

THE CURRENT STATUS OF THE GAZA STRIP UNDER INTERNATIONAL LAW

by

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A THESIS

Presented to the Department of International Studies  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Master of Arts

June 2013

THESIS APPROVAL PAGE

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Title: The Current Status of the Gaza Strip under International Law

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Degree awarded June 2013

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## THESIS ABSTRACT

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Master of Arts

Department of International Studies

June 2013

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Starting in 2005, there have been major changes in the situation prevailing in the Gaza Strip. The Egyptian uprising, in particular, had important consequences that have changed the balance of control over the Strip. Israel's degree of control has declined and the local Palestinian degree of control has increased. Israel still holds power over many aspects of Gaza's national life, including most of its means of access to the outside world, but Gaza now has an independent door to the world via its southern border with Egypt. This thesis analyzes whether or not the legal status of occupation which has prevailed in Gaza since the 1967 war still holds today in light of these changed circumstances. The relevant legal standards and the facts on the ground are reviewed, leading to the conclusion that Gaza is currently best characterized as a partially occupied territory.

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# CHAPTER I

## A NEW FACT PATTERN IN THE GAZA STRIP?

### *Introduction*

For several decades after the 1967 war in the Middle East, there was a general consensus in the international-law community on the legal status of the Gaza Strip (and the other territories that had fallen under Israeli control): it was occupied territory. Since 2005, however, a series of changes in the pattern of facts in Gaza has taken place that affects the question of occupation. In autumn of that year, Israel withdrew its settlements and permanent military presence. In 2011, after a period in which Gaza's borders remained mostly closed, the situation changed further as a consequence of the Egyptian revolution. The new government that eventually took power in Egypt stopped cooperation with Israel's border closure policy, so that control of the southern Rafah crossing point shifted out of Israeli hands and into those of Egyptian and Palestinian actors. The common effect of these developments has been to change the situation in Gaza, possibly "removing a basic reference point" from the conflict.<sup>1</sup> Because occupation is a legal status as well as a factual situation, it is possible that the changed facts have led to a changed situation under international law. The occupied or non-occupied status of Gaza today is the topic of this thesis.

### *Legal Background*

Before we can understand the legal status of Gaza today, it is helpful to be aware of the legal history. This chapter will review the international consensus on Gaza's legal status after 1967, which was shaped by occupation law. Occupation law is a branch of international humanitarian law (also known as the laws of war). Modern occupation law appears mainly in the Fourth Geneva Convention, a multilateral treaty which states in its second article that it is applicable "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them," as well as "to all cases of partial or

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<sup>1</sup> Geoffrey Aronson, "Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip," *Journal of Palestine Studies*, vol. 34, no. 4, Summer 2005, pp. 49–63, at p. 57.

total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>2</sup> Gaza was under Egyptian control from 1949 until the 1967 war. Both Israel and Egypt had signed and ratified the Fourth Geneva Convention by 1967, when Israel took over Gaza in the course of the war.<sup>3</sup> Gaza might be said to be occupied territory on this basis.

But the Convention refers to “occupation of the territory of a High Contracting Party,” and Egypt was never the legal “owner” of Gaza. Gaza is sometimes described as being under Egyptian “administration” after 1948, though some scholars have argued that the Egyptian presence was an occupation.<sup>4</sup> Because of the legal question about Gaza’s status before 1967 and the “territory of a High Contracting Party” language, Israel has argued that the Fourth Geneva Convention does not apply.<sup>5</sup> Israel has officially used the term “administered territories” to describe all the areas overtaken in the 1967 war.

Legal counterarguments to the Israeli position have been raised. One is that the reference to “territory of a High Contracting Party” does not necessarily mean territory *legally belonging to* the party, and should be considered to include territory under the

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<sup>2</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, in *United Nations Treaty Series*, vol. 75 (1950) ([New York?]: n.d., ca. 1950), treaty no. 973, pp. 287–392 (henceforth cited as “Geneva IV”), Art. 2, ¶¶ 1, 2, at p. 288.

