

Sari Bashi*

Controlling Perimeters, Controlling Lives: Israel and Gaza

Abstract: This article analyzes the way in which the Israeli military exercises control over life in Gaza by regulating who and what may enter or leave. Using primary source documents obtained via the Freedom of Information Act proceedings, the article details a military bureaucracy that micro-manages requests to move people and goods through Gaza's crossings. For example, the transfer of chickpea paste requires approval from a senior military official holding the rank of major general, and soldiers evaluate the quality of care offered to an orphan by his or her surviving parent, as a condition of authorizing the child's passage to his parent's home. The article discusses the effects of such control on the lives of those inside Gaza, including their exercise of rights and their social and economic choices. It then explores the motivations behind the restrictions, relying on statements and actions by Israeli officials. The article extends the current literature on deliberately nonrational bureaucracies in the context of rule by a foreign power by showing how the Israeli military bureaucracy maintains some functions of control over the local population in Gaza, despite its withdrawal and dismantling of its military government. It concludes by noting that the effects of the travel restrictions and their purpose are relevant to the normative debate over their legitimacy and suggests areas for further research.

*Corresponding author: **Sari Bashi**, Gisha-Legal Center for Freedom of Movement, Co-founder and executive director of Gisha-Legal Center for Freedom of Movement, E-mail: sari@gisha.org.il

Introduction

Israeli control over historic Palestine/Land of Israel¹ has been undergoing continuous evolution since the founding of the State of Israel in 1948. The carving out of what is today internationally recognized as the state of Israel – the border

I present here my personal views, opinions and analysis and do not express the positions of Gisha-Legal Center for Freedom of Movement. All footnotes last visited June 2013.

1 The article refers to the area within the borders of the post-World War I British Mandate over Palestine.

in existence between 1949 and June 4, 1967 – was a result of an ethnic struggle over land, and the subsequent conquest of the West Bank and Gaza Strip represented a continuation of the struggle between two self-defined nationalities – Jews and Palestinians. In this struggle, the authorities of the Jewish State exercised control over the Palestinian population via what evolved into a civilian government² within the internationally-recognized borders of Israel (control over Palestinian citizens of Israel) and a military government in the territories captured in 1967 (control over Palestinian residents of Gaza and the West Bank).

The nature of such control varied in different parts of the territory captured in 1967: east Jerusalem, the West Bank³ (exclusive of east Jerusalem), and the Gaza Strip. Israel annexed east Jerusalem and imposed Israeli law there, granted Israeli residence to its Palestinian residents and eventually settled about 200,000 Jewish settlers in the area⁴; in the rest of the West Bank and in the Gaza Strip, Israel established military governments that functioned under the international law of belligerent occupation.⁵ Israel also built Jewish settlements and moved hundreds of thousands of its own citizens into the areas. That continues to be the case in the West Bank, where about 319,000 Jewish settlers live among 2.6 million Palestinians.⁶ In 2005, Israel removed its settlers and permanent ground troop presence from the Gaza Strip.

2 Until 1966, Arab citizens of Israel were subject to the authority of a military government that mediated their contact with civilian governmental offices and imposed restrictions on travel.

3 Because of the differences in the way east Jerusalem and the West Bank are governed, I discuss them separately, although east Jerusalem comprises part of the West Bank captured in 1967.

4 According to a 2010 survey, 195,500 Jews and 260,800 Arabs live in east Jerusalem. See JERUSALEM INSTITUTE FOR ISRAEL STUDIES, 42 JERUSALEM, FACTS AND TRENDS 2009–2010 11 (2010), available at <http://jiis.org/.upload/facts-2010-eng%20%281%29.pdf>.

5 For the status of Israel's military control of the West Bank and control over Gaza until 2005, I rely on the position stated by the Israeli Ministry of Justice since 1967, insisting on the law of belligerent occupation as the source of authority for Israel's military government. See, e.g. H.C.J. 7015/02 Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352 [2002] (Isr.), para. 13.

6 The figures relate to the West Bank, exclusive of east Jerusalem. See Israeli Central Bureau of Statistics, 63 STATISTICAL Y.B. ch. 2, table 6 (2012), available at http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_06x&CYear=2012; Palestinian Central Bureau of Statistics, 2012 Population Figures, available at <http://www.pcbs.gov.ps/site/881/default.aspx#Population>. Note that the data on Israeli settlers are from 2011, while the data for the Palestinian population are as of 2012. Israeli settler organizations claim that as of 2012, there are 350,000 Jewish settlers in the West Bank. See Hagai Huberman, *Haochlusia Hayehudit Bi'yosh Hichpila Atzma Me'az Protz 'Ha'Intefadeh Hashmia'*, 34 AMANA NEWSPAPER [in Hebrew], available at <http://www.amana.co.il/?CategoryID=291&ArticleID=503>.

While in the first decades of the occupation, it was not entirely clear what the fate of the West Bank and Gaza would be – whether they, too, would be annexed and whether Israel would take responsibility for the Palestinian residents living there – in 1993 Israel entered into a peace agreement with the Palestine Liberation Organization⁷ based on UN resolutions calling for a withdrawal from territories occupied in 1967⁸ and the gradual establishment of a Palestinian state in the Gaza Strip and the West Bank, with the future of east Jerusalem to be determined by the parties. Presumably, the parties were to divide historic Palestine/Land of Israel into two states, Israeli and Palestinian, where Israeli control over the people living in Gaza and the West Bank was to yield to Palestinian independence, while Israel would maintain control over the Jewish State, including its Palestinian minority. The fate of the Jewish settlers living in east Jerusalem, the West Bank, and Gaza and that of the Palestinian refugees wishing to return to their homes in what is now the State of Israel was not determined.

The Oslo Accords marked the culmination of an ideological shift in the framework of responsibility for the Palestinian population of Gaza and the West Bank. The Palestinian Authority (PA) was created, to which Israel delegated powers and responsibilities for the vast majority of the Palestinian population's civil affairs: health, welfare and education, civilian courts, police powers in designated areas, economic and cultural institutions, and much more. The Israeli interpretation of that change was to maintain the framework of the law of occupation so far, as it regulated the authority of the occupying power to take measures to protect security, but to transfer responsibility, including the financial cost, for the welfare of the civilian population to the fledgling PA, which in turn shifted the financial cost to foreign donors, comprised mostly Western governments.

Here, we can mark a paradigm shift. While at this time, Israel continued to claim the authority of an occupying power, it carved out geographical and subject-matter related boundaries over its responsibility for the rights and needs of Palestinian residents of the area of the occupied territories marked as Areas “A” and “B,” which corresponded to the Palestinian cities and towns where the PA had responsibility for civil affairs such as education, health, and other government functions.⁹ Geographical control continued, especially over

7 Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, *available at* <http://www.unhcr.org/refworld/docid/3de5e964.html>.

8 S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF/22/Rev.2 (1967); S.C. Res. 338, U.N. SCOR, 28th Sess., 1747th mtg. at 10, U.N. Doc. S/INF/29 (1973).

9 *See, e.g.* H.C.J. 6133/03 Abu Baker v. Defense Ministry (unpublished, Sept. 23, 2003), holding “the Petitioner must address his grievance to the [Palestinian – S.B] Authority rather than the State of Israel; the aforesaid Article 28 expressly states that powers and responsibilities in the sphere of population registry and documentation in the West Bank and Gaza Strip will be

perimeter areas: surrounding Area A; within Areas B and C; surrounding the Gaza Strip; and surrounding the West Bank (including all access routes between Gaza and the West Bank). However, Israel drew a distinction between control over land, for which it claimed the powers granted to an occupant under international humanitarian law and responsibility for the people living in that land. The latter, Israel claimed, belonged to the PA.¹⁰

With the collapse of the Oslo Accords and the outbreak of the Second Intifadeh in September 2000, Israel began a process of re-drawing borders, in some areas demarcating the borders of responsibility determined during the Oslo process with a physical, geographical imprint. In 2003, Israel began constructing a barrier that effectively annexed part of the West Bank by locating about 5,000,000 dunams of it (8.5% of the West Bank's land mass) on the "Israeli" side of the barrier.¹¹ These areas – now separated from the rest of the West Bank by fences and walls – included large Jewish settlement blocks and also Palestinian neighborhoods, villages, agricultural lands. Palestinian access to homes, farmland, and grazing areas on the "Israeli" side of the barrier was

transferred from the military government and its Civil Administration to the Palestinian side." Palestinian police do not have authorization to operate in Area B, which remains under full Israeli security control, in contrast to Area A, in which police functions were also transferred to the PA. Area "C," constituting about 60% of the West Bank, including all Jewish settlements, remains under full Israeli control.

10 See, e.g. State's Response, Oct. 17, 2006 in H.C.J. 8242/06 Salameh v. IDF Commander in the West Bank (Isr.) (unpublished, decided May 25, 2009) [hereinafter "*Salameh* case"], para. 20, available at www.gisha.org/UserFiles/File/LegalDocuments/SawsanSalameh/StateResponse18_10_2006.pdf. There, the State argued that "according to the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip signed between the State of Israel and the PLO, responsibility for education in the Region, as well as other civilian issues including the healthcare system, has been transferred to the PA. In these circumstances, the military commander does not have direct responsibility for the state of the education system in the Region." Of course, under the law of occupation, Israel is free to delegate responsibilities to the local authorities, so long as it retains overall responsibility for residents of the occupied territory, but the position taken by the Israeli government reflects unwillingness to assume responsibility in cases in which the PA fails to adequately address needs, accompanied by the claim that it is no longer responsible. In the above-mentioned *Salameh* case, the government of Israel declined to assume responsibility for the inability, first of its military government and then of the Palestinian Authority, to establish a doctoral program in the West Bank, by allowing a student in the West Bank to enter Israel for purpose of participation in an Israeli doctoral program to which she was accepted.

11 See B'TSELEM, THE SEPARATION BARRIER: STATISTICS, available at http://www.btselem.org/separation_barrier/statistics.

regulated by a permit regime,¹² and Palestinian access to Jewish settlements on both sides of the barrier remained limited to workers holding special permits.

A parallel but distinct process took place in Gaza. In 2005, Israel removed its permanent military presence and all settlements from the Gaza Strip, already separated from Israel by a fence built in 1995, and declared an end to the occupation. The military government in place since 1967 was abolished by decree, although jurisdiction over requests to move persons and goods into and out of Gaza remained in the hands of military officials.¹³ Although Israel continued to control access into and out of Gaza via the sea and air, and to a significantly lesser extent, via the border between Gaza and Egypt, it related to Gaza as a foreign and “hostile” territory,¹⁴ to which Israel owed no responsibilities other than those mandated by the law of armed conflict. At the same time, Israel continues to regulate the flow of people and goods into and out of Gaza, to control the Palestinian population registry common to Gaza and the West Bank (i.e. determining who is a resident of Gaza and may pass through its crossings), and to control the rate and collection of customs and value added tax on goods entering Gaza, the proceeds of which are used to fund public services.

I have elsewhere addressed the issue of occupation in both Gaza and the West Bank, in light of these changes, arguing that the law of occupation continues to apply, and that Israel owes obligations under the law of occupation in the spheres – geographical and subject-matter – in which it continues to exercise control.¹⁵ I have joined other scholars in making similar arguments regarding the application of human rights law to Israel’s actions *vis-à-vis*

12 See B’TSELEM, ACCESS DENIED: ISRAELI MEASURES TO DENY PALESTINIANS ACCESS TO LANDS AROUND SETTLEMENTS, SEPTEMBER 2008” [hereinafter Access Denied], available at http://www.btselem.org/sites/default/files2/publication/200809_access_denied_eng.pdf.

13 Formally, Israel declared the crossings between it and Gaza as border crossings, but then transferred jurisdiction for approving passage from Gaza to Israel from the Ministry of Interior to military officials working at the Gaza District Coordination Office. See Entrance to Israel Order (Exemptions for Residents of the Gaza Strip) (Interim Order) 2005 K.T. 6425, 1010. The order has been continuously renewed up to the present time.

