

# Scale of Control: Israel's Continued Responsibility in the Gaza Strip

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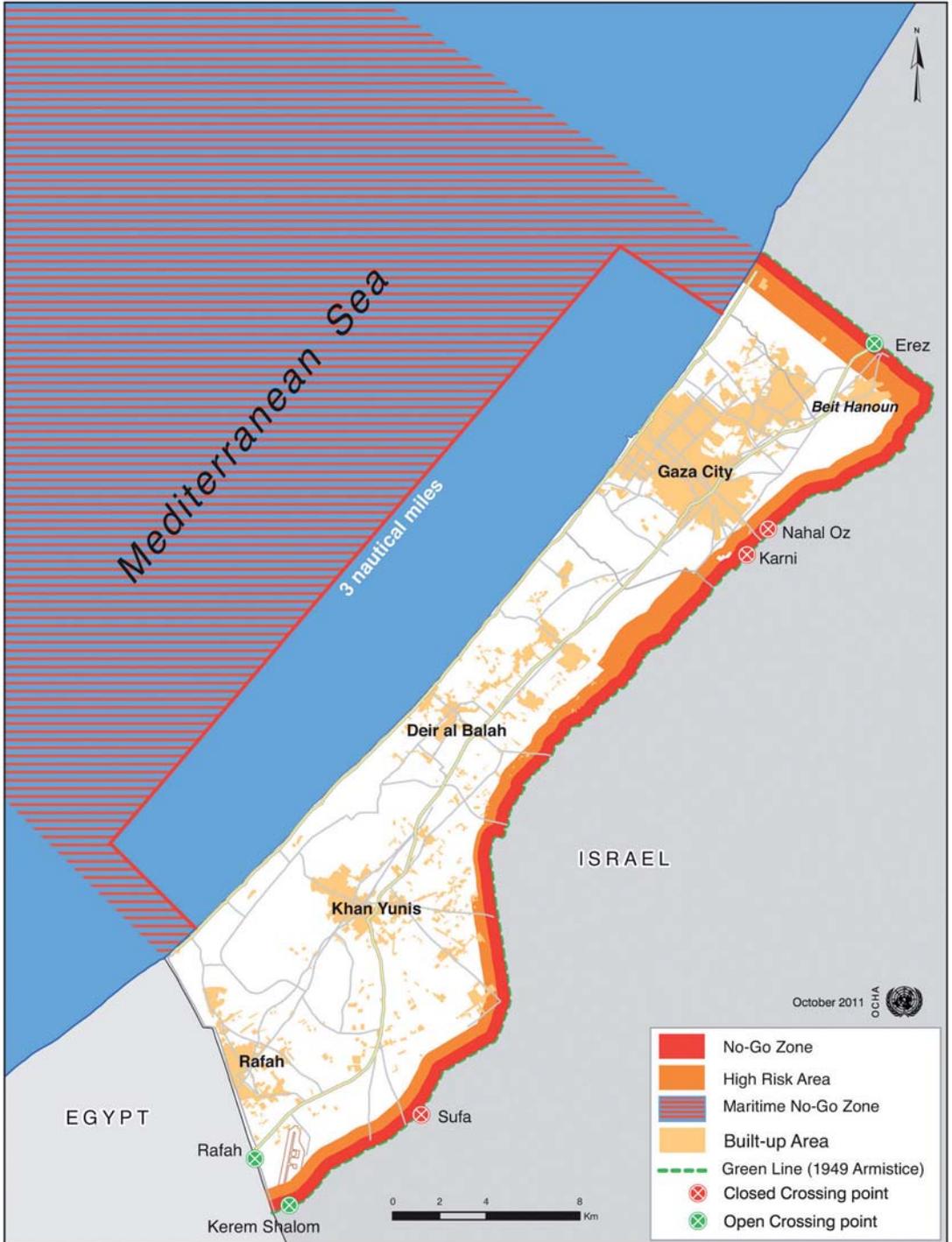
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## Introduction

In 2006, after a visit to the Gaza Strip, Ramallah and West Jerusalem, the United Nations' High Commissioner for Human Rights at the time, Louise Arbour, held a meeting with representatives from Israeli human rights organizations. When speaking about the state of human rights in the Gaza Strip, she noted that the violation of the rights of Gaza's residents is painfully apparent. The trouble, she added, after having spoken with officials from the Israeli government, the Hamas regime and the Palestinian Authority, is identifying who is responsible.

Lack of clarity regarding who is responsible for protecting the rights of Palestinians living in Gaza has persisted since then and has contributed to attempts to eschew responsibility by all parties, particularly those who exert the most control over the lives of Gaza's residents – namely, Israel, the Hamas regime and the Palestinian Authority. Even in the complex context of the Palestinian territory, analyzing responsibility under international law is particularly challenging when it comes to the Gaza Strip. Since 2005, Israel has claimed that the "disengagement" brought about an end to the Israeli occupation of the Gaza Strip and that the laws of occupation, primarily the relevant provisions of the Fourth Geneva Convention and the Hague Regulations, have ceased to apply to Israeli actions toward Gaza residents. This position has solidified further following the Hamas movement's rise to power in June 2007 and the ensuing changes in the means of control by all parties. For this reason, Israel considers itself obligated to uphold only minimum standards in its decisions regarding entry into and exit out of the Gaza Strip of both people and goods. Since June 2007, Israel has claimed that its obligations toward the Gaza Strip are limited to a duty to allow the passage of goods which are "vital for the survival of the civilian population" and of people "in humanitarian cases, with an emphasis on urgent medical cases" only.

In January 2007, Gisha published a position paper, "Disengaged Occupiers",<sup>1</sup> in which it argued that the laws of occupation continue to apply to Israel's actions in Gaza even after "disengagement", and that the scope of Israel's obligations vis-à-vis the residents of Gaza is commensurate with the scope of its control. It was further argued that additional branches of law apply to Israel's actions, including human rights law, post-occupation law and Israeli administrative and constitutional law.

The current position paper addresses the changes which have transpired in control over the Gaza Strip since 2007, changes which impact the analysis of the various parties' obligations. Although we focus on the Gaza Strip, we also address the normative framework pertaining to the entire Palestinian territory, including Gaza and the West Bank; we focus on Israel's obligations,<sup>2</sup> but we also address the responsibilities of other parties, particularly the Hamas regime in Gaza and the Palestinian Authority in the West Bank.

Our main argument is that Israel continues to owe obligations related to the maintenance of public order and the ability to conduct normal life in the Palestinian territory, because it currently controls some aspects of these domains, and because in the past it controlled additional aspects. We especially emphasize obligations under the laws of occupation and post-occupation, because the nature of these obligations – related to public order – corresponds to the nature of current and past control, namely control over the functions of government that regulate public life and determine whether residents can lead normal lives. We argue that under the current circumstances existing in the Palestinian territory, where Israel has relinquished some powers but continues to exercise others, the laws of occupation and post-occupation apply concurrently, commensurate with the degree of control exerted by Israel and the dependence of Gaza's residents on Israel in those areas of control.

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1. GISHA, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA* (2007), (hereinafter: GISHA, *DISENGAGED OCCUPIERS*), [www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf](http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf)

2. The choice to focus on the obligations of the State of Israel reflects Gisha's mandate, as an Israeli human rights organization, to ensure that Israeli authorities respect the law and safeguard the rights of the individuals under their control. Gisha expresses deep appreciation for its colleagues working in Palestinian human rights organizations who aim to ensure that Palestinian authorities, both in Gaza and the West Bank, safeguard the rights of the individuals under their control.

As a human rights organization that provides legal assistance to residents of the Palestinian territory, we of course strive to find a legal framework that best protects the rights of the individual. We seek to ensure that the governing authorities fulfill their obligations to allow the civilian population to enjoy freedom of movement and conduct normal lives. However, the goal of this position paper is not to present what we view to be the desirable legal framework (which is a far cry from the existing legal framework), but rather to apply accepted international law doctrines to the current situation in the Palestinian territory: a situation in which a foreign power exerts control over people who are not its citizens or residents and to whom its laws (including the protection they provide to individuals) do not apply. The purpose of international humanitarian law is to regulate the relationship between residents and the foreign power, particularly via the laws of occupation. The Gaza Strip and West Bank are not unique in this sense, and humanitarian law provides solutions for the complex issues arising from the attempt to analyze the responsibility of the various parties exerting control over the Palestinian territory. This position paper aims to present these solutions.

**Chapter 1** presents a factual overview of the control of Gaza by the relevant parties – Israel, the Hamas regime and the Palestinian Authority – while emphasizing the changes that have occurred since Hamas’ rise to power in Gaza and since the publication of "Disengaged Occupiers". We demonstrate that Israel’s control over the movement of people and goods into and out of the Gaza Strip has decreased since 2007, although Israel still maintains significant control over such movement. We also address changes in the taxation system in the Gaza Strip as a result of the change in internal control.

**Chapter 2** offers a normative framework for applying the law of occupation to Israel’s actions in the Gaza Strip. We view Israeli control over the Palestinian territory as a dynamic situation in which Palestinian sovereignty is partially realized while, at the same time, the occupying power continues to exercise functions of government. In this context, we regard the "end of occupation" as a process that takes place over time, where it is not always possible to know where we are located on the spectrum of control between occupation and its termination. We offer an analysis whereby responsibility is commensurate with control, and relinquishing control over a certain sphere corresponds with reduced responsibility in that sphere.

**Chapter 3** addresses the obligations arising from the law of post-occupation, even after some aspects of control have been relinquished. We demonstrate that, for a transitional period, Israel will continue to owe obligations even in spheres in which it relinquished control, as part of its duty to protect the civilian population during the transition between occupation and the realization of lawful sovereignty.

**Chapter 4** addresses human rights law, which also applies to Israel's actions toward the Gaza Strip, on the lives of whose residents Israel has a direct and significant impact.

**Chapter 5** addresses the obligations of the Palestinian authorities exercising control over the Palestinian territory, with an additional brief reference to Egypt's role.

**Chapter 6** applies the suggested framework to the Gaza Strip while attempting to provide solutions to specific issues arising from the combined control of the three main parties.

We believe that this analysis will help in understanding the division of responsibilities of the various parties in protecting the rights of Palestinian residents both in Gaza and in the West Bank. While the analysis focuses on the Gaza Strip, its principles are equally applicable to the West Bank where the scope and nature of control by various actors may change over time, including as a result of evolution in the international status of the Palestinian territory and the degree to which its independence is recognized.

## Summary

In recent years, the Gaza Strip has been the focal point of a legal debate which has growing ramifications for the political reality in the region and for the lives of Israelis and Palestinians. The debate revolves around the question of Gaza's legal status after the removal of Israeli army bases and settlements in the September 2005 "disengagement". Israel's official position is that this marked the end of the occupation that began in 1967 and that the law of occupation ceased to apply to Israel's relationship with Gaza at that point. According to this position, Israel's sole obligations to residents of the Gaza Strip are those mandated by the law of armed conflict, which continues to apply, so long as the violent conflict between the Israeli military and armed groups in Gaza continues.

In 2007, Gisha published "Disengaged Occupiers: The Legal Status of Gaza", a position paper in which it argued that the law of occupation continues to apply to all Israeli actions toward the Gaza Strip due to the significant control it still exercises over Gaza. "Scale of Control: Israel's Continued Responsibility in the Gaza Strip" updates our previous legal analysis and adapts it to reflect the changes on the ground and in the patterns of control exercised over the Gaza Strip by the various actors since 2007, including as a result of the Hamas movement's takeover of internal control in Gaza.

This position paper illustrates how despite recent developments, Israel continues to control Gaza's airspace and territorial waters, the Palestinian population registry and passage of goods and people to and from Gaza. Israel still collects customs and value added tax for goods entering the Gaza Strip and maintains some physical presence in the Strip. Israel also controls Gaza's infrastructure by virtue of its control over supply of electricity and other inputs to the system.

Does this mean Israel is still occupying the Gaza Strip? In this position paper, we refer to the "end of occupation" both in Gaza and in the West Bank as a process

that takes place over time. We are currently located somewhere on the spectrum between occupation and the end of occupation, that is, a situation in which Israel has already relinquished some governmental powers in the West Bank and Gaza Strip and allows Palestinian authorities to exercise them, yet continues to exercise other governmental powers, to the exclusion of others. Under these circumstances, it is impossible to say that the occupation of the Gaza Strip has ended and therefore, the international law of occupation continues to apply to Israel in the spheres in which it continues to exercise control over the lives of Palestinian residents. In the spheres in which Israel has transferred or relinquished powers and allows others to exercise them, its responsibility toward the civilian population is diminished or extinguished.

In addition, for a transitional period, Israel continues to owe obligations in spheres in which it relinquished control, until the representatives of the Palestinian people are able to exercise their sovereignty independently. These obligations are owed according to the post-occupation doctrine which provides protection to the civilian population during the transition from occupation to fulfillment of lawful sovereignty. Israel also has obligations under human rights law wherever actions by its official agents have a significant and direct impact on Gaza's residents.

Despite the fact that the Palestinian authorities are non-state actors (and recognition of a Palestinian state as such will not turn them into state actors), they owe obligations in the spheres they control under human rights law and the law of armed conflict.

Israel currently interprets its obligations toward residents of the Gaza Strip (and to a lesser degree, the West Bank as well) as limited to the "minimum" standard required under the law of armed conflict. As a result of this position, Israel allows passage of people only in "exceptional humanitarian cases" and has restricted passage of goods to those "essential for the survival of the civilian population". In contrast, we argue that under the law of occupation and post-occupation, Israel is obligated to allow the movement of people and goods at the level required to maintain normal life. Israel may restrict movement only in order to meet concrete security needs, and even then while balancing the restrictions against the needs and rights of Gaza's residents.

Israel must fulfill its obligations under international law by allowing free passage of goods and people to and from the Gaza Strip, subject to individual security checks and subject to arrangements that meet both Israel's security needs and its obligation to facilitate normal life in the Gaza Strip. **Because social and economic development, family unification and access to education and proper medical care largely depend on the ability to travel and transport goods, Israel must allow freedom of movement at a level that extends beyond survival and allows for prosperity, development and the realization of individual rights.**

Although this paper focuses on the Gaza Strip, the analysis offered here may assist in understanding Israel's obligations regarding the Palestinian territory in general, particularly in light of possible future changes in the elements of control, including as a result of international recognition of a Palestinian state. Whether it concerns a state or any other entity – control creates responsibility. The scope and nature of the responsibility are determined by the scale of control.

# Chapter 1:

## A Review of the Facts – Control of the Gaza Strip

In June 2007, Gisha published "Disengaged Occupiers", a position paper addressing, *inter alia*, the areas in which Israel continues to exercise control over the Gaza Strip even after its withdrawal of permanent military installations and settlements in August-September of 2005.<sup>3</sup> The position paper also describes how Israel's permanent military presence in the West Bank and the means of control it employs there affect the lives of residents of Gaza as well, as they continue to maintain extensive family ties and close business, economic, cultural and academic relationships with residents of the West Bank. Israeli control of the Gaza Strip has undergone changes since 2007, primarily due to the Hamas movement's takeover of the Gaza Strip in June of that year. This chapter presents a brief review of the areas over which Israel continues to maintain control in Gaza: movement of people and commercial goods, the population registry, the tax system, physical control of the Gaza Strip, civilian infrastructure such as electricity, water and communications and the impact Israeli control over the Palestinian Authority and the West Bank has on the lives of Gaza's residents. The chapter also highlights the changes that have occurred since publication of "Disengaged Occupiers".

### A. Movement of people and goods

#### Airspace

Israel maintains complete control over Gaza's airspace and prevents movement of people and commercial goods by air. Gaza's airport, built in 1998, was closed in October 2000, following the outbreak of the Second Intifada, and bombed by

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3. GISHA, DISENGAGED OCCUPIERS, *supra* note 1.

Israel in 2001. Since then, there has been no air traffic into and out of the Strip. The only exception is Israeli aircrafts, manned and unmanned, which fly over the Gaza Strip to carry out observations, collect information and bomb targets including in "targeted killings", that is to say the assassination from the air of individuals defined by Israel as wanted.

