

Gaza Closure Defined: Collective Punishment

Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip

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SUMMARY

The following document presents a brief account and legal analysis of the 18-month long closure of the Gaza Strip.

Not a siege, not a blockade, not economic sanctions → Closure imposed for purposes of collective punishment.

Gisha's position is that the closure is illegal because it punishes civilians in the Gaza Strip for acts they did not commit and for political circumstances beyond their control. The closure inflicts harm to the civilian population and civilian institutions by blocking the passage of goods necessary for health, well-being, and economic life. The closure infringes on the right to freedom of movement and thereby violates other rights for which freedom of movement is a precondition, such as the right to health, to education, to family life, and to access economic opportunities.

This document addresses the terminology being used to describe the closure of Gaza. Israel is able to prevent the passage of people and goods into and out of Gaza because of its continued control over Gaza's land crossings, territorial waters, air space, tax system, and population registry (which in turn allows for the issuing of identification papers necessary for travel). Gisha's position is that Israel's control over and continued occupation of the Gaza Strip determines its obligations to residents there as defined by international law. Israel also owes obligations to Gaza residents under international human rights law and the laws of combat, obligations which are violated by severe restrictions on freedom of movement.

The closure of Gaza is neither a siege, nor a blockade, nor an economic sanction – it is an illegal act of collective punishment and stands in violation of both international and Israeli law. In the following paper, we seek to de-mystify the terminology being used and misused to describe the closure of Gaza in order to dispel any uncertainty regarding Israel's responsibility towards residents of Gaza and accountability for the rights violations occurring as result of the closure. We argue that the restrictions on freedom of movement in and out of Gaza constitute a **closure** aimed at **civilians** and undertaken for purposes of **collective punishment** – and are therefore illegal.

BACKGROUND

Following the Hamas takeover of internal control within the Gaza Strip in June 2007, Israel closed Gaza's border crossings, permitting only extremely limited passage of goods and people. Initially, Israel justified the closure on security grounds, stating that in the absence of security personnel loyal to the Palestinian Authority on the Gaza side of the crossings, it could not permit the opening of Karni Crossing, Gaza's commercial lifeline, or the passenger crossing at Rafah, Gaza's gateway to the outside world.¹ Limited passage for international workers and some humanitarian cases continued, with frequent interruption, via Erez Crossing, between Israel and Gaza. Later, Israel gave the nod for Egypt to allow limited passage through Rafah Crossing via sporadic, ad hoc crossing for humanitarian cases, and since March 2008, Rafah has opened approximately once per month, each time permitting hundreds of Palestinian ID card-holders and Egyptian citizens to enter and leave Gaza.² While the Gaza Strip had been repeatedly subject to such closures in the past, which worsened following the September 2005 "disengagement" in which Israel removed civilian settlers and permanent military posts from the Strip, the year and half long closure since June 2007 has been particularly severe.

Militants fire rockets → Civilians are deprived of basic goods

Cabinet Decision authorizes collective punishment

In September 2007, Israel's Security Cabinet approved a decision that openly called for restricting the movement of people and goods into and out of Gaza as a response to Qassam rockets being fired on civilian targets in southern Israel.³ The September 19, 2007 decision classified the Gaza Strip as a "hostile territory", a term that has no significance under Israeli or international law but which Israel has used to *evoke* the more grave term "enemy state". Israel has, however, stopped short of actually using the term, careful not to trigger the legal implications involved in classifying the Gaza Strip as an enemy entity or as a state.⁴ According to the Cabinet Decision:

"Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to

¹ Letter from Asaf Barhel, Coordination for Government Activities in the Territories (Israel Defense Ministry) to Adv. Noam Peleg of Gisha, July 15, 2007.

² Detailed information on these ad hoc openings will be forthcoming in 2009 in a joint report by Gisha and Physicians for Human Rights-Israel.