14 ISRAELI MINISTRY OF FOREIGN AFFAIRS, GOVERNMENT COMMUNIQUÉS, SECURITY CABINET DECLARES GAZA HOSTILE TERRITORY, Sept. 19, 2007 [hereinafter, Cabinet Decision], available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle-+to+Peace/Hamas+war+against+Israel/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

15 See GISHA, SCALE OF CONTROL: CONTINUED ISRAELI RESPONSIBILITY IN GAZA, November 2011 [hereinafter Scale of Control], available at http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf. See also Sari Bashi & Kenneth Mann, *Shlita Viahrayut: Mamatda Hamishpati shel Ritzuat Aza Liahar “Hahitnatkut”* [Control and Responsibility: the Legal Status of Gaza after the “Disengagement”], 14 HAMISHPAT 35 (2010) [in Hebrew].

residents of Gaza.¹⁶ Here, I would like to explore how Israel's control over external borders affords it control over the lives of those living inside the perimeter. I locate the Israeli military bureaucracy controlling entry and exit to and from Gaza within the framework of existing research into bureaucracies in the colonial and occupation context. The innovation that I suggest is that in Gaza, Israel continues to exercise elements of bureaucratic control associated with colonial and military governments – not by direct administration but rather by control over who and what enters and leaves Gaza. Although this control is substantial, Israeli officials disavow responsibility for its effects on those living in Gaza.

In a previous article, Shenhav and Berda examine the colonial bureaucratic control applied by Israel's military government and find it to be quite the opposite of Weber's rational model of bureaucracy.¹⁷ Weber describes the ideal type bureaucracy as instrumental, rational, precise, predictable, coordinated, and well-organized. Shenhav and Berda find the bureaucratic control to be applied flexibly and secretly, via undisclosed rules applied with nearly untamed discretion. They also find that the bureaucracy applies different rules for different categories of people, based on a racialized view of Palestinians first and foremost as security threats. These features, they argue, are not flaws or dysfunctions but rather inherent characteristics of the Israeli military bureaucracy's control of Palestinians.

Here, I argue that the bureaucratic control over the civilian population that the Israeli military exercised directly via the military government that operated in Gaza until 2005 and that still operates in the West Bank, is now being exercised, to a lesser, but nonetheless significant extent, by regulating who and what enters and leaves Gaza. I show that the "rule by exception" characteristic of Israeli military control is still in place and has even become more sophisticated, as exercised in the permit regime now operated by military officials sitting just outside the Gaza Strip. These officials employ an organically increasing hyper-categorization which is linked to perceived notions of threat. Far from the objective, rational Weberian ideal, the Israeli bureaucracy approves or denies movement of persons and goods based on criteria that seem at least in

¹⁶ See, e.g. 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 [hereinafter Shany, *The Law Applicable to Non-Occupied Gaza*].

¹⁷ See Shenhav Yehouda & Yael Berda, *The Colonial Foundations of State of Exception: Juxtaposing the Israeli Occupation of Palestinian Territories with Colonial Bureaucratic History*, in *THE POWER OF INCLUSIVE EXCLUSION: ANATOMY OF THE ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES* 337 (Michal Givoni, Sari Hanafi & Adi Ophir eds., 2009) [hereinafter, *Colonial Foundations*].

part arbitrary and in ways that facilitate a rather high amount of control over people's lives. Palestinians seeking permits are required to supply intimate details of their lives, which are then evaluated to determine whether a permit will be granted. The nature and seriousness of the illness of a family member, the quality of the relationship between a parent and child, the nature of a planned conference or workshop, and the spices and seasonings in a staple Middle Eastern food; are all relevant factors in decisions whether to permit movement. In this way, despite the withdrawal of its permanent ground presence from the Gaza Strip, the Israeli military has managed to preserve significant elements of its bureaucratic control over civilian life in Gaza.

For details of the nature of this control, I rely on information provided by the Israeli government, especially documents recently released by the Israeli Ministry of Defense following extensive procedures and litigation under the Freedom of Information Law conducted by the human rights organization Gisha. I link restrictions on the passage of people and goods into and out of the territory to the level of rights enjoyed by those living inside. While I do not delve into detail regarding the highly contested question of the normative framework that applies to Israel's actions in Gaza, I do review the intentions behind the restrictions, including those stated by Israeli officials and those that I cautiously venture to surmise from their actions. I do so with the understanding that the purpose of the restrictions is relevant to the inquiry into their legitimacy.¹⁸

The article proceeds as follows: Section "Carving Out Borders and Controlling Access" provides an account of control over movement into and out of the Palestinian territory, beginning with a brief historical overview and then analyzing how the Israeli government has used "closure" – a blanket rule

18 For example, the law of armed conflict and the law of occupation would treat favorably restrictions motivated by military necessity or security interests, whereas restrictions imposed collectively, for punitive reasons, would be illegitimate under the law of occupation. I refer to, but choose not to detail here, the robust debate over whether the law of occupation applies to Israel's actions in Gaza. For arguments that the law of occupation applies, see Scale of Control, *supra* note 15; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 277–80 (2009); 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, 30–1 (2006); see also *DISENGAGED OCCUPIERS*, *infra* note 78. For arguments that the law of occupation does not apply, but human rights law applies, see Shany, *supra* note 16. For arguments that Gaza is a *sui generis* case to which the laws of combat apply, see Elizabeth Samson, *Is Gaza Occupied? Redefining the Legal Status of Gaza*, BEGIN–SADAT CTR. FOR STRATEGIC STUDIES– MIDEAST SECURITY AND POLICY STUDIES (2009), available at www.biu.ac.il/Besa/MSPS83.pdf. This last argument reflects the position of the Israeli government.

of no-travel marked by the carving out of exceptions – to make detailed distinctions between the kind of persons and goods that would be allowed to move into and out of the Gaza Strip and in that way, to retain some aspects of the control it previously exercised using the bureaucracy of its now dismantled military government there. Section “Life Inside the Perimeter” explores the manner in which control over the perimeter of Gaza affects the lives of those living inside. I address in Section “Searching for Intent” the intentions that may underlie the restrictions, including security protections, “pressure” on the civilian population, population control, relationships with third party political actors, responsiveness to Israeli public opinion, and the shaping of political boundaries. I conclude by noting the implications of this analysis on the question of the legitimacy of the access restrictions and by suggesting areas for further research.

Carving Out Borders and Controlling Access

Background

In recent history, Israel, Gaza, and the West Bank, part of historical Palestine or the Biblical Land of Israel, were incorporated into related units of governance under the Ottoman Empire and formed mandatory Palestine under post-World War I British rule. The 1948 Mideast War resulted in the de facto carving out of the State of Israel (within the 1949 armistice lines or “green line”), and the Gaza Strip and West Bank, which were ruled by Egypt and Jordan, respectively. For two decades, historic Palestine/Land of Israel was separated into three distinct entities, between which movement was highly restricted. In 1967, Israel captured Gaza and the West Bank, effectively re-integrating the three areas into a single unit. A 1971 general exit permitted Palestinian residents of Gaza and the West Bank to move freely within historic Palestine/Land of Israel,¹⁹ and Israeli citizens were accorded similar access through orders permitting them to travel freely throughout the West Bank and Gaza and through a state practice of establishing Jewish settlements in the occupied territory. Israel employed a system of economic integration among the different parts of the land, erasing tariff barriers, facilitating the employment of Palestinian workers inside Israel

¹⁹ In essence, a number of exit permits, spanning different time-periods, and parts of the territory captured in 1967 were issued. See, e.g. Israel Defense Forces, “General Exit Permit (No. 4) (Judea and Samaria) 1971.”

and encouraging the development of markets for Israeli consumer goods within Gaza and the West Bank.²⁰

The 1990s marked an end to the vision of integration. Following the outbreak of violence during the First Intifadeh (the 1987 uprising) and its repression, in 1991 Israel canceled the general exit permit that had allowed Palestinians to move freely, effectively changing the default rule. Prior to 1991, Palestinian residents could mostly travel throughout historic Palestine/Land of Israel unless specifically prohibited; beginning in 1991, Palestinians were not to travel unless specifically permitted. The limitations on travel were implemented gradually, over more than a decade. In 1993, with an increase in violence and suicide bombings inside Israel by Palestinian militants, Israel began enforcing the demand that individuals obtain specific permits in order to leave Gaza or the West Bank. Over the years, as is evidenced herein, the criteria for receiving such permits were tightened. In the early years, the permits simply indicated security clearance, and they were granted to those approved by the Israeli Security Agency (“ISA,” also known as the Shin Bet). Gradually, however, the security check became a pre-condition, to which Israel added the requirement of showing a justification for the travel.

Physical enforcement also took place in stages: in 1995, Israel built a fence around the Gaza Strip; throughout the late 1990s, enforcement operations against those without permits stepped up, and the checkpoint system became more extensive; in 2003, Israel began building a barrier in the West Bank and along the border between Israel and the West Bank, separating Israel and Israeli settlements from Palestinian towns and farmlands. Passage through the barrier became limited to controlled checkpoints, now bulwarked by physical barriers and frequent patrols. The numbers of Palestinians entering Israel and traveling between Gaza and the West Bank plummeted.²¹

While there was a brief reversal of the trend toward closure with the operation of the “Safe Passage” between Gaza and the West Bank in 1999–2000, the outbreak of the second Intifadeh in September 2000 led to further tightening of restrictions and what has now become, at least for Gaza, a perma-

20 See, e.g. Sara Roy, *The Gaza Strip: A Case of Economic De-Development*, 17 (1) J. PALESTINE STUD. 56 (1987); H.C.J. 69/81 Abu Ita v. West Bank Military Commander P.D. 37(2) 197 [1983] (Isr.); H.C.J. 493/81 Kanzil v. Customs Tax Official, Gaza Strip Command 37(2) PD 197, 210 [1983] (Isr.) (approving a policy of economic integration between Israel, Gaza, and the West Bank).

21 Graphs showing current levels of movement of people via Erez Crossing compared with movement in 2000, available at http://www.gisha.org/graph.asp?lang_id=en&p_id=1236.

ment “closure.” In September 2005, Israel completed its disengagement plan,²² removing settlements and a permanent troop ground presence.

An additional relevant point in our timeline is the 2007 takeover of the internal control of Gaza by the Hamas movement. At that point, Israel closed most of Gaza’s crossings and openly declared that its movement restrictions were designed to apply pressure on the Hamas regime.²³ Beginning in 2007, Israel’s restrictions were explicitly designed to undermine Gaza’s economy by preventing the flow of goods that could be used for industry or the movement of people beyond exceptional humanitarian cases.²⁴ In June 2010, the ban on the import of raw materials and consumer goods was lifted, as were some of the restrictions on travel by merchants, but the restrictions on movement of people between Gaza and the West Bank, sale of goods from Gaza to traditional markets in Israel and the West Bank and transfer of construction materials continued.

Hyper-Categorization – Movement of People

Especially since 2000, the Israeli Defense Ministry has regulated who may travel into Israel and between Gaza and the West Bank, issuing detailed criteria, usually on a weekly basis, for military personnel to evaluate requests from Palestinians to travel. The absence of a claim by the ISA that the person’s travel could threaten security or public safety is a precondition for approval in any category. Between June 2006 and June 2010, Rafah Crossing

²² PRIME MINISTER’S OFFICE, ADDENDUM A – REVISED DISENGAGEMENT PLAN – MAIN PRINCIPLES 2 (June 6, 2004), *available at* <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revise%20disengagement%20plan%206-june-2004.aspx>.

²³ See Cabinet Decision, *supra* note 14.