## Territorial waters

Israel has complete control over Gaza's territorial waters and prevents movement of people and goods by sea. It also limits fishing to a distance of three nautical miles from Gaza's coastline. In 2008, Israel made an exception and allowed six ships to reach Gaza,<sup>4</sup> but has since prevented the arrival of any vessels.<sup>5</sup> Israel has cited various legal sources as the basis for the ban on maritime travel off the Gaza coast: until 2005 it maintained the ban was imposed pursuant to the laws of occupation; beginning in 2005, it justified its control of Gaza's territorial waters as "security restrictions on fishing areas off the Gaza Strip coast",<sup>6</sup> and, at times, as an exclusion zone or a combat zone.<sup>7</sup> On January 3, 2009, in the midst of the large scale military operation "Cast Lead", Israel declared a maritime blockade off Gaza's coast, and though the operation ended that same month, the blockade has remained in force.<sup>8</sup>

In 2001, despite its commitment to allow the construction of a seaport in the Gaza Strip, Israel destroyed the on-site facilities belonging to the foreign company which

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4. Military Advocate General, *Position Paper on the Legal Aspects Relating to the Imposition of a Naval Blockade on the Gaza Strip and its Enforcement Provided by the IDF Military Advocate General to the Public Committee Investigating the Naval Incident of 31<sup>st</sup> of May 2010* (hereinafter: MAG. Position Paper), p. 39 at: [www.mag.idf.il/SIP\\_STORAGE/files/1/911.pdf](http://www.mag.idf.il/SIP_STORAGE/files/1/911.pdf) [in Hebrew]; an English summary is available at: [www.mag.idf.il/163-4314-en/patzar.aspx](http://www.mag.idf.il/163-4314-en/patzar.aspx).
  5. In December 2008, the Israeli navy prevented a number of ships from reaching the Gaza coast. Thus, for example, the navy prevented the arrival of a Libyan ship (Roni Sofer and News Agencies, *Navy Prevents Libyan Ship from Transporting Equipment to Gaza*, YNET, Dec. 1, 2008) [in Hebrew], at: [www.ynet.co.il/articles/0,7340,L-3631228,00.html](http://www.ynet.co.il/articles/0,7340,L-3631228,00.html), and a ship that sailed from Cyprus with an aid shipment (Roni Sofer and Yael Levy, *Aid Ship Runs Into Israeli Naval Vessel in Gaza*, YNET, Dec. 30, 2008) [in Hebrew], at: [www.ynet.co.il/articles/0,7340,L-3631228,00.html](http://www.ynet.co.il/articles/0,7340,L-3631228,00.html).
  6. Letter from Ruth Bar, Defense Minister Aide, to Sari Bashi, Executive Director of Gisha and Jessica Montell, Executive Director of B'Tselem (May 9, 2007) (on file).
  7. MAG Position Paper, *supra* note 4, p. 38.
  8. *Id.*, cf: GISHA, THE TURKEL COMMISSION AND THE MARITIME CLOSURE OF GAZA, at: [www.gisha.org/UserFiles/File/HiddenMessages/PositionpaperTurkel23111.doc](http://www.gisha.org/UserFiles/File/HiddenMessages/PositionpaperTurkel23111.doc).

was about to begin construction of a port and has since prevented construction by failing to provide donors with assurances that such port would not be destroyed.<sup>9</sup>

## Land crossings between the Gaza Strip and Israel

Naturally, Israel exercises complete control over the crossings between it and the Gaza Strip. Since June 2007, it has closed three of the four commercial crossings: Karni, which was Gaza's commercial life line, through which all trucks exited and most trucks entered; Sufa, through which construction materials were brought into the Gaza Strip; and Nahal Oz, through which fuel and cooking gas were transported. The crossings that remain open are Kerem Shalom, which is designated for the passage of goods and located inside Israel (near the three-way meeting point of Israel, Gaza and Egypt); and Erez, which is designated for passage by people and may be used by Palestinian residents only in "humanitarian cases, with an emphasis on urgent medical cases".<sup>10</sup> In practice, as of July 2010, Israel permits approximately 3,000 exits by Palestinians through Erez each month, mostly by patients and accompanying family members, and, since 2011, merchants as well.

Through its control over the passage of commercial goods, Israel has a tremendous impact on life in the Gaza Strip, a small and densely populated area which relies on trade with the outside world for obtaining basic products and maintaining a productive economy. When Israel decides to allow the export of flowers, strawberries and peppers but not ice cream, cookies or soft drinks,<sup>11</sup> it essentially determines which of Gaza's industries will function. When Israel requires an international organization to change the location of a new school as a condition for allowing into Gaza the materials required for building it,<sup>12</sup> it influences planning and zoning policy inside the Gaza Strip.

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9. GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, p. 47-8.

10. Section 15 of the State's response in H.C. 4906/10 Sharif v. Defense Ministry, at: [www.gisha.org/UserFiles/File/HiddenMessages/Shariff\\_petition\\_eng.pdf](http://www.gisha.org/UserFiles/File/HiddenMessages/Shariff_petition_eng.pdf) (hereinafter: State's response in Sharif).

11. Security Cabinet Resolution, 32nd Government, Dec. 8, 2010: [www.pmo.gov.il/PMOEng/Communication/Spokesman/2010/12/spokedes081210.htm](http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2010/12/spokedes081210.htm); see also IDF Spokesperson, *Pepper Export from Gaza Strip Begins* [in Hebrew] (Jan. 23, 2011), at: [dover.idf.il/IDF/News\\_Channels/today/2011/01/2201.htm](http://dover.idf.il/IDF/News_Channels/today/2011/01/2201.htm).

12. Thus, for example, the Coordinator of Government Activities in the Territories required UNRWA to shift the location of a school it was planning to build by a few hundred meters, as the original location was allegedly near a building used by Hamas (Yaakov Katz, *Israel Reviewing UNRWA List of Sites for Gaza Schools*, *The Jerusalem Post* [Dec. 15, 2010], at: [www.jpost.com/Defense/Article.aspx?id=199471](http://www.jpost.com/Defense/Article.aspx?id=199471)).

## The land crossing between the Gaza Strip and Egypt

The 2005 Agreement on Movement and Access marked the end of Israel's military presence at the Rafah Crossing on the border between Egypt and the Gaza Strip, yet allowed Israel to maintain substantial control over the terminal. This control was exercised via Israel's continued control of the Palestinian population registry, which determines who may travel through Rafah, the ability to monitor individuals traveling through the crossing, and the power to decide when and if to close Rafah. The crossing operated routinely as per the Agreement on Movement and Access until June 2006. The circumstances that led to the end of this arrangement are detailed in a report published by Gisha and Physicians for Human Rights-Israel in 2009, entitled "Rafah Crossing: Who Holds the Keys?" The report also presents our position on the responsibility of each of the parties – Israel, Egypt, the Palestinian Authority, Hamas and external players – as a result of their influence on the ability to open the crossing.

In June 2010, Israel intercepted the Mavi Marmara, a ship headed for Gaza, resulting in the deaths of nine passengers and international condemnation. In the wake of that incident, Egypt opened Rafah Crossing for regular travel. The crossing was opened outside the context of the Agreement on Movement and Access and for limited categories of travelers including foreign nationals; Palestinians seeking medical treatment in Egypt; Palestinians with foreign citizenship, residency status, or a visa to a third country; students wishing to study abroad and individuals receiving special travel coordination from the Egyptian authorities. Between June 2010 and the end of May 2011, a monthly average of 15,700 passengers traveled through Rafah in both directions, representing some 40% of the monthly average in the beginning of 2006, before implementation of the Agreement on Movement and Access was halted.<sup>13</sup> In late May 2011, Egypt announced that Rafah Crossing would be opened for travel to all Gaza residents who hold a Palestinian ID card and passport, with the exception of males aged 18 to 40, whose travel would be subject to certain conditions. Between June and August 2011, the monthly average of travelers through Rafah increased to some 27,700. However, the

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13. Press Release, Gisha, Gisha response to Egyptian announcement on the opening of Rafah Crossing: There is still a need to permit passage of people and goods between Gaza and the West Bank, (May 26, 2011), at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=1283](http://www.gisha.org/item.asp?lang_id=en&p_id=1283).



### **The Rafah Crossing between Gaza and Egypt**

Photo: Mohammed Azaiza / Gisha, June 16, 2011

Egyptian-imposed cap on the number of individuals who can exit Gaza per day has resulted in waiting periods of weeks.

The Agreement on Movement and Access prohibited the import of goods from Egypt to the Gaza Strip through Rafah, and although it permitted export of goods through the crossing, arrangements allowing for export were never made. Egypt still does not allow the transport of goods through Rafah, with the exception of humanitarian aid, subject to its discretion.

As has been the case since Rafah Crossing first opened, travel through it is subject to registration in the Israeli-approved Palestinian population registry. As such, Israel continues to have some, if significantly reduced, control over Rafah Crossing. Its continued influence over the crossing is also a result of cooperation with Egypt on security matters. Egypt continues to consider Israel as holding

governmental powers in the Palestinian territory, in part due to the peace treaty between the two countries which stipulates that the international border between Israel and Egypt in the northern part of the Sinai desert is the border between Egypt and the Gaza Strip.<sup>14</sup>

Movement of people and goods between Egypt and the Gaza Strip by land also takes place through underground tunnels on the Egypt – Gaza border. The tunnels are not new, but before June 2007, they were primarily used for smuggling contraband such as weapons and narcotics. When Israel began restricting the passage of civilian goods into the Gaza Strip in June 2007, commercial trade via the tunnels increased and began to include many consumer goods and industrial products whose transfer Israel bans through land crossings. The tunnels now serve as the primary route for transporting fuel and building materials, which are restricted for import into Gaza by Israel.<sup>15</sup> The tunnels are also used for transporting cigarettes from Egypt, which are cheaper than the ones brought from Israel, as well as weapons, cash and narcotics. Israel occasionally bombs the tunnels from the air.<sup>16</sup> The tunnels do not provide a dependable or satisfactory trade route, yet the transporting of civilian goods through them has allowed the government in Gaza to determine tax rates (which are different from the ones set by Israel) for goods such as fuel, cigarettes and building materials, as explained below.

## **B. The population registry**

Israel continues to control the Palestinian population registry which is common to the Gaza Strip and the West Bank. Any change made in these records requires Israel's approval, including the registration of births, marriages, divorces, deaths or

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14. Peace Treaty Between Israel and Egypt, March 26, 1979, 1138 U.N.T.S. 59, Article 2, according to which: "The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip."

15. Based on visits to the area, telephone conversations and personal interviews with tunnel operators in the Gaza Strip (February 2011). See also, Gisha, *Reconstructing the closure – Will recent changes to the closure policy be enough to build in Gaza?* (Dec. 2010), (hereinafter: Gisha, *Reconstructing the closure*) at: [www.gisha.org/UserFiles/File/HiddenMessages/Reconstructing\\_the\\_closure19\\_12\\_10.doc](http://www.gisha.org/UserFiles/File/HiddenMessages/Reconstructing_the_closure19_12_10.doc).

16. See for example, IDF Spokesperson press release, *IAF Strikes Gaza Tunnel in Response to Rocket Fire* (Feb. 2, 2011), at [dover.idf.il/IDF/English/Press+Releases/2011/02/0201.htm](http://dover.idf.il/IDF/English/Press+Releases/2011/02/0201.htm).

address changes. The Palestinian Authority may amend or issue an ID card only after Israeli approval is granted. Israel updates all the changes in its copy of the population registry, which determines who is recognized as a Palestinian resident for the purpose of travel permits. Palestinian passports are issued by the Palestinian Authority only to residents who are listed in the Israeli-administered population registry. Physically, coordination on issues pertaining to the population registry for Gaza is done through meetings between representatives from Israel and the Palestinian Authority in Gaza which are held at Erez Crossing.

Through its control of the population registry, Israel continues to control Palestinian travel, since any Palestinian wishing to cross via Rafah or Erez is required to present an Israeli-approved ID card or passport. Israel also controls where Palestinian residents may live, as the address listed in the Israeli-approved ID card determines where its holder may reside: a Palestinian who resides in the West Bank or is temporarily present there may be forcibly removed to the Gaza Strip if the address listed in his or her ID card is in the Gaza Strip.<sup>17</sup> It should be noted that since 2000, Israel has refused to allow residents of the Gaza Strip to change the address in their ID cards to an address in the West Bank, even if they have been living in the West Bank for many years.<sup>18</sup>

**Through its control of the population registry, Israel continues to control Palestinian travel, since any Palestinian wishing to cross via Rafah or Erez is required to present an Israeli-approved ID card or passport.**

In 2005, Israel agreed to add some 50,000 adults living in the Palestinian territory without residency status to the Palestinian population registry. These were mostly spouses of residents who had entered the Palestinian territory on short-term

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17. Gisha, *Restrictions and Removal: Israel's Double-Bind Policy for Palestinian Holders of Gaza ID's in the West Bank* (2009), at: [www.gisha.org/UserFiles/File/publications/RestrictionsAndRemoval.doc](http://www.gisha.org/UserFiles/File/publications/RestrictionsAndRemoval.doc) (hereinafter: *Restrictions and Removal*); see also Gisha, *FAQ: The Threat of Deportation from the West Bank and the New Order on the Prevention of Infiltration* (Apr. 21, 2010) at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=726](http://www.gisha.org/item.asp?lang_id=en&p_id=726).

18. For further information see *Restrictions and Removal*, *supra* note 17. In February 2011, Israel agreed to allow 5,000 Palestinians who live in the West Bank and whose registered address is in the Gaza Strip to change their address. At the time of publication, the change was approved for approximately 2,700.

visitor permits and remained there after their expiry date due to the moratorium Israel placed on family unification in 2000. About half of these permits were designated for status-less individuals in the Gaza Strip. By 2008, Israel had approved residency for 12,308 status-less persons in the Gaza Strip. The process has since been put on hold. The Palestinian Interior Ministry in Gaza estimates that there are currently at least 10,600 people living in the Gaza Strip without Palestinian ID cards, among them thousands whom Israel considers ineligible for such cards, even in the context of future gestures, since there is no record of them having received Israeli approval to enter Gaza. These individuals may not travel through Rafah or Erez crossings, as they are not registered in the Israeli-controlled Palestinian population registry. They are therefore "trapped" in the Gaza Strip with no way out, partly for fear of not being allowed back.<sup>19</sup>

### C. The tax system

Israel continues to control taxation in the Gaza Strip, which forms part of a single customs envelope along with Israel and the West Bank. This means that Israel sets the customs and Value Added Tax rates collected for goods and in so doing influences product prices as well as Palestinian fiscal policy. To illustrate: a merchant in Gaza who purchases clothes from an Israeli manufacturer pays VAT at a rate determined by Israel, and Israel is responsible for transferring this amount to the Palestinian Authority. If the merchandise is imported, Israel sets and collects the customs for it and is responsible for transferring the amount to the Palestinian Authority. The VAT and customs rates set by Israel then affect the price the consumer pays for clothes in Gaza.

Israel continues to collect VAT and customs on behalf of the Palestinian Authority and has the power to decide whether or not to transfer this revenue. As such, Israel controls the Palestinian Authority's ability to use this revenue to fund public

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19. For further details on Israel's control of the population registry see: GISHA, *RAFAH CROSSING: WHO HOLDS THE KEYS?*, pp. 57-63 (Mar. 2009), pp. 57-63 (March 2009), at: [www.gisha.org/UserFiles/File/publications/Rafah\\_Report\\_Eng.pdf](http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf) (hereinafter: *GISHA, RAFAH CROSSING: WHO HOLDS THE KEYS?*), and GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, pp. 50-54. See also, Gisha, *Who Controls the Palestinian Population Registry?*, *GAZA GATEWAY* (Nov. 11, 2010), at: [www.gazagateway.org/?p=1716](http://www.gazagateway.org/?p=1716), and Gisha, *Camped Out in Erez Crossing*, *GAZA GATEWAY* (May 2, 2010), at: [www.gazagateway.org/?p=1140](http://www.gazagateway.org/?p=1140).

services in the West Bank and Gaza Strip, such as electricity, health care, public service salaries, etc.<sup>20</sup>

The exception to the rule whereby Israel controls the collection of taxes and hence the services provided to the Palestinian public is the taxes collected by Hamas on goods entering Gaza from Egypt through the underground tunnels. The volume of goods transferred via the tunnels significantly increased since Israel began restricting the entry of civilian goods to the Gaza Strip in 2007. The government in Gaza collects taxes for some of these goods, such as cigarettes, fuel, and occasionally building materials. For example, the Hamas regime in Gaza sets the tax rate for fuel transported through the tunnels and collects it from the merchants who import the fuel to Gaza from Egypt. In this way, the regime in Gaza influences local fuel prices, which are significantly cheaper than those in Israel or the West Bank. Having some goods transported into Gaza via tunnels rather than the Israeli-controlled crossings and the collection of taxes on these goods allow the government in Gaza to reduce its dependence on Israel for setting tax rates for these goods and for funding public services.

## D. Physical control of the Gaza Strip

Following "disengagement" in 2005, Israel continued to control the area adjacent to its border with the Gaza Strip on the Palestinian side. In 2008, Israel expanded this area, referred to as the "no-go" zone, and today it covers a distance ranging from 300 to 1,500 meters from the border.<sup>21</sup> The area which is restricted in practice includes both areas which have officially been declared off-limits and areas where one risks being shot at. It amounts to some 17% of the entire territory of the Gaza Strip and a third of its agricultural lands.<sup>22</sup>

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20. See e.g., GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, p. 56, which provides details of the impact of Israel's nonpayment of tax revenues to the Palestinian Authority from March 2006 until June 2007, a period in which Hamas presided in the Palestinian Authority along with Fatah and other parties. A similar measure was taken in May 2011, when Hamas and Fatah announced a reconciliation agreement. See: *Israel Suspends Cash to Palestinians after Hamas Deal*, BBC News (May 1, 2011), at: [www.bbc.co.uk/news/world-middle-east-13254155](http://www.bbc.co.uk/news/world-middle-east-13254155).

21. For details see, OCHA (UN Office for the Coordination of Humanitarian Affairs), *Between the Fence and a Hard Place – The Humanitarian Impact of Israeli-imposed Restrictions on Access to Land and Sea in the Gaza Strip* (Aug. 2009), at: [www.ochaopt.org/documents/ocha\\_opt\\_special\\_focus\\_2010\\_08\\_19\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_special_focus_2010_08_19_english.pdf).