³ See "Security Cabinet declares Gaza hostile territory", September 19, 2007:

<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>

⁴ The Gaza Strip is not a state, and classifying it as an "enemy" would trigger restrictions, within Israeli law, on contact with residents of Gaza, economic and other ties, and the passage of people between Israel and Gaza and between Gaza and the West Bank.

and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis".⁵

The Cabinet decision was widely condemned by humanitarian and human rights groups as authorizing collective punishment because it imposed severe restrictions on the movement of civilians and civilian goods, not in response to a concrete security threat but rather as a means of exercising pressure on the Hamas leadership. United Nations' Secretary-General Ban-Ki Moon warned that "such a step would be contrary to Israel's obligations towards the civilian population under international humanitarian and human rights law".⁶

However, Israel implemented its decision by tightening restrictions on the movement of people and goods, including deliberately restricting fuel and electricity supplies.⁷

Ceasefire Agreement: Palestinian militants fire rockets at Israel → Israel deprives Palestinian civilians of basic goods

In June 2008, Israel reached a partial ceasefire (*tahadiya* or "calm") with the Hamas leadership in Gaza, which was mostly respected until November 4, 2008. In exchange for a cessation of armed activity by both sides (not including activities in the West Bank), Israel permitted an approximately 25% increase in the scope of goods permitted to enter Gaza, limited to "humanitarian" goods (food, medicine, some spare parts for infrastructure and generators, animal feed, grocery items, etc.).⁸ Other harsh restrictions continued, including a total ban on exports and on the movement of people, apart from exceptional humanitarian cases (which themselves have also been restricted).⁹

The tahadiya brought a more direct admission by Israel of the nature of its closure of Gaza's borders. Whereas the state had previously made nominal claims that its restrictions stemmed from threats to Gaza's crossings¹⁰ or fears that goods entering Gaza could be used for military purposes,¹¹ beginning in the summer of 2008 the State of Israel openly created a

⁵ See "Security Cabinet declares Gaza hostile territory", *supra* note 4.

⁶ "Palestinian Economic Prospects: Aid, Access, and Reforms", World Bank, Economic Monitoring Report to the Ad Hoc Liaison Committee, Sept. 22, 2008; "The Gaza Strip: A Humanitarian Implosion," Oxfam et al, March 2008, available at <http://www.caremiddleeast.org/Linked%20pdf%20documents/Gaza%205308.pdf>; "Aid Groups, UN protest Israeli Sanctions Move on Gaza", *IRIN News*, UN OCHA, September 20, 2007.

⁷ See HCJ 9132/07 Al Bassiouni v. Defense Minister, English translation available at www.court.gov.il, approving deliberate cuts to fuel and electricity supplies to Gaza.

⁸ Data on movement through the crossings on file with the authors. Additional data are published by the United Nations Office for the Coordination of Humanitarian Affairs, available at www.ochaopt.org.

⁹ See Physicians for Human Rights-Israel press release, "A lull for the sick? Not in Gaza", July 6, 2008, available at www.phr.org-il.

¹⁰ See HCJ 4258/08 Gisha-Legal Center for Freedom of Movement v. Defense Minister, State Response of May 20, 2008, paragraphs 16-19, available (in Hebrew) at: http://www.gisha.org/UserFiles/File/Legal%20Documents/4258-08%20state%2020_5_08.pdf.

¹¹ See HCJ 9132/07 Al Bassiouni v. Defense Minister, State Response of November 2, 2007, para. 93, available (in Hebrew) at:

direct link between political goals vis-à-vis Hamas and rocket fire by militants on the one hand – and blocking the entrance of even basic humanitarian goods for the civilian population on the other. In response to violations of the ceasefire agreement in the form of rocket fire, Israel regularly closes Gaza's crossings, even to the trickle of humanitarian goods that had been permitted to pass. For example, in late September, Israel blocked the passage of humanitarian goods in response to rocket fire and openly cited the closure as a means of pressuring with Hamas leadership, with whom it is negotiating indirectly for the release of captured Israeli soldier Gilad Shalit:

"We are examining the issue, and apparently **we will need to reduce the scope of goods and thus create pressure on the Hamas organization**, which is deliberately failing to take steps to advance the negotiations ..." said Deputy Defense Minister M.K. Matan Vilnai (emphasis added).¹²

More recently, beginning with the collapse of a ceasefire agreement on November 4, 2008, Israel closed Gaza's borders almost entirely and even to humanitarian goods, preventing the passage of fuel, food, and other basic items. Public declarations in the media by military officials note an "equation" of closing crossings in direct response to rocket fire. As articulated by Defense Ministry Spokesman Peter Lerner:

"The opening of the crossings will be reviewed on a daily basis and will be subject to Palestinian militants halting their rocket fire against southern Israel (emphasis added)".¹³