<sup>3</sup> Egypt signed the Convention on the day it was executed, 12 August 1949, and deposited its ratification on 10 November 1952. *United Nations Treaty Series*, vol. 75 (1950) ([New York?]: n.d., ca. 1950), treaty no. 973, p. 396 (signature); *idem*, vol. 150 (1952) ([New York?]: n.d., ca. 1952), p. 372 (ratification). Israel signed the Convention on the same date and deposited its ratification on 6 July 1951. *Idem*, vol. 75, p. 397 (signature); *idem*, vol. 96 (1951) ([New York?]: n.d., ca. 1951), p. 326 (ratification). Israel’s only reservation to the Convention was that it would use the Red Shield of David as its international humanitarian symbol, instead of the Red Cross or Red Crescent. *Idem*, vol. 75, pp. 436, 438. Egypt did not use a reservation to “exclude a treaty relationship with Israel,” as Arab League states have sometimes done. Stephen M. Boyd, “The Applicability of International Law in the Occupied Territories,” *Israel Yearbook on Human Rights*, vol. 1 (1971), pp. 258–61, at p. 258.

<sup>4</sup> See e.g. Sara Roy, *The Gaza Strip: The Political Economy of De-Development*, 2<sup>nd</sup> ed. (Washington, D.C.: Institute for Palestine Studies, 2001), p. 3. Roy does not specify whether she means occupation in the legal as well as the factual sense.

<sup>5</sup> Meir Shamgar, “The Observance of International Law in the Administered Territories,” *Israel Yearbook on Human Rights*, vol. 1 (1971), pp. 262–77, at pp. 263–6. Shamgar was Israel’s Attorney-General at the time he wrote this article. See also Yehuda Z. Blum, “The Missing Reversioner: Reflections on the Status of Judea and Samaria,” *Israel Law Review*, vol. 3, no. 2, April 1968, pp. 279–301, at pp. 281–94. Israel still held the same position in 2003–4. International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, in *Reports of Judgments, Advisory Opinions and Orders: 2004*, vol. 1 ([The Hague?]: n.d., ca. 2004), pp. 136–271 / 4–139 (dual-paginated) (henceforth cited as “I.C.J., *Occupied Palestinian Territory*”), ¶ 90, at p. 173 / 41.



party's control regardless of ownership. U.S. State Department official Stephen Boyd presented this argument at a 1971 symposium of legal scholars in Israel:

I do not think that the ICRC [International Committee of the Red Cross, which coordinated the drafting of the treaty] expressly considered the sovereignty question in drafting the Convention. Their intent was to provide . . . a widely accepted Convention for the protection of the inhabitants of occupied territories, with the language broad enough to include the type of situation in which Israel finds itself now. It does not say 'the sovereign territory of a High Contracting Party,' but merely 'the territory.' The Red Cross has interpreted this language consistently with the purpose and intent of the Convention, which is protection of individuals in a humanitarian way, not the settlement of disputed questions of sovereignty, which obviously the Convention was not intended to do.

It would seem to me that if that little phrase in Article 2 were troublesome to a particular State, such as Israel in this case, it would be very easy to acknowledge the applicability of the Convention with whatever kind of reservations were deemed necessary to protect a Government's position on a disputed question of territorial sovereignty.<sup>6</sup>

The *Commentary* to the Convention prepared by the Red Cross makes a similar suggestion that a reservation could be used as a way for states to apply the Convention in civil wars without having to legally recognize the enemy side.<sup>7</sup> Other sections of the treaty also suggest that it can apply despite legal controversies between enemy parties. Article 3, paragraph 4, for example, states that though the Convention may be applied to non-international violence this "shall not affect the legal status of the Parties to the conflict."<sup>8</sup> The *Commentary* also states that the Convention must be given effect even if there may be territorial changes after a conflict.<sup>9</sup> Most importantly, the purpose of the

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<sup>6</sup> Remarks of Stephen M. Boyd in the "Human Rights in Time of War" session of the Tel Aviv University Faculty of Law "Symposium on Human Rights," 1–4 July 1971, printed in *Israel Yearbook on Human Rights*, vol. 1 (1971), pp. 366–92, at pp. 367–8.