22. *Id.* pp. 8-10.



**Munther Budi's strawberry farm, Beit Lahiya, in the buffer zone adjacent to the border with Israel**

Photo: Mohammed Azaiza / Gisha, December 1, 2010

The restrictions are enforced by live fire in the no-go zone from the Israeli side, including from remotely-controlled unmanned weapon stations. According to UN figures, from the end of Operation Cast Lead in January 2009 until August 2010, 22 Palestinian civilians who entered the zone were killed and 146 were injured. Forty-one armed Palestinians and four Israeli soldiers were killed in the zone in the same period of time.<sup>23</sup> Israel has informed Gaza residents about this zone by dropping flyers from airplanes, but there is a discrepancy between the area noted on the flyers and the area actually restricted in practice. Since 2009, the military has conducted routine incursions into the "no-go" zone in order to level land and destroy crops or trees with bulldozers (these actions are referred to as "razing"). According to UN figures, in early 2010, the military entered the "no-go" zone three times per week on average.<sup>24</sup> The military also periodically conducts incursions

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23. *Id.* p. 5.

24. *Id.* p. 16.

into areas of the Gaza Strip which are not included in the "no-go" zone in the framework of large scale military operations such as Operation Summer Rains in the summer of 2006, following the capture of the Israeli soldier Gilad Shalit, and Operation Cast Lead in the winter of 2009, following the collapse of a ceasefire between Israel and the Hamas regime.<sup>25</sup> Israel has announced that it reserves the right to re-enter the Gaza Strip at will.<sup>26</sup>

## E. Control of civilian infrastructure

Israel controls the supply of infrastructure upon which the Gaza Strip is reliant. Gaza's electricity system, as developed since 1967, is largely based on power supplied from Israel through 11 high voltage transmission lines.<sup>27</sup> A power station was built in Gaza in 1998, but its capacity has been limited since it was bombed by Israel in 2006. The station has never been fully repaired. Restrictions on the transfer of equipment and the entrance of trained professionals, as well as on the shipping of equipment for repairs outside Gaza, have also impaired the ability to upgrade the electricity system. Another factor that interfered with the operation of the power station was the restrictions Israel imposed on the transfer of industrial diesel into Gaza beginning in October 2007 as part of its policy of "economic warfare", designed to undermine Gaza's economy. A dispute over finances between the Palestinian Authority and the Hamas regime in the Gaza Strip further decreased industrial diesel supply to Gaza in 2010. In early 2011, the shortage was partially resolved by the purchase and transport of diesel for the power station through the tunnels. As a result, the power station's dependence on Israel has decreased, though it still relies on Israel, to a degree, for shipping equipment for repairs, importing parts, bringing in expert engineers and sending engineers from Gaza for professional training and business meetings. Additionally, Israeli-supplied electricity still makes up the lion's share of Gaza's electricity, and there is no plan for an alternative in sight.

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25. See for example, MAG Position Paper, *supra* note 4, pp. 8-10.

26. For example, Resolution No. 1996 of the 30<sup>th</sup> Government "Amended Disengagement Plan", Annex A, Section 3(A)(3), June 6, 2004) stipulates: "The State of Israel reserves the basic right to self-defense, including taking preventative measure as well as responding by force to threats emanating from the Gaza Strip". Israel has also declared that the IDF would take "whatever action required of it" (IDF Spokesperson, *Ceasefire in the Gaza Strip Starting at 02:00* (Jan. 17, 2009) at: [www.idf.il/1133-8635-he/Dover.aspx](http://www.idf.il/1133-8635-he/Dover.aspx) [in Hebrew]).

27. See, GISHA, RED LINES CROSSED: DESTRUCTION OF GAZA'S INFRASTRUCTURE (Aug. 2009), [www.gisha.org/UserFiles/File/publications\\_/Infrastructures\\_Report\\_Aug09\\_Eng.pdf](http://www.gisha.org/UserFiles/File/publications_/Infrastructures_Report_Aug09_Eng.pdf).

The dependence on Israel for electricity translates into dependence on Israel for water supply and sewage treatment, as electricity is needed for pumping water from wells and delivering it to homes, pumping sewage from homes and transporting it to sewage treatment facilities and for operating the treatment facilities. Additionally, some 5% of the water in Gaza is delivered in pipes by the Israeli water company.

Israel also controls wired, wireless and Internet communications in the Palestinian territory: international calls from the Gaza Strip and the West Bank are made on the Israeli network via an underwater communications cable located in the Mediterranean; the Internet connection runs through the Israeli network, and Israel determines what frequencies are designated to Palestinian cellular phone companies. The Palestinian Authority's dependence on the Israeli network is a result of Israel's control over the periphery of the Gaza Strip and passage between it and the West Bank, which includes control over the ability to bring in equipment, lay cables and build infrastructure. For instance, Israel prohibits transporting into the Palestinian territory certain types of equipment needed for improving communications and building independent infrastructure. In addition, repairing telephone network optical fibers that run between Palestinian cities in the West Bank or between the West Bank and the Gaza Strip requires Israeli approval, as these fibers run through Israeli territory or areas controlled by Israel.

## **F. Control over the Palestinian Authority and movement between the Gaza Strip and the West Bank**

Following Hamas' takeover of internal control in Gaza in June 2007, the Palestinian Authority's influence over Gaza has significantly diminished, and most of the routine administration of the government and public services, such as the education system, policing, sanitation and hospitals, is carried out by the Hamas regime. However, the Palestinian Authority still maintains significant responsibilities, particularly the financing of major public services such as the healthcare system and the supply of electricity. The Palestinian Authority continues to coordinate the passage of people and goods with Israel, and taxes levied on goods transported from Israel through the crossings are collected by Israel on behalf of the PA. Additionally, Palestinian Authority officials remain responsible for transferring applications for changes in the population registry to Israeli authorities, including for the purpose of issuing passports.

For this reason, Israel's control over the Palestinian Authority, which operates both in the Gaza Strip and the West Bank, influences the latter's ability to make independent decisions related to Palestinian residents, govern them and fund public services.<sup>28</sup>

In addition, Israel's control over travel between the West Bank and Gaza Strip affects the operation of civil institutions and systems throughout the Palestinian territory. These systems and institutions have developed as part of a single apparatus serving residents in both parts of the Palestinian territory.<sup>29</sup> For example, a Palestinian democracy and human rights academic program is offered by Birzeit University in the West Bank. Israeli control over movement between Gaza and the West Bank and its prohibition on travel from Gaza to the West Bank for the purpose of studying impact Gaza residents' access to this program and to higher education in general.<sup>30</sup> In addition, control over the ability of Palestinian professionals from the West Bank to work in Gaza impacts the quality of services available in Gaza.<sup>31</sup> It should be noted that control over movement between Gaza and the West Bank is not merely a result of the fact that Israel is situated between the two parts of the Palestinian territory, but also of its exclusive control over all crossings to and from the West Bank, including the Allenby Bridge, on the West Bank's Jordanian border. Israel prohibits residents of Gaza from entering the West Bank irrespective of passage through Israel: a Gaza resident who exits to Egypt and seeks to enter the West Bank from Jordan will be thwarted by Israel's policy of disallowing use of the Allenby Bridge by Palestinian residents whose registered address is in the Gaza Strip.<sup>32</sup> Though a distinction should be made between Israel's control over one part of the Palestinian territory and the other (and the

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28. For details see, GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, pp. 56-58.

29. See, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington DC, September 28, 1995, Article XI (hereinafter: Oslo B), and GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, p. 58.

30. See, Press Release, Gisha, Israel Announces: No Easing for Travel of People Into and Out of Gaza (July 8, 2010), at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=530](http://www.gisha.org/item.asp?lang_id=en&p_id=530).

31. For example, the refusal to allow an educator from the West Bank to provide professional training for teachers designed to encourage parents to read to their children affects the quality of educational services in the Gaza Strip. See Press Release, Gisha, Following Gisha's petition to the High Court: Parents in Gaza to benefit from workshop encouraging reading to children (Nov. 28, 2010), at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=1395](http://www.gisha.org/item.asp?lang_id=en&p_id=1395).

32. Gisha, *Legal Framework: Merchants and the Economy – Rights and Obligations under International and Israeli Law* (May 2010), [www.gisha.org/UserFiles/File/safepassage/PositionPapers/Eng/trade.pdf](http://www.gisha.org/UserFiles/File/safepassage/PositionPapers/Eng/trade.pdf) (hereinafter: Gisha, *Merchants and the Economy*).

legal ramifications of this distinction should be taken into account), Israel's control over travel between the two areas impacts civilian institutions and the lives of residents throughout the Palestinian territory.



In conclusion, even after 2007, Israel continues to maintain exclusive control of Gaza's airspace and territorial waters as well as the administration of the Palestinian population registry. Israel continues to collect customs and VAT for goods entering the Gaza Strip and maintains responsibility for transferring these revenues to the Palestinian Authority and as such, influences funding for public services in the Gaza Strip. Israel continues to control Gaza's infrastructure via the latter's dependence on supply from Israel, primarily of electricity. Since 2007, Israel's control over the passage of people and goods into and out of Gaza has somewhat decreased, while its physical control of the territory of the Gaza Strip has somewhat increased. These changes have ramifications for the lives of Gaza's residents and for the obligations owed by the parties which exercise control over the Gaza Strip.

## Chapter 2: The Application of the Law of Occupation in Gaza

How do the changes in Israel's control over Gaza, as described above, affect its obligations toward the Strip? Does the law of occupation continue to apply to Israel's actions toward the civilian population of the Gaza Strip?

In this chapter, we argue that the law of occupation continues to apply to the Gaza Strip (in addition to the West Bank) in the areas in which Israel maintains control over the lives of Palestinian residents, while in the areas in which it has transferred or relinquished its powers and allows others to exercise them – its responsibility vis-à-vis the civilian population is diminished or extinguished.<sup>33</sup> This approach to humanitarian law, which Professor Aeyal Gross calls a "functional approach",<sup>34</sup> has been put into practice by international tribunals considering the issues of occupation and responsibility. It allows the purpose of the law of occupation, namely protecting people under the control of a foreign power, to be realized, including in the complex situations arising from modern-day armed conflicts. In the context of the Palestinian territory, the relevant actors, including the State of Israel, seem to have endorsed a functional approach, which applies the norms of humanitarian law while addressing the issue of control by multiple actors. We note that in some of the areas in which Israel fully or partially ceded control, it still has responsibilities under post-occupation law. We will address this issue in detail in the next chapter.

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33. We first presented this argument in *Disengaged Occupiers*, *supra* note 1, yet here we elaborate on its sources and its current application in the Palestinian territory as we see it.

34. Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (forthcoming) (manuscript at chapter 2, on file with authors) (hereinafter: Gross).

## The controversy over whether Israel is an occupying power in the Palestinian territory

Whether or not occupation exists depends on whether a certain power has effective control, as defined in Article 42 of the Hague Regulations,<sup>35</sup> over a foreign territory which does not belong to it, as a result of armed conflict (belligerent occupation). Whether such control exists is determined both by how it is put into practice, that is how it is exercised on the ground, as well as by its potential, that is, the ability to exercise such control at the occupying power's will. This ability is measured, *inter alia*, by how readily the occupying power is able to make its authority felt in the area.<sup>36</sup> The traditional test focuses on the deployment of ground troops or the ability to deploy them at will and enforce order in different places as an indication of effective control. In "Disengaged Occupiers", we reached the conclusion that although Israel delegated some authorities, first in the context of the Oslo Accords and then through the "disengagement" plan in 2005, Israel's control of the Gaza Strip, even without the presence of permanent ground troops, rises to the level of effective control. We therefore found that Israel still owes residents of the Gaza Strip obligations under the law of occupation. The scope and nature of these obligations are commensurate with the scope and nature of control. We reached the conclusion that in the areas in which Israel relinquished control and allows a different actor (at the time, the Palestinian Authority) to exercise powers, it no longer owes obligations under the law of occupation.<sup>37</sup>

**The scope of Israel's control of the Gaza Strip has undergone changes, which again raise the question of whether Israel continues to have effective control over the Palestinian territory and bear responsibilities under the law of occupation.**

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35. Hague Regulation concerning the Laws and Customs of War on Land, 18 Oct. 1907, I Bevans 631 (hereinafter: the Hague Regulations).

36. See Hila Adler, *The Law of Occupation* in ROBBIE SABEL, INTERNATIONAL LAW 557, 561 and 594, note 258 (2nd edition) [in Hebrew]; see also ORNA BEN NAFTALI AND YUVAL SHANY, INTERNATIONAL LAW BETWEEN WAR AND PEACE 138 (Tali Nir, ed., 2006) [in Hebrew] and H.C. 102/82 Tsemel v. Defense Minister, 37(3) P.D. 365, 372-374 (1983).

37. GISHA, *DISENGAGED OCCUPIERS*, *supra* note 1, p. 81.

As detailed in the previous chapter, since the publication of "Disengaged Occupiers", the scope of Israel's control of the Gaza Strip (as well as the West Bank) has undergone changes, which again raise the question of whether Israel continues to have effective control over the Palestinian territory and bear responsibilities under the law of occupation. The level of Israel's control in Gaza was not reduced by the "traditional means" anticipated by international humanitarian law,<sup>38</sup> such as the defeat of the occupying power or the transfer of powers in a peace treaty. The reduction in Israel's control of the Gaza Strip was gradual and took place via a different mechanism: first, some competencies were transferred to the PA in the context of the Oslo Accords, beginning in 1994; then, with the unilateral disengagement in the summer of 2005, Israel relinquished further powers in Gaza and allowed the PA to exercise them; later, Hamas, as a result of its takeover of internal control in the Gaza Strip in June 2007, seized additional functions of government, and Israel's control over the Gaza-Egypt border waned.

These changes gave rise to a dispute in the legal literature and among local and international officials as to the legal status of the Gaza Strip and the source of the obligations owed to it by the State of Israel. Some maintain that Israel is still an occupying power in the Gaza Strip and therefore the law of occupation continues to apply.<sup>39</sup> Others, on the other hand, claim that Israel's effective control of the Gaza Strip has ended and therefore the law of occupation no longer applies, in contrast to human rights law, which continues to apply to Israel in the areas in which it maintains control.<sup>40</sup> Some writers believe Israel's responsibilities and duties toward residents of the Gaza Strip derive from the law of post-occupation which applies as a result of the lengthy duration of the occupation and the duty

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38. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 616 (2006) (hereinafter, Roberts, *Transformative Military Occupation*). Roberts discusses a situation of a gradual transfer of powers from the occupying power to a local regime by residents of the occupied territory.

39. See: 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 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 3, 30-1 (2006); see also *DISENGAGED OCCUPIERS*, *supra* note 1.

40. Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, INT'L LAW FORUM OF THE HEBREW UNIV. OF JERUSALEM LAW FACULTY (2009), at [ssrn.com/abstract=1350307](http://ssrn.com/abstract=1350307) (hereinafter: Shany, *The Law Applicable to Non-Occupied Gaza*).

to transfer control in a manner allowing continued public order and normal life in the territory, at least during the transitional period.<sup>41</sup> Others reject all these interpretations and claim that the Gaza Strip is a "special" case, to which the laws of war most aptly apply.<sup>42</sup>

In **al-Bassiouni v. Prime Minister**,<sup>43</sup> the Israeli Supreme Court ruled that Israel's effective control of the Gaza Strip had reached its end and therefore, so has the occupation. However, the court held that Israel continues to owe obligations to residents of the Gaza Strip under the laws of war, as a result of Israel's continued control of the crossings, as well as the dependence that has been created over the four decades of direct Israeli control.<sup>44</sup> The court did not cite any source for the additional obligations it contends Israel owes other than the laws of war. However, researchers suggest that human rights law,<sup>45</sup> post-occupation law<sup>46</sup> and general principles of international humanitarian law<sup>47</sup> provide the normative basis for these obligations.

Contrary to the Supreme Court of Israel, international organizations such as the UN<sup>48</sup> and the International Committee of the Red Cross (ICRC)<sup>49</sup> continue to consider Gaza to be occupied territory, a position also held by countries with

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41. For a review of the literature on the Gaza Strip and the post-occupation doctrine, see chapter 3.

42. Elizabeth Samson, *Is Gaza Occupied? Redefining the Legal Status of Gaza*, BEGIN-SADAT CTR. FOR STRATEGIC STUDIES – MIDEAST SECURITY AND POLICY STUDIES (2009), at: [www.biu.ac.il/Besa/MSPS83.pdf](http://www.biu.ac.il/Besa/MSPS83.pdf).

43. H.C. 9132/07 Al- Bassiouni v. Prime Minister of Israel (unreported, 30.1.2008) (hereinafter: al- Bassiouni).

44. *Id.*, para. 12.

45. Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, p. 11. See also Yuval Shany, *Binary Law meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68 (2008).

46. Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, TEL AVIV UNIV. LAW FACULTY, 11-12 (2008) at [law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps](http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps) (hereinafter: Benvenisti).

47. Benjamin Rubín, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42(3) ISR. L. REV. 528, 555 (hereinafter: Rubín).