LEGAL ANALYSIS

What is the legal framework governing Israel's closure of Gaza's borders, blocking the passage of people and goods? The restrictions on the movement of people and goods through Gaza's borders are not "economic sanctions," as the Government of Israel argues, nor a siege or blockade, as they are popularly known in the media, but rather constitute a **closure imposed for purposes of collective punishment – and are therefore illegal under international law.** The closure cannot be compared to economic sanctions implemented against sovereign states or to a military siege or blockade designed to conquer an area or prevent weapons from reaching it. The stated purpose of the closure – as well as the circumstances in which it is imposed – indicate that it is designed to apply pressure on

http://www.gisha.org/UserFiles/File/Legal%20Documents/_fuel%20and%20electricity_oct_07/strate_response_2_11_07.pdf.

¹² Hanan Greenberg, "Israel Considering Reducing the Passage of Goods to the Strip", *Ynet*, September 23, 2008, available (in Hebrew) at:

<http://www.ynet.co.il/articles/0,7340,L-3600973,00.html>.

See also Yuval Azulai, "Palestinians fire Qassam from the Gaza Strip and hit near Nativ Haasra; Barak: Close the crossings", *Haaretz*, October 21, 2008, available (in Hebrew) at:

<http://www.haaretz.co.il/hasite/spages/1030205.html>

¹³ As quoted in Agence France Presse, "Israel Eases Gaza Blockade", December 4, 2008, available at <http://www.google.com/hostednews/afp/article/ALeqM5iflhCqMdfmP6fA2nNDMm-fygUu7w>.

Gaza's civilian population in order to influence the behavior of militants – effectively penalizing civilian protected persons for the actions of combatants fighting against Israel.

1. Israel's closure in Gaza cannot be classified as a “siege”.

No Concrete Military Objective.

A “siege” is commonly defined as the act of surrounding a particular area in order to induce surrender.¹⁴ Throughout history, as far back as the Old Testament, the goal of siege has been capitulation.¹⁵ During the Nuremberg Trials, the International Military Tribunal stated that, in war, it is only lawful to lay siege to enemy territory when the goal is to cause the territory's surrender.¹⁶ The 1956 United States Army Field Manual, defining the laws of war, similarly defines siege as “hasten[ing] surrender”.¹⁷ For any action to be a siege, it must have the end goal of surrender. The *only* reason the laws of war allow some leniency regarding harm to civilians in a time of siege is that the siege has a concrete military objective – after which it is achieved, the siege would end and with it – the harm to civilians.¹⁸

No Intent to Compel Surrender.

The restrictions on the movement of people and goods into and out of the Gaza Strip are not a siege because they do not have a concrete military objective of inducing capitulation or surrender. Israel is not trying to re-conquer Gaza or to militarily re-take physical control of the streets.¹⁹ Indeed, the restrictions on the movement of people and goods that Israel has imposed do not incorporate the humanitarian protections for civilians that continue to apply during a siege.²⁰ These laws require that humanitarian aid be allowed to pass through the besieged area.²¹

¹⁴ James D. Fry, "Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law" 44 Colum. J. Transnat'l L. 453 at 512 (2006)

¹⁵ Id at 409; Humanitarian Law and the Environment, Based on remarks at the 1999 Sutton Colloquium, "International Environmental Law & Policy," University of Denver College of Law, 28 Denv. J. Int'l L. & Pol'y 265, at 267 (2000).

¹⁶ United States v. Von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 563 (1950) (quoting 3 CHARLES CHENEY HYDE, INTERNATIONAL LAW 1802-03 (2d rev. ed. 1945)).

¹⁷ U.S. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare 20 (1956).

¹⁸ Matthew C. Waxman, "Siegecraft and Surrender: The Law and Strategy of Cities as Targets", 39 VA. J. INT'L L. 353, at 421 (1999); William J. Fenrick, SYMPOSIUM: JUSTICE IN CATAclysm CRIMINAL TRIALS IN THE WAKE OF MASS VIOLENCE: COMMENT: ATTACKING THE ENEMY CIVILIAN AS A PUNISHABLE OFFENSE, 7 Duke J. Comp. & Int'l L. 539 (1997); H. Lauterpacht, The Problem of the Revision of the Law of War, 1952 Brit. Y.B. Int'l L. 360, 374.