²⁴ See GISHA, RESTRICTIONS ON THE TRANSFER OF GOODS TO GAZA: OBSTRUCTION AND OBFUSCATION, January 2010, *available at* http://www.gisha.org/UserFiles/File/publications/Obstruction_and_obfuscation.doc. The Israeli military used mathematical formulas to determine how much food would be allowed to enter Gaza, as part of a policy to allow basic humanitarian items into Gaza, but not goods that could be used for economic development. See letter from Alex Rozensweig, Coordinator of Government Activities in the Territories, Ministry of Defense, to Director of Gisha, Oct. 13, 2010, submitted as part of proceedings in A.P. (T.A.) 2744/09 Gisha v. Defense Ministry (unpublished, decided Mar. 22, 2011) [hereinafter COGAT documents]. The letter includes three documents that regulated the flow of goods into Gaza until June 2010, including a list of items deemed “humanitarian” and therefore permitted into Gaza. Items not on the list were banned. Unofficial English translation *available at* <http://www.gisha.org/UserFiles/File/HiddenMessages/DefenseMinistryDocumentsRevealedFOIAPetition.pdf>.

between Gaza and Egypt was closed except for sporadic openings for humanitarian cases,²⁵ such that approval to pass through “Erez Crossing” between Gaza and Israel was essentially approval to leave Gaza for any destination: Israel, the West Bank, or third countries. Israel does not permit travel via Gaza’s airspace or territorial waters. Since Rafah Crossing was opened for regular (if restricted) traffic in June 2010, Gaza residents have been able to travel abroad without Israeli permission, so long as they hold an Israeli-approved ID card. However, passage from Gaza to the West Bank may take place only via Erez Crossing, because Palestinian residents whose addresses are registered in Gaza are not permitted to enter the West Bank via Allenby Crossing between Jordan and the West Bank, even if they make the long and expensive trip from Gaza via Egypt and Jordan. Allenby Crossing between Jordan and the West Bank has been open on a regular basis, allowing Palestinians registered as living in the West Bank to travel abroad, with the exception of those banned because of security claims by the ISA.

In 2011, as part of legal proceedings brought by the Israeli human rights organizations Gisha, Physicians for Human Rights-Israel, and Hamoked, the Israeli Defense Ministry, released hundreds of documents outlining weekly instructions for travel between Gaza and Israel and, in some cases, between the West Bank and Israel. The documents span nonconsecutive periods of time between February 13, 2005 and April 4, 2011, revealing changes in criteria for travel over time, including throughout events that led to changes in access policies for Gaza: the September 2005 removal of Israeli settlements and permanent military installation; the June 2006 capture of Israeli soldier Gilad Shalit; the June 2007 takeover of internal control of Gaza by the Hamas movement; and the June 2010 interception of a Gaza-bound flotilla. Travel criteria immediately before, during, and after the December 2008–January 2009 large-scale military operation in Gaza were not turned over.²⁶

The weekly instructions, distributed to military personnel but not revealed to the public contemporaneously, reflect the default rule that all travel is prohibited (closure) except for exceptions that are explicitly permitted. Most documents are titled, “Permissions within the Closure: Guidelines and Criteria,” and they cite the week during which they are in effect. The documents reveal that the Defense Ministry in effect segmented the Palestinian population into categories, whose members at various points were or were not allowed to

25 GISHA & PHYSICIANS FOR HUMAN RIGHTS-ISRAEL, RAFAH CROSSING: WHO HOLDS THE KEYS? Mar. 2009, available at http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf.

26 For the documents revealed in Hebrew, see http://www.gisha.org/item.asp?lang_id=he&p_id=1412.

travel: workers holding permits for jobs in Israel; medical patients and staff seeking to reach hospitals in Israel, the West Bank, or Jordan; family members seeking to reunite or visit loved ones who are ill or incarcerated in Israeli prisons; VIPs; employees of international organizations; lawyers representing detainees; and a number of other categories. The documents reflect criteria defined by the military which, if met, make a resident of Gaza eligible to request a permit, and each week, the instructions specified whether each category of people would be denied or permitted, and if permitted – for how many days the travel would be authorized.

I describe, translate, and partially reproduce here one of the earliest documents²⁷ that reflects criteria for Palestinian travel via Erez Crossing (travel from Gaza to Israel and the West Bank). These criteria are more expansive than later documents; in later years, the criteria for travel eligibility narrowed.

Status of Permissions within the Closure Guidelines and Criteria – February 13, 2005

Primary Permissions

1. Erez Crossing: Open for travel between the hours of 4:00 and 19:00 according to the following itemization:
 - a. Entrance of workers to Israel: 1,000 workers are permitted to enter Israel (married and aged 35+) for the construction industry only.
 - b. Entrance of merchants to Israel: 500 merchants are permitted to enter Israel (married and aged 35+).

...

- f. High Court of Justice groups (not adversely affected in the closure)
 1. Lawyers attending court hearings are permitted to exit to Israel.
 2. Families of detainees are permitted to enter for hearings on extending detention.
 3. Fifty medical staff members are permitted to exit for work in hospitals in east Jerusalem.

...

Appendix A: Itemization of the Permissions, Guidelines, and Criteria

1. Erez Crossing

...

 - b. Movement of Palestinians:
 1. Senior PA officials (Abu Alaa's list – 25 ministers + General Secretary of the Government attached): Passage between the areas requires permission from the Coordinator of Government Activities in the Territories (COGAT) without ISA screening,

²⁷ For the full document in Hebrew, see www.gisha.org/UserFiles/File/HiddenMessages/kriter-yonim13_2_05.pdf. (emphases in the original.)

whose passage requires screening by the ISA headquarters which will be conducted by COGAT.

2. Heads of Security Services

Their travel between the areas requires permission from COGAT and ISA headquarters screening.

3. VIPs not included in Abu Mazen's list

Their travel between the areas requires permission from COGAT and ISA headquarters screening.

4. Exit of visitors to prisons in Israel according to the following criteria:

- a. Only first degree relatives will be permitted to exit.
 - b. Children, brothers/sisters under the age of 16 must be accompanied by an adult.
 - c. Exit for visitors over the age of 16 is not permitted with the exception of his parents and the wives of husbands.
 - d. Up to three visitors per prisoner.
5. 1,000 workers, aged 35+ and married, may enter for the construction sector only.
 6. 500 merchants, aged 35 and married, may enter for work in Israel.
 7. Entrance of Palestinians is permitted for participation in court hearings/meeting with lawyer/medical examination according to a written summons, subject to individual screening. Subject to one-day permits.
 8. Entrance of lawyers for hearings to extend detention, duration of permit is up to one month subject to individual screening.
 9. Families of detainees may enter for hearings to extend detention, subject to a one-day permit. Women of any age, men aged 35+ and married, subject to individual ISA screening.
 10. Travel for employees of the PA between Judea and Samaria and the Gaza Strip is not permitted.
 11. Entry to Israel is permitted for 50 health employees whose exit will be approved by occupation permits (Payment Division) – primarily Doctor-Interns working in hospitals in Israel.
 12. The renewal of permits for Palestinians within a process of family reunification to Israel is approved – according to guidelines that will be distributed.
 13. Travel from the Gaza Strip to Judea and Samaria for those “stuck” is not permitted, except for humanitarian and exceptional cases.
 14. 50 medical staff members may enter for work in hospitals in east Jerusalem subject to individual ISA screening.²⁸

In addition to the categories reproduced above, the 16-page document authorizes exit for medical patients and their escorts, Gaza residents wishing to visit a sick family member, 800 married farm workers aged 35 or older, Palestinian holders of foreign passports seeking to leave via Ben Gurion Airport, and medical patients seeking to leave via Ben Gurion Airport under

28 *Id.*

humanitarian circumstances. The document specifies that visits to family members in the West Bank and the return of West Bank residents from Gaza to their homes in the West Bank are not permitted at this time. An additional category of “personal needs” is defined but not specified, and the military official in charge of Erez Crossing is granted authority to approve exceptional requests.

As the years passed, and at times commensurate with political or security developments, the guidelines became increasingly restrictive. Currently, the guidelines are limited to “exceptional humanitarian cases, with an emphasis on urgent medical cases.”²⁹ The restrictions reduced movement to and from Gaza to a fraction of its past level. In September 2000, on the eve of the outbreak of the Second Intifadeh, there were more than a half million exits of Palestinians via Erez Crossing. In September 2011, that number was reduced to less than 1% of its prior level: There were 3,493 exits of Palestinians via Erez Crossing, mostly medical patients and accompanying family members, merchants, and employees of international organizations.³⁰ In 1987, there were 109,000 Palestinian workers from Gaza and the West Bank employed in Israel; in 2011, no workers from Gaza were permitted to enter Israel, and ~30,000 from the West Bank were working in Israel.³¹

Since the Freedom of Information litigation was filed, the COGAT, the Defense Ministry office in charge of civilian life, including regulating travel of Palestinians, has published the criteria for travel via Erez Crossing.³² A glance at the document and additional statements by the Israeli authorities reveals a continuation of the hyper-categorization of population seen in the 2005 document reproduced above. Again, the default rule is that no Palestinians may travel, except for “exceptional humanitarian cases”. Examples of exceptional categories permitted to travel include medical patients, family visits in the case of the death of a first degree relative, soccer players, students in transit to

29 See GISHA, THE CLOSURE OF GAZA – IN ISRAEL’S OWN WORDS,” Sept. 2011 [hereinafter, The Closure of Gaza], available at http://www.gisha.org/UserFiles/File/publications/gisha_brief_docs_eng_sep_2011.pdf. The document includes links to military documents outlining the criteria for travel via Erez.

30 See Gisha, Exit of Palestinians via Erez Crossing, listing monthly graphs, available at http://www.gisha.org/graph.asp?lang_id=en&p_id=1236.

31 The precise number was the subject of Freedom of Information Act litigation whose result was inconclusive: A.P. 27605-01/11 (T.A.) Gisha v. Coordinator of Government Activities in the Territories (unpublished, decided May 19, 2013).

32 *Coordinator for Government Activities in the Territories, Israeli Ministry of Defense, Policy on Movement of People between the State of Israel and the Gaza Strip*, May 2011 [in Hebrew], available at http://www.cogat.idf.il/Sip_Storage/FILES/3/2533.pdf [hereinafter, COGAT Criteria]. For an unofficial English translation by Gisha, see www.gisha.org/UserFiles/File/HiddenMessages/Criteria_for_travel_from_Erez.pdf.

universities abroad, and Christians seeking to visit holy places during the holidays. Examples of categories denied travel include family visits to comfort a first degree relative who is mourning the death of a spouse or child, students admitted to universities in the West Bank, and Muslims seeking to visit holy places during the holidays. The list is exclusive, such that anyone not included in the recognized categories in principle would not be permitted to travel, although in practice, officials occasionally deviate from the criteria, especially when foreign governments make requests for Palestinians participating in activities they sponsor. The military states that it considers all requests on the merits.

The table below presents a few examples of the distinctions drawn by the criteria. The information it contains is based on the published criteria, documents obtained via Freedom of Information proceedings, and statements by the Israeli military and the Israeli State Attorney's Office, especially in response to requests to travel and court petitions submitted on behalf of Palestinian residents of the Gaza Strip.