48. See E-mail from Yves Sorokobi, Office of the UN Secretary General Spokesperson, to Adv. Sari Bashi, Executive Director of Gisha (Feb. 27, 2007) (on file with authors): "The UN welcomed the Israeli disengagement from Gaza in August 2005. However, there has been no change in our characterization of the Gaza Strip as occupied territory."

49. See for example, a news release issued by the International Committee of the Red Cross (ICRC) which defines the Gaza closure as "collective punishment": *Gaza closure, Not Another Year!*, INT'L COMMITTEE OF THE RED CROSS, June 14, 2010, at: [www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm](http://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm). See also posts on the ICRC website in which Gaza is defined as an occupied territory: "In 2010, the ICRC reminded the Israeli authorities of their responsibilities under IHL towards the people under Israeli occupation and called for an end to the Gaza blockade". *The ICRC in Israel and the Occupied Territories*, International Committee of the Red Cross, 2010 at: [www.icrc.org/eng/where-we-work/middle-east/israel-occupied-territories/index.jsp](http://www.icrc.org/eng/where-we-work/middle-east/israel-occupied-territories/index.jsp).

influence on the Israeli-Palestinian conflict, such as the United States<sup>50</sup> and the United Kingdom.<sup>51</sup>

## The functional approach to the question of occupation

Although opinions on the issue of Gaza's legal status widely vary, researchers on the subject all face the difficulty of applying an ostensibly binary classification to Gaza's complex and fluid situation. Most scholars at least agree that international law does not provide definitive answers to the complex issues arising from this situation. Ayal Gross expresses this complexity by referring to a seam zone between occupation and sovereignty which he calls the "indeterminacy" of occupation.<sup>52</sup> Gross analyzes a few cases in which the question of occupation was discussed by international tribunals, which took a functional approach whereby obligations in a certain area derive from control and power in that area, even when other actors are also exercising control. These tribunals recognized complex situations in which an occupying power exercises certain governmental functions but does not fully expropriate the powers of the *de jure* sovereign (the occupied population and its representatives), which continues to exercise some governmental functions simultaneously with the occupying power. In these situations, responsibility can be attributed both to the occupying power as well as to the people's representatives (the *de jure* sovereign), commensurate with the control each party exercises. Gross maintains that this approach promotes accountability, protects people living under foreign occupation and takes into consideration political and technological developments in the way occupations are conducted.<sup>53</sup>

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50. See: CENT. INTELLIGENCE AGENCY, *The World Factbook, Gaza Strip* (2011) at <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>, which states "West Bank and Gaza Strip are Israeli-occupied with current status subject to the Israeli-Palestinian Interim Agreement – permanent status to be determined through further negotiation; Israel removed settlers and military personnel from the Gaza Strip in August 2005".

51. UNITED KINGDOM: FOREIGN AND COMMONWEALTH OFFICE, *Annual Report on Human Rights 2008 – Israel and the Occupied Palestinian Territories* (2009), at: [www.unhcr.org/refworld/docid/49ce361bc.html](http://www.unhcr.org/refworld/docid/49ce361bc.html), according to which, "Although there is no permanent physical Israeli presence in Gaza, given the significant control Israel has over Gaza's borders, airspace and territorial waters, Israel retains obligations as an occupying power under the Fourth Geneva Convention".

52. GROSS, *supra* note 34, chapter 2.

53. *Id.*, p. 4.

The functional approach is anchored in case law and provides a partial explanation for the seemingly different standards applied by international tribunals in deciding whether or not to apply the law of occupation to a specific situation. In case law, the question of whether the law of occupation applies may be affected by another issue: what is the function for which one seeks to assign responsibility? In other words, the context in which one seeks to apply the law of occupation may influence the answer to the question of whether or not it applies.

Consider the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) which reviewed crimes perpetrated in the 1990s. In **Prosecutor v. Naletilić**, the ICTY held that for the purpose of applying the protections provided to civilians by the Fourth Geneva Convention,<sup>54</sup> the term "in the hands of" must be interpreted such that it applies to residents who find themselves under foreign rule, even in transitional periods when it is impossible to determine that the foreign power has effective control of the territory.<sup>55</sup> In effect, the tribunal held that the answer to the question "Does the law of occupation apply?" is influenced by the answer to the questions "For what purpose are you asking?" This, in order to give a purposive interpretation of the law of occupation and, in particular, to ensure that where residents find themselves under the control of a foreign power, this power is assigned corresponding obligations and authorities. The ICTY holds as follows: "Consequently, the Chamber will have recourse to different legal tests to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters".<sup>56</sup>

This ruling is based on the ICTY's judgment in the **Tadić** appeal, where it was held that in order to apply the protection afforded by the Fourth Geneva Convention, one must examine the substantive, rather than just the formal, relationship between the residents invoking protection and the power controlling them.<sup>57</sup> The ICTY held that applying the law of occupation for the purpose of protecting civilians does not necessarily require its blanket application for every other purpose. This is an example of applying the law of occupation using the functional

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54. Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949 (hereinafter: the Geneva Convention).

55. Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 221 (March 31, 2003).

56. *Id.*, para. 222.

57. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 166 (July 15, 1999).

approach with obligations being imposed according to the sphere and context, for the purpose of protecting civilians and without a need to apply the law of occupation in its entirety as an indivisible whole.<sup>58</sup>

The trend that emerges from case law is that the decision on whether to apply the law of occupation to a certain area is influenced by the desire to avoid a vacuum which would leave civilians under the control of a foreign power without sufficient legal protection. For instance, the judgments of the European Court of Human Rights (ECtHR) on the conflict in Cyprus lack consistency regarding the question of responsibility for the government's actions in the north of the island under the European Convention on Human Rights. This responsibility is ascribed to Turkey as an occupying power in some cases but not in others, despite the court's finding that Turkey exercises effective control of the northern part of the island. The ECtHR alluded to the discrepancies by explaining that one of its primary motivations is the desire to protect civilians who are under the control of a foreign power:

In the Court's view, the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation...<sup>59</sup>

Indeed, the court declared its intent to ascribe responsibility for human rights violations to Turkey in cases where refraining from doing so would deprive victims of the protection provided by the European Convention on Human Rights. The court held that where the rights of the residents of the northern part of the island are violated as a result of the acts or omissions of Turkish soldiers stationed in the area, Turkey will bear the responsibility under the convention.<sup>60</sup> The court did so,

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58. Gross, *supra* note 34, chapter 2. We note that this case law, which allows giving different answers to the question of whether the law of occupation applies depending on the function being exercised, helps avoid an absurd situation in which the conclusion that the law of occupation applies to a certain aspect of the relationship between a foreign power and a protected person would necessarily lead to blanket application of the law of occupation to the entire relationship between the foreign power and the protected resident. This is why it is possible to determine, for instance, that the law of occupation obliges Israel to allow the level of trade required for a normal life in Gaza (as it controls the crossings) but does not oblige it to uphold order on the streets of Gaza (as it does not control Gaza's streets).

59. Demopoulos and Others v. Turkey (dec.), no. 46113/99, ¶ 96, ECHR 2010.

60. See, *Cyprus v. Turkey*, Decision on the admissibility of applications no. 6780/74 and no. 6950/75, (26 May 1975), 1975 Y.B. Eur. Conv. on H.R. 82 para. 10, where it was held: "Therefore, insofar as these armed forces, by their acts or omissions, affect such persons' rights or freedoms under the Convention, the responsibility of Turkey is engaged."

even though full responsibility for upholding the provisions of the convention in the island's north had not yet been imposed on Turkey at the time of the ruling.

Another example of this approach can be found in the warnings issued by the Claims Commission with respect to the conflict between Ethiopia and Eritrea, to the effect that a dispute over the legal status of a territory must not undermine the protections provided to civilians by humanitarian law.<sup>61</sup>

In addition to the desire to avoid depriving victims of protection, international tribunals also make the link between the nature of control and the nature of responsibility. An interesting point in this context, which is also relevant to the situation in Gaza, is the question of Turkey's responsibility for preventing Cypriot refugees from returning to their homes in the north of the island. In order to rule on this issue, the court examined the type of control Turkey exercised in Cyprus and the effect this control had on the right of Cypriots to return to their homes and enjoy their property. Without ascribing to Turkey full responsibility for what transpires in the island's north, the court ruled that Turkey's control of the line separating north from south and its use of that control to prevent refugees from crossing north constituted an exercise of authority which engages Turkey's responsibility under the Convention:

The Commission considers that by these measures preventing their return to the north, Turkey exercised in effect a control which in this respect brought the said persons under her jurisdiction within the meaning of Article 1 of the Convention as interpreted in the Commission's decision on admissibility.<sup>62</sup>

In all the judgments relating to the situation in Cyprus, the court took a functional approach to assigning responsibility under the Convention, whereby Turkey's control in a certain sphere gave rise to obligations in that sphere.

Shortly before publication of this position paper, the ECtHR delivered its judgment in the renowned **Al Skeini** case. We chose to address it briefly, as it follows the

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61. The Federal Democratic Republic of Ethiopia v. The State of Eritrea, 2 Eritrea Ethiopia Claims Commission-Permanent Court of Arbitration 8 (partial award) (2004) at: [www.pca-cpa.org/upload/files/ET%20Partial%20Award%281%29.pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award%281%29.pdf).

62. Cyprus v. Turkey, App. Nos. 6780/74 and 6950/75, 4 Eur. H.R. Rep. 482, ¶ 203 (1982) (hereinafter: Cyprus v. Turkey [1982]).

functional approach and provides an opportunity to extract a legal test for ascribing responsibility in complex situations of occupation. When the case was reviewed in the UK,<sup>63</sup> the British House of Lords held that the type of control exercised by British soldiers in Iraq did not allow them to uphold the provisions of the European Convention on Human Rights with respect to investigating deaths. Therefore, its protections did not apply to certain cases in which British soldiers killed Iraqi civilians, even though the existence of a state of occupation in Iraq for purposes of the Geneva Convention and Hague Regulations was not disputed. The House of Lords held that effective control for the purpose of the Geneva Convention does not necessarily meet the conditions of effective control for the purposes of human rights law. In contrast, the European Court, which also employed a functional approach, reached the opposite conclusion, holding that the provisions of the Convention apply both under the state agent authority doctrine and also due to the soldiers' effective control of the area (Effective Control Authority).<sup>64</sup> The court held that although the UK exercised only some of the governmental functions which are the sovereign's prerogative, maintaining security is one of these functions. Therefore, the UK bears responsibilities toward local residents specifically in the context of acts designed to maintain security, including those in which the applicants' relatives were killed.

In a separate opinion, Judge Bonello concurs with the majority's conclusion that the convention applies to the named party and suggests a test that can be generally applied to the question of when a foreign power has obligations toward residents of another state. He believes that there should be a clear rule that when a certain state has the capacity to uphold the provisions of the convention – it must do so.

[W]as it within the State's authority and control to see that those positive obligations would be respected? If it was, then the functional jurisdiction of the State would come into play, with all its natural consequences.<sup>65</sup>

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63. R (Al-Skeini) v. Secretary of State for Defence [2007] UKHL 26, para. 83.

64. Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, 2011, (at [cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en](http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en), search for Al-Skeini and Other v. the United Kingdom in Case Title and click on the link to the case), para. 149.

65. *Id.*, opinion of Judge Bonello, para. 19.



### **Gaza's airport, defunct since 2000**

Photo: Mohammed Azaiza / Gisha, January 2, 2011

In the context of occupation, Judge Bonello emphasizes the possibility that partial control gives rise to partial responsibility, depending on the sphere of control and the context:

It is quite possible to envisage situations in which a Contracting State, in its role as an occupying power, has well within its authority the power not to commit torture or extra-judicial killings, to punish those who commit them and to compensate the victims – but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line.<sup>66</sup>

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66. *Id., id.*, para. 32.

Though the court addresses the applicability of a human rights convention, the functional approach it offers may assist in decisions on the applicability of humanitarian law, particularly the pragmatic test offered by Judge Bonello.

The above suggests that international tribunals actually find effective solutions for the problem of binarism: they apply the law of occupation using a functional approach which examines the relationship between the foreign power and local residents and seeks to ascribe responsibility in the spheres in which the foreign power has control. The courts' approach can also be seen as purposive, since it seeks to realize the purpose of international humanitarian law by imposing duties on those who, on one hand, have the capacity to fulfill them and, on the other, incurred these duties as a result of exercising governmental powers over civilians. The trend is toward finding a way to apply the protections offered by the law of occupation to those subject to the authority of a foreign power, particularly when it comes to protecting civilians. In his commentary on the Fourth Geneva Convention, Pictet suggests the following:

The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. . . . The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.<sup>67</sup>

Consider also the commentary by Adam Roberts, who found that doctrines on the application of the law of occupation are not necessarily binary and that it is possible to apply only some of the provisions of the law of occupation in order to regulate the relationship between the foreign power and local residents:

One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law of occupation are applicable...<sup>68</sup>

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67. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 60 (Jean S. Pictet ed., 1958).

68. Adam Roberts, *What Is a Military Occupation?* 1984 BRIT. Y.B. INT'L L. 249, 250-251.

It should be noted that Pictet, like the ICTY, makes a distinction between the definition of the term occupation for the purpose of the Hague Regulations of 1907 and its definition for the purpose of applying the Fourth Geneva Convention. He maintains that the Fourth Geneva Convention can be applied even in the absence of the conditions enumerated in Article 42 of the Hague Regulations. Gisha takes the position that one should adopt a functional (and purposive) approach to applying the Hague Regulations, as well, to the extent that they regulate the relationship between a foreign power and residents subject to its control. We adopt this stance because of the need to interpret the Hague Regulations in light of the development of humanitarian law toward increasing protections for civilians which are anchored, *inter alia*, in the Fourth Geneva Convention. In essence, we must read into the Hague Regulations the protections for civilians enshrined in the subsequent evolution of humanitarian law. While in the past, Article 43 of the Hague Regulations was viewed as primarily designed to protect the rights of the temporarily ousted sovereign, today, the right of the people to self-determination and concern for the needs of civilians as rights-holding individuals form an inherent part of it. Today, Article 43 should be interpreted as imposing a duty to facilitate public order, or "*la vie publique*", for the residents of the territory, inasmuch as the ability to do so is under the control of a foreign power.<sup>69</sup>

## **The Palestinian territory and the spectrum of control**

As we shall see, in the Palestinian context, Israel, as well as other relevant actors, have rejected the binary approach to the law of occupation – including with respect to the application of Article 43 of the Hague Regulations – at least since implementation of the Oslo Accords brought about changes in control over the territory which were expected gradually to end the occupation.<sup>70</sup>

In accordance with the functional approach found in case law and considering the facts on the ground in the Palestinian territory, we suggest relating to the "end

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69. For details on the sovereign characteristics of the manner in which Israel exercises its authority see p. 45-46.

70. The agreements anticipated a five-year interim period which was to end in 1999 with a permanent settlement, which was never achieved.

of occupation" or the "loss of effective control" both in the Gaza Strip and the West Bank as a process that takes place over time. The scope of control exercised by Israel and Palestinian actors has changed over time, with neither exercising the full spectrum of powers belonging to the lawful sovereign. Since 1994, all parties involved (Israel, the Palestinian Authority and the international community) have taken a functional rather than binary approach to the issue of control and occupation of the Palestinian territory, ascribing duties and responsibilities in a certain sphere according to who controls it and commensurate with the degree of control, while at the same time agreeing that Israel is the occupying power in the territory (in Gaza, at least until 2005).

At this point in time, it is not entirely clear where we are on the spectrum between full expropriation of lawful sovereignty – as was the case prior to the partial transfer of some competencies to the Palestinian Authority upon its establishment in 1994 – and the "end of occupation", namely a situation in which Israel no longer exercises governmental powers over the Gaza Strip and West Bank and allows them to be exercised by representatives of the people as holders of the right to self-determination. We can, however, identify a number of landmarks on this spectrum at which the level of control changed in ways that also changed the scope and nature of responsibility. We list them below, as a way of illustrating the fluidity that has characterized the transfer of control between Israel and Palestinian actors:

1. In June 1967, Israel conquered the Palestinian territory, established a military administration in the Gaza Strip and the West Bank and applied Israeli law to east Jerusalem, effectively annexing it to Israel. Israeli settlements were built in the Palestinian territory and Israeli law was applied to their Jewish residents. Palestinians were denied access to these settlements.
2. Between 1994 and 2000, some competencies were gradually transferred to the "Palestinian Council" in the context of the Oslo Accords. Powers over civilian services such as the healthcare system, education and the economy were transferred to the Palestinian Authority, as well as policing inside Palestinian cities (defined as "Area A"). Israel retained the powers belonging to the occupant but claimed to have no direct responsibility for the spheres in which competencies had been transferred to the PA.

