental powers in Gaza at any given moment and to the extent it chooses. This is evidenced, in part, in the frequent military operations and other incursions during which Israeli military forces enter the Strip. Israel's ongoing control over Gaza's border crossings, its sea and air space, infrastructure, customs and value added tax rates, and the Palestinian population registry all serve as indications of its enduring occupation of the Strip.

In *al-Bassiouni*, the court also held that although the laws of belligerent occupation do not apply in their entirety to Israel's relationship with the Gaza Strip, Israel does bear "humanitarian obligations." It did not, however, explain the legal source for these obligations or determine whether they stem solely from the laws of war, or also the laws of belligerent occupation, human rights law or post-occupation law. Nor did the court specify Israel's actual obligations, their scope, or the state's responsibility to fulfill these obligations during times of relative calm and during states of emergency. Although the court did, in the case of *al-Bassiouni*, clarify that these obligations meant Israel must continue to supply electricity and fuel to Gaza in a manner that met residents' essential humanitarian needs, the



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question of how these obligations are to be implemented in other circumstances remains unclear.

The legal ambiguity generated by the court in al-Bassiouni led the state to formulate an extremely injurious policy toward Gaza residents, only allowing them to enter Israel or receive goods for purposes defined by Israel as “exceptional humanitarian needs.” Israel has given the term “humanitarian obligations” an exceedingly narrow interpretation, which was unfortunately perpetuated by the courts in the dozens

of petitions that followed al-Bassiouni. This has severely curtailed the legal protection Gaza residents are rightfully entitled to in light of Israel’s pervasive control over their lives.

» *Full translation of the judgment.*

For further reading, see:

- Gisha, [Briefing: Israeli High Court Decision Authorizing Fuel and Electricity Cuts to Gaza](#), January 2008.
- Gisha, [Scale of Control: Israel’s Continued Responsibility in the Gaza Strip](#), November 2011.
- Gisha, [50 Shades of Control](#), June 2017.

HCJ 1169/09 The Legal Forum for the Land of Israel v. The Prime Minister et al. (June 15, 2009)

Synopsis:

In 2009, the Legal Forum for the Land of Israel petitioned the court against the implementation of a decision by the Israeli government to transport 175 million ILS in cash (almost 50 million USD) through its territory, from banks in the West Bank to the Gaza Strip. The petitioner argued that accommodating the transfer of these funds, which comprised the salaries of Palestinian Authority employees in Gaza, was tantamount to funding terrorism and was therefore prohibited under Israeli law. The court dismissed the petition, ruling that the law was not intended to apply to government actions the purpose of which was “to serve the public interest in Israel in the broad sense, and to uphold Israel’s obligation to the residents of the area on the humanitarian level, in the context of international law.”

Analysis:

This is an important judgment on an issue of principle, addressing Israel’s legal obligation under international humanitarian law to supply the essential needs of Gaza residents even after the implementation of the disengagement plan. The court emphasized Israel’s clear and unquestionable obligation to assist Gaza residents on a humanitarian level, adding that “although the Gaza Strip is currently controlled by the Hamas movement, which was declared a terrorist organization, civilians reside there who need essential services to maintain reasonable and humane quality and standard of living. Israel is required to provide assistance that would allow meeting the basic needs of the local population, without which they will not

be met.” The court goes on to say: “The innocent population living in the Gaza Strip cannot remain disconnected from means of subsistence and basic lines of supply which are required for life in dignity. Where securing such means requires Israel’s cooperation, the government is entitled, sometimes obligated, by virtue of its responsibility, to assist in transferring them to their destination.”

Though Israel’s obligation to see to the humanitarian needs of Gaza residents was established in the al-Bassiouni judgment, this judgment elaborates further on this obligation, ruling that it includes the accommodation of monetary transactions. According to the court, the obligation to ensure basic means of subsistence for Gaza’s civilian population includes the transfer of funds for remuneration of Palestinian Authority employees, a necessary component for the proper functioning of Gaza’s economy. The court’s findings also indicate that Israel’s obligations stem not only from its control over the ability to transfer funds between the West Bank and the Gaza Strip, but also from the dependence of Gaza residents on Israel’s facilitation. This obligation is not diminished by the security situation or the fact that the de-facto government in the Gaza Strip has been defined as a terrorist organization.