Palestinians permitted to travel from Gaza to West Bank	Palestinians denied travel from Gaza to West Bank
Medical patients seeking life-saving treatment	Medical patients seeking "quality of life-enhancing" treatment ³³
Participation in mourning rites where deceased is a first degree relative (i.e., visiting relatives when a sibling has died)	Participation in mourning rites where first degree relative is mourning death of first degree relative (i.e., visiting a sibling who has lost a child or spouse)
Students enrolled in foreign universities (seeking to travel abroad via the West Bank)	Students enrolled in Palestinian universities in the West Bank
Soccer players	Poets ³⁴
Christians visiting holy places during holidays	Muslims visiting holy places during holidays ³⁵
Senior (male) merchants traveling to business meetings	(Female) hairdressers seeking professional training ³⁶
Orphan seeking to live with surviving parent, where no relative in Gaza is available to care for him/her ³⁷	Orphan seeking to live with surviving parent, where a relative in Gaza is available to care for him/her

³³ Beginning in 2007, Israel announced that while it would permit medical patients from Gaza seeking life-saving treatment to travel to Israel, the West Bank and Jordan via Erez Crossing, if the ISA did not object on individual security grounds, it did not see itself as obligated to permit passage in cases in which the patient would not die in the absence of medical treatment but rather would "only" suffer loss of a limb, loss of sight, or other significant disabilities. This

These rules concerning movement into and out of Gaza have been characterized by opacity; until the military published criteria for travel of persons in May 2011, following litigation under the Freedom of Information Act, the rules concerning movement of people were not made public in real time, and most were disclosed only after lawsuits were filed against the military.

Hyper-Categorization: Movement of Goods

A similar system was set in place for restricting passage of goods into and out of Gaza, although there has been significantly more flux in the policy,

distinction, quality of life treatment, and life-saving treatment was raised at various points in time, but at the current time Israel appears to permit passage for this second category of persons, too, provided there is a financial commitment from the Palestinian Authority and the ISA does not raise an individual security objection. See PHYSICIANS FOR HUMAN RIGHTS-ISRAEL ET AL., WHO GETS TO GO? IN VIOLATION OF MEDICAL ETHICS AND THE LAW: ISRAEL'S DISTINCTION BETWEEN GAZA PATIENTS IN NEED OF MEDICAL CARE, June 2010, available at http://www.phr.org.il/uploaded/Microsoft%20Word%20-%20PP%20-%20English%20_2_.pdf

34 Letter from Public Inquiries Department of the Gaza DCO to Shadi Butthish of Gisha, Sept. 26, 2011 (on file with author, in Hebrew), refusing request for travel by a poet to a poetry contest in the West Bank: “At the present time, in light of the security-political situation, entry into Israel by Gaza residents is not permitted save for exceptional humanitarian circumstances, with an emphasis on urgent medical cases.” The letter refers to the published list of criteria referenced in note 32.

35 See A.P. 11268-02/11 (B.S.) Kishawi v. Interior Minister (unpublished, decided May 11, 2011).

36 See Catrina Stewart, *Israel Stops Hairdressers Travelling to West Bank*, May 5, 2011, THE INDEPENDENT, available at <http://www.independent.co.uk/news/world/middle-east/israel-stops-hairdressers-travelling-to-west-bank-2279135.html>. The gender of the applicant is not part of the criteria, but because, in Gaza, merchants purchasing large volumes of goods are overwhelmingly male, while businesswomen tend to work in the service industry or in small-scale production, the criteria are more responsive to the needs of businessmen than businesswomen. On women's labor force participation in Gaza, see UN WOMEN, WHO ANSWERS TO GAZAN WOMEN? (Oct. 17, 2011) available at <http://www.unwomen.org/publications/who-answers-to-gazan-women/>.

37 See Ministry of Defense, Coordinator of Government Activities in the Territories, *Procedure for Handling Applications by Gaza Strip Residents for Settlement in the Judea and Samaria Area*, Mar. 8, 2009, attached to Respondents' Response in HJC 2905/08 Abu Shenar v. West Bank Military Commander and related petitions submitted by Hamoked-Center for the Defence of the Individual (hereinafter: “Gaza Settlement Procedure”). Unofficial English translation available at www.hamoked.org. The procedure establishes restrictive criteria for moving from Gaza to the West Bank. Sec. 10(b) permits an orphan under the age of 16 years old, whose parent in Gaza has died, to join his or her surviving parent in the West Bank if no other relative is available in Gaza to care for the child and subject to an evaluation by the military of “the degree, nature and scope” of the relationship between the child and the parent compared to the relationship between the child and any relatives living in Gaza.

notably a three-year period, between June 2007 and June 2010, of extremely restrictive limitations, followed by a partial easing. Prior to June 2007, the restrictions on passage of goods primarily took place through closing the commercial crossings or limiting their opening hours. At those times, Israel would prioritize incoming goods over outgoing goods and humanitarian goods over commercial goods.

Beginning in June 2007, with the takeover of Gaza by the Hamas regime, Israel began a policy of deliberately restricting the movement of goods to those necessary for basic humanitarian needs. A September 2007 Cabinet decision³⁸ authorized restrictions on the movement of people and goods as a means of pressure on the Hamas regime. The transfer of outgoing goods was banned, and Israel declared a policy of barring all but “essential goods,” so long as the restrictions did not “undermine the ability of the civilian population to survive.”³⁹ In that context, Israel said it would permit basic food items into Gaza.

Although at the time, Israel did not release the lists of the goods that were permitted or forbidden and in fact denied that any such lists existed, documents obtained in October 2010⁴⁰ and again in April 2011⁴¹ and October 2012⁴² through Freedom of Information proceedings reveal a “hyper-categorization” of the goods policy, too. Weekly instructions to military officials provided guidance as to which goods would be permitted. There were no lists of forbidden goods; the default rule was that everything was banned unless explicitly permitted. In some cases, one can see the evolution of the policy through changes in the weekly instructions.

38 Cabinet Decision, *supra* note 14.

39 See HCJ 9132/07 al Bassiouni v. Defense Minister, Preliminary Response on behalf of the Respondents, Nov. 2, 2007, para. 49 (Isr.) [hereinafter State response in al-Bassiouni], available at www.gisha.org/UserFiles/File/Legal%20Documents/_fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf.

40 See COGAT documents, *supra* note 24.

41 A.P. 22775/02/11 (T.A.) Gisha v. Coordinator for Government Activities in the Territories (unpublished, decided January 13, 2013). Most of the documents released in the context of the litigation are available in Hebrew in the appendix to *The Closure of Gaza*, *supra* note 29.

42 The last document was released in October 2012, following a ruling by the Israeli Supreme Court rejecting the military’s appeal of a district court order to disclose. AA 3300/11 State of Israel-Defense Ministry v. Gisha (unpublished, decided Sept. 5, 2012). The document, showing calculations made by the Israeli government of the caloric needs of Gaza residents, in the context of a policy that restricted the entrance of food into Gaza, is available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>. See also GISHA, READER: FOOD CONSUMPTION IN THE GAZA STRIP: RED LINES (Oct. 2012), available at <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>.

For example, the instructions reveal that for two years, prepared chickpea paste known as hummus, a staple in the Palestinian diet, was banned, although raw chickpeas, from which the paste is made locally, were permitted. In mid-July 2009, however, Israel changed the policy to allow prepared hummus to enter Gaza, but only if it was not seasoned. We can deduce this from the absence of “hummus” on the lists of permitted items up until and including July 14, 2009⁴³ and its appearance, for the first time, on the “List of food items and nonfood humanitarian items permitted to enter Gaza as of July 19, 2009.”⁴⁴ In that updated list canceling the ban on hummus, the military specified that it would allow entry only for “processed ‘plain’ hummus (without additions such as pine nuts, mushrooms, etc.)”⁴⁵

Similarly, the instructions for that same day reveal that the transfer into Gaza of canned meat was banned for the general public but permitted for international organizations, as were tea, coffee, tomato paste, and packaged fish. According to the internal procedures in place at the time, additions to the list of items permitted – for example, the decision in July 2009 to allow people in Gaza to purchase hummus but only if it were not seasoned with pine nuts or mushrooms – required approval at the highest level of the military bureaucracy, by the COGAT himself, a senior official holding the rank of Major General.⁴⁶

In June 2010, Israel changed the policy to cancel the ban on consumer products and raw materials, but it continued to ban construction materials from entering Gaza and finished products from leaving Gaza for markets in

43 Gaza District Coordination Office, “Status of Permissions in the Closure, Gaza DCO, Update July 15, 2009,” Appendix A, “List of Food Items and Humanitarian Items Permitted For Entry into the Strip – 14.07.09” [in Hebrew], *available at* www.gisha.org/UserFiles/File/HiddenMessages/kriteriyonim15_7_09.pdf.

44 Gaza District Coordination Office, “Status of Permissions in the Closure, Gaza DCO, July 29, 2009,” Appendix A, “List of Food Items and Humanitarian Items Permitted For Entry into the Strip – 19.07.09” [in Hebrew], *available at* www.gisha.org/UserFiles/File/HiddenMessages/kriteriyonim29_7_09.pdf.

45 (Parentheses in original).

46 See COGAT documents, *supra* note 24, “Permission for Transferring Goods into the Gaza Strip” sec. 5(e): “Permission from the Coordinator to add a product to the list of permitted products, whether on the recommendation of the civilian department or the approval/directive of another party, will be given in writing by the assistant to the Coordinator to the economic branch.” It should be noted that in the original version of the letter sent by COGAT, the titles of the officials in charge of giving permission were redacted, and the redaction continues to appear on the English translation. The District Court later ordered COGAT to release the unredacted documents, showing that it was the Coordinator of Government Activities in the Territories who was authorized to approve additions to the list of goods. See A.P. (T.A.) 2744/09 Gisha v. Defense Ministry⁵ (unpublished, decided Mar. 22, 2011).

Israel and the West Bank. Israel has made an exception to this ban by allowing construction materials intended for internationally sponsored projects to enter Gaza, and it allows a few hundred truckloads of goods to be exported abroad each year, mostly to Europe as part of an agricultural project subsidized by the Netherlands.

Yet these exceptions continue to be characterized by hyper-categorization. In granting permission for construction materials to enter, Israel requests detailed building plans, including geographical coordinates, design plans, lists of equipment, and information about costs and funding.⁴⁷ In some cases, Israel conditions approval to transfer the equipment on changes in the building plans. For example, in 2010, Israel declined to allow construction materials into Gaza for the construction of a school until UNRWA agreed to change the location of the school, which Israel said was near a militant training site.⁴⁸ Aid organizations report expedited treatment for approving the transfer of building materials, depending on Israel's relationship with the country funding the project.

Similar distinctions have been drawn for export. Israeli exceptions to the ban on export are granted per type of good or truckload, usually with international mediation.⁴⁹ Thus far, Israel has allowed strawberries, flowers, sweet peppers, tomatoes, herbs, furniture, and plus-size clothing to be sold abroad. Israel permits residents of Gaza to sell produce to Europe but not to Israel or the

47 COGAT, "Procedure for Implementing Internationally Funded Projects in the Gaza Strip," Appendix C, COGAT response of October 26, 2011 to Gisha's request under the Freedom of Information Act (hereinafter, "Construction Materials Procedure"). An unofficial English translation is available at <http://www.gisha.org/UserFiles/File/freedomofinformation/Translations/AppendixC-ProjectProcedures-Oct2011.pdf>.

48 Yaakov Katz, *Exclusive: 'No' to UNRWA School 'Near Hamas Base'*, JERUSALEM POST, Oct. 22, 2010, available at <http://www.jpost.com/Israel/Article.aspx?id=192368>.

49 The military does not publish criteria for approval of exports but rather states that: "Every request is evaluated on the merits, taking into consideration the range of necessary considerations, including decisions of the political echelon, security aspects, customs, agriculture – prevention of disease and additional considerations, according to the substance of the request. In addition, it should be noted that coordination for exporting goods is conducted after approval of the request, on a daily basis and between the Palestinian coordinator for incoming goods and the Gaza DCO." See Letter from Guy Inbar, Ministry of Defense, Coordinator of Government Activities in the Territories, to Tamar Feldman of Gisha, Oct. 26, 2011 [in Hebrew], para. 36, available at <http://www.gisha.org/UserFiles/File/LegalDocuments/freedomofinformation-buildingcriteria/preliminary-letter.pdf>.