3. Beginning at the end of September 2000, following the outbreak of the Second Intifada, Israel reclaimed some powers that had been transferred to the PA in the context of the Oslo Accords. From that point on, Israel launched military invasions into some of the parts of the Gaza Strip and West Bank from which Israeli forces withdrew as part of the Oslo Accords.
4. In the winter of 2002, Israel temporarily regained direct military control of major cities in the West Bank during operation "Defensive Shield".
5. In 2005, Israel ended its permanent civilian and military presence in the Gaza Strip and removed its ground troops from the Philadelphi corridor, between the Gaza Strip and Egypt.
6. In 2007, the Hamas movement took over internal control of the Gaza Strip. Hamas, unlike the Palestinian Authority, does not consider itself bound by the agreements signed with Israel as part of the occupation. The Hamas regime began to develop a separate system of government, which does not rely on Israel for exercising its authority or for funding via taxes collected by Israel on behalf of the Palestinian Authority.
7. At various times since 2005, particularly in the summer of 2006 and between December 2008 and January 2009, the Israeli military invaded the Gaza Strip, and Israel once again had direct control over the area, sometimes for a number of hours or days, and sometimes for weeks. Beginning in 2008, the "no-go" zone near the Israeli border which is off-limits to Gaza residents was expanded.
8. Beginning in June 2006, following the capture of the Israeli soldier Gilad Shalit, Israel tightened the restrictions on the territorial waters of the Gaza Strip. It now restricts fishing to three nautical miles from the Gaza coast and has imposed a "maritime blockade" since January 2009. Israel claims the authority to intercept ships on the high seas if there is concern that they are headed for the Gaza Strip.
9. In June 2010, the Rafah Crossing was opened for regular, while still restricted, travel between Gaza and Egypt, outside the context of the Agreement on Movement and Access of 2005, which gave Israel substantive powers to allow

or to prevent travel between Gaza and Egypt.<sup>71</sup> Israel took no action against the opening of the crossing, and in May 2011, Egypt increased the categories and numbers of individuals approved for passage through Rafah.

10. In the years since 2007, Israel has decreased military activity in the West Bank, and some of the authorities seized by the military in 2002 were returned to the Palestinian police force.

The above is not an exhaustive list, and there are additional landmarks at which Israel's control of the Palestinian territory tightened and loosened intermittently. Changes in the scope of Israel's and other actors' control over this territory is expected to change in the future. At the time of publication, two trends which may affect the nature and level of Israel's control of the Gaza Strip can be detected: on the one hand, the Egyptian promise to facilitate Palestinian travel through Rafah (while ostensibly decreasing the level of coordination with Israel) and the PA's plan to declare statehood and manage its foreign affairs more independently may indicate a desire or attempt by Palestinian authorities (the Fatah-controlled PA and the Hamas regime) to exercise more governmental powers in the Gaza Strip and West Bank.<sup>72</sup> On the other hand, Israeli declarations that it will restrict the powers it allows the PA to exercise and will withhold tax monies from it in response to political developments, such as a reconciliation agreement between the Palestinian factions, suggest a possible restriction of Palestinian governmental powers.

**So long as we remain somewhere between full expropriation of governmental powers by Israel and full realization of Palestinian sovereignty, Gisha argues that it is not possible to claim that the occupation has ended.**

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71. GISHA, RAFAH CROSSING: WHO HOLDS THE KEYS? *supra* note 19, p. 21.

72. Declaring statehood will not *ipso facto* strengthen Palestinian sovereignty on the ground. However, actions taken as a result of such a declaration, particularly with respect to foreign affairs, could enable Palestinian authorities to exercise additional functions of government. A more detailed analysis of the possible ramifications would be speculative at this stage.

A glance at the events listed above suggests that at this point in time, there is no single actor which exclusively exercises the governmental powers that are, in principle, the prerogative of the lawful sovereign. This situation of shared control and, to quote Gross, "indeterminacy", may continue well into the future, given that in the past two decades, Israel's control of both the Gaza Strip and the West Bank has been quite dynamic, its grip tightening and loosening in response to political and military developments. So long as we remain somewhere between full expropriation of governmental powers by Israel and full realization of Palestinian sovereignty, Gisha argues that it is not possible to claim that the occupation has ended, even if the occupying power is gradually retreating, at least from some of the territory and from some areas of government. Israel therefore continues to owe duties under the law of occupation, commensurate with the control it exercises both in Gaza and the West Bank. Other actors owe duties in the spheres they control.

This functional approach has long since been applied to the Palestinian territory, and in fact, it is Israel that has insisted on it. As pointed out by Gross,<sup>73</sup> Israel's policy on the applicability of the law of occupation has been deliberately vague ever since 1967. Israel has expressed this ambiguity in a variety of ways: it has rejected the *de jure* application of the Fourth Geneva Convention to the occupied Palestinian territory (although, in practice, the Convention served as the framework for Israel's actions, because Israel agreed to apply its "humanitarian" portions); it annexed part of the territory (east Jerusalem) *de jure* and others *de facto* (by building settlements, applying Israeli law to settlers and Jews in the occupied territory on a personal basis, building the separation barrier which effectively annexes some of the occupied territory and increasing control over the seam zones); it transferred certain governmental powers to the PA in the Oslo Accords; and it implemented the Gaza "disengagement" plan in 2005, accompanied by the claim that this move ended Israel's responsibility toward the Gaza Strip (though Israel continued to claim the power to restrict movement into and out of the Gaza Strip). Throughout the years, Israel's approach to the Gaza Strip and West Bank has been mixed; Israel relinquished certain powers to the PA (some of which were later seized by Hamas in Gaza) and seized some of them back, while acknowledging its responsibility for the Palestinian territory and its

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73. GROSS, *supra* note 34, chapter 3.

residents in some contexts and rejecting them in others, including in the case of Gaza.

Israel has always opposed a binary ruling on the application of the law of occupation (including Article 43 of the Hague Regulations) and insisted that although the law of occupation does apply, responsibility is commensurate with control. Despite the fact that in public statements Israel relates to the Palestinian territory as "administered" territory or belonging to the "Jewish people"<sup>74</sup>, its consistent legal position as argued before Israeli courts and in international fora is that the Palestinian territory (with respect to Gaza, until 2005) is held under belligerent occupation and that the military commanders in the area retain all the powers granted by occupation law.<sup>75</sup> Yet, beginning with the implementation of the Oslo Accords, Israel has been claiming that its duties in the areas of health, education, economy and others were transferred to the PA, together with the transfer of governmental powers in these spheres.<sup>76</sup> Under a binary approach, Israel would continue to have full responsibility toward the protected civilians as long as the occupation continued. Responsibility has been allocated in accordance with control for some time now, disagreement between the parties on the nature of the division notwithstanding. It should be noted that the many international actors involved in the conflict also take this approach, and, within the framework

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74. See for example, Benjamin Netanyahu [Prime Minister], Speech to a Joint Meeting of the U.S. Congress [May 24, 2011], at: [www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/Speech\\_PM\\_Netanyahu\\_US\\_Congress\\_24-May-2011.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/Speech_PM_Netanyahu_US_Congress_24-May-2011.htm), according to which "In Judea and Samaria, the Jewish people are not foreign occupiers". See also, "The Truth about the West Bank", a video clip distributed by the Israel Foreign Affairs Ministry where the Deputy Foreign Affairs Minister claims the West Bank is not occupied, but rather "disputed territory", at: [www.youtube.com/watch?v=XGYxLWUKwWo](http://www.youtube.com/watch?v=XGYxLWUKwWo).

75. See, for example, H.C. 7015/02 Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352 (2002), para. 13. Despite the fact that Israel claims the Fourth Geneva Convention does not apply to the Palestinian territory *de jure*, although it is under Israel's belligerent occupation even according to Israel's own position, Israel has declared its willingness to apply the humanitarian portions of the Convention and claims the authorities of an occupying power in the West Bank, and, until 2005, also in the Gaza Strip.

76. See for example, State's Response in H.C. 8242/06 Salameh v. IDF Commander in the West Bank (17.10.2006), section 20 at: [www.gisha.org/UserFiles/File/LegalDocuments/SawsanSalameh/StateResponse18\\_10\\_2006.pdf](http://www.gisha.org/UserFiles/File/LegalDocuments/SawsanSalameh/StateResponse18_10_2006.pdf) [in Hebrew] (hereinafter: the state's response in Salameh), where the State claimed, "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". This argument was made in a petition which sought to abolish the prohibition on Palestinian students' entering Israel for the purpose of academic studies, based, *inter alia*, on Israel's responsibility to facilitate the development of an educational system in the West Bank.

of the law of occupation, look either to Israel or the Palestinian authorities, according to the area in which they seek accountability. The Supreme Court of Israel applies the law of occupation in order to affirm the authority of the military to legislate, try detainees and employ the full range of security measures at the disposal of an occupying power, yet it refrains from holding Israel responsible for civilian issues, where competencies have been transferred to the PA.<sup>77</sup>

It is true that at least since 1994, events on the ground, including the disengagement and the change in internal control over Gaza in June 2007, affect the scope of Israel's responsibility both in Gaza and in the West Bank. In some spheres, that responsibility has been reduced or even disappeared altogether. However, even if we are progressing on the spectrum of control toward increased realization of governmental powers by the Palestinian authorities, Israeli control over major aspects of the lives of Palestinian residents in both parts of the Palestinian territory has yet to come to an end.

Our position may be summarized as follows: because we cannot assert that the occupation of the Palestinian territory in general, and the Gaza Strip in particular, has ended, the Gaza Strip and West Bank must continue to be seen as occupied territory, where the scope and nature of Israel's obligations derive from the scope and nature of the control it continues to exercise.

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77. So for example in H.C. 6133/03 Abu Baker v. Defense Ministry (unreported, 23.9.2003), where the court held "...the Petitioner must address his grievance to the [Palestinian – S.B, T.F] 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 transferred from the military government and its Civil Administration to the Palestinian side". In H.C. 10548/06 Hajj v. Judea and Samaria Area Civil Administration (unreported, 6.9.2007), the court held "According to Article 28 of the Annex to the Interim Agreement between Israel and the Palestinian Authority which concerns civil affairs the Authority has the power to approve family unification in the Region, subject to Israeli approval This court has ruled time and again that so long as no application was transmitted from the Authority to Israel, there is no cause to interfere with the Respondent's decision. Grievances on the issue are to be addressed to the Authority", and in HC 7221/08 Abu Hamada v. State of Israel (unreported, 13.1.2009), the court held: "according to the Interim Agreement between Israel and the Palestinian Authority the Palestinian Authority has the authority to process applications for permanent residency, subject to Israeli approval the competent official here will be obligated to process and decide on the application only if the Authority refers it to Israel". We leave open the question of Israel's residual responsibility, as the occupier, in spheres of life over which the PA also exercises powers. The suggestion that Israel continues to maintain indirect responsibility for spheres in which competencies were transferred to the PA can be found in the State's response in Salameh, *supra* note 76, which asserts that Israel has no "direct" responsibility for civilian matters.

## The law of occupation v. the law of armed conflict: normal life v. humanitarian minimum

In adopting the above position, we dispute Israel's position that the standard it is obligated to meet in the Gaza Strip<sup>78</sup> is the minimal standard set by the law of armed conflict, namely, the obligation only to allow the passage of goods which are essential for the survival of the civilian population.<sup>79</sup> Our position is that the standard that applies to Israel is the obligation to allow commerce at the level needed to maintain normal life, in the sense intended by Article 43 of the Hague Regulations (*la vie publique*). Israel's official position is that it ended the occupation of the Gaza Strip the moment it removed its permanent presence from Gaza's soil, and that the standard it is obligated to uphold changed accordingly, including in areas over which it continues to exercise control, such as the passage of goods. According to this position, once control decreases significantly but partially, as with the "disengagement" plan, Israel's duties are limited to the minimum standards stipulated in the law of armed conflict, even in those realms where control did not change at all. According to the Israeli position, Israel may exercise the same functions of government it has exercised since 1967, namely the decision about who and what enters and leaves the Gaza Strip in a way that impedes the possibility for human and economic development, so long as it allows the passage of "goods which are essential to the survival of the civilian population"<sup>80</sup> and passage of people in "exceptional humanitarian cases".<sup>81</sup>

This approach subverts humanitarian law, which seeks to link control of a sovereign nature (such as regulating the passage of people and goods) with responsibility of a sovereign nature (such as providing the opportunity to lead normal lives, inasmuch as this depends on freedom of movement). Roberts was correct in pointing out

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78. See for example section 49 of the Preliminary Response on behalf of the Respondents in H.C. 9132/07 al-Bassiouni v. Prime Minister (1.11.2007), at: [www.gisha.org/UserFiles/File/Legal%20Documents/\\_fuel%20and%20electricity\\_oct\\_07/state\\_response\\_2\\_11\\_07.pdf](http://www.gisha.org/UserFiles/File/Legal%20Documents/_fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf) [in Hebrew]. (hereinafter: Respondents' response in al-Bassiouni), where Israel defines the scope of its responsibility with regards to the passage of goods.

79. See Geneva Convention, Article 23, *supra* note 54 and Protocol I of the Convention, 1977, Article 70 (hereinafter: Protocol I of the Geneva Convention).

80. Respondents' response in al-Bassiouni, *supra* note 78, section 73.

81. See, for example, section 14 in State's response in Sharif, *supra* note 10, where the Defense Ministry articulates the criterion for allowing Palestinians to travel to and from the Gaza Strip.

that in the absence of a peace treaty or defeat of the occupying power, it is difficult to determine when an occupation ends, and any attempt to fix a specific date may overlook the gradual manner in which powers are transferred from the occupying power.<sup>82</sup> Lowering the standards Israel must meet in terms of regulating Gaza's crossings, without any substantive change in its control over Gaza's travel routes, leads to an a-symmetrical situation where Israel exercises governmental powers related to regulating civilian life (even if the official reason given for this control is security), but owes the same minimum obligations owed by parties to an armed conflict exercising temporary control over a certain crossing in order to achieve a concrete military objective.

It is impossible to analyze the means of control without reference to the context: the manner in which control was obtained (the occupation of a territory as a result of an armed conflict in 1967), the intentions which underlie the way control is exercised (exerting pressure<sup>83</sup> or "security-political" objectives<sup>84</sup> rather than a specific military objective) as well as the specific context of the Israeli-Palestinian conflict and the territorial claims of each party. For example, it is possible to exercise control over territorial waters in the context of a maritime blockade. Air travel can be prevented as an act of war. However, if these acts are put into context, namely continuous control over the sea and air for more than four decades, it is more difficult to see this control as an act of war or an attempt to achieve a temporary military objective, to which the "minimum" standard of the laws of war would apply. It is difficult to see regulation of a civilian nature, such as setting passage arrangements, collecting taxes, monitoring border crossings, determining who is a "Palestinian resident" and where he or she may reside, regulating infrastructure, and determining planning and zoning arrangements as acts of armed conflict. Even if there is a military purpose for controlling the borders, when the military officials in charge of "fabric of life" regulate trade and

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82. Roberts, *Transformative Military Occupation*, *supra* note 38, pp. 616-617.

83. See for example, statements made by senior officials in the Defense Ministry, Hanan Greenberg, *Israel Considering Reducing Passage of Goods to Gaza*, YNET, Sept. 23, 2008, at: [www.ynet.co.il/articles/0,7340,L-3600973,00.html](http://www.ynet.co.il/articles/0,7340,L-3600973,00.html) [in Hebrew].

84. See for example, Coordination of Government Activities in the Territories, *Civilian Policy toward the Gaza Strip* (presentation), presented to the Public Commission to Examine the Maritime Incident of 31 May 2010, at: [www.turkel-committee.gov.il/files/wordocs/dangot.ppt](http://www.turkel-committee.gov.il/files/wordocs/dangot.ppt) [in Hebrew]. Page 15 presents the principles of the civilian policy toward the Gaza Strip which include "separation between Judea and Samaria and the Gaza Strip as a security-political need".

travel, as they have since 1967, this control has a dominant civilian aspect. These powers are exercised on a permanent basis, using protocols that regulate the lives of Gaza's residents. It is not an instance of temporary control designed to achieve some military purpose such as seizing an area or overpowering an enemy. Though the law of armed conflict does apply, it alone cannot frame or regulate the relationship between Israel and the residents of the Gaza Strip. The minimal standard applied by humanitarian law to situations of combat is ill-suited to the ongoing control and regulation of civilian life.

For these reasons, we argue that the law of occupation, and particularly the standard established in Article 43 of the Hague Regulations, is the appropriate framework for evaluating the degree of Israel's responsibility in the Gaza Strip, commensurate with the scope of its control.

In addition to these obligations, Israel is also subject to the law of post-occupation and human rights law, as detailed in Chapters 3 and 4. The additional actors exercising control, the PA and the Hamas regime, also have obligations to the residents of the Gaza Strip under human rights law and humanitarian law. We detail these obligations in Chapter 5.<sup>85</sup>

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85. On the normative framework which applies to the Hamas regime and the Palestinian Authority, see GISHA, *RAFAH CROSSING: WHO HOLDS THE KEYS*, *supra* note 19, pp. 134-137.

## Chapter 3: Post-Occupation Obligations

In the previous chapter we argued that as long as Israel maintains significant elements of control in Gaza and exercises control at its discretion and according to its needs, it continues to bear obligations toward residents of the Gaza Strip under the law of occupation. However, as we demonstrated, Israel has ceded its control over certain aspects of life in Gaza and allows other actors to assume control, at least in part. The question is: What is Israel's responsibility in those spheres?