Notably, this judgment and the important ethical statements contained within



The obligation to ensure basic means of subsistence for Gaza’s civilian population includes the transfer of funds for remuneration of Palestinian Authority employees, a necessary component for the proper functioning of Gaza’s economy



it stand in isolation amidst a litany of other judgments rendered by the court on the status of Gaza residents and Israel's obligations toward them, both before and after this judgment was given. As this report illustrates, in many other cases the court ruled in keeping with the state's position, holding that Gaza residents are foreign nationals for all intents and purposes, and that Israel's obligations towards them come down to humanitarian assistance, and nothing more. Conversely, if the transfer of funds for salary payments was recognized in this judgment as a humanitarian issue, it is unclear why other types of activities were not recognized as humanitarian, such as travel to the West Bank for marriage (HCJ 2088/10), entry into Israel for urgent medical treatment (HCJ 5429/07), or visiting a relative incarcerated in Israel (HCJ 5268/08). Accordingly, the positive judgment discussed in this case is inconsistent with the many other judgments that sanctioned injurious policies employed by Israel toward Gaza residents.

» *Full translation of the judgment.*

For further reading, see:

- [COGAT, Coordination procedure for the transfer of cash between the Palestinian Authority territories and Israel or overseas \(Hebrew\), April 2015.](#)

HCJ 5268/08 Anbar et al. v. GOC Southern Command (December 9, 2009)

Synopsis:

In 2008, Gisha petitioned the court together with several Israeli and Palestinian human rights organizations and private individuals from Gaza, in order to revoke the state's blanket ban on the entry of Gaza residents to Israel for the purpose of visiting incarcerated relatives. The ban was introduced when Hamas came to power in June 2007, and made official following a decision passed by the Security Cabinet in September 2007. The court dismissed the petition, ruling that the state had a right to institute a sweeping prohibition, preventing all Gaza residents from entering Israel for the purpose of prison visits. The reasoning presented in the judgment was that residents of Gaza were foreign nationals living in a hostile entity, and that visiting imprisoned relatives did not constitute humanitarian grounds for entry into Israel.

Analysis:

In the Anbar judgment, the court gave a legal seal of approval to a policy that instituted a sweeping prohibition on travel from Gaza to Israel for prison visits. In accordance with the al-Bassiouni judgment, the court ruled that entry into Israel for the purpose of prison visits was not a humanitarian need. The court further ruled that Gaza residents are foreign nationals who have no legal right to enter Israel. After Hamas seized power over the Strip, Palestinians in Gaza were classified as residents of a "hostile entity" or "enemy entity," which further weakened their legal status and rights vis-à-vis the State of Israel.

Like it had in other cases, the court accepted that Israel exerts

wide-ranging discretion in issues pertaining to its security and politics, and stated it would not intervene other than in exceptional cases. The court reiterated the judgment given in the case of al-Bassiouni, holding that the laws of belligerent occupation no longer applied to the Gaza Strip. The court also ruled that Israel's obligations toward the civilian population of Gaza had changed in both substance and scope after the disengagement plan was implemented, but refrained from explaining what the current obligations were, or provide their legal source. The legal implication of this is that no clear, instructive judicial ruling exists as to what kinds of policy choices Israel may or may not make vis-à-vis Gaza residents.

As argued by Gisha and fellow human rights organizations, the blanket ban on Gaza residents visiting their relatives incarcerated in Israel constitutes a violation of residents' right to family life. The ban also constitutes unlawful and forbidden collective punishment

of the entire population of the Gaza Strip. Given that Israel has chosen to imprison Palestinian residents within its own territory, it is obligated under international law to enable routine visits from relatives residing in the Palestinian territory. These provisions remain binding even after the implementation of the disengagement plan and the military withdrawal from Gaza.

Notably, despite the court's unconditional endorsement of Israel's policy on prison visits by Gaza residents, Israel changed its policy in 2012 and reinstated prison visits under restrictive conditions. At the time of publication, a weekly quota of up to 50 residents of Gaza is allowed to enter Israel to visit



No clear, instructive judicial ruling exists as to what kinds of policy choices Israel may or may not make vis-à-vis Gaza residents



incarcerated first-degree relatives. The procedure governing this matter explicitly states that the residents' entry into Israel is enabled "as part of the international conventions to which Israel is signatory." In court, the state's position was in direct opposition to this principle, as Israel claimed it was not obligated to permit prison visits under international law and that it held exclusive discretion in the matter.