<sup>7</sup> Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm, & Jean-Pierre Schoenholzer, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1994; reprint of 1958 original) (from series *The Geneva Conventions of 12 August 1949: Commentary*, Jean S. Pictet, series editor) (henceforth cited as "Uhler *et al.*, *Commentary*"), p. 43.

<sup>8</sup> Geneva IV, Art. 3, ¶ 4, at p. 290. See also Uhler *et al.*, *Commentary*, pp. 30, 44.

<sup>9</sup> Uhler *et al.*, *Commentary*, pp. 16–17, 18, 275–6. Accord "Report of the Third Commission: Condition and Protection of Civilians in Time of War," pp. 272–301 in International Committee of the Red Cross, comp., *Report on the Work of the Conference of Government Experts for the Study of the Conventions for*

Convention is, as it says in the title, “the Protection of Civilian Persons,” and narrow application of the treaty would not be in agreement with this purpose.<sup>10</sup> The Regulations annexed to the Fourth Hague Convention of 1907, the other relevant treaty, have a section on occupation with the same purpose.<sup>11</sup> The article of this Convention defining occupation has no language limiting it to the sovereign territory of a signatory state,<sup>12</sup> so it would seem that Gaza would be included.

Other states, including the “powers friendly to Israel,” have not agreed with Israel’s position.<sup>13</sup> There was a broad international legal consensus after the 1967 war that the Convention did apply to the Palestinian areas, and that their legal status was occupied territory. The United Nations Human Rights Council,<sup>14</sup> the General Assembly,<sup>15</sup> the Security Council,<sup>16</sup> the U.S. government,<sup>17</sup> “most Governments in the

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*the Protection of War Victims (Geneva, April 14–26, 1947)* (Geneva: International Committee of the Red Cross, 1947) (henceforth cited as “I.C.R.C., ‘Report of the Third Commission’”), p. 274.

<sup>10</sup> For more on the broadness of the Convention’s purpose, see Uhler *et al.*, *Commentary*, pp. 12–4, 27, 44, 51, 200, 272, 273–4; I.C.R.C., “Report of the Third Commission,” p. 269.

<sup>11</sup> Convention Respecting the Laws and Customs of War on Land, with annexed “Regulations respecting the laws and customs of war on land,” adopted 18 October 1907, printed in *United States Statutes at Large*, March 1909 – March 1911 (Washington, D.C.: Government Printing Office, 1911), vol. 36, part 2, pp. 2277–2309 (henceforth cited as “Hague IV”), Regulations Arts. 43–56, at pp. 2306–9. See also Uhler *et al.*, *Commentary*, pp. 3, 273–4. The Hague Convention applies to all states because it has become customary international law. Judgment of the International Military Tribunal at Nürnberg, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (Nürnberg: Secretariat of the Tribunal, 1947), vol. 1, pp. 171–364, at pp. 254, 334; I.C.J., *Occupied Palestinian Territory*, ¶ 89, at p. 172/40.

<sup>12</sup> Hague IV, Regulations Art. 42, ¶ 1, at p. 2306.

<sup>13</sup> Testimony of Rita E. Hauser to the U.S. House of Representatives on 12 September 1977, in *Israeli Settlements in the Occupied Territories: Hearings before the Subcommittees on International Organizations and on Europe and the Middle East of the Committee on International Relations*, 95th Congress, 1st session, 12, 21 September & 19 October 1977 (Washington, D.C.: U.S. Government Printing Office, 1978), p. 95.

<sup>14</sup> See e.g. U.N. Human Rights Council Resolution S-9/1, adopted 12 January 2009 at the 9<sup>th</sup> special session, in *Report of the Human Rights Council: Tenth Session (2–27 March 2009) . . . Eleventh Special Session (26–27 May 2009)* (United Nations: New York, 2009) (supplemental volume to *General Assembly, Official Records*, 64<sup>th</sup> session), Supp. No. 53, U.N. doc. no. A/64/53, pp. 153–6, preambular ¶ 6, operative ¶ 5, at pp. 153, 154.