¹⁹ Indeed, Israeli troops can enter the Gaza Strip at will and have done so consistently since withdrawing a permanent ground presence in September 2005.

²⁰ UK Ministry of Defence, The Manual of the Law of Armed Conflict, Oxford University Press, 2004 at 87-88.

²¹ Id.

They also require that the civilian population be permitted to leave the besieged territory.²² However, Israel is not permitting civilians to leave the area (with very narrow exceptions) and is severely limiting the passage of humanitarian goods – even using their passage as a direct leverage point, restricting the entry of food and fuel in response to the activities of militants. A siege may be permitted under international humanitarian law, if robust protections are implemented for civilians as outlined above, only to achieve a concrete (and, it is assumed, time-bound) military objective – military surrender. This framework seeks to ensure that a siege will be time-bound and aimed at combatants – not at civilians. Israel's closure of Gaza has no concrete military objective. It is aimed primarily at civilians, with the goal of using them as a point of pressure on the Hamas regime – in blatant violation of the fundamental international law prohibition against collective punishment and deliberately harming civilians.

2. Israel's closure in Gaza cannot be classified as a “blockade”.

A blockade is similar to a siege, in that it is intended to deprive a military adversary of needed supplies in a time of conflict.²³ “Supplies” in this case are narrowly defined to include only “supplies needed to conduct hostilities”.²⁴ A blockade, like a siege, must also have the goal of compelling surrender, including by preventing the adversarial force from receiving weapons that will enhance its combat ability.²⁵

Target of restrictions is civilian goods, not military supplies.

Israel's actions in Gaza cannot be considered a blockade. First, as described above, the goal is not for Gaza to surrender to the Israeli military. Second, Israel has restricted a variety of goods, not just weapons, and has even limited the quantity and kind of humanitarian goods it will permit to enter Gaza, arguing that it need not permit the passage of even humanitarian goods beyond an undefined "humanitarian minimum".²⁶ This is not a limited action blocking military supplies until a conflict ends. It is a deliberate decision to restrict the supply of a broad range of civilian goods, most of which have absolutely no military use or potential for military use.²⁷

²² Dinstein, Yoram, *Siege Warfare and the Starvation of Civilians in Humanitarian Law of Armed Conflict: Challenges Ahead* Delissen, Astrid J.M. and Tanja, Gerald J. eds Martinus Nijhoff Publishers, Boston, 1991 at 148-9.

²³ 152 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 654, para. 2097 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987), available at www.icrc.org [hereinafter PROTOCOL COMMENTARY].

²⁴ Id.

²⁵ Lieutenant Todd A. Wynkoop, JAGC, USN, *The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 1995, 42 Naval L. Rev. 91, at 103.

²⁶ See HCJ 9132/07 Al Bassiouni v. Defense Minister, State Response of November 2, 2007, paras. 48, 73, available (in Hebrew) at:

http://www.gisha.org/UserFiles/File/Legal%20Documents /fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf.

²⁷ For example, the military has restricted the amount and type of food that it will permit Gaza residents to receive, including fresh meat, articulating its policy as follows: "The supply to the Strip of

3. Israel's closures in Gaza are not sanctions.

Israel has attempted to claim that its closure of Gaza constitutes a "sanction"²⁸ or part of "economic warfare".²⁹ But its actions in Gaza fail to meet either the legal definition of a sanctions regime or even the requirements of a unilateral sanction.

3.a. Sanctions are imposed by international organizations; not by individual states blocking access.

A sanction is commonly understood as a group of nations coming together and agreeing to withhold trade or impose other restrictive economic measures on a state or state-like entity in order to achieve a defined goal.³⁰ An individual state is not authorized to implement sanctions unilaterally. The UN Charter, as commonly interpreted, only allows sanctions to be imposed by the Security Council or a multi-country regional organization.³¹ Article 41 of the charter refers to economic alternatives to war that may be imposed on a country to coerce particular behavior, but the measures listed in Article 41 may only be legally utilized after the Security Council determines that the state is a threat under Article 39 of the Charter. This means that the only legal sanctions regimes are those initiated through the Security Council or through multi-lateral regional organizations.³²

food items not of a humanitarian character, or [food] items in quantities exceeding the quantities required for humanitarian needs, is not permitted". See HCJ 4250/08 Afana Brothers Co. Ltd. v. Agriculture Minister, State Response of September 19, 2008, para. 12, on file with the authors (Hebrew only).