West Bank, where the markets for more than 85% of Gaza's outgoing goods are.⁵⁰

The current status of the goods policy can be summarized as such: Israel permits into Gaza ~40% of the quantities of incoming trucks that entered prior to June 2007.⁵¹ The current default rule for incoming goods is that all goods are permitted into Gaza except construction materials⁵² and dual use items as identified in Israeli legislation. Israel restricts outgoing goods to specific projects that are approved according to goods type, destination, and the identity of the requestor.⁵³ Although outgoing goods enter Israel and in some cases the West Bank, en route to Israeli ports or the West Bank's border with Jordan, goods are not permitted to remain in Israel or the West Bank, Gaza's traditional markets.

The system described above is quite the opposite of the Weberian ideal of rational bureaucracy. Instead, the bureaucracy appears to function as a means of control, sharing characteristics with colonial bureaucracies, military governments, and other cases of a regime established over a foreign population. These characteristics include rule by exception; lack of transparency; deliberate inefficiency; and what Yael Berda has described, in the West Bank, as the "invisible sovereign," control exercised by a diffuse military bureaucracy whose decision-making power cannot be located and therefore – cannot be challenged.⁵⁴ Gaza residents seeking to travel or transfer goods submit a request via a Palestinian coordination office responsible for transferring requests to travel to the Israeli military. Negative or positive answers are given orally, by the Palestinian office, usually without explanation of the reason for refusal. If a Gaza resident is represented by a lawyer, refusals are

50 See GISHA, GAZA GATEWAY, "EXPORT FROM GAZA: FREQUENTLY ASKED QUESTIONS," available at <http://www.gazagateway.org/2012/05/export-from-gaza-frequently-asked-questions/>

51 See GISHA, "GOODS ENTERING GAZA," WEEKLY GRAPHS, available at http://www.gisha.org/graph.asp?lang_id=en&p_id=901.

52 At the time of submission of this article for publication, in January 2013, Israel was taking steps to relax restrictions on the entrance of gravel for the private sector, while continuing to strictly regulate the entrance of construction materials for international organizations, including continuing to condition entrance of the construction materials on Israeli approval of the location of the planned structures in Gaza.

53 See GISHA, *Exports from Gaza*, WEEKLY GRAPHS, available at http://www.gisha.org/graph.asp?lang_id=en&p_id=903.

54 See YAEL BERDA, *HABUREAUCRATIA SHEL HAKIBUSH: MISTAR HETEREI HATNUA BGADA HAMARAVIT 2000–2006* 111 [The Bureaucracy of the Occupation: The Permit Regime in the West Bank 2000–2006] (2012).

given by letter explaining that the request “does not meet the criteria”⁵⁵ or citing security objections based on secret information. Residents of Gaza learn about the policy through trial and error. Decision-making is personalized, where individual military officials can determine what foods will be available to families in Gaza and make judgments about the quality of care that a child might expect from a relative in Gaza versus a parent in the West Bank. Striking, however, is that the system is maintained primarily via control over movement into and out of Gaza, with no military government inside Gaza and no permanent ground presence to enforce rules. Many of the functions familiar to bureaucracies aimed at controlling foreign populations – are fulfilled via control over crossings and access.

Life inside the Perimeter

How does this system of movement restrictions influence individual, social and economic life? Here, I briefly present a few illustrations of the way in which individual choices and social structures are affected by the above-described access regime.

The Hamas regime, which exercises internal control over Gaza, is responsible for the daily running of governmental services and regulation of civilian life, and the West Bank-based PA exercises some control in the form of funding health and infrastructure services and coordinating with the Israeli authorities to request travel permits.⁵⁶ Significant influence over daily life – services, laws, and respect for individual freedoms – is therefore, in the hands of PAs. However, control over who and what enters and leaves Gaza also shapes civilian life inside Gaza, including the ability to exercise a range of human rights and to receive governmental services.

⁵⁵ See Letter from Humanitarian Center, Gaza District Coordination Office, to Rana Awada, Gisha (Apr. 26, 2011) (on file with the author). The letter is the military’s response to a request to allow hairdressers from Gaza to reach a hairdressing convention in the West Bank. It notes that requests to travel should be submitted “to the Palestinian Civil Affairs Committee, which is the agency responsible for collecting and prioritizing requests from Palestinian residents of Judea and Samaria [West Bank-sb] and Gaza to be transferred to the Israeli side.” The letter goes to note that “after reviewing the request, the responsible authorities decided to reject it, because it does not meet the criteria which are established from time to time, commensurate with the political-security situation.”

⁵⁶ See Scale of Control, *supra* note 15.

Regarding movement of people, some consequences of the regulations are highly predictable. Decisions regarding the circumstances under which family members may visit or reunite affect the ability of people in Gaza and the West Bank to enjoy the right to family life and protections for the family unit. A decision to allow senior merchants, who are men, to travel for business purposes but not to allow businesswomen, who lack seniority, to do so, reinforces and entrenches existing gender inequalities in the business sector. Decisions over who may access holy places have implications for the right to freedom of worship, privileging Christians over Muslims. If we look at the West Bank, limiting work permits (in the past in Gaza too) to married fathers⁵⁷ over the age of 35 affects unemployment rates and earning potential among women and young men, as well as personal choices such as the decision to marry or have children.

As in any regime of restrictions, however, there are also more subtle and perhaps unpredicted effects. For example, the decision to allow students from Gaza to enter the West Bank en route to traveling abroad for study, but not to remain in the West Bank in order to study, has a disproportionate effect on women and low-income students. Male students from Gaza prevented from reaching their studies in the West Bank may study abroad, finances permitted, whereas female students are less likely to be permitted to travel abroad alone, due to societal and familial restraints.⁵⁸ Similarly, the high cost of study abroad – compared with study in the West Bank – favors higher-income students, while students from poorer backgrounds may not be able to access alternatives abroad.

The regulations regarding access to goods similarly affect the exercise of rights. The ban on raw materials, in place between June 2007 and June 2010, prevented factories in Gaza from producing, affecting the rights of their workers to engage in dignified, productive work. The decision, during that same period, to ban paper from entering Gaza, except for international organizations, meant that schools run by UNRWA could continue to purchase textbooks, while government schools experienced shortages, eventually buying poorer quality paper smuggled into Gaza via tunnels. Most of Gaza's factories closed or operated at

⁵⁷ The criteria do not specify gender, but they authorize employment primarily in sectors dominated by men, such as construction and agriculture.

⁵⁸ See Amira Hass, *Otherwise Occupied/If Only I Were A Soccer Player*, HAARETZ Dec. 26, 2011, available at <http://www.haaretz.com/print-edition/features/otherwise-occupied-if-only-i-were-a-soccer-player-1.403600>.

minimal capacity, due to the difficulty of obtaining raw materials and of exporting finished products.⁵⁹ The granting of permission, beginning in June 2010, to transfer raw materials into Gaza allowed some factories to resume production, but the ongoing ban on selling materials outside Gaza means that economic recovery is felt among industries who can sell to the local population, while industries dependent on markets in Israel and the West Bank – for example, textile, furniture, and some food products – have experienced little recovery.⁶⁰ The ban on construction materials – subject to exceptions for internationally-sponsored projects – allows Israel control over which projects will be promoted and where they will be located. When Israel conditions permission to transfer construction materials for a UN school on the UN changing the location of the school – it is exercising control over land use policies and the ability to access education for the students concerned.

In some cases, the restrictions appear to have had the effect of benefiting, rather than undermining, political rivals. For example, while the ban on construction materials had the stated goal of preventing Hamas from obtaining cement to build bunkers, because of the availability of construction materials via the underground tunnels between Gaza and Egypt, the primary effect of the ban appears to have been to delay and render more costly projects sponsored by international organizations and Western donors, who eschew purchasing materials from the tunnels, while the Hamas regime and Arab and Islamic donors are able to obtain materials for their construction projects.⁶¹

A primary effect of the restrictions is to deepen the separation within Palestinian society, because of the difficulty of maintaining familial, cultural, economic, educational and social ties between Gaza and the West Bank.

At the same time, the way in which the restrictions are implemented maintains a high level of involvement of military officials in the lives of Palestinians, despite the transfer of authority for welfare, education, health, and other areas of civilian life from the Israeli military government to the PA. Certainly, requests

59 See GISHA, COMMERCIAL CLOSURE: ERASING GAZA'S ECONOMY FROM THE MAP, July 2007, available at http://www.gisha.org/File/publications_english/Publications_and_Reports_English/Formatted-DeletingGazaEconomyfromtheMap.doc.

60 Survey by Palestinian Federation of Industries showing recovery by manufacturing sector, March 2011, cited in GISHA, DOING THE MATH: 1.6 MILLION PEOPLE, ZERO EXPORT, available at <http://www.gazagateway.org/2011/06/doing-the-math-1-6-million-people-zero-export/>.

61 See, e.g. JANINE ZACHARIA, *Aid Groups Say They, Not Hamas, are Thwarted by Israeli Restrictions on Gaza*, WASHINGTON POST, Dec. 21, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/20/AR2010122004661.html>. See also GISHA, RECONSTRUCTING THE CLOSURE: WILL RECENT CHANGES TO THE CLOSURE POLICY BE ENOUGH TO BUILD IN GAZA? December 2010, available at http://www.gisha.org/UserFiles/File/Hidden Messages/Reconstructing_the_closure19_12_10.doc.

for travel within the criteria set out by the military require the Palestinian applicant to supply detailed information about even intimate details of his or her life, for evaluation by military officials. Requests to travel based on exceptional humanitarian circumstances require submitting medical reports about a sick applicant or relative. Qualification to travel as a merchant requires submission of documents showing the extent of trade and its importance to the Palestinian economy. Even an orphan in Gaza seeking to join her surviving parent in the West Bank must submit information, for the army's evaluation, about the nature of her relationship with the surviving parent and the possibilities that exist for other relatives to care for her in Gaza,⁶² presumably so that the military can evaluate the care she would receive from her surviving parent, compared with that of a more distant relative. In other words, while the authority of the military authorities is mostly limited to approving or rejecting travel requests, the criteria for evaluating those requests put military officials in the position of social workers, medical experts, nutritional consultants, and economic development advisers.

With the transfer of responsibility for the daily running of Palestinian civilian life – hospitals, schools, and economic development – to the PA in the 1990s, the Israeli military government lost many of the contact points with the Palestinian population that had permitted control over the population, including regulation of the economy and school curriculum, and collection of intelligence information. Additional contact points were lost in Gaza when Israel implemented the 2005 Disengagement Plan. The bureaucracy regulating the access restrictions allows Israeli officials to retain some of the control that would otherwise have been lost with the removal of a permanent physical presence in Gaza and the dismantling of the military government. Requests for permits provide security officials with an opportunity to summon applicants for interviews in which they may be asked to provide information about their friends and neighbors and to cultivate groups of people who receive favorable treatment.⁶³ Some level of supervision over the economy is made possible by regulation of the flow of goods into and out of Gaza, and indeed the Israeli

⁶² *Supra* note 37.

⁶³ The access criteria include a number of categories of people singled out for exceptional and favorable treatment, including VIP lists submitted by the Palestinian Authority and expedited access for senior businesspeople in the form of a “Businessman’s Card” (BMC).

military publishes regular updates on the economy in Gaza, linking economic improvements to its granting of permission for persons or goods to travel.⁶⁴

Shenhav and Berda have argued that the Israeli military's administration of Gaza and the West Bank made use of uncertainty and ambiguity as a means of asserting authority and suppressing rebellion, by keeping the people unsure of the rules governing their lives and dependent on the perceived favors of military officials. They argue that the personalized decision making process, lack of transparency and shifting rules construct a bureaucracy that is deliberately nonrational, in order to make its authority more difficult to locate and challenge. The nontransparent access regime enforced for Gaza following the 2005 disengagement – most rules are not published, and most of the documents discussed in this article were attained only after the military was sued in court under the Freedom of Information Act – fits their description of a bureaucracy aimed at subduing, rather than serving, the population.⁶⁵ The innovation in the case of Gaza is that the military bureaucracy is able to perpetuate many aspects of this control, despite having removed its permanent physical presence inside Gaza. Indeed, while formally the authority to approve requests for individuals to travel from Gaza to the West Bank via Israel was transferred to the Ministry of Interior,⁶⁶ as a matter of delegating authority and practice, the same military officials who used to be responsible for contact with the civilian population in Gaza – including economic, agricultural, financial and humanitarian coordinators – continued in their functions, although their ability to exercise power over the civilian population is limited to the power to grant or refuse access requests. Because the Gaza Strip is so dependent on commercial, educational, familial and medical ties with Israel and the West Bank and, to a lesser extent, Egypt – the power to grant or refuse access requests allows the military to continue to wield significant power.