<sup>15</sup> See e.g. U.N. General Assembly Resolution 3092A, adopted 7 December 1973 at the 2193<sup>rd</sup> plenary meeting, in *Resolutions Adopted by the General Assembly During Its Twenty-Eighth Session*, vol. 1, 18 September – 18 December 1973 (New York: United Nations, 1974) (supplemental volume to *General Assembly, Official Records: Twenty-Eighth Session*), Supp. No. 30, U.N. doc. no. A/9030, pp. 28–9.

world,”<sup>18</sup> the International Committee of the Red Cross,<sup>19</sup> the High Contracting Parties to the Fourth Geneva Convention,<sup>20</sup> and the International Court of Justice<sup>21</sup> considered all the territories that fell under Israeli control in 1967 to be occupied under the law of the Fourth Geneva Convention. Solon Solomon, a former member of the Knesset’s legal department, summarizes that “throughout the post-1967 period” the common international view meant that “a legal certainty regarding the status of these territories existed.”<sup>22</sup>

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<sup>16</sup> See e.g. U.N. Security Council Resolution 465, adopted unanimously 1 March 1980 at the 2203<sup>rd</sup> meeting, in *Resolutions and Decisions of the Security Council: 1980* (New York: United Nations, 1981) (supplemental volume to *Security Council, Official Records: Thirty-Fifth Year*), U.N. doc. S/INF/36, p. 5, preambular ¶ 4, operative ¶ 5.

<sup>17</sup> See e.g. “Letter from State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories,” 21 April 1978, printed as Appendix in House of Representatives, *Israeli Settlements in the Occupied Territories*, pp. 167–72, at pp. 169, 171–2.

<sup>18</sup> Boyd, p. 259.

<sup>19</sup> See e.g. Resolution III (“Application of the Fourth Geneva Convention of 12 August 1949”) of the XXIVth International Conference of the Red Cross (1981), in *International Review of the Red Cross*, no. 224, September–October 1981, pp. 320–1, preambular ¶¶ 3–4, operative ¶¶ 2, 4–5, at pp. 320, 321.

<sup>20</sup> “Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001,” in *Yearbook of International Humanitarian Law*, vol. 4 (2001), pp. 664–7, ¶¶ 1, 3, 12–4, at pp. 664, 665, 666.

<sup>21</sup> I.C.J., *Occupied Palestinian Territory*, ¶ 95, at pp. 174–5 / 42–3.

<sup>22</sup> Solon Solomon, “Occupied or Not: The Question of Gaza’s Legal Status after the Israeli Disengagement,” *Cardozo Journal of International and Comparative Law*, vol. 19, no. 1, Winter 2011, pp. 59–89, at p. 64.

## CHAPTER II

### THE CHANGING SITUATION AFTER 2005

Developments after 1967 such as the “Oslo process” of the 1990s had important effects, but they did not change the legal status of occupation. Legally it would be difficult to argue that the Oslo accords could change that status, due to Article 47 of the Fourth Geneva Convention, which reads: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power.”<sup>23</sup> The Israeli Supreme Court agreed that the situation of occupation still existed during this time period,<sup>24</sup> and the International Court of Justice held that this was still true of the West Bank in 2004.<sup>25</sup> The case did not directly concern Gaza, but its situation at the time was similar.

More significant changes came starting in 2005, when Israel carried out its “Disengagement Plan.” This meant the removal of the settlements and the soldiers stationed in Gaza. From 2005 to 2010 the facts continued to shift in fairly complex ways, but in general Israel maintained its control over Gaza’s borders. Then in 2011 a major change was set in motion again by the Egyptian revolution, which eventually led to real Palestinian control over the Rafah crossing point on the southern border. Gaza’s status has become less clear in light of these developments. If Gaza is not occupied anymore, but is also not a sovereign territory, it might become *terra nullius* (Latin for “nobody’s land”), which would place it in an anomalous position under international law. This chapter will give a general overview of circumstances from 2005 up to 2012, in order to clarify the facts necessary for a current legal analysis.

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<sup>23</sup> Geneva IV, Art. 47, at p. 318.

<sup>24</sup> See e.g. Israeli High Court of Justice, H.C. 1661/05, *Gaza Coast Regional Council et al. v. Knesset of Israel et al.*, as excerpted in English under this (translated) title in *Israel Yearbook on Human Rights*, vol. 37 (2007), pp. 358–67, ¶ 4 at p. 361.