²⁸ Israeli Ministry of Foreign Affairs, Government Communiqués, "Security Cabinet declares Gaza hostile territory", September 19, 2007. <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

²⁹ See HCJ 9132/07 Al Bassiouni v. Defense Minister, State response of November 7, 2007, available (in English) at: http://www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/english_docs/restrictions%20on%20fuel%20supply%204%2011%202007.pdf.

³⁰ See Vera Gowlland-Debbas, *UN Sanctions and International Law: An Overview*, in United Nations Sanctions and International Law, Edited by Vera Gowlland-Debbas, The Graduate Institute of International Studies, Kluwer Law International, Boston, 2001 at 6; International Sanctions, A Report by a Group of Members of the Royal Institute of International Affairs, Oxford University Press, New York, 1938 at 16.

³¹ *Judicial Review of Sanctions* in United Nations Sanctions and International Law, Edited by Vera Gowlland-Debbas, The Graduate Institute of International Studies, Kluwer Law International, Boston, 2001 at 88.

³² ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, *The adverse consequences of economic sanctions on the enjoyment of human rights*, working paper prepared by Mr. Marc Bossuyt, E/CN.4/Sub.2/2000/33, 21 June 2000 at 5.

Israel is actively preventing every nation in the world from "trading" with Gaza.

The 2006 UN-imposed sanctions against Iran provided a clear example of a legal sanctions regime. The Security Council determined that a threat existed, then designed a targeted sanctions regime with the specific goal of getting Iran to halt or slow its nuclear program.³³ Indeed, the multi-lateral nature of an economic sanction is the key to its enforceability. The sanction is "enforced" by the agreement of a group of nations to decline to trade with the sanctioned state. No physical barriers are erected or are necessary to enforce the sanction – the sanctioned state "suffers" because a group of states refuses to trade with it. This is certainly not the case in Israel's restrictions on the movement of people and goods into and out of Gaza – which are effected, in part, by the Israeli Navy and the Israeli Air Force physically preventing the movement of people and goods into and out of Gaza by air and by sea. Indeed, other nations have strongly indicated their interest and intent to trade with Gaza, including by sending humanitarian supplies, and have repeatedly asked Israel to permit them to bring goods into Gaza and to permit Gaza residents to engage in trade with them.³⁴

3.b. Sanctions must have clear and precise objectives.

Further, a legal sanctions regime must have "clear and precise objectives".³⁵ Israel has not identified "clear and precise" objectives in implementing its so-called "sanctions" against Gaza. In its communiqué announcing the further imposition of "sanctions", it stated that because Hamas was a terrorist organization and Gaza hostile territory, it would place "additional sanctions" on "the passage of various goods to the Gaza Strip" and "restrictions" on "the movement of people to and from the Gaza Strip".³⁶ It did not make any statement about its overall goals, what the specific aim of the sanctions was, or at what point it could determine that sanctions had achieved their objectives.³⁷ Without a clear objective or endpoint, Israel's closures in Gaza cannot be considered sanctions.

No clear objective.

3.c. Israel's actions in Gaza do not even constitute unauthorized unilateral sanctions.

³³ Security Council Resolution S/2006/1010

³⁴ For example, the European Union, which donates humanitarian goods to the Gaza Strip, protested Israel's closure of Gaza's border crossings and called for "the re-opening of border crossings and the immediate resumption of fuel and humanitarian supplies" (Statement by the presidency of the Council of the European Union, November 14, 2008, available at: http://www.diplomatie.gouv.fr/en/country-files_156/israel-palestinian-territories_290/israel_2157/the-eu-and-israel_6489/closure-of-border-crossings-into-gaza-14.11.08_12186.html).

³⁵ General Assembly Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization, *Declaration on the basic conditions and standard criteria for the introduction and implementation of sanctions and other coercive measures*, Revised working paper submitted by the Russian Federation, A/AC.182/L.114/Rev. 1, 17 March 2004

³⁶ Supra note 4.

³⁷ Id.