Berda and Shenhav have demonstrated how the Israeli military government in the West Bank and, in the past, in Gaza, perpetuated aspects of the British colonial control over Palestine, including via use of the emergency regulations created by the British Mandate.⁶⁷ I have shown here that, following the dismantling of the Israeli military government in Gaza, the Israeli military perpetuates

64 See, e.g. Coordinator of Government Activities in the Territories, GENERAL STATUS REPORT – FIRST HALF 2012 SUMMARY (Jul. 5, 2012), available at <http://www.cogat.idf.il/901-10266-en/Cogat.aspx>. Additional examples available at www.cogat.idf.il.

65 See Colonial Foundations, *supra* note 17.

66 See *supra* note 13. The exemption for Gaza residents means that military officials are not bound by statutory regulations regarding entrance to Israel. A similar system operates in the West Bank.

67 Colonial Foundations, *supra* note 17.

some aspects of the control that it formerly exercised via direct administration – despite having no permanent physical presence in Gaza. By virtue of its control over the movement of people and goods, the Israeli military bureaucracy continues to rule by exception, to maintain opacity regarding decision-making processes, to personalize decisions, and to maintain involvement at a high level of detail, including decisions over the appropriateness of child custody arrangements and the level of seasoning permitted in packaged chickpea paste. In contrast to the rigid, formalized rules used to regulate entry and exit of persons and goods between international borders, usually in the form of statutes and treaties, the Gaza access policy gives the military bureaucracy a high degree of flexibility and discretion.

Searching for Intent

To what extent does Israel's movement regime serve functions similar to those served by the military government that used to rule Gaza and that still rules the West Bank? In its regulation of movement into and out of Gaza, is the Israeli military still motivated by some of the concerns identified in the research into colonial bureaucracies and stemming from the challenges of controlling a foreign population?

Here, I cautiously consider the intentions behind the restrictions, as a way of locating them in the context of control over historic Palestine/Land of Israel and out of recognition that the purpose of the restrictions is relevant to the question of their legitimacy.

In the early years of the occupation, when access was the rule and restriction the exception, the restrictions appeared to be designed to restrict movement deemed threatening to Israeli security and, in some cases, as part of an overall policy of controlling the population of the occupied territory, using the regulation of travel as a means of asserting authority. As the default rule changed, however, and travel became the exception, the intentions behind the policy appear to be more complicated. I explore here six intentions that may underline various restrictions, where possible, referring to iterations of those intentions by Israeli officials; *First*, I address security as an intention, either narrowly defined as preventing a concrete security threat or broadly defined as undermining the strength of militant groups; *Second*, I explore the use of “pressure” on the civilian population in Gaza as a means of influencing the behavior of militants

or political leaders; *Third*, I discuss the possibility that the restrictions are imposed as a general means of population control, for example, creating leverage in order to coerce collaboration or maintain compliance; *Fourth*, I explore the ways in which the movement policy is used to benefit favored political actors, including influential and mostly Western members of the international community and the PA; *Fifth*, I examine how the movement policy may be responsive to a perceived need to show the Israeli public that the government is taking decisive action in response to attacks; and *Sixth*, I examine the manner in which movement restrictions may be used to shape political borders within historic Palestine/Land of Israel.

It would be misguided to take the question of intention too seriously in evaluating the entrenched policies of any government, but I believe that a clearer understanding of the possible intentions – stated and unstated – can help locate the Gaza access regime within the context of control over historic Palestine/Land of Israel and provide background for considering the legitimacy of the actions taken, especially given the deference that international law affords to measures taken to achieve military or security goals. I avoid making definitive determinations about the purpose of the restrictions but rather seek to explore the possibilities that arise from the statements and actions of Israeli officials.

Access Restrictions Intended to Protect Security

Many of the restrictions on the movement of people and goods appear to be motivated by genuine concern for security, in the general context of the armed Israeli-Palestinian conflict and the specific context of attacks by individuals entering Israel from Gaza and the West Bank and rocket and missile fire from the Gaza Strip.

A precondition for any travel – whether of persons or goods – is the absence of an individualized security objection. For travel into and out of Gaza via Erez Crossing or in the rare cases in which Israel permits a Palestinian resident whose address is listed in Gaza to travel to or from the West Bank via Allenby Crossing with Jordan, the ISA (also known as the Shin Bet) must approve the request after running a background check of the would-be traveler. Similarly, all persons and all shipments of goods seeking to enter or leave Gaza are physically inspected at the crossings between Gaza and Israel. Some restrictions on specific incoming goods into Gaza are motivated by concern about “dual use” – a term used to

describe civilian goods that have a military purpose, such as certain kinds of fertilizer, electronic equipment, steel pipes of a certain diameter, and thousands of other items listed in Israeli and international legislation.⁶⁸

In addition, Israel has explained restrictions on entire access routes – the closure of three out of four of Gaza’s goods crossings since 2007, the 44-year-old ban on travel via the sea, the refusal to allow Gaza’s airport to resume functioning – as justified by security concerns emanating from the operation of the crossings or a stated inability to effectively inspect goods or persons entering and leaving Gaza via the sea or air.

I would describe these rationales as concrete security objections – objections raised to specific threats alleged to emanate from a person or item crossing into or out of Gaza or an access route for persons or goods.

In addition, Israel has articulated second tier security justifications for restricting the movement of people and goods into and out of Gaza. Over the years, Israel has classified entire categories of persons as posing a generalized security risk, due to age and demographic factors or, more recently, applying to anyone coming from the Gaza Strip. Israel has identified, for example, young people between the ages of 16 and 35 as belonging to a “risk profile” and has imposed special restrictions on them, such that even if they belong to categories that otherwise would be permitted to travel at various points in time – Christians seeking access to holy sites, family members visiting relatives imprisoned in Israel, workers seeking to access their jobs in Israel – their age prevents them from traveling. Israel has also identified people as belonging to a special risk profile, for example, students seeking to travel between Gaza and the West Bank.⁶⁹ In general, Israel has claimed that allowing people from Gaza to travel to the West Bank would be dangerous because of intentions by militants in Gaza to transfer “terrorist infrastructure” from Gaza to the West Bank.⁷⁰

68 Israeli legislation incorporates the Wassenaar Agreement on dual use goods as a frame of reference and adds thousands of other items whose entry into Gaza and the West Bank is either prohibited or highly regulated. See *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*. WA Secretariat, Vienna, 2004; see also Israel Defense Export Control Law, 5766-2007, SH No. 2105 p. 398 (Isr.). Office of the General Counsel, Ministry of Defense, 2007 (English) and related legislation. The ban on construction materials entering Gaza is a post-2007 development, and construction materials are not included in the above-referenced legislation.

69 See HCJ 11120/05 Hamdan v. Southern Command and related cases (unpublished, decided Aug. 7, 2007) (Israel), para. 16 [hereinafter *Hamdan* case] “the 16–35 age group is central to terrorist activities, with students playing a prominent role among this group.”

70 *Hamdan* case, State Response, Jan. 19, 2006 (Isr., para. 40), available at www.gisha.org/item.asp?lang_id=he&p_id=96.

In addition to a generalized risk argument, Israel characterizes its policy to block economic activity in Gaza as a policy designed to protect its security by preventing the Hamas regime from obtaining access to money that could be used to fund combat operations.⁷¹ The argument put forth by the State of Israel in *al-Bassiouni v. Defense Minister*, which was accepted by Israel's Supreme Court, is that economic activity in Gaza would benefit the Hamas regime, and therefore a generalized policy of restricting goods that could be used for economic development, including the ban on raw materials entering Gaza in place from 2007 to 2010, is an integral part of Israel's combat operations. Israel made similar arguments regarding the supply of fuel and electricity to Gaza, arguing that it may reduce the flow of fuel and electricity to a "humanitarian minimum" so that there would be enough for hospitals and other humanitarian institutions, but not enough for military use.⁷² To that end, Israel calculated how many liters of diesel, for example, would be necessary to fuel ambulances, hospital generators, trucks delivering basic humanitarian goods, and "minimal" public transportation and committed to allow at least those amounts into Gaza, but blocked additional quantities.⁷³

In addition, Israel conditions the entrance of building materials into Gaza on military approval of the location of the project, in cases in which the construction will change the topography of Gaza, presumably to ensure that the changes do not interfere with the military objectives of the Israeli military, including clear lines of vision for its observation posts.⁷⁴ This would appear to be a "forward-looking" military need – manipulating topographical conditions to be favorable for future combat.

Access Restrictions as a Means of Pressure

A related but distinct set of intentions for restricting the movement of people and goods is the aim to apply pressure on the civilian population in Gaza, as

⁷¹ See State Response in *al-Bassiouni*, *supra* note 39, at para. 29.

⁷² *Id.* at para. 71. In instituting the fuel cuts, Israel argued that "There is a possibility that reducing the quantity of fuel in Gaza will reduce, although not, of course, completely neutralize, the resources available to terrorist organizations."

⁷³ *Id.* at para. 79. In cutting fuel supply, Israel promised "to make sure that the reduction in diesel will be such that it will not interfere with ambulance traffic and diesel supply to hospital generators, to the extent that such things are dependent on Israel."

⁷⁴ See Construction Materials Procedure, *supra* note 47. Para. 7(d) and footnote 1 stipulate that IDF approval is required in cases in which the project would change the topography of the Gaza Strip.

a means of influencing the behavior of political actors and/or militants. Israel has stated that its restrictions on the flow of goods into and out of Gaza are designed to “apply pressure on the Hamas regime to influence it to reduce the scope of the hostile activity committed against Israel from inside the Strip.”⁷⁵ Israel has called this type of pressure “sanctions” or part of its “economic warfare,” against the Hamas regime, in which it is permitted to take measures to harm the economy in Gaza, so long as it permits passage of goods essential to the survival of the civilian population and refrains from interfering in its ability to survive.⁷⁶ Israeli human rights organizations and the International Committee of the Red Cross have called it collective punishment.⁷⁷ At times, the goal of the restrictions has been articulated as reducing the level of combat, as described above. In other cases, travel and goods have been blocked as a way of pressuring the Hamas regime to release a captured Israeli soldier, as was the case with the closure of Rafah Crossing to passengers beginning in June 2006⁷⁸ or to make concessions in negotiations over his release.⁷⁹

Israeli officials described the policy of economic warfare as designed to exercise maximum pressure on people living in Gaza, without interfering in the ability of the civilian population to meet basic humanitarian needs. When sued by Israeli meat importers seeking permission to bring calves into Gaza for food consumption, the Israeli government explained that it had carefully calculated the types and quantities of food that were necessary for people in Gaza and that it would allow only those to enter the Strip: “In accordance

75 State Response in al-Bassiouni, *supra* note 39 at para. 71.

76 *Id.* para. 49: “The capacity of a country to make use of coercive economic measures during armed conflict is in principle permitted and is limited by international law only by the obligation to permit passage of essential goods and the prohibition on interfering in the ability of the population to survive. That is all.”

77 See Int’l Committee of the Red Cross, GAZA CLOSURE, NOT ANOTHER YEAR!” June 14, 2010, available at <U>www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm.</U> See also GISHA, GAZA CLOSURE DEFINED: COLLECTIVE PUNISHMENT, December 2008, available at <http://www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>.