<sup>25</sup> I.C.J., *Occupied Palestinian Territory*, ¶ 77–8, at p. 167 / 35.

Israel's Disengagement Plan for Gaza was released as a public document in 2004.<sup>26</sup> The major points were: Israel would “redeploy outside the territory of the Strip . . . apart from military deployment along the border line between the Gaza Strip and Egypt”; “Israel will supervise and guard the external envelope on land, will maintain exclusive control in the air space of Gaza, and will continue to conduct military activities in the sea space of the Gaza Strip”; construction of ports was “subject to arrangements that will be determined with Israel”; “existing arrangements with regard to water and the electromagnetic area” remained in force; “the economic arrangements that are currently in effect between Israel and the Palestinians” – including “taxation arrangements,” the “customs envelope,” “postal and communications arrangements,” “[t]he movement of goods between the Gaza Strip, Judea and Samaria [i.e., the West Bank], . . . and foreign countries,” and the border crossing between Gaza and Egypt – remained in force; “[t]he Gaza Strip will be . . . devoid of armaments”; “there will be no foreign security presence in the Gaza Strip . . . that is not in coordination with Israel and with Israel's agreement”; and “Israel reserves for itself the basic right of self-defense, including taking of preventative steps as well as responding by using force against threats that will emerge from the Gaza Strip.”<sup>27</sup> “As a result” of the removal of “permanent Israeli civilian or military presence” from Gaza's “continental expanse,” the plan states that “there will be no basis for the claim that the Gaza Strip is occupied territory.” In this way “[t]he disengagement move will obviate the claims about Israel with regard to its responsibility for the Palestinians in the Gaza Strip.”<sup>28</sup>

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<sup>26</sup> The plan went through at least three drafts. See “Key Principles of Prime Minister Ariel Sharon's Unilateral Disengagement Plan, Presented in Washington, 14 April 2004,” as reprinted from the Israeli Ministry of Foreign Affairs' website in *Journal of Palestine Studies*, vol. 33, no. 4, Summer 2004, pp. 90–5 (henceforth cited as “Disengagement Plan”); Prime Minister's Office, “The Disengagement Plan – General Outline,” 18 April 2004, posted on the Israeli Ministry of Foreign Affairs' website (accessed February 2013); Prime Minister's Office, “Revised Disengagement Plan – Main Principles,” Addendum A to “The Cabinet Resolution Regarding the Disengagement Plan,” 6 June 2004, posted on the Israeli Ministry of Foreign Affairs' website (accessed February 2013). Though the different drafts of the plan did change some language having to do with Israel's legal claims, the points for implementation are basically the same in all versions.

<sup>27</sup> Disengagement Plan, sections II.A.1, III.A, V, VI, VIII, X, XII.A.1, at pp. 91–4 *passim*.

<sup>28</sup> Disengagement Plan, sections I.F, II.A.2, at pp. 91, 92.

Despite this legal claim, however, Israel did not seek formal international recognition of a new relationship with Gaza, a decision which has been attributed to its desire to maintain flexibility.<sup>29</sup> Israel's decision not to confirm a new legal framework with the international community makes it harder to say that the occupation ended after the disengagement; but more important, there are factual problems in this respect. As stated in the Disengagement Plan, the Israeli withdrawal was a redeployment to an "external envelope," so that Israel still held control of the Strip from 360° around it (and in the air). The legal test for occupation is whether or not the outside military power has effective control over a territory.<sup>30</sup> Where a territory does not control its borders and airspace (and maritime space in this case) it does not have substantial autonomy at the international level, and so it may be said that the outside power commanding these areas has taken effective control. Israel's policymakers were aware of this, and government lawyers recognized that its legal claim to have ended the occupation would be weak as long as it held onto the "external envelope."<sup>31</sup> This was a further reason they did not seek to have the U.N. recognize that the occupation had ended.<sup>32</sup>

Though Israel had full control over the northern and eastern land borders, the western border via the sea, and Gaza's airspace, the situation on the southern border was more complicated. The Disengagement Plan had stated that Israel would keep its "military deployment along the border line between the Gaza Strip and Egypt" after withdrawal, but in the end this did not happen. Though it might be argued that Israel keeps a military presence over the southern border via its air force (which has sometimes bombed the Rafaḥ crossing area),<sup>33</sup> it did not keep a ground presence. Instead, after a period of more than two months in which the border was largely closed, a special

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<sup>29</sup> Aronson, "Israel's Disengagement," pp. 55, 56, 60.