This chapter examines a complementary doctrine according to which Israel has ongoing duties toward the Gaza Strip even in spheres in which it relinquished control: the ancient doctrine of *jus post bellum*, which translates as "post-war justice" or "post-conflict law". The doctrine has recently attracted the renewed interest of leading scholars in political philosophy and international law.

*Jus post bellum* is the "third leg" in the just war theory, together with the rules of entering into war and the laws governing the conduct of war. The logic behind this theory's tripartite structure is that if a war has legitimate reasons (according to the principles justifying waging war – *jus ad bellum*) and if it is conducted justly (according to the laws of war – *jus in bello*) it should lead to a just result (*jus post bellum*). Back in the 17<sup>th</sup> century, Hugo Grotius, considered to be one of the forefathers of international law, developed a concept of post war justice based on the rules of natural law. Two centuries later, Immanuel Kant made the connection between "law after war" and substantive principles of justice, fairness, respect for sovereignty and the limits of punishment.<sup>86</sup>

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86. Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT'L L. REV. 311, 314 (2008) (hereinafter: Stahn, *Mapping the Discipline(s)*).

In the 19<sup>th</sup> and 20<sup>th</sup> centuries, the *jus post bellum* branch was neglected in the literature on international humanitarian law relative to the other two branches of the just war theory and, unlike its counterparts, did not undergo codification. A primary reason for this underdevelopment is the binary conceptualization of war and peace as two entirely separate and distinct normative paradigms, a concept which is incompatible with modern reality and the nature of conflict in today's world.<sup>87</sup>

Renewed interest in *jus post bellum* began in the 21<sup>st</sup> century, in the context of the controversial American intervention in Iraq and Afghanistan and the American military's realization that its responsibility toward the civilian population in these areas would not end with the formal end of occupation. Legal scholars have attempted to ascertain the legal obligations of an occupying power in complex transitional situations such as these, when the occupying power has fully or partially ceded control, but control has not yet been fully and effectively assumed by the legitimate sovereign.

The structure of international humanitarian law is such that it can address only temporary power vacuums following a conflict, and then only in a very general manner, based on basic legal norms rather than rules that specifically address transitional situations.<sup>88</sup> This is where post-conflict or post-occupation law comes into play. The post-occupation doctrine offers a different and important perspective on the array of rights and duties assigned to the different actors in the transitional phase, primarily because it accepts that such a phase exists.<sup>89</sup> Post-occupation doctrine presupposes a continuum between war and peace and between occupation and the full realization of lawful sovereignty. As such, it may

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87. *Id.*

88. Stahn, *Mapping the Discipline(s)*, *supra* note 86, pp. 328-331. International law allows a very limited review of actions taken after an armed conflict ends. Articles 32 to 41 of the Hague Regulations supply most of the relevant provisions, but they are largely inapplicable to modern conflicts. The absence of detailed legal provisions suitable for situations of transition from an armed conflict to a sustainable arrangement increases the sense that the results of a conflict reflect a "victor's justice": See Major Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 131 (Winter 2005) (hereinafter: DiMeglio).

89. According to Michael Walzer, who is considered an authority on just war, not only are "just" occupiers permitted to intervene in post-war reforms, but they actually have a (moral) obligation to do so. Cited in: Dr. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119 (January, 2010), note 55 (hereinafter: De Brabandere).

provide an appropriate framework for understanding Israel's obligations toward the Gaza Strip, particularly in the spheres in which Israel has relinquished control.

According to this doctrine, Israel continues to bear obligations toward residents of the Gaza Strip even in areas in which it no longer exercises direct control and even if it no longer occupies Gaza at all. These obligations remain in force for a limited period of time after control is removed.<sup>90</sup> This principle is anchored in the practice of countries such as the United States (in Iraq and Afghanistan), legal scholarship<sup>91</sup> and the Israeli Supreme Court's judgment in **al-Bassiouni**, even if the court did not refer to the doctrine by name.<sup>92</sup> Below, we briefly address the normative framework of the post-occupation doctrine and its major precepts, which may help understand the nature and scope of Israel's obligations toward residents of the Gaza Strip.

## A. Applying general principles and avoiding a normative vacuum

At its core, international law cannot tolerate a vacuum of responsibility, particularly when it comes to civilian populations. The architects of international humanitarian law anticipated the limitations of the structure they created and sought to avoid a normative and moral vacuum by laying down fundamental principles that would apply in situations which are not fully or clearly regulated. The renowned Martens Clause which was first included in the Hague Regulations of 1899 refers to "the laws of humanity" and "public conscience" as guiding principles:

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90. See Benvenisti, *supra* note 46, Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, pp. 16-18, Rubin, *supra* note 47.

91. Inger Österdahl & Esther van Zadel, *What Will Jus Post Bellum Mean? Of New Wine and Old Bottles*, 14 J. CONFLICT & SECURITY L. 175 (2009) (hereinafter: Österdahl & van Zadel); Carsten Stahn, "*Jus Ad Bellum*"; "*Jus In Bello*"... "*Jus Post Bellum*"? – *Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 927-8 (November, 2006); for criticism claiming that post-occupation doctrine presents nothing new but rather brings existing obligations under one heading, see: De Brabandere, *supra* note 89, p. 135.

92. In *al-Bassiouni*, *supra* note 43, at para. 12, President Beinisch writes: "[T]he primary obligations borne by the State of Israel with regards to the residents of the Gaza Strip are derived from the state of armed conflict between it and the Hamas organization which controls the Gaza Strip; its obligations **also stem from the degree of control that the State of Israel has over the border crossings between it and the Gaza Strip, and also from the situation that was created between the State of Israel and the Gaza Strip territory due to the years of Israeli military control in the area**, as a result of which the Gaza Strip is at this time almost totally dependent on Israel for its supply of electricity" (emphasis added – S.B., T.F.); see also Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, p. 16.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>93</sup>

A slightly more refined version of the clause was also included in the Hague Regulations of 1907.<sup>94</sup> The Martens Clause has been extensively featured in the literature, and scholars differ as to its intentions and meaning.<sup>95</sup> In the ICJ's opinion on the use of nuclear weapons, Judge Shahabuddeen held:

In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community.<sup>96</sup>

According to the ICJ's interpretation, the laws of humanity and the requirement to meet the standards of public conscience can be applied in order to establish a duty of reasonable care in post-occupation situations.<sup>97</sup> But what exactly does this duty entail and how long does it remain in effect? We attempt to clarify below.

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93. Hague Convention (III) With Respect to the Laws and Customs of War on Land, July 29, 1899, Preamble, T.S. No. 403.

94. "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." (Hague Regulations, Preamble, see *supra* note 35).

95. See for example: Theodor Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000).

96. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996 (July 8) (Dissenting Opinion of Judge Shahabuddeen) 375, 406. The court held that the Martens Clause is in effect customary international law to which state practice is subject (*Id.*, p. 405).

97. The ICJ applied a similar principle in *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania) (merits), Judgment, I.C.J. Rep., 1949 (Apr. 9), 4, 22.

## B. Residual responsibility

If occupation, as a system of control, exists on a spectrum, the process of control shifting from the occupying power to a different actor may also be gradual, particularly when the occupation is long and deeply entrenched, and therefore has had a more significant impact on the civilian institutions of the protected population. The process begins with the occupying power ceding control and ends with the full and effective assumption of control, and attached responsibility, by the local ruler, the lawful sovereign. But what about the time in between? Who has responsibility during the "power vacuum"?

Professor Eyal Benvenisti argues that the law of occupation imposes forward-looking obligations on the occupant to ensure that public order and civilian life<sup>98</sup> continue during the end of occupation and immediately thereafter, until the transfer of sovereign powers to the local regime is completed. According to Benvenisti, the scope of these obligations depends on the duration of the occupation and the level of the occupant's involvement in running the local residents' civilian institutions and day-to-day lives. The more a population is dependent on the occupant, the greater the latter's responsibility for the transition.<sup>99</sup>

Israel's Supreme Court took a similar approach in **al-Bassiouni**, where it referred to Gaza's dependence on Israel and the services it provides – dependence created by Israel over the four decades of occupation – as one of the sources for Israel's ongoing obligations toward the Gaza Strip.<sup>100</sup> The court found this obligation to exist in addition to Israel's obligations under the laws of war, so long as the armed conflict persists, and the obligations stemming from its continued control over certain aspects of life, such as control over borders and crossings.<sup>101</sup> That is, if and inasmuch as an occupied population remains dependent on the occupying power even after it cedes control, the occupying power continues to have responsibilities in the areas in which the civilian population remains dependent on it.

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98. According to the meaning of the term under Article 43 of The Hague Regulations, *supra* note 35.

99. Benvenisti, *supra* note 46, p. 9.

100. al-Bassiouni, *supra* note 43, para. 12.

101. *Id.*, *id.*



### Queue at a gas station in Gaza City

Photo: Mohammed Azaiza / Gisha, February 3, 2011

According to Professor Yuval Shany, although the **al-Bassiouni** verdict did not specify the normative source for the obligations accrued from dependence, it may have insinuated that over the prolonged occupation of the Gaza Strip, Israel failed to meet its responsibility to allow local capacities to develop and therefore has a legal duty to repair the damage.<sup>102</sup> According to Shany, even if one accepts that post-occupation responsibility exists, it is difficult to grasp how it translates into concrete legal duties.

The analysis offered by Benjamin Rubin may help substantiate the obligations owed by a "retreating occupant" and determine their duration. According to Rubin, the occupying power continues to bear residual responsibility for the population of an occupied territory after the end of occupation, until the local sovereign is able to fulfill all the duties previously imposed on the occupant, or until it is possible to ascertain that these duties are not being fulfilled as a result of

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102. Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, p. 16.

the lawful sovereign's omissions rather than the occupier's actions during or after occupation.<sup>103</sup> Rubin thinks that imposing residual obligations on the former occupant follows the logic of the law of occupation, which endeavors to avoid a vacuum of power or responsibility. This is why, under the law of occupation, all the responsibilities of the sovereign are transferred to the occupying power the moment occupation begins. At the end of occupation, however, there is not always a sovereign that can carry the full burden of responsibility, and the danger of a vacuum of responsibility is even greater. Therefore, there is a need to impose residual obligations on the occupying power, until it is clear that the sovereign can carry the burden.<sup>104</sup> In contrast to the "effective control" test used for determining the beginning of occupation, the test Rubin suggests for the end of occupation may be termed "effective assumption of sovereignty".

Rubin traces the concept of applying the law of occupation beyond the term of occupation, during post-occupation, to Article 3(b) of the First Protocol of the Geneva Convention, which expressly stipulates that the Conventions and the Protocol continue to apply in certain situations even after the end of occupation.<sup>105</sup> Rubin also refers to the case of the occupation of Germany at the end of World War II. The occupation ended with Germany's defeat, but the Hague Regulations continued to apply, at least partly, to the allies.<sup>106</sup> Rubin also claims that UN Security Council Resolution 1546 of June 2004, which established the multinational force in Iraq, is a current practice reflecting the idea that the occupant continues to bear responsibilities and obligations toward the population in an occupied territory, until local authorities are able to exercise their sovereignty independently.<sup>107</sup>

Thus, according to the residual responsibility theory, the main normative source grounding the obligations of a retreating occupier is Article 43 of the Hague

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103. Rubin, *supra* note 47, pp. 553, 556-558.

104. *Id.*, pp. 550-551.

105. Protocol I of the Geneva Convention, *supra* note 79, Article 3(b): "[T]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment".

106. Rubin, *supra* note 47, p. 554.

107. *Id.*, p. 551.

Regulations, which enshrines the duty to ensure normal civilian life in the territory.<sup>108</sup> Clearly, the application of these obligations after the occupation is not identical to their application during occupation. The duty to facilitate and assist normal life and other duties does not apply wholesale after the occupier has relinquished control, but rather only to the scope and degree required in the relevant factual circumstances. In this context, one has to consider the degree to which the occupier fulfilled its duties during the time it was in power;<sup>109</sup> the duration of control and the dependence this control created among the occupied population even after it ended or was transferred;<sup>110</sup> the time that elapsed since control ended; the *de facto* ability of the retreating occupier to fulfill its duties;<sup>111</sup> and, finally, the degree to which dependence on the retreating occupier is a result of the new sovereign's omissions in discharging its obligations toward the civilian population.<sup>112</sup>

So, for example, with respect to Gaza's electricity supply, on which the review in **al-Bassiouni** focused, the court held that the historical ties between Israel and Gaza and the dependence that had been created give rise to a duty on Israel's part to see to it that Gaza receives electricity, both through the high-voltage lines running from Israel to Gaza and also by allowing enough industrial diesel to be brought in for the local power station.<sup>113</sup> The court did not detail why the dependence on Israel for electricity *per se* gives rise to a duty to supply it, but it may have considered Israel's failure to fulfill the forward-looking obligations Benvenisti speaks of, such as the duty to develop an independent electrical system in Gaza during the four decades of direct control over the Strip.<sup>114</sup>

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108. *Id.*, p. 553. Article 43 of the Hague Regulation sets forth: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

109. Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, p. 16.

110. Benvenisti, *supra* note 46, p. 9.

111. al-Bassiouni, *supra* note 43, para. 12.

112. Rubin, *supra* note 47, pp. 556, 558.

113. al-Bassiouni, *supra* note 43. We emphasize that the Palestinian Authority, not Israel, pays for both the electricity and the diesel.

114. It should be noted that Gisha petitioned the Supreme Court in al-Bassiouni arguing that the obligations Israel owes to the Gaza Strip do not allow it to restrict the supply of fuel and electricity other than for concrete security reasons (such a threat to the fuel depot). The Supreme Court held that Israel may restrict the quantity it allows the Palestinian Authority to purchase and transfer to the Gaza Strip as long as it is sufficient for meeting "humanitarian needs". We dispute the operative outcome of the general holding in the judgment and argue that the relevant standard is what is needed to maintain "normal life" as per Article 43 of the Hague Regulations.

## C. The principle of restoration or restitution

Another legal principle that may assist in determining the nature of the obligations under post-occupation law and their scope is the principle of restoration, which the theologian, Professor Michael Schuck, addresses in the post war context. This principle is the source of the victor's duty to return to the battlefield and remove instruments of war such as landmines and bombs in order to prevent further injuries after the end of the conflict. In certain cases, the victors are also required to assist in rebuilding the civilian infrastructure of the vanquished/occupied party.<sup>115</sup> Himes interprets Schuck broadly and suggests an obligation to build infrastructure and civilian institutions. According to Himes, building society completes the principle of restoration by expanding the term "basic civilian infrastructure" so that it is not limited to material infrastructure such as roads, electricity and communications but also includes the human infrastructure required for creating a social-cultural-economic network.<sup>116</sup> Like the principle guiding the residual responsibility concept, here too, the duty of restoration is seen as accruing from the duration and depth of the occupation, that is from the degree of its impact on the existence and operation of civilian institutions, irrespective of the legitimacy of the occupation per se.<sup>117</sup> In situations of prolonged occupation, such as in the Gaza Strip, it is difficult to assess how society, the economy and physical infrastructure would have developed without the occupation, and therefore it is difficult to determine the impact of the occupation on these institutions.

The Palestinian territory was separated from the State of Israel for a relatively short period of 19 years (between 1948 and 1967, as until 1948, Gaza, Israel and the West Bank were a single territory – mandatory Palestine) and has been reunited under Israeli rule for the last 44 years. In this context, Gisha's position is that the criterion for assessing Israel's duties toward the protected population should be

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115. DiMeglio, *supra* note 88, p. 137.

116. "The principle of establishing a civil society complements the principle of restoration by extending "basic infrastructure" to include not just the material infrastructure of roads, electricity, and communication but the human infrastructure for peaceful communal life, such as police and judicial functions."; see: Kenneth R. Himes, *The Case of Iraq and the Just War Tradition*, [Dec. 3, 2002], at: [www.jknirp.com/himes2.htm](http://www.jknirp.com/himes2.htm); see also: Österdahl & van Zadel, *supra* note 91, p. 181; as well as: Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 50 (fall 2004).

117. Brown, pp. 50-51.

set with reference to the level to which Israel developed its own civilian institutions in its sovereign territory. Obviously, where other actors have some control or the ability to exercise control, they share responsibility for reaching that standard. Moreover, the standard may be changed and lowered if a significant part of the control was transferred to a power other than the occupant during the occupation, and if omissions by said power contributed to the failure to develop civilian institutions under its control.

Going back to the general principles of international humanitarian law, enshrined in the Martens Clause, it can be said that the rules of humanity and fairness demand at the very least that the occupying power not leave behind a situation which is worse than the one prior to its intervention. However, in situations of prolonged occupation, it is difficult to ascertain how things might have developed in the absence of occupation and therefore the criterion for determining the scope of the occupier's responsibility is not always clear.

## **D. State responsibility for breaches of international law**

In contrast to the position that post-occupation obligations are divorced from the issue of culpability and justice, the principle of state responsibility for breaches of international law actually draws a connection between the legitimacy of the conflict and the actions taken as part of it and responsibility for the effects of those actions.<sup>118</sup> According to Professor Benvenisti, the occupant's omission in failing to take forward-looking measures during the occupation could give rise to obligations on its part in the period following occupation, according to the principle of state responsibility.<sup>119</sup> How to implement these obligations would again depend on the circumstances of the occupation and on how it ended. The remedy a former occupant is required to provide is naturally related to the services it provided or should have provided during the occupation and includes at least the basic services required for normal civilian life.<sup>120</sup>

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118. *Id.*, pp. 58-59. Brown cites (at note 112) the ICJ decision 1928 P.C.I.J. (Ser. A) No. 17, at 29, where it was held that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"; the same is stated in Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 Y.B. Int'l L. Comm'n, vol. II (Part Two).