» *Full translation of the judgment.*

For further reading, see:

- Coordinator of Government Activity in the Territories (COGAT), [Exit procedure from the Gaza Strip for families of prisoners imprisoned in Israel](#) (Hebrew), October 2014.
- Gisha, [Application by Gaza resident to see her imprisoned son repeatedly denied with no explanation, then finally approved with Gisha's intervention](#), March 2015.

HCJ 9329/10 Anonymous v. Minister of Defense et al. (March 8, 2011)

Synopsis:

In 2010, Gisha filed a petition on behalf of a resident of Gaza who was forbidden by Israel to return to his home in the Strip after entering Israel with a valid permit. Gisha argued that the decision violated the resident's right to freedom of movement and the universal right to return to one's home. The state justified the prohibition, claiming that it was instituted for reasons pertaining to his personal safety and national security. According to the state, the petitioner, like all Gaza residents, was not an "ordinary tourist" visiting Israel, nor was he a "protected person" under the laws of belligerent occupation, and therefore, it had the power to hold him on its soil. The High Court accepted the state's position, ruling that the foreignness of Gaza residents was "unique," and thus, that Israel could limit them from returning to their homes in Gaza.

Analysis:

This judgment illustrates the depth of Israel's control over Gaza residents post-disengagement. It implies that Israel has the authority to hold Gaza residents in its territory without trial and prohibit them from returning home, revealing the frailty of their legal status in Israel, where the law offers them no legal protection from the violation of their rights. This judgment gives rise to the interesting question of which system of law applies to the circumstances described in the petition: (1) the laws of belligerent occupation, (2) the laws of war, or (3) human rights law. The answer to this question is critical, since each of these legal frameworks imposes different obligations on the state, and offers corresponding protections to the petitioner.

As for the laws of belligerent occupation, the state argued that they did not apply since Israel's effective control over the Strip had ended with the implementation of the disengagement plan in 2005. Human rights law was rejected because according to



The High Court adopted the state's position, finding that Gaza residents are "unique" foreign nationals; not entitled to the protections offered under the laws of belligerent occupation or international human rights law



Israel, it is superseded by the laws of war, which constitute "lex specialis" (special law in a situation of armed conflict, which trumps general human rights law). Israel maintained that only the laws of war continue to apply to its relationship with residents of Gaza and all of its actions toward them, given that they are nationals of a belligerent party in an ongoing, armed conflict with Israel. Apparently the laws of war also apply to Israel's actions within its territory, both in times of relative calm and during combat operations. As to whether or not Gaza residents are "foreign nationals," a claim made

by the state in the past, in its response to the petition the state claimed that Gaza residents are not "ordinary tourists" and therefore special arrangements had been established with respect to their movement and ability to return home.

The High Court adopted the state's position, finding that Gaza residents are "unique" foreign nationals, who are therefore not entitled to the protections offered under the laws of belligerent occupation, or under international human rights law. Though this position is rife with legal flaws, and though Israel did not specify what obligations toward Gaza residents it bears in such a "unique" framework, the court accepted it wholeheartedly. It held that: "Indeed, residents of Judea and Samaria, and most

certainly residents of Gaza, may be considered ‘foreigners’ as far as Israel is concerned [...] but this is a foreignness that is ‘sui generis,’ unique, and therefore it is not identical to the foreignness of ‘ordinary’ tourists.”

The judgment illustrates that when Israel is called upon to justify the imposition of restrictive measures on Gaza residents, classifying them as foreign nationals becomes an obstacle, and hence, a different classification for their legal status is offered, in this case, that of “unique” foreign residents. The intentional ambiguity surrounding the legal status of Gaza residents allows Israel a great deal of flexibility. When it suits its purposes, it refers to them as foreign nationals, hence denying them any rights; while for other purposes they are referred to as “unique,” a classification used as justification for the continuous control over their lives and restriction of their freedom of movement. Unfortunately, by adopting the state’s position without addressing the issues it raises or considering Gaza residents’ human rights, the court only preserved this ambiguity.