A state imposes unilateral sanctions when it uses its own international trade and finance policies to coerce or punish certain behaviors by another state or state-like entity.³⁸ Outside of compliance with the UN Charter, the major difference between Security Council sanctions and unilateral sanctions is that unilateral sanctions are not binding on third-party states.³⁹ A unilateral sanction occurs when a state withholds something that is its own sovereign right, for example the choice to trade with others. A state may decide whether it wishes to trade with another state, but a state may *not* prevent third party states from trading with the target state.⁴⁰ That principle is true *a fortiori* when the entity being targeted is not a state at all, but rather a territory under occupation – whose residents enjoy the international humanitarian law protections owed by the foreign power exercising control over them.

Israel's restrictions are enforced through control over borders, not by withholding its own decision to engage in economic activity with the Gaza Strip.

Israel is not simply choosing not to trade with Gaza. It is requiring all trade with Gaza to take place through Israeli-controlled crossings – and then restricting that trade. It is, in effect, preventing every state in the world from trading with Gaza.⁴¹ This illegally forces every country on the globe to be bound by the restrictions that Israel has unilaterally imposed on the Gaza Strip. The key to Israel's ability to prevent others from trading with the Gaza Strip – is its control over Gaza's borders and taxation system.

The restrictions on the movement of people and goods into and out of Gaza do not fit the legal definition of sanctions, nor can they be viewed as a unilateral sanction, in which a sanctioning state withholds its own trade with a sanctioned state, as a means of pressure. The restrictions on the movement of people and goods have no clear end-goal, they are not targeted, they are unauthorized by the UN Security Council, and they use control of Gaza's borders to force every other state in the world to comply with Israeli-determined restrictions.

³⁸ Defense Technical Information Center, "Unilateral Economy Sanctions: A Policy Assessment" by James C. Boozeer, Sr. Army War Coll. Carlisle Barracks PA, April 15, 2000.

³⁹ Richard N. Haass, Vice President and Director of the Brookings Institute, *Use and Effect of Unilateral Trade Sanctions*, Testimony before the House Committee on Ways and Means, Subcommittee on Trade, May 27, 1999; David T. Griswold, Executive Director of the Center for Trade Policy Studies at the Cato Institute, *Going Alone on Economic Sanctions Hurts U.S. More than Foes*, November 27, 2000 available at <http://www.freetrade.org/node/216>.

⁴⁰ Lieutenant Todd A. Wynkoop, JAGC, USN, *The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 1995, 42 Naval L. Rev. 91, at 98; General Assembly Plenary - 3 - Press Release GA/9486 43rd Meeting (AM) 26 October 1998.

⁴¹ For example, in June 2007, Israel, which controls customs and tariff regulations for the Gaza Strip and the West Bank (known as the "customs envelope") deleted the customs code used to clear commercial goods into Gaza, effectively banning all nonhumanitarian goods from being imported into Gaza. See Gisha, "Commercial Closure: Deleting Gaza's Economy from the Map", July 2007, available at www.gisha.org.

CONCLUSION

Israel's restrictions on movement in and out of Gaza constitute a closure undertaken for purposes of collective punishment – and are therefore illegal.⁴²

The closure of Gaza is taking place in the context of an occupation (see "Disengaged Occupiers: The Legal Status of Gaza" for a full description of Gisha's position on the continued occupation of the Gaza Strip).⁴³ Israel continues to control Gaza through substantial control of Gaza's land crossings, total control of Gaza's airspace and territorial waters, control of the Palestinian population registry (including the question, who is a "resident" of Gaza) and control of tax policy and transfer of tax revenues. That control rises to the level of "effective control", the test in international law for the existence of a state of occupation.⁴⁴ Gisha's position is that Israel owes obligations to Palestinian residents of the Gaza Strip and the West Bank commensurate with the level of control it exercises. The fact that control may not be exercised in one area does not exempt the occupying power from responsibility in the area in which it does exercise control – for example, Israel's control of the movement of people and goods into and out of Gaza.⁴⁵

Control = Responsibility

In June 2007, Israel used its existing control over Gaza's borders to squeeze them shut. Since then, it has openly created an equation in which it responds to the behavior of militants by restricting the ability of civilians to receive even basic humanitarian goods and to travel in and out of Gaza. Such prevention violates Israel's active duty to provide for the welfare of the residents of the Gaza Strip, including by facilitating the supply of goods necessary for the civilian population and for the proper functioning of civilian institutions.⁴⁶

And of course, Israel owes obligations to Gaza residents stemming from its duties under international human rights law, including the right to life,⁴⁷ the right to freedom of movement,⁴⁸ the right to access clean water,⁴⁹ the right to health,⁵⁰ the right to decent living

⁴² For a more detailed outline of the legal framework governing the prevention of the passage of humanitarian goods into Gaza, see HCJ 9132/07 Al Bassiouni v. Defense Minister, Petitioners Submission of November 29, 2007, pp. 43-56, available (in Hebrew) at: http://www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/english_docs/response_27_11_07_no_detail.pdf.