<sup>30</sup> Shane Darcy & John Reynolds, "An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law," *Journal of Conflict & Security Law*, vol. 15, no. 2, Summer 2010, pp. 211–43, at pp. 216–22.

<sup>31</sup> Aronson, "Israel's Disengagement," pp. 50, 51.

<sup>32</sup> *Ibid.*, pp. 59–60; Aluf Benn, "Israel proposes 'in-between' status for Gaza," *Haaretz* online, 14 November 2004 (accessed May 2013).

<sup>33</sup> Gisha – Legal Center for Freedom of Movement, *Scale of Control: Israel's Continued Responsibility in the Gaza Strip*, November 2011, available online, p. 17.

agreement on the Rafah crossing was brokered, principally between Israel and the Palestinian National Authority (P.N.A.), but with international involvement as well.<sup>34</sup> This Agreement on Movement and Access made the crossing's opening conditional on both the physical presence of European Union monitors at the terminal,<sup>35</sup> and Israeli monitoring of movements there via live camera and data transmission.<sup>36</sup> Movement of goods other than personal effects was not allowed for,<sup>37</sup> and entry of people other than Palestinians included in the Israeli-run population registry was strictly limited.<sup>38</sup> Israel could object to movement of persons, which was supposed to set off a consultation between the Israeli, Palestinian, and E.U. sides.<sup>39</sup> As can be seen, the arrangement was complicated; and the language of the Agreement did not suggest that Israel had the final word on the crossing's operations. In practice, however, it would turn out that Israel still held ultimate control. The crossing could not function according to the Agreement without the European presence, and was not allowed to function without the Israeli monitoring. Israel often caused the crossing to close by not operating its control room and by halting the movement of the European monitors (who commuted to Rafah via

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<sup>34</sup> Gisha – Legal Center for Freedom of Movement & Physicians for Human Rights – Israel, *Rafah Crossing: Who Holds the Keys?*, March 2009, available online, pp. 21–3.

<sup>35</sup> “Israel and the Palestinian Authority, Agreement on Movement and Access in Connection with the Gaza Disengagement, Jerusalem, 15 November 2005,” as reprinted from the Israeli Ministry of Foreign Affairs’ website in *Journal of Palestine Studies*, vol. 35, no. 2, Winter 2006, pp. 184–7 (henceforth cited as “Agreement on Movement and Access”), “Agreement on Movement and Access” section – “Rafah” subsection, “Agreed Principles for Rafah Crossing” section – “General” subsection, ¶¶ 2, 7, 14, “Agreed Principles for Rafah Crossing” section – “Third Party” subsection, ¶ 1, at pp. 185, 186, 187.

<sup>36</sup> The text of the Agreement did not actually refer to this Israeli role. It describes the installation of cameras and a “liaison office, led by the 3rd party [the E.U.]” to monitor the crossing. “Agreed Principles for Rafah Crossing” section – “General” subsection, ¶¶ 13, 19, at p. 186. But, as discussed here, the Agreement was not actually implemented as it was written.

<sup>37</sup> *Ibid.*, “Agreed Principles for Rafah Crossing” section – “Security” subsection, ¶¶ 2, 3, at p. 186.

<sup>38</sup> *Ibid.*, “Agreed Principles for Rafah Crossing” section – “General” subsection, ¶¶ 3–4, at p. 186.

<sup>39</sup> *Ibid.*, “Agreed Principles for Rafah Crossing” section – “General” subsection, ¶¶ 3–6, “Agreed Principles for Rafah Crossing” section – “Security” subsection, ¶ 6, at pp. 186, 187.