» *Full translation of the judgment.*

For further reading, see:

- [HCJFH 2493/11 A. v. Minister of Defense, May, 2011.](#)

AP 2744/09 Gisha v. Ministry of Defense (March 22, 2011)

Synopsis:

In 2009, Gisha petitioned the Tel Aviv District Court, demanding that the Ministry of Defense disclose several documents, particularly a document entitled Food consumption in the Gaza Strip – Red Lines. The documents in question guided Israel's policy of restricting the entry of food items into the Gaza Strip, which was implemented between 2007 and 2010. The court accepted Gisha's petition and ordered the disclosure of the documents after deliberating on the Freedom of Information Act and the public interest in the documents' exposure, even if it pertains to residents of Gaza. Though some of the documents were revealed in 2010, the state filed an appeal regarding the release of the "Red Lines" document. The appeal was dismissed by the Supreme Court (AAA 3300/11), and in October 2012, following three and a half years of an intense legal battle, Gisha received the document. It contained detailed charts of food consumption in the Gaza Strip arranged by type of food, weight and nutritional value. According to the document, Israel had determined that Gaza residents need no more than 2,279 calories per day, on average. Calculations made by the authors of the document found that 106 trucks entering Gaza every day during the work week would suffice in order to supply residents with the "daily humanitarian portion," which includes basic food, medicine, medical equipment, hygiene products and agricultural inputs.

Analysis:

When Hamas took control of the Gaza Strip and Israel tightened the closure, a number of punitive measures were enforced against Gaza's residents collectively. The official and declared

purpose of these measures was “economic warfare,” aimed at making life difficult for residents and mounting pressure on the Hamas regime. Along with extremely severe restrictions on travel of people into and out of the Strip, Israel also imposed restrictions on the entry of goods into Gaza, including limiting the types of food allowed to enter.

Though this policy was overtly pursued, its exact provisions were concealed from the Israeli and Palestinian public. Following Gisha’s extensive legal advocacy, which included two legal actions based on the Freedom of Information Act, the documents and charts detailing the policy were made accessible to the public. The lists uncovered included, for example, the prohibition on the entrance of seasoned hummus, fresh meat, and cilantro into the Strip. The “Red Lines” document revealed Israel had calculated the “humanitarian minimum” required by Gaza residents for sheer survival.

During the legal proceedings, Israel claimed the document was only a draft presented in internal discussions, and as such, need not be exposed. It also argued that this was sensitive material pertaining to the transport of goods into Gaza and that it was doubtful whether there was any public interest in disclosing it. The court ruled, inter alia, that aside from the right to information itself, and the need for transparency in governmental action, the document also touched on the issue of public health or safety, as it pertained to the minimal amount of food required by the public in Gaza. The court ruled that even if Gaza residents are not part of the “public” to which the Freedom of Information Act refers, revealing information relating to them



The official and declared purpose of the punitive measures collectively enforced against Gaza’s residents was “economic warfare”



is an interest of the public in Israel.

Following the Mavi Marmara flotilla incident in May 2010, Israel altered its policy toward Gaza residents, and no longer imposes direct restrictions on the entry of food into the Strip. The public campaign and legal advocacy led by Gisha brought Israel to the realization that it cannot, from a legal and moral standpoint, restrict food consumption in Gaza. Israel still imposes various restrictions on the entry of goods into Gaza by setting strict technical requirements and charging high fees for the entrance of trucks, and by broadly defining many goods as “dual-use.” Today, only one commercial crossing between Gaza and Israel is active, Kerem Shalom, and though it has the capacity to let 1,000 trucks through per day, only 500 to 700 travel through it daily.

» *Full translation of the judgment.*

Or further reading, see:

- Ministry of Defense, [“Food consumption in the Gaza Strip – Red Lines,”](#) (Unofficial translation to English by Gisha), 2008.
- Aeyal Gross & Tamar Feldman, [“We Didn’t Want to Hear the Word ‘Calories’”: Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure,”](#) *Berkeley Journal of International Law*, Vol 33(2), 379-441, 2015.
- Gisha, [The dual use list finally gets published but it’s the opposite of useful](#), April 2017. OR – Gisha, [Dark-gray lists](#), January 2016.