78 See Protocol of discussion among Israeli security experts from August 26, 2006, reproduced in GISHA, DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA, January 2007, p. 59, available at http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf.

79 See Hanan Greenberg, *Israel Considering Reducing the Passage of Goods to the Strip*, YNET, sept. 23, 2008 [in Hebrew], available at <http://www.ynet.co.il/articles/0,7340,L-3600973,00.html>.

with government policy, supplying Gaza with food items which are not of a humanitarian nature or products in quantities exceeding those necessary for humanitarian needs is not made possible.”⁸⁰ The state attorney’s office emphasized in its response that the restrictions are imposed “according to government policy, in view of the fact that Gaza is ruled by a terrorist organization hostile to the State of Israel.”⁸¹

The desire to restrict food consumption to that necessary for humanitarian needs as a means of pressure may help explain the micro-managing of the menu available to residents of Gaza, as reflected in the COGAT documents. If we analyze the example of the hummus policy, raw chickpeas were at all times permitted into Gaza. Indeed, they were defined as a basic humanitarian item, especially for their use in making hummus, an important staple of the Palestinian diet and a cheap source of protein. Packaged hummus could be considered a higher level of purchase, and indeed, it is more expensive than raw chickpeas and the hummus produced locally in Gaza. The decision, in 2009, to allow people in Gaza to purchase packaged hummus, but only the unseasoned kind, might have reflected a compromise between the desire to limit consumption to that necessary for humanitarian reasons and a response to criticism from the international community and pressure from financially-interested Israeli food manufacturers, such as the petitioners in the above-mentioned meat case.

In a general way, Israel has also indicated that its restrictions are aimed at regime change, by limiting growth and development in Gaza while improving economic activity in the West Bank, presumably to persuade Palestinians in Gaza to overthrow the Hamas regime.⁸²

80 HCJ 4250/08 Afaneh Brothers LTD. et al. v. Ministry of Agriculture, paras. 12–13 of the State Response (Sept. 18, 2008), available at http://www.gisha.org/userfiles/file/publications/redlines/footnotes/state_response18.9.08.pdf.

81 *Id.* para. 14. Additional information about the restrictions on food supplies is available in GISHA, READER: FOOD CONSUMPTION IN THE GAZA STRIP: RED LINES, October 2012, available at <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>.

82 See comments by military officials explaining the ban on merchants from Gaza selling goods to Israeli markets as intended to distinguish them “from the merchants in the West Bank, who are permitted to trade with Israel.” Amir Buchbot, *For the First Time Since 2007, Israel will Allow Extensive Export from Gaza*, WALLA!, Nov. 18, 2011, available at <http://news.walla.co.il/?w=/13/1877998>. See also military officials’ explanation of rationale for restrictions on travel between Gaza and the West Bank: “For Gaza, we are promoting a policy of separation, the goal of which is, to put it plainly, to bring Abu Mazen to Gaza and not Hamas to the West Bank.” Nir Yahav, *Why can’t Samah from Bethlehem Visit her Sick Father in Gaza?*, WALLA!, Sept. 8, 2012, available at <http://news.walla.co.il/?w=/2565353>.

Access Restrictions as Population Control

Another purpose to explore is the use of access restrictions as a means of population control. Throughout the occupation of the West Bank and Gaza, Israel has used control over movement as a means of demonstrating its presence and power to Palestinian residents, including in order to exact compliance or collaboration. While this purpose is related to the aim of pressure to change the behavior of political actors or to induce regime change, it is distinct in that it seeks to influence the behavior of individuals, either as deterrence against participation in violence or as a means to persuade or coerce them into providing information to the ISA. Conditioning permission to travel via Erez Crossing on collaboration with the ISA is a frequent example of using the removal of travel restrictions as a reward.⁸³ According to this theory, the imposition of access restrictions provides Israel with leverage over the behavior of individuals: it can deter undesirable behavior with the threat of movement restrictions and coerce desirable behavior with the promise to remove them. In addition to a more straightforward use of access as a reward for desired behaviors, the lack of transparency and personalized decision-making help subdue and establish authority over people living in Gaza, who experience but cannot locate the “phantom sovereign”⁸⁴ controlling important aspects of their lives and, therefore, find it difficult to challenge its decisions.

Part of what may be of interest to the military is the contact that the regulation of travel restrictions affords with Palestinian residents, including for purposes of gathering information. Access in Gaza and the West Bank is regulated by the COGAT, a unit of the Defense Ministry staffed by soldiers and officers. One of the activities of the unit is defined as conducting “surveys of the current state of affairs in civilian matters (social, political, and economic aspects) in order to better understand the thoughts and desires of the Palestinian civilian population, locate various trends and needs, and act accordingly.”⁸⁵ While certainly, such information gathering is necessary to evaluate the urgency of requests for movement of goods and people, it is also of interest to security officials, whose role in evaluating travel requests is significant. Indeed, Israeli

83 See Physicians for Human Rights-Israel, *HOLDING HEALTH TO RANSOM GSS: INTERROGATION AND EXTORTION OF PALESTINIAN PATIENTS AT EREZ CROSSING*, Aug. 2008, available at http://www.phr.org.il/uploaded/HoldingHealthToRansom_4.pdf.

84 See Yehouda & Berda, *supra* note 17, at 361.

85 See COGAT WEBSITE, “ABOUT,” “CIVILIAN COORDINATION,” available at <http://www.cogat.idf.il/1567-en/Cogat.aspx>.

security officials have requested interviews, supposedly in order to evaluate a travel request, in order to lure residents of Gaza to Erez Crossing for purposes of arresting them,⁸⁶ under circumstances in which they would be unlikely to expend the resources and incur the risks necessary to enter Gaza in order to arrest that person in his or her home.

Access Restrictions as Benefit to Political Actors

An additional purpose of imposing the access restrictions may be their effectiveness as leverage, meaning that Israel can remove them as a benefit to political actors, primarily friendly Western countries and the PA. The policy of access restrictions in Gaza is characterized by a high level of responsiveness to pressure from the international community, particularly powerful Western countries such as the United States. A review of the weekly guidelines regarding movement through Erez Crossing, for example, indicates repeated concessions in response to pressure from the United States. In the summer of 2008, following American protest of Israel's refusal to allow Fulbright students from Gaza to leave in order to reach universities in the United States, Israel lifted the ban on students leaving Gaza for study abroad, in cases in which a "friendly" country provided scholarships to the students.⁸⁷ A similar concession was made following a protest by senior US officials concerning the refusal to permit macaroni, donated by an American aid agency, into Gaza; following the protest, Israel added pasta to the list of humanitarian items permitted into Gaza.⁸⁸

86 See, e.g. PHYSICIANS FOR HUMAN RIGHTS-ISRAEL, ISRAELI AUTHORITIES ESCALATE BLACKMAIL AND DETENTION OF GAZAN PATIENTS, July 18, 2012 update, available at <http://www.phr.org.il/default.asp?PageID=190&ItemID=1556>.

87 See Ethan Bronner, *US Withdraws Fulbright Grants to Gaza*, N. Y. TIMES, May 30, 2008, available at <http://www.nytimes.com/2008/05/30/world/middleeast/30gaza.html?pagewanted=print>. Following US protest, Israel began allowing students to leave Gaza for study abroad, if they received a scholarship from a country having diplomatic relations with Israel. The change is reflected in the Defense Ministry's weekly instructions dated Sept. 22, 2008, in which, following a year of prohibition, scholarship holders heading abroad are listed as being permitted to travel through Erez. See DEFENSE MINISTRY, STATUS OF PERMISSIONS IN THE CLOSURE, Sept. 22, 2008 Update [in Hebrew], available at www.gisha.org/UserFiles/File/HiddenMessages/kriteriyonim22_9_08.pdf.

88 See Dion Nissenbaum, *Israel Blocks Pasta Shipment to Gaza and Tensions Boil*, MCCLATCHLEY NEWSPAPERS, Feb. 25, 2009, available at <http://www.mcclatchydc.com/2009/02/25/62797/israel-blocks-pasta-shipment-to.html>. The addition of pasta to the list of items permitted into Gaza is reflected in the May 21, 2009 weekly instructions. See DEFENSE MINISTRY, STATUS OF PERMISSIONS IN THE CLOSURE, May 21, 2009 Update [in Hebrew], available at www.gisha.org/UserFiles/File/HiddenMessages/kriteriyonim21_5_09.pdf.

In addition, as a general rule, Israel grants access favors to international organizations and Western countries, including by allowing them to bring construction materials into Gaza, providing permits to their employees and beneficiaries, and negotiating concessions in access policy as an integral part of Israel's engagement with Western countries over regional issues. An explicit goal of Israel's policies for approving the entry of construction materials is enhancing Israel's "legitimacy" in the eyes of the international community.⁸⁹ In this way, even senior diplomats from powerful countries expend significant resources to negotiate and supervise exceptions to the rule of no access, diverting political agendas to focus on micro-issues and logistical arrangements.⁹⁰

On a smaller scale, similar concessions are granted to the PA, which can move people through crossings by placing them on VIP lists⁹¹ and can choose, within the numerical and category limitations imposed by Israel, for which individuals it will request permits. Some categories of travel are permitted on

89 See Construction Materials Procedure, *supra* note 47. The procedure lists the identity of the organization requesting construction materials as a factor in determining whether to approve it and notes the need to approve groups of small projects in order to have a "quick influence on the population [and] legitimacy to Israel in implementing the policy" (para. 4(a) of Appendix C). See also GAZA DISTRICT COORDINATION OFFICE, PROCEDURE FOR HANDLING SENIOR LEVEL DELEGATIONS, Order 3.0/0010, September 2006 [in Hebrew], available at http://www.cogat.idf.il/Sip_Storage/FILES/9/3329.pdf. The procedure notes, as one of its goals, "the proper entrance of delegations, especially high level delegations headed by senior diplomats, that are of high diplomatic significance and that have great influence over the way the international community perceives the seriousness, professionalism and willingness of the IDF and the Israeli side."

90 For example, US Secretary of State Hillary Clinton and Senator John Kerry publicly urged Israel to allow pasta into Gaza; US Secretary of State Condoleezza Rice publicly expressed her opinion that Israel should allow Fulbright scholarship recipients from Gaza to reach their studies, and once Israel agreed, the diplomats from the United States and other Western countries acceded to an Israeli demand to escort scholarship holders from Gaza through Israel and the West Bank en route to Jordan, as a condition for the students receiving permits. See Ethan Bronner, *State Dept. Reinstates Gaza Fulbright Grants*, N.Y. TIMES, June 2, 2008, available at <http://www.nytimes.com/2008/06/02/world/middleeast/02fulbright.html?pagewanted=print>. See also GAZA DCO, STATUS OF PERMISSIONS, GAZA DCO, Sept. 2, 2009, [in Hebrew], at para. 7(e), available at www.gisha.org/UserFiles/File/HiddenMessages/kriteryonim2_9_09.pdf ("American scholarship holders – permits subject to the ISA – exit for one day, for visa interviews in Jerusalem coordinated by the (United States – SB) consulate, exit of the scholarship holders via Allenby to Jordan, subject to escort by an official of the embassies"); GISHA, OBSTACLE COURSE: STUDENTS DENIED EXIT FROM GAZA, July 2009, available at http://www.gisha.org/UserFiles/File/publications_/Students2009_Report_Eng.pdf.