119. Benvenisti, *supra* note 46, p. 12.

120. Cf. Benvenisti at p. 13, who refers to the duty to provide conditions for "basic subsistence".

Let us take, for example, the seaport and airport – both essential civilian institutions, especially in a territory such as the Gaza Strip, whose land access routes are limited and largely dependent on a party to the conflict in which it is embroiled, namely Israel. In the Oslo Accords, Israel undertook to allow the Palestinians to build a seaport and airport. Yet, with the outbreak of the Second Intifada, Israel bombed the airport, three years after its inauguration, and it razed the site where the seaport was about to be built. Israel has since prevented the reconstruction of the ports and in so doing breached its obligations under the law of occupation (given that no appropriate alternative was offered). Therefore, after the occupation and the removal of its control over the air and sea, Israel would owe a duty to allow the residents of the Gaza Strip to use Israeli ports for a transitional period. It might also be argued that Israel owes a duty to see to the building of a seaport and an airport in Gaza, as part of its responsibility for the omission of failing to develop options for sea and air travel.

In conclusion, Israel's obligations under post-occupation law will be determined by the duration of control; the level of fulfillment of its obligations under the law of occupation, including forward-looking duties; Gaza's residual dependence; and the acts (or omissions) of other actors which assumed control. In the context of the Palestinian territory, in which Israel has relinquished some aspects of control but continues to hold others, there will be areas in which Israel owes duties under the law of occupation and others in which it owes duties under post-occupation law. While its post-occupation duties would decrease with time, its duties under the law of occupation will remain in effect as long as it maintains control.

**Israel's obligations under post-occupation law will be determined by the duration of control; the level of fulfillment of its obligations under the law of occupation; Gaza's residual dependence; and the acts (or omissions) of other actors which assumed control.**

## Students at Al-Azhar University in Gaza

Photo: Al-Azhar University Public Relations Department,  
June 16, 2006



## Chapter 4:

# Obligations under Human Rights Law

The principle that control gives rise to responsibility is at the heart of human rights law. This body of law generally links responsibility to power or control over people and imposes legal obligations according to the type and degree of power. The prevailing position among international legal scholars today is that because of its universal and general nature, human rights law applies in all situations, including peacetime, armed conflict and transitional periods. Awareness of the important role human rights law plays during armed conflict and particularly during belligerent occupation has increased in recent years in light of judgments by international, regional and domestic tribunals.<sup>121</sup>

Although effective control by a foreign power over a population in a given territory – i.e., occupation – gives rise to obligations under human rights law, this law may

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121. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004 (July 9), 136 ¶¶ 106-113; (hereinafter: the Wall Opinion); Armed Activities on the Territory of the Congo (Congo v. Uganda) judgment, ICJ Rep. 2005 (Dec. 19), 168, ¶¶ 216. In a number of judgments, the ECtHR held that the geographic applicability of the European Convention on Human Rights is determined by the "effective control" test rather than by the territorial borders of the State party: *Loizidou v. Turkey* (merits), 18 December 1996, ¶¶ 52, Reports of Judgments and Decisions 1996-VI (hereinafter: *Loizidou v. Turkey*); *Behrami v. France*, *Saramati v. France, Germany and Norway* (Application Nos 71412/01 and 78166/01 [unreported], 2 May 2007). The High Court of Justice has also acknowledged the applicability of basic rights under international human rights law in a territory held under belligerent occupation. It has often held that fundamental individual or collective rights apply during armed conflict: H.C. 10356/02 *Haas v. IDF Commander in the West Bank* (unreported, 4.3.2004); H.C. 1890/03 *Bethlehem Municipality v. State of Israel* (unreported, 3.2.2005) (hereinafter: *Bethlehem Municipality*); H.C. 3969/06 *Head of Deir Samit Village Council al-Harub v. IDF Commander in the West Bank* (unreported, 22.10.2009). In the judgment in H.C. 769/02 *Public Committee Against Torture in Israel v. Government of Israel*, 57(6) P.D. 285, known as the targeted killings case, which was delivered after "disengagement" and applies to the Gaza Strip, the Supreme Court was willing to presume that human rights law applies in the Palestinian territory parallel to international humanitarian law, without ruling on the issue. See generally: William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of jus ad bellum* (Forthcoming) 40 ISRAEL L. REV. 592 (2007); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories* 37 ISRAEL L. REV. 17 (2003).

also apply in other situations. According to the UN Human Rights Committee which is entrusted with monitoring the implementation of the International Convention on Civil and Political Rights, human rights law applies when a state or its agents exercise power or control outside the country's borders.<sup>122</sup> The ECtHR and the British House of Lords have similarly held, in different contexts, that individuals who are subject to the power of state agents in a foreign territory are protected by human rights law.<sup>123</sup> In one of its judgments, the ECtHR held that the test for attaching responsibility to human rights violations is "effective authority, or at the very least decisive influence" by the state in the area where the violations took place.<sup>124</sup>

Professor Yuval Shany argues that a state may have obligations under human rights law not just for extra-territorial acts (acts taking place outside the borders of the country), but also for certain extra-territorial effects, that is the impact of acts which are carried out inside the country's territory on individuals outside it. He finds support for this approach in, among other sources, the **al-Bassiouni** judgment where dependence is considered a source for Israel's obligations.<sup>125</sup> Shany suggests a test, based on American law, for imposing human rights obligations for actions with cross-border effects. According to this test, the effects must be direct, substantial and foreseeable.<sup>126</sup>

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122. General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, ¶ 10, CCPR/C/21/Rev.1/Add.13 (26.5.2004). See also the decision in *Burgos v. Uruguay*: *López Burgos v. Uruguay*, U.N. Doc. CCPR/C/OP/1 88 (1984); see also the decision in *Montero v. Uruguay*: *Montero v. Uruguay*, U.N. Doc. CCPR/C/OP/2 136, ¶ 5 (1990).

123. *Öcalan v. Turkey* [GC], no. 46221/99, ¶ 86, 90, ECHR 2005-IV; *Al-Skeini v. Secretary of State for Defence* UKHL 26 [13.6.2007]; *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* UKHL 58, [12.12.2007]. See also EXTRA TERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Eds. F. Coomans & M. Kamminga, 2004); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 193-235 (2010).

124. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ¶ 392-393, ECHR 2004-VII, see discussion of this case and previous contradictory rulings by the ECtHR on this issue in Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 40, *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no 52207/99 ¶ 75 ECHR 2001-XII), where the court rejected the argument on the extra-territorial applicability of the convention based on an "all or nothing" approach. As Shany argues, this ruling is inconsistent with other rulings by the court and other tribunals, but it does point to a resistance against the extra-territorial application of human rights law in legal practice. It should be noted that in both these cases, the issue was the limits of applying a regional convention, whereas the issue we address involves international conventions.

125. *Id.*, p. 14.

126. *Id.*, p. 15. Shany uses a standard established in RESTATEMENT (THIRD) OF FOREIGN RELATIONS – 403(2) regarding the exercise of regulative powers with respect to extra-territorial acts that have cross-border effects.

In the context of the Gaza Strip, Israel's control over borders and crossings, the population registry and the tax system clearly has a substantial, direct and foreseeable effect on the residents. Therefore, human rights standards apply to Israel irrespective of the question of effective control of the Gaza Strip.<sup>127</sup> In other words, Israel owes obligations under human rights law everywhere actions taken by its official representatives have a direct and substantial effect on Gaza's residents.

For instance, because Israel controls movement by Gaza residents, particularly to the West Bank, it is obligated to protect their freedom of movement under the International Convention on Civil and Political Rights (1966).<sup>128</sup> Similarly, where Israel exercises control over Gaza's economic welfare by controlling the passage of goods into and out of the Strip,<sup>129</sup> this control is subject to the provisions of the International Covenant on Economic, Social and Cultural Rights. Israel's control of the Palestinian population registry and its consequent decisive influence on the ability of persons whose addresses are registered in Gaza to reunite with their relatives in the West Bank give rise to duties under the UN Universal Declaration of Human Rights and a number of other instruments. Control over the collection and transference of Palestinian tax revenues, which are required for paying the salaries of health ministry employees for example, creates duties under the Convention on the Rights of the Child, pursuant to the articles relating to children's health.<sup>130</sup> As stated, these obligations exist parallel to the provisions of international humanitarian law, where such provisions apply.

In addition, Israel continues to bear obligations under human rights laws in the spheres in which residents of the Gaza Strip are dependent on it and the services it provides. The dependence created by Israel in different areas, such as the supply of electricity, allows it to maintain substantial and direct authority and influence over residents of the Gaza Strip and imposes a corresponding obligation to protect their rights under international human rights law.

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127. *Id.*, p. 15-16.

128. For a discussion of Israel's obligation to uphold the freedom of movement of the residents of the territory under its control, see Bethlehem Municipality *supra* note 121, para. 15; the Wall Opinion, *supra* note 121, para. 134.

129. Response on behalf of the Respondents in H.C. 2990/06 Al Mezan Center for Human Rights v. Minister of Defense; State Response in H.C. 5841/06 The Association for Civil Rights in Israel v. Minister of Defense, particularly para. 51.

130. Convention on the Rights of the Child (opened for signing in 1989).

## Chapter 5:

# The Responsibility of Palestinian Authorities

This chapter presents a brief overview of the obligations the Palestinian authorities that exercise control in the Gaza Strip and West Bank owe under international law. The chapter concludes with a brief review of Egypt's involvement in operating its border crossing with the Gaza Strip.

Although the Palestinian authorities are not a state actor, they do have an obligation to respect the rights of Gaza residents in the spheres they control. Non-state actors are now commonly seen as bearing duties under international human rights law, at the very least when it comes to customary obligations. A joint report on Lebanon and Israel by four senior UN officials states the following:

Although Hezbollah, a non-state actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.<sup>131</sup>

Moreover, the authors stress that:

It is especially appropriate and feasible to call for an armed group to respect human rights when it 'exercises significant control over territory and population and has an identifiable political structure'.<sup>132</sup>

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131. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everybody to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary General on human rights of internally displaced persons, Walter Kalin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, 2 October 2006, para. 19.

132. *Id., id.* This principle was the basis for the UN finding that the Liberation Tigers of Tamil Eelam (LTTE), a party to the armed conflict in Sri-Lanka, was subject to the human rights norms accepted by the international community; see: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, HRC, paras. 25-26 U.N. Doc. E/CN.4/2006/53/Add.5 (Sept. 2006). The UN Security Council reached a similar conclusion regarding Afghanistan; see: SC Resolution on the situation in Afghanistan S/RES/1214 (Dec. 8, 1998).

Both governments currently operating in the Palestinian territory exercise this type of control. In the West Bank, the PA exercises governmental powers, while in the Gaza Strip, internal control is shared by the PA and the Hamas regime. Since taking over internal control of the Gaza Strip in 2007, Hamas has been exercising a broad spectrum of governmental powers affecting many aspects of the lives of the civilian population, including education, health, internal security and sanitation. Hamas also physically controls the Palestinian side of the crossings with Israel and Egypt. This control gives rise to a responsibility for Gaza's residents and their rights, including freedom of movement, to the extent Hamas is able to exert control in this matter. The PA continues to exercise control over major aspects of life in the West Bank (particularly in Area A) and some control in Gaza, by controlling the funding of public services such as electricity and healthcare, paying its officials, coordinating with the Israeli authorities on matters relating to the population registry and the passage of goods and people, and coordinating with international donors on issues of planning and implementing humanitarian and economic projects. Whether Hamas and the PA continue to exercise control separately or join forces under a single government, they continue to owe obligations in the spheres they control. Their obligations begin where Israel's control and responsibility end.

It is important to emphasize that the PA has officially undertaken to uphold international law and major human rights conventions both in its basic law<sup>133</sup> and in international agreements, including the Oslo Accords.<sup>134</sup> These declarations establish the PA's obligation to respect and uphold the provisions of customary international law in addition to the specific provisions of the agreements to which it is party.

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133. Title Two of The Palestinian Basic Law 2002 (sec. 9-33), at: [www.palestinianbasiclaw.org/2002-basic-law](http://www.palestinianbasiclaw.org/2002-basic-law), which refers to "public rights and liberties" safeguards a number of political, social and economic rights. Sec. 10, for example, stipulates "basic human rights and liberties shall be protected and respected" and "the Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights".

134. In the Oslo Accords, (Oslo A – Declaration of Principles on Interim Self Government, Sept. 13, 1993 and Oslo B (*supra* note 29), the Palestinian Authority and Israel both declared they would exercise their powers while respecting international human rights and the rule of law. In 1995, the Palestinian Authority undertook to respect the provisions of the UN Charter, the Universal Declaration of Human Rights (GA 3rd Session, A/RES/217[III] U.N. Doc A/810 [Dec. 10, 1948]), and other human rights norms as part of its membership in the Euro-Mediterranean Partnership (adoption of the Barcelona Declaration and Euro-Mediterranean Partnership, Nov. 27-28, 1995, at: [europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/mediterranean\\_partner\\_countries/r15001\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r15001_en.htm)).



### Humanitarian goods shipped to the Gaza Strip through Kerem Shalom Crossing

Photo: Oren Ziv / Activestills.org, January 1, 2009

Additionally, as a party to an armed conflict, the Hamas organization owes obligations under international humanitarian law, irrespective of its legal status or the fact that it is not party to international agreements. This position is in line with the clear trend in international law to impose obligations on non-state actors who are party to an armed conflict. For instance, in 1999, the Institute of International Law established that non-state actors who are party to international and local armed conflicts are subject to the principles of international law and the duties it imposes, as well as to obligations under international human rights law.<sup>135</sup> Various UN Security Council resolutions regarding the conflict in the former Yugoslavia have also attached significant obligations to a number of non-state actors who were involved in the conflict, including official and unofficial militias, as well as a number of political parties. These actors were required, *inter alia*, to enforce treaties, allow humanitarian aid, respect undertakings, cease infringement of

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135. Institute of International Law, *The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties* (Berlin session 1999).

international law and cooperate with humanitarian bodies.<sup>136</sup> This leads to the conclusion that in addition to obligations under human rights law, Hamas also has obligations under humanitarian law, particularly those stemming from customary norms.

The Palestinian authorities naturally owe obligations under domestic Palestinian law. A discussion of these is beyond the scope of this paper which focuses on obligations under international law.

As demonstrated, the Palestinian authorities have an obligation to uphold the rights of Gaza's residents in the spheres in which they exercise control. For instance, the fact that the Palestinian authorities control the internal administration of the educational system imposes an obligation on their part to ensure equality among students and free access to educational institutions as prescribed by the Covenant on Economic, Social and Cultural Rights;<sup>137</sup> control over movement inside the Gaza Strip and Area A in the West Bank imposes a duty to respect freedom of movement and an obligation not to restrict it for political reasons.<sup>138</sup> Wherever Israel allows the Palestinian authorities to exercise governmental powers, exercising them is subject to the provisions of human rights and, in some cases, humanitarian law.

**The Palestinian authorities have an obligation to uphold the rights of Gaza's residents in the spheres in which they exercise control.**

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136. THEO C. VAN BOVEN, *Non-State Actors: Introductory Comments*, in HUMAN RIGHTS FROM EXCLUSION TO INCLUSION; PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORK OF THEO VAN BOVEN pp. 366-9 (Fons Coomans et al. eds., 2000), at [books.google.com/books?id=sZrB1KhQ9voC&printsec=frontcover&hl=iw&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=sZrB1KhQ9voC&printsec=frontcover&hl=iw&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

137. International Covenant on Economic, Social and Cultural Rights, (opened for signing in 1966).

138. For cases in which the Gaza police prevented Palestinian residents from reaching Erez Crossing for the purpose of travel to the West Bank, including individuals in possession of Israeli issued permits, see Gisha, *Merchants and the Economy*, *supra* note 32. See also documentation of restrictions on travel abroad by senior academics at the Palestinian Center for Human Rights PCHR: *Universities Must Be Kept Out of Political Conflict*, Oct. 11, 2009, at: [www.pchrgaza.org/portal/en/index.php?option=com\\_content&view=article&id=1148:pchr-universities-&catid=36:pchrpressreleases&Itemid=194](http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1148:pchr-universities-&catid=36:pchrpressreleases&Itemid=194). Additional cases are documented at: [www.pchrgaza.org](http://www.pchrgaza.org).

We note briefly, in light of the current debate regarding Palestinian statehood, that recognition of the Palestinian territory as a state or membership in international organizations would not by itself change the status of the PA and Hamas as non-state actors. Discussion of the obligations that a recognized government of a future Palestinian state would owe is beyond the scope of this position paper.