AAA 4620/11 Umayma Qishawi v. Minister of Interior (August 7, 2012)

Synopsis:

In 2011, Gisha filed a petition together with six Muslim women from Gaza against Israel's decision to deny entry into Israel for religious worship in Jerusalem on the holiday marking the birth of the Prophet Mohammed. The petition argued that the decision went against Israel's obligation to respect residents' freedom of movement and freedom of religious worship; constituting wrongful discrimination of the petitioners as compared to Gaza's Christian community, whose members do receive permits to travel for religious worship in Israel. The petition was dismissed by the District Court, and the appeal was dismissed by the Supreme Court, who ruled that Israel's policy on travel, which denies Muslims exit from Gaza for religious worship, was reasonable and legitimate.

Analysis:

As it has in countless other judgments, the court adopted the state's position on this matter without criticism and hardly any deliberation, while making four legal findings: (1) Gaza residents are classified as foreign nationals, and as such, have no vested right to enter Israel. Concomitantly, Israel holds broad discretion to decide who among them can enter its territory and who is barred from doing so. (2) Israel's policy regarding movement by Gaza residents is legitimate, and is justly restricted to the most exceptional humanitarian cases. (3) Exercising freedom of religious worship is not in and of itself a "humanitarian need," and does not adequately justify the issuance of travel permits to Palestinians from Gaza to Israel. (4) Issuing permits for Christian residents of Gaza to enter Israel for religious worship and barring Muslims from doing so does not constitute

wrongful discrimination, since the state's obligation to the principle of equality in these circumstances is questionable. This, "all the more so when nationals of an enemy state are concerned." The court added that the differences between Muslims and Christians in Gaza were relevant to the matter at hand.

Gisha maintains that these findings are erroneous, both factually and in terms of the law. Firstly, given the great degree of control wielded by Israel over Gaza residents, they should not and cannot be classified as foreign nationals, but rather as people still living under Israeli occupation to a great degree. The legal status of Gaza's residents compels Israel to respect their rights to freedom of movement and freedom of religious worship and to allow them to travel out of Gaza to the fullest extent possible, subject to specific security constraints. Secondly, Israel's policy on travel is illegitimate, since the criteria it sets forth for travel are arbitrary and extremely restrictive.

Moreover, Israel's actual travel policy is not limited strictly to "humanitarian" needs, as was found by the court: The document listing the criteria for eligibility for submitting permit applications also includes participation in conferences and seminars, business meetings, athletic competitions, visa interviews, excursions into Israel, and more. Even if Israel's policy would have been, in fact, limited travel to the barest of humanitarian needs, exercising freedom of religious worship may very well be considered an essential humanitarian



Given the great degree of control wielded by Israel over Gaza residents, they should not be classified as foreign nationals, but rather as people still living under occupation to a great degree



necessity. Lastly, given the legal status of Gaza's residents, and in the absence of individual security concerns, there is no justification for the distinction between Gaza residents based on their religion.

Several years after the judgment was given, and despite the complete adoption of the state's position by the court, Israel added travel for Friday prayers at al-Aqsa Mosque in Jerusalem to the list of criteria. This denotes some sense of an internalization by Israel of the fact that religious worship does constitute a vital need, shared by Gaza's Christian and Muslim residents alike. Nonetheless, the fact that the court dismissed the vast majority of petitions filed by Gaza residents against Israel's policy, as seen in the Qishawi case, sent a clear message to Israel that it can pursue whatever course of action it sees fit with respect to Gaza residents. This can explain the decision to suspend all permits for prayers at al-Aqsa in late 2016, still in effect to this day.

» *Full translation of the judgment.*

For further reading, see:

- COGAT, [Procedure for the exit of Gaza Strip residents to Temple Mount prayers on Fridays \(Hebrew\)](#), February 2015.
- Gisha, [Update: Friday prayers at al-Aqsa Mosque cancelled for Gaza residents](#), December 2016.