91 See, for example, the document reproduced in Part II(B), which includes special concessions for politicians, VIPs, and businesspersons on lists submitted by the PA. Individuals wishing to be classified as "VIPs," "merchants," and other special categories must have their names submitted to Israel by the PA.

the condition that the destination event is sponsored by the PA,⁹² and one of the few exceptions to the ban on selling goods from Gaza to the West Bank was authorized to allow the PA to receive a shipment of school furniture ordered from a supplier in Gaza.⁹³

Access Restrictions in Response to Israeli Public Opinion

Another purpose of the restrictions may be to show the Israeli public that the government is adopting strong measures in the face of public anger over rocket fire from Gaza onto towns in southern Israel and the holding of captured Israeli soldier Gilad Shalit from 2006 to 2011.⁹⁴ Certainly, the imposition of movement restrictions has been accompanied by public statements describing the government's determined stance in relation to Hamas' participation in Palestinian governance.⁹⁵ Of course, such statements may simply reflect a public relations strategy that accompanied the policy, but public pressure to take action against Hamas was and is strong, and it should not be discounted as a motivation for Israeli politicians.

Access Restrictions as a Means of Defining Political Borders

In the past, Israeli policies allowing and even encouraging freedom of movement between Gaza, Israel, and the West Bank indicated a policy of integrating the different parts of historic Palestine/Land of Israel under Israeli rule. Yet, at least since 1991, Israel has used access restrictions as a means of carving out *de facto* borders by designating certain areas to particular populations. This is most obviously seen in the West Bank, where Palestinians are excluded from the Jewish settlements and surrounding areas,⁹⁶ while Israeli citizens are banned from entering Palestinian cities, but it can also be seen in what the Israeli

⁹² COGAT Criteria, *supra* note 32, sec. 7(a)(16).

⁹³ MINISTRY OF DEFENSE, COORDINATOR OF GOVERNMENT ACTIVITIES IN THE TERRITORIES, "PROJECTS IN GAZA, 2010-2012" 4, available at http://www.cogat.idf.il/Sip_Storage/FILES/5/3495.pdf.

⁹⁴ See Cabinet Decision, *supra* note 14.

⁹⁵ See, for example, quote from Dov Weisglass, senior adviser to then-Prime Minister Ehud Olmert: "the idea is to put the Palestinians on a diet, but not to make them die of hunger," quoted in Conal Urquhart, *Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite*, GUARDIAN, Apr. 16, 2006, available at <http://www.guardian.co.uk/world/2006/apr/16/israel>.

⁹⁶ See, e.g. Access Denied, *supra* note 12.

military calls the “separation policy” to block the movement of people and goods between Gaza and the West Bank.⁹⁷ As noted, Israel allows limited quantities of outgoing goods from Gaza to reach European markets but bans goods from Gaza from being sold in the West Bank or Israel. Similarly, Israel allows some students from Gaza to travel to the West Bank en route to universities abroad (via Jordanian ports), but does not allow those students to remain in the West Bank for study in Palestinian universities there. At least some of the movement restrictions imposed by Israel appear designed to shape political borders, namely to facilitate the development of Gaza and the West Bank as two distinct political entities and to separate the West Bank into areas intended for Palestinians and areas intended for Jewish Israelis.

If, prior to the first Intefadeh Israel’s access policy was characterized by integration of the whole of historic Palestine/Land of Israel, and during the Oslo period it reflected a conflicted policy to separate Gaza and the West Bank from Israel but permit some access between Gaza and the West Bank, the Israeli government’s current separation policy is cutting off Gaza, which it has renounced as a site for Jewish settlement, from Israel and the West Bank, where Israel continues to make territorial claims. In doing so, the Israeli government articulates the position that Palestinians are foreigners who have no “vested right” to enter east Jerusalem or Israel,⁹⁸ including for purposes of traveling between Gaza and the West Bank.⁹⁹ In addition, it treats Palestinians from Gaza as having no right to enter the West Bank and requires them to obtain permits in order to remain in the West Bank, the violation of which is punishable by removal to Gaza and/or up to seven years in prison.¹⁰⁰

At the same time that Palestinians from Gaza are prevented from moving to the West Bank and, if already in the West Bank, may be removed to Gaza, Israel creates incentives for Palestinians from the West Bank – to move to Gaza. The

⁹⁷ The Coordinator of Government Activities in the Territories characterizes the policy as “Separation between Judea and Samaria and the Gaza Strip – as a security-political need.” See COGAT, *THE CIVILIAN POLICY TOWARD GAZA*, Aug. 31, 2010, presentation to the Public Commission to Examine the Maritime Incident of 31 May 2010, at 15 [hereinafter COGAT Presentation], available at <http://turkel-committee.gov.il/content-121.html>. See also GISHA’S INFORMATION SHEET, *WHAT IS THE SEPARATION POLICY?* June 2012, available at <http://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>.

⁹⁸ *Salameh* case, *supra* note 10, State Response of October 17, 2006, para. 2.

⁹⁹ See *Hamdan* case, *supra* note 69, State Response of January 19, 2006 at para. 16.

¹⁰⁰ See Israel Defense Forces, Order 1605, Order Regarding Prevention of Infiltration (Amendment No. 2), October 13, 2009. Unofficial English translation by the Hamoked: Center for the Defence of the Individual, available at <http://hamokeden.red-id.com/Document.aspx?dID=Updates1013>.

policy preventing Palestinians in Gaza from joining their spouses, children, or parents in the West Bank creates an inducement for the family member in the West Bank to move to Gaza, in order to avoid separation. Once a Palestinian from the West Bank moves to Gaza, the military seeks to prevent him or her from returning to the West Bank.¹⁰¹

The net effect of the military orders and procedures is to encourage or force movement of Palestinians in one direction, from the West Bank to Gaza, in the context of a policy described as having both security and political rationales.

Since 2007 at least, the separation between Gaza and the West Bank is exacerbated by the political split between the Fatah and Hamas governments in the West Bank and Gaza, respectively, which have duplicated public institutions due to their failure to maintain or recreate a single government in both parts of the territory.

A Summary Note

Of course, it is artificial to separate these purposes into distinct categories, as decisions and policies are multi-determined. I do not pretend to supply definitive answers, but I believe the inquiry is relevant in understanding the role that Israeli regulation of movement plays in what it calls its “security-political” policy toward Gaza. The absence or presence of a genuine security purpose, and its weight and level of specificity, is also highly relevant for those who, like me, believe that Israel continues to owe obligations to residents of Gaza, under the law of occupation, which permits restrictions motivated by security interests but does not permit use of the civilian population for purposes of pressuring militants or political actors.

101 Here, a comparison of two complementary military procedures is instructive. The Gaza Settlement Procedure (*supra* note 37) prevents family members in Gaza from joining their first degree relatives in the West Bank, except under extraordinary circumstances. A second procedure regulates the movement of Palestinians from the West Bank to Gaza. The military in such cases will facilitate the move, but after it is completed, “passage to Judea and Samara for a resident who chose to settle in the Gaza Strip is not made possible.” See MINISTRY OF DEFENSE, COORDINATOR OF GOVERNMENT ACTIVITIES IN THE TERRITORIES, December 2010 [in Hebrew], para. 4a, available at <http://www.gisha.org/UserFiles/File/LegalDocuments/Procedure-for-Settlement/PROCEDURE-FOR-SETTLEMENT-IN-THE-GAZA-STRIP-he.pdf>. The procedure notes that “because the settlement of residents of the Gaza Strip in Judea and Samaria is permitted in extremely exceptional cases ... there is a need to allow the family unit to be maintained in the Gaza Strip” (para. 1c).

Publicly, Israeli officials consistently highlight their intention to protect security interests, although between 2007 and 2010, during the policy of “economic warfare,” they also emphasized their desire to apply pressure on the Hamas regime. Since 2010, the public message regarding the travel restrictions has been mixed, summed up by official statements regarding the necessity of separation and distinction between Gaza and the West Bank for “political-security reasons.”¹⁰² There has been some discrediting of the pressure rationale, in light of consensus that the restrictions on the entrance of goods, at least, did not achieve their stated goal of weakening the Hamas regime.¹⁰³ Of senior Israeli officials, only former Foreign Minister Avigdor Liberman explicitly advocated using the access regime to shape borders; he called for cutting Gaza, and its population of 1.7 million Palestinians, off from Israel and the West Bank by preventing all travel from Gaza to Israel and the West Bank, but allowing travel via Gaza’s land crossing with Egypt and eventually, its territorial waters.¹⁰⁴

Conclusions

I have described the system of movement restrictions that Israel exercises over Gaza and argued that it perpetuates aspects of control once exercised by direct military administration of Gaza and identified in the literature analyzing colonial bureaucracies. The same military bureaucracy that once directly controlled education, development, infrastructure, and other civilian affairs in Gaza and the West Bank – now makes decisions about movement of people and goods that substantially impact those spheres.

I have explored two additional, related issues: first, how does such control affect the lives of people living in Gaza, and second, what is the purpose of the restrictions imposed? Both questions are important to consider the legitimacy of the restrictions Israel imposes on access into and out of Gaza, a subject of robust scholarly, political, and public policy debate. While this article does not analyze the normative framework governing the access restrictions applied to Gaza, my hope is that the information and analysis presented here will inform that discussion. I also hope that this account of how some aspects of control are maintained in the context of Gaza will further our understanding of the ways in

102 See COGAT Presentation, *supra* note 97.

103 See GISHA, UNDO THE CLOSURE, Facebook page quoting senior Israeli officials speaking out against the restrictions on goods entering Gaza, *available at* <https://www.facebook.com/media/set/?set=a.249326338487066.60505.114183292001372&type=3>.

104 Itamar Eichner, “*Lieberman Matzig: Hitnatkut Shniya*,” July 16, 2010, YEDIOT AHRONOT, p. 3.

which bureaucracies deviate from the Weberian rational model and the functions that may be served by such deviation. While the history and nature of control over Gaza are unusual, their study may provide insight into the exercise of control by foreign powers in additional contexts, such as military occupation, sanctions regimes, and majority control over autonomous, ethnically designated areas within a state.

I want to identify two areas of further research. First, I would suggest a more in-depth study of the effects of the movement restrictions on life inside Gaza. I have provided anecdotal examples of the way in which people adjust their lives to respond to the rules regarding who and what may enter and leave Gaza and the type of behavior that the criteria benefit and penalize. Further research is needed, including, for example, an in-depth analysis of effects of the policies regarding transfer of goods on economic and labor force behavior. For a better understanding of the effects of the restrictions on movement of persons, data should be collected regarding the effect of the exceptions to the travel ban on people's choices, including child custody arrangements, decisions about work and study, economic opportunities, marriage, divorce and separation, and others.

Second, I would advance a more rigorous investigation into the purpose of the policies, including interviews with current and former junior and senior Israeli officials responsible for determining and implementing the policy toward Gaza.

In this article, I have highlighted a growing trend of Israeli control over historic Palestine/Land of Israel – shaping *de facto* borders and exercising a substantial degree of control over the lives of those living inside those borders, not by direct involvement but rather by decisions over who and what may enter and leave.¹⁰⁵ I have focused on movement restrictions applying to residents of the Gaza Strip, for whom Israeli control is primarily felt through control over borders. While in the West Bank, Israeli soldiers also play a more direct role in regulating the lives of civilians because of their permanent physical presence there, the trend toward retreating to the perimeter – and disavowing responsibility for what takes place inside – continues to be apparent, first by the division of the West Bank into Areas A, B, and C, with Israeli soldiers mostly remaining on the outskirts of the Palestinian cities located in Area A, and later by the division of the West Bank into enclaves divided by bypass roads, tunnels, and the separation barrier. The analysis presented in this article is likely to become

105 See NEVE GORDON, *ISRAEL'S OCCUPATION* (2008) (examining the evolution of Israel's approach to the occupation).

increasingly relevant to the West Bank, too, where the Israeli military bureaucracy is transitioning toward controlling lives by controlling borders.

Acknowledgments: I wish to thank Tally Kritzman-Amir, Nomi Heger, and Yoni Eshpar for their helpful comments on earlier drafts. I also wish to thank Tamar Feldman, Gisha's former legal director, for her role in the litigation that led to the revelation of many of the military documents discussed in this article.