⁴³ Gisha – Legal Center for Freedom of Movement, "Disengaged Occupiers: The Legal Status of Gaza," January 2007, pp. 64-65, available at: <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention") Articles 18, 21, 55, 56, 57, 59, and 63. See also First Protocol to the Geneva Convention, 1977, articles 69, giving an expansive interpretation of the kind of supplies that must be guaranteed by the occupying power.

⁴⁷ International Covenant on Civil and Political Rights ("ICCPR"), art. 6.

⁴⁸ International Covenant on Economic and Social Rights ("ICESR"), art. 12.

⁴⁹ Universal Declaration on Human Rights, art. 25.

⁵⁰ ICCPR, art. 12.

conditions,⁵¹ the right to protection from hunger,⁵² and the special duties owed to protect children.⁵³

Every state is obligated to actively facilitate passage of relief consignments to civilians.

Indeed, in addition to violating the special responsibilities owed to Gaza residents stemming from Israeli control over Gaza's borders, Israel's deliberate blocking of humanitarian supplies violates the duty that all states owe, all the time, to facilitate the passage of humanitarian goods to civilians affected by an armed conflict, irrespective of the existence of a state of occupation:

"The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party".⁵⁴

This obligation applies to all states whose geographical position renders the passage of humanitarian goods over their territory necessary or even useful. These states "do not have the competence to refuse such passage".⁵⁵

Israel's total control of the movement of people and commercial goods into and out of Gaza does not fit the legal definition of siege, blockade or sanctions. Israel, which has controlled Gaza's borders since 1967 and has over the years gradually decreased the amount of traffic permitted to enter and leave Gaza - squeezed the borders nearly hermetically shut in June 2007. Because the closure of Gaza's borders seeks to punish civilians living in the Gaza Strip, in response to the behavior of militants living there, it violates the international humanitarian law prohibition against collective punishment.⁵⁶

⁵¹ ICESR, art. 11.

⁵² ICESR, art. 11(b).

⁵³ International Covenant on the Rights of the Child.

⁵⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("First Protocol"), 8 June 1977, Article 70(2) (applying to areas not under occupation). See also Article 70(5) requiring cooperation with international relief schemes in areas not under occupation. On the applicability of these articles, see Protocol Commentary, *supra* note 23, paragraph 2792.

⁵⁵ See Protocol Commentary, *supra* note 23, paragraphs 2824 and 2825.

⁵⁶ See Fourth Geneva Convention, Art. 33; First Protocol, Article 75(2)(d). It should be noted that international law forbids the use of collective punishment even beyond the context of an occupation. See First Protocol, Article 75(1).

RECOMMENDATIONS

Civilians must not be used as pawns to achieve military or political goals.

Gisha calls on Israel immediately to disassociate its political goals toward the Hamas regime and its military goals toward militants – from its policies toward the Palestinian civilians in Gaza subject to Israeli control. Israel may take action against combatants within the bounds of international humanitarian law. It may NOT use civilians as pawns to achieve military or political goals.

Israel must immediately open Gaza's crossings. Israel must immediately desist from punishing civilians by depriving them of their fundamental right to the freedom of movement of persons and goods.

The purpose of humanitarian law is to protect civilians from the effects of armed conflict and minimize their exposure to violence. Any equation created between rocket fire by militants and the closure of Gaza's crossings to civilian goods violates that fundamental principle of international humanitarian law. Gisha calls upon both sides to respect international law - and to refrain from deliberately harming civilians.

Gisha is an Israeli human rights organization whose goal is to protect the freedom of movement of Palestinian residents of the Gaza Strip and West Bank. Gisha promotes rights guaranteed by international and Israeli law.

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