HCJ 495/12 Azza Izzat et al. v. Minister of Defense (September 24, 2012)

Synopsis:

Five years after the Hamdan judgment was rendered, where students attempted to exit Gaza for academic studies in the West Bank (see above), Gisha again raised the issue of access to education before the High Court, together with the Palestinian human rights organization, Al Mezan. The petition was filed on behalf of five women from Gaza, including four between the ages of 37 and 49, who had begun postgraduate studies at Birzeit University in the West Bank prior to 2000, and had been re-admitted to the university in 2012 to complete degrees they hadn't completed because of the ban on travel of students in 2000. The state refused to grant the women exit permits, in light of its ongoing, blanket ban on travel of Gaza residents to the West Bank for the purpose of academic studies. The High Court chose to address the issue of principle that arose from the petition, and an uncharacteristic disagreement between the justices ensued. Justice Rubinstein (who wrote the majority's opinion in Hamdan) thought the petition should be accepted, but Justices Naor and Zylbertal ruled it should be dismissed, and that Israel's policy of denying travel of Palestinian students from Gaza to the West Bank should remain intact.

Analysis:

The judgment given in the case of Izzat stands out among judgments rendered by the High Court on matters pertaining to Gaza residents. For the first time since the implementation of the disengagement plan, the justices were in disagreement over Israel's policy on the movement of Gaza residents. Uncharacteristically, the court reviewed the justifications for the policy on their merits, and considered whether it was just,

reasonable, and suited to the daily reality of life in Gaza. The question at the heart of the discussion was whether Israel's criteria for allowing Gaza residents to travel were sufficient and appropriate; or whether the state should be forced to establish an "exceptions committee" to individually examine applications made by Gaza residents for travel via Israel, even if they do not meet its existing criteria.

Justice Rubinstein believed the moment had come to establish such a committee, given the time that had elapsed since the restrictive policy was instituted, and in light of the fact that over the years, Israel had expanded the list of criteria under which Gaza residents would be permitted to enter Israel. In Rubinstein's opinion, the gradual expansion of the policy, which stood in contradiction to official statements to the effect that travel was permitted only in "exceptional humanitarian cases," expressed a recognition of Gaza residents' entitlement to enter Israel in a larger range of cases. Rubinstein added that Israel's relationship with the Strip was not "normal," but rather "complex and unique," and that since allowing more freedom of movement would have "positive human implications," the state should be compelled to individually review applications such as those submitted by the petitioners for travel to universities in the West Bank.

Conversely, Justice Naor and Justice Zylbertal repeated the court's earlier findings that Gaza residents should be classified like any other foreign national, that Israel's access policy is legitimate, and that as a rule, the court should refrain from intervening in it. They sanctioned Israel's "separation policy" regarding the West Bank and the Gaza



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Strip, despite it being based not only on security interests, but also on foreign policy and other external considerations. Following on this position, the two justices rejected the notion of an “exceptions committee,” arguing that the state was not able to individually review student applications in the current security climate. They also reiterated the notion that education should not be considered a humanitarian need, adding only that should Israel be interested in doing so, it could allow Gaza residents to exit the Strip for non-humanitarian needs as well.

Gisha opposes the majority opinion in this judgment, and maintains that residents of Gaza cannot be considered as holding equal status to that of any other foreign national; the state’s policy governing entry of Gaza residents to Israel must be predicated on recognition of Israel’s obligations under international law toward a population that is still under its control and largely dependent on its discretion. Israel is compelled by these obligations to establish a policy that respects Palestinians’ right to freedom of movement, and does not discriminate among them on the basis of immaterial considerations. Subject to individual security examinations, such a policy should allow travel for all residents of Gaza and grant them passage, at the very least to the West Bank, an inextricable part of the Palestinian territory.

» *Full translation of the judgment.*

For further reading, see:

- Gisha, [Legal framework: Higher Education – Rights and Obligations under International and Israeli Law](#) , May 2010.
- Gisha, [Student travel from Gaza to the West Bank 101](#), September 2012.
- Gisha, [Press Release: Supreme Court upholds refusal to allow students to travel from Gaza to the West Bank](#), September 2012.

HCJ 2088/10 HaMoked: Center for the Defence of the Individual et 12 al. v. Military Commander of the West Bank (May 24, 2012)

Synopsis:

In 2010, Gisha and 12 other human rights organizations petitioned against a procedure that prohibits Gaza residents from moving to the West Bank for the purpose of “settlement” there, other than in exceedingly rare and exceptional cases. One of the provisions included in the procedure is that family ties (marriage included) do not constitute a “humanitarian ground” qualifying an individual for a permit to “settle” in the West Bank. The petition contended that the procedure should be revoked as it is unlawful and unreasonable, given it stands in violation of the rights of residents in both areas to freedom of movement and family life. Justice Dorit Beinisch, who was the president of the Supreme Court at the time, dismissed the petition, holding that there was no cause for intervention in the restrictive policy instituted in the procedure. This, subject to a number of comments on the proper implementation of the procedure.