We briefly address Egypt. A detailed review of Egypt's duties was presented in "Rafah Crossing: Who Holds the Keys?", published in March 2009 by Gisha and Physicians for Human Rights-Israel. In this current paper, Gisha recalls that Israel's actions give rise to a duty on Egypt's part to allow movement through its border with the Gaza Strip for two reasons: First, Israel's ban on travel by air, sea and through its own land crossings with Gaza has turned the Gaza Strip into a land-locked territory, whose residents have a right to demand passage through a neighboring country pursuant to the right of transfer.<sup>139</sup> Second, Israel's closure of Gaza's crossings as a means of putting pressure on Gaza's residents as part of a policy of collective punishment is a breach of the Fourth Geneva Convention. Egypt, as is the case with any other country in the world, has an obligation to act against violations of the convention and not facilitate them by closing Rafah Crossing and thereby tightening the closure. Additionally, as is the case with any other country, Egypt is obligated to allow shipment of humanitarian aid through its territory to the area where armed conflict is taking place. This obligation is a result of Egypt's geographic location which makes passage through its territory feasible and effective.

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139. GISHA, RAFAH CROSSING: WHO HOLDS THE KEYS, *supra* note 19, pp. 134-137.

## Chapter 6:

# Applying the Normative Framework – Israel's Obligations toward the Gaza Strip Today

How can the normative framework outlined in this paper be applied? What are the ramifications of the continued application of the law of occupation and post-occupation law on Israel's actions toward the Gaza Strip? This chapter offers an analysis of the specific obligations Israel owes to Gaza's residents as a result of its current and past control of the Strip and includes references to the areas in which the Palestinian authorities bear responsibility. While Israel claims the standard it is obligated to meet vis-à-vis residents of the Gaza Strip is "minimal" (for instance, allowing passage of goods essential for the survival of the civilian population),<sup>140</sup> we argue that the standard that applies to Israel is the higher standard set by Article 43 of the Hague Regulations. According to this article, Israel has a duty to facilitate normal life for Palestinian residents of Gaza.<sup>141</sup> In the spheres controlled by Israel, particularly with respect to the passage of goods and people, Israel must allow the freedom of movement required for maintaining normal civilian life. This freedom may only be restricted for concrete security reasons.

We are not arguing that Israel should intensify its control over the Palestinian territory in order to fulfill its obligations. Rather, Israel must exercise its existing control, particularly over the passage of goods and people, in a manner that enables it to fulfill its duties under international law and allow normal life in the Gaza Strip. We must ask the following question for every aspect of civilian life in the Gaza Strip: Does Israel still exercise control in this sphere? If the answer is yes, Israel owes obligations under the law of occupation commensurate with the scope and nature of control. If the answer is no, we proceed to examine whether even in the absence of control, Israel still bears obligations under post-occupation

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140. Response on behalf of the Respondents in al-Bassiouni, *supra* note 78, para. 73.

141. See Article 43 of the Hague Regulations, *supra* note 35.

law for a transitional period. Below, we address a number of major civilian spheres and illustrate how the above concept of responsibility can be applied to the complicated reality of Israel's control over the Gaza Strip.

## A. The passage of goods

As described in Chapter One above, Israel still controls the majority of civilian goods entering the Gaza Strip and all goods transported out of Gaza for trade and export. Israel is therefore obligated to allow the free passage of goods, subject to individual security checks, in order to allow normal life according to the meaning of the term in Article 43 of the Hague Regulations, as this article should be interpreted in the context of a decades-long occupation.<sup>142</sup>

The closure imposed by Israel, which still includes significant restrictions on the transport of civilian goods into Gaza, particularly construction materials, and prevents normal trade between Gaza and the West Bank, Israel and the rest of the world, is inconsistent with Israel's obligations. Preventing the entrance of construction materials delays the repair of public buildings, businesses and homes and effectively deprives many of Gaza's residents of their right to housing, education, health and livelihoods, while providing no security benefits that might justify the ban.<sup>143</sup> The restrictions on export and the prohibition on trade with the West Bank and Israel preclude economic recovery and development in Gaza and in so doing directly contribute to rising unemployment and poverty rates and increased dependence on aid organizations.<sup>144</sup> Israel must open a feasible route for passage of civilian goods with sufficient capacity to meet the needs of the civilian population in the Gaza Strip. These needs are determined by what is

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142. *Id.* See the Israeli Supreme Court's interpretation of Article 43 of the Hague Regulations in HC 393/82 Jam'iat Iscan al-Ma'al'moun al-Tha'anuiya al-Mahduda al-Masuliya v. IDF Commander in the Judea and Samaria Area, 37(4) P.D. 785 (1983).

143. Gisha, *Reconstructing the closure*, *supra* note 15; see also OCHA (UN Office for the Coordination of Humanitarian Affairs), *Easing the Blockade – Assessing the Humanitarian Impact on the Population of the Gaza Strip*, 7-8 (Mar. 2011) at: [www.ochaopt.org/documents/ocha\\_opt\\_special\\_easing\\_the\\_blockade\\_2011\\_03\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf), according to which more construction materials enter through the tunnels than through crossings with Israel, a situation that allows the regime in Gaza to purchase building materials but makes it difficult for international organizations involved in rebuilding to do so.

144. *Id.*, pp 5-6, 9-10.

required for maintaining a normal life in the Strip, including economic development and investment in infrastructure and civilian institutions. We note that Israel's obligations toward the Gaza Strip would not end even in the event that Egypt were to allow trade through Rafah Crossing. As long as Israel continues to control Gaza's airspace, territorial waters and passage between Gaza and the West Bank, Israel continues to bear responsibility for the passage of goods into and out of Gaza. Additionally, and irrespective of whether or not Rafah and other routes are open, Israel bears enhanced responsibility for allowing trade between the two parts of the Palestinian territory, as passage between them is entirely under its control. Israel must allow free passage of goods and free travel by merchants between the Gaza Strip and West Bank, in both directions, subject to individual security checks.

**As long as Israel continues to control Gaza's airspace, territorial waters and passage between Gaza and the West Bank, Israel continues to bear responsibility for the passage of goods into and out of Gaza.**

It should be noted that as the occupying power, Israel has the authority to decide which routes are to be used for transporting goods, as long as it allows trade at a level sufficient for maintaining normal life. Israel currently prevents Gaza residents from rebuilding the airport it bombed and the seaport whose site it razed. Israel, therefore owes a duty to allow Gaza residents to transport goods through Israeli ports. Even if Israel allows the transport of goods through Gaza's own airspace and territorial waters, it will most likely continue to be obligated to allow the use of Israeli ports and crossings for a transitional period under post-occupation law.

## **B. Passage of people between the Gaza Strip and the West Bank**

As described in Chapter One, beginning in the Second Intifada, Israel has increasingly restricted movement of people into and out of the Gaza Strip, including travel by Palestinian residents between the West Bank and Gaza Strip. Since the summer of 2007, Israel has allowed travel between the two parts of the

Palestinian territory in "humanitarian cases, with an emphasis on urgent medical cases".<sup>145</sup> Our position is that Israel has a legal obligation to allow free travel between Gaza and the West Bank, subject to individual security checks.

Israel has recognized the West Bank and Gaza Strip as a single territorial unit in the Oslo Accords, and because Israel continues to exercise almost complete and exclusive control over travel between the two parts of the Palestinian territory,<sup>146</sup> it also continues to bear obligations under the law of occupation with respect to the passage of goods and people between them. The passage of goods is discussed in detail above, but Israel's obligation to facilitate normal life also includes a duty to allow people to travel freely between the West Bank and Gaza, subject to individual security checks. Upholding Palestinians' freedom of movement between Gaza and the West Bank is essential for upholding their rights to family life, health, employment and livelihoods, education, religious worship, freedom of movement, personal and economic development, and maintaining cultural ties.

The possibility of travel through Rafah Crossing, which has been expanded recently, does not detract from Israel's responsibility to permit travel between the West Bank and Gaza, because all West Bank border crossings, including the Allenby Bridge crossing with Jordan, are under Israel's control. Israel prevents Gaza residents from entering the West Bank even if they manage to leave Gaza through Rafah Crossing. It is important to remember that Israel owes obligations toward the protected population of the West Bank, which is still under occupation even according to Israel's own position. These duties include allowing travel between the West Bank and Gaza Strip and reinforce the obligations Israel incurs in any case, as a result of its control over Gaza's borders and crossings.<sup>147</sup>

We note that the Palestinian authorities in Gaza bear responsibility for travel between Gaza and the West Bank wherever they exercise control over such travel

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145. See, para. 15 in State's response in Sharif, *supra* note 10.

146. See Chapter 1 above.

147. See on this issue, *Cyprus v. Turkey* (1982), *supra* note 62, para. 203 and para. 483; see also *Loizidou v. Turkey*, *supra* note 121, para. 56, where the ECtHR held that Turkey's control of the line separating occupied north Cyprus from unoccupied south Cyprus gives rise to a duty on Turkey's part to respect the right of residents of the south of the Island to reach their lands in the north.

– mainly through a police roadblock situated inside Gaza, before the Erez Crossing. The Hamas regime in Gaza is obligated to respect the rights of Palestinian residents to travel between the two parts of the Palestinian territory. It has breached this duty on several occasions when it prevented individuals who had received Israeli permits from traveling to the West Bank.<sup>148</sup>

### C. Education in the Gaza Strip

Israel no longer controls the education system in the occupied Palestinian territory and therefore has no responsibility for its internal management. The Palestinian authorities, who have been exercising authority in this sphere since 1995, are responsible for the curriculum, teacher training, and other aspects. However, since Israel controls the passage of goods to the Palestinian territory, including materials needed for construction, it has an obligation to allow sufficient construction materials for building and repairing schools and other educational institutions.<sup>149</sup> Israel is obligated to allow teachers and education professionals to travel for the purpose of training and must also transfer Palestinian tax revenues that go toward paying teachers. Additionally and as stated above, Israel bears increased responsibility to facilitate travel by students between the two parts of the Palestinian territory, subject to individual security checks.<sup>150</sup> This obligation is intensified when a program is not offered in Gaza or when the program on offer in Gaza is inferior to the one offered in the West Bank. In such cases, respecting the right to freedom of movement is required in order to respect the individual's right to access education and to lead a normal life.

Israel may also continue to bear residual responsibility or responsibility under the principle of restoration and restitution for rehabilitating the education system. This responsibility is a result of Israel's neglect of the Palestinian education system for

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148. See note 138 above.

149. Press Release, Gisha, Due to Gaza closure, 40,000 students refused from UNRWA schools (Sept. 15, 2010), at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=697](http://www.gisha.org/item.asp?lang_id=en&p_id=697).

150. See Gisha, *The Impact of the Separation between the Gaza Strip and the West Bank on Higher Education* (May 2010), at: [www.gisha.org/UserFiles/File/safepassage/InfoSheets/English/students.pdf](http://www.gisha.org/UserFiles/File/safepassage/InfoSheets/English/students.pdf); see also Gisha, *Legal Framework: Higher Education, Rights and Obligations under International and Israeli Law*, (May 2010), at: [www.gisha.org/UserFiles/File/safepassage/PositionPapers/Eng/education.pdf](http://www.gisha.org/UserFiles/File/safepassage/PositionPapers/Eng/education.pdf).

some thirty years prior to transferring partial control to the Palestinian Authority in the 1990s, in the framework of the Oslo Accords. Israeli measures which have impeded the development of the Palestinian education system (for instance, closing universities and preventing students and teachers from getting to educational institutions by setting up roadblocks and imposing curfews) may add to these obligations. Israel can use its control over the passage of people and goods into and out of the Gaza Strip in order to fulfill these obligations by allowing students to leave Gaza in order to study in the West Bank or Israel for example,<sup>151</sup> or by allowing educators to travel for the purpose of attending professional seminars and training. This paper does not expand on the possibility of requesting restoration or restitution under post-occupation law, although we note that the likelihood of an international discussion on this issue will increase if and when a Palestinian state is established.

## D. Economic development inside Gaza

Israel's obligations with respect to economic development are a mix of duties stemming directly from the law of occupation and post-occupation law. In terms of passage of goods, Israel continues to bear responsibilities under the law of occupation, as detailed above, and as it has done since the beginning of the occupation. Israel also bears residual responsibilities under post-occupation law with respect to economic development. These obligations are a result of its omission in failing to facilitate appropriate and independent economic development throughout the years of direct physical control of the Gaza Strip. Another source of these obligations is Gaza's economic dependence on Israel. This does not mean Israel must intervene in regulating business inside the Gaza Strip, but rather that its obligations with respect to economic development in the Strip should reflect the degree of Israeli control of Gaza's economy throughout the

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151. Israel currently allows Palestinian students living in the West Bank to enter Israel for academic studies under extremely restrictive conditions (para. 16 of the response in Salameh, *supra* note 76, an English translation of the relevant section is available at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=942](http://www.gisha.org/item.asp?lang_id=en&p_id=942)). Israel prohibits students from Gaza from entering Israel for academic studies (Press Release, Gisha, Israeli Military Continues Sweeping Ban on Palestinian Students Studying in Israeli Universities (May 20, 2007), at: [www.gisha.org/item.asp?lang\\_id=en&p\\_id=1031](http://www.gisha.org/item.asp?lang_id=en&p_id=1031)) and in the West Bank (State's response in Sharif, *supra* note 10, secs. 13-14.)

years; Israel's omission in failing to develop a stable, independent economy while in control; and the dependence that remained after it relinquished control. Additionally, since Israel still exercises physical control over fishing areas and the "no-go" zone, it bears direct responsibilities in these areas under the law of occupation. Israel must allow economic activity in these areas, specifically farming and fishing. This activity may be restricted only when absolutely necessary for security reasons. Moreover, even if Israel limits the restrictions it imposes to those absolutely necessary for legitimate security reasons, it would be obligated to provide alternative employment (for example, inside Israel), as well as nutritional and financial alternatives in lieu of the diminished capacities caused by the restrictions on fishing and farming.

**Since Israel still exercises physical control over fishing areas and the "no-go" zone, it bears direct responsibilities in these areas under the law of occupation.**

In contrast, since Israel does not have the governmental powers required for drawing economic development plans, regulating business and controlling the markets inside the Gaza Strip, it does not bear direct responsibility for these areas. This responsibility is in the hands of Palestinian authorities.

## Conclusion and Recommendations

The examples provided of how to implement the legal framework we suggest are by no means exhaustive. They are designed to illustrate the ramifications of Israel's past and present control of the Gaza Strip for its current policy toward Gaza. Although this paper focuses on the Gaza Strip, the analysis offered may assist in understanding Israel's obligations regarding the Palestinian territory in general, particularly in light of possible future changes in the elements of control, including as a result of international recognition of a Palestinian state.

Our evaluation is that at the present time, Israel is in breach of its obligations toward Palestinian residents in general and residents of the Gaza Strip in particular. This breach is a result of restrictions which are not required for security reasons. These include: restrictions on access to large swaths of farmland in the Strip and most of its key fishing areas; restrictions on the Palestinian population registry which block Palestinians from changing their place of residence and preclude the possibility of adding new residents to the registry; and the imposition of severe restrictions on passage of people and goods which then impact numerous aspects of life. Other restrictions imposed by Israel may have a security justification. However, when imposing these restrictions, Israel does not appropriately balance its security concerns against its obligations toward residents of the Gaza Strip and their rights.

**Therefore, Gisha calls upon Israel to allow free passage of goods and people to and from the Gaza Strip, subject to individual security checks and subject to arrangements that meet both Israel's security needs and its obligation to facilitate normal life in the Gaza Strip.** We call upon the State of Israel to take three concrete steps that will help in bringing its policy in line with the requirements of international law:

1. **Lift the restrictions on transport of goods for sale outside the Gaza Strip** and allow Gaza's residents to transport goods to buyers in Israel, the West Bank and abroad, subject to individual security checks and in accordance to the commitments made with respect to volume in the 2005 Agreement on Movement and Access, namely, allowing at least 400 trucks to leave the Gaza Strip per day.
2. **Lift the restrictions on entrance of construction materials** such as cement, gravel and steel into Gaza and expand routes for transport of all other goods into the Gaza Strip commensurate with demand.
3. **Allow free passage of people between the Gaza Strip and the West Bank** subject to individual security checks and while balancing security concerns against Israel's obligations and Palestinians' right to freedom of movement and additional rights for which travel is a precondition.

We have presented a legal framework which implements international humanitarian law regarding occupation and complementary legal doctrines in the context of the Palestinian territory. We believe that this legal framework is practicable and that its application can provide an adequate solution for upholding the rights of Palestinian residents while safeguarding Israel's security.



**This position paper examines the changes in the methods and means of control of the Palestinian territory, particularly the Gaza Strip, since 2007. It analyzes the responsibility of the various actors exercising control and presents a legal framework for understanding the obligations of an occupying power that has partially ceded control.**

**Gisha – Legal Center for Freedom of Movement** is an Israeli human rights organization, founded in 2005, whose goal is to protect the freedom of movement of Palestinian residents of the West Bank and the Gaza Strip. Gisha, whose name means both "access" and "approach," uses legal assistance and public advocacy to protect that right, which is guaranteed by international and Israeli law. Because freedom of movement is a precondition for exercising other basic rights, Gisha's work has a multiplier effect in helping residents of the Occupied Territory realize their rights to education, livelihood, medical care and family unity.

**[www.gisha.org](http://www.gisha.org)**