Analysis:

This judgment effectively sanctioned Israel’s “separation policy,” aimed at separating between residents of Gaza and the West Bank and preventing movement between the two areas. The court’s approval of this procedure legitimized the practice of tearing families apart, and drives the wedge between the two parts of the Palestinian territory ever deeper, damaging social, cultural, and economic ties.

In this instance too, the legal sources that inform the framework of legal discussion over Israel’s obligations toward the Strip



This judgment effectively sanctioned Israel’s “separation policy,” aimed at separating between residents of Gaza and the West Bank and preventing movement between the two areas



remained vague. The court noted that it believed Israel no longer had effective control over the Gaza Strip, but held that there was no need to elaborate on “the scope of the obligations and the source of the rights” of Gaza’s residents.

The court, once again, dismissed the petition in full, declining to intervene in the state’s policy. Remarks made in the judgment do, however, display dissatisfaction with the procedure’s provisions. For instance, the court

criticized the narrow criteria set out in the procedure, which largely preclude the possibility of anyone qualifying to apply, let alone receive a “settlement” permit. The court noted that, “a restrictive approach was employed in selecting them [the criteria, – Gisha], which in certain circumstances, is overly rigid,” adding that “it is possible and appropriate to apply these exceptions [in the procedure, – Gisha] in a manner that would allow these groups to maintain contact with their first degree relatives.” Unfortunately, these remarks and points of criticism were voiced as obiter dicta, an expression which is outside of the main ruling and which the state is not obligated to fulfill.

The judgment reflects the High Court’s tendency to avoid intervening in Israel’s policies of regulating the movement of Gaza residents. Though the petition pertained to movement of Palestinians between the two parts of the Palestinian territory, rather than entry of Gaza residents to Israel, the court did not hold a significant legal discussion on the matter, simply citing previous judgments where petitions on other issues had been dismissed. Hence, the lack of meaningful intervention in the past supports the decision to withhold intervention in the

present, propagating a bleak legal reality, as well as a flawed moral one.

» *Full translation of the judgment.*

For further reading:

- COGAT, [Procedure for handling applications by Gaza Strip residents for settlement in the Judea and Samaria Area \(Unofficial translation to English by Gisha\)](#), last updated July 2013.
- Gisha, [Separating Land, Separating People](#), June 2015.

HCJ 4047/13 Nijmeh Hadri et 12 al. v. Prime Minister et 2 al. (June 14, 2015)

Synopsis:

In 2013, HaMoked: Center for the Defence of the Individual and 12 Palestinian residents filed a petition against an Israeli government resolution from 2008 that denied Gaza residents (and persons registered as Gaza residents) from entering Israel for the purpose of residing there following marriage (“family unification”). The petition was rejected by then president of the Supreme Court, Miriam Naor, who held that the blanket ban and lack of individual review of family unification applications were justified considering security conditions in the Gaza Strip. The court further ruled that applying the ban to Palestinians who live in the West Bank but are registered as Gaza residents was legitimate, as was the retroactive application of the ban beginning in 2007.

Analysis:

The “Citizenship and Entry into Israel Law (Temporary Order) – 2003” severely impedes the ability of Palestinian spouses of Israeli citizens to live in Israel. The law empowers the minister of interior to deny a Palestinian who marries an Israeli citizen what is referred to as a “stay permit” if the Palestinian or a member of his/her family are under a ‘security block.’ The Israeli court found this provision constitutional in its ruling in HCJ 7052/03 Adalah v. Minister of Interior, IsrSC 61(2) 202 (2006). The law further provides that a permit can be denied if the applicant’s place of residence is considered “dangerous,” which was approved by the court as constitutional in HCJ 466/07 Galon v. Attorney General, IsrSC 65(2) 44 (2012). In 2008, the government published a resolution according to which, for the purposes of this specific provision in the law, the Gaza Strip

is a dangerous place, and therefore no application for family unification made by people living in or registered as residents of Gaza should be accepted. The Hadri petition sought the revocation of this resolution.

The court upheld this injurious resolution in its judgment, without providing any reasoning or holding an in-depth legal discussion of the necessary balance between Israel's national security needs, on the one hand, and the constitutional and universal right of Israelis and Palestinians to family life, on the other. With this ruling, the court eliminated any possibility of Palestinians living in and/or registered in Gaza to live with their spouses holding Israeli citizenship, in Israel. Gisha maintains that Israel is obligated to protect and uphold the right to family life, under both Israeli constitutional law and under the law of belligerent occupation, which continue to apply due to Israel's control over Gaza.

The judicial findings in this judgment raise both factual and legal questions. For instance, the court accepted the state's position that individually assessing the risk posed by each and every person applying for family unification was not possible, given security conditions. This finding is incongruent with the facts on the ground; in practice, Israeli authorities individually assess numerous applications submitted by Palestinians for entry permits for various purposes on a daily basis, indicating that individual assessments are, in fact, possible given the will to perform them. Moreover, this finding is a



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departure from the case law of the Supreme Court, whereby blanket bans that infringe on human rights cannot be accepted, and an examination of the particular circumstances of any case is warranted.

The court's ruling that the ban should be applied to residents whose registered address is in the Gaza Strip but have lived in the West Bank for years is particularly troublesome. Following another petition to the High Court, Israel agreed not to forcibly remove these residents to the Strip; but refused to change their official addresses, which would allow them to live in the West Bank lawfully and exercise their right to leave and return to the area. Blocking these residents' option of living in Israel with their spouses on the grounds that they are still "residents of Gaza" can be seen as double punishment. It also defies the security argument: If security conditions in Gaza are the reason why individual assessment of family unification applications made by its residents is impossible, then it should not apply to people who have lived in the West Bank for many years.

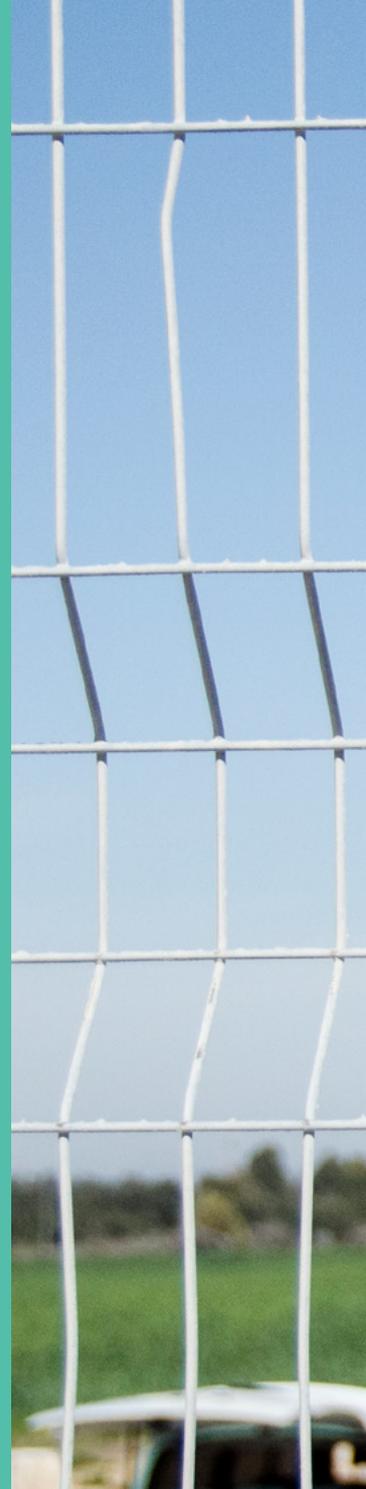
» *Full translation of the judgment.*

For further reading, see:

- [HCJ 7052/03 Adalah v. Minister of Interior, IsrSC 61\(2\) 202 \(2006\).](#)
- [Gisha and HaMoked, New Procedure – Israel bars Palestinians in Gaza from moving to West Bank, June 2009.](#)
- [Gisha, Factsheet: "Security blocks", December 2016.](#)
- [Gisha, Legal Update: In response to FOIA filed by Gisha, COGAT confirms: only one application processed under the "settlement procedure" in the past year, March 2017.](#)

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