Israel) on security grounds. Its objections to movement of particular individuals through the crossing operated as effective vetoes.<sup>40</sup>

Israel's control of the crossing was often evident in the following years. After Palestinian combatants took the Israeli soldier Gilad Shalit captive on 25 June 2006, the crossing was almost completely closed for months.<sup>41</sup> The transcript of a Ministry of Defense meeting that August which leaked to Israeli civil society revealed that the government regarded closure of Rafah as a means of pressure to free the soldier. The E.U. monitors believed that such pressure was aimed at the Gazan population.<sup>42</sup> The Ministry of Defense document shows that the Israeli government assumed that it had the power to open and close Rafah unilaterally.<sup>43</sup> In June 2008, Israel announced publicly that, under a guarantee from Egypt's President Ḥusnī Mubārak to Prime Minister Ehud Olmert, "Rafah crossing w[ould] not be open and return to normal business" unless the soldier was released.<sup>44</sup>

During the same time period, "very few residents [were] allowed to leave, and only with Israeli permission," wrote the Israeli legal scholar Solon Solomon at the end of 2010.<sup>45</sup> As these events show, being able to shut it down, Israel still had effective control over the crossing in the first years after the disengagement. The Israeli human rights group Gisha, which has done the most detailed studies on this subject, wrote at the beginning of 2007 that "Israel exercises ultimate control over the opening of the Rafah crossing," and "over the entrance and exit of all persons and goods by virtue of the ability

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<sup>40</sup> Gisha – Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza*, January 2007, available online, pp. 32–9, 40, 45; Gisha & Physicians for Human Rights, *Rafah Crossing*, pp. 23–6.

<sup>41</sup> Gisha, *Disengaged Occupiers*, p. 36; Gisha & Physicians for Human Rights, *Rafah Crossing*, pp. 27–9.

<sup>42</sup> Avi Issacharoff, "Israel using Rafah crossing to pressure PA on Shalit release," *Haaretz* online, 30 August 2006 (accessed June 2013).

<sup>43</sup> Gisha, *Disengaged Occupiers*, pp. 59–61 (a partial translation of this document). See also *ibid.*, pp. 102–3 (reprinting a letter from the Israeli government showing the same assumption).

<sup>44</sup> Steve Weizman, "Egypt pledges in Olmert-Mubarak talks not to reopen Gaza crossing till Israeli soldier is free," Associated Press, 24 June 2008 (accessed May 2013 via LexisNexis database).

<sup>45</sup> Solomon, p. 81.



to close all crossings into and out of Gaza.”<sup>46</sup> Influence over the crossing became somewhat more dispersed after Ḥamās fully took over Gaza in the June 2007 Palestinian civil war, Israel declared the Strip an “enemy entity,” and all efforts at cooperation between Israel and the new Gazan government ceased. But Israel still held significant power over Rafah. A detailed March 2009 report by Gisha and the Israeli branch of Physicians for Human Rights concluded that Israel then had “indirect – but substantial – control over the opening of the crossing.”<sup>47</sup> Gisha notes the important point that, due to the extensive closures of the southern border after 2005, “disengagement has actually led to greater restrictions on the ability of most residents of Gaza to enter and leave the Strip.”<sup>48</sup>

Israel’s continued indirect control over the crossing was dependent on the collaboration of the P.N.A. and, even more so, on Egypt’s cooperation. That required link disappeared from the scene when the Egyptian revolution, starting in late January 2011, led to the downfall of the Mubārak regime in Cairo. With the successor Egyptian governments under more pressure to be responsive to public opinion, the unpopular policy of coordinating the closure of Rafah with Israel was abandoned. At the end of May 2011, Egypt officially announced that it was fully reopening the Rafah crossing.<sup>49</sup> (Earlier, after the *Mavi Marmara* incident in June 2010 – described in the following chapter – Egypt had resumed regular operation of the crossing, but with restrictions that kept the level of movement at around 40% of its natural level.)<sup>50</sup> From May 2011, coordination was made directly with the Ḥamās government in Gaza, and the E.U. monitors were not invited to return to their posts.<sup>51</sup> The shift in policy has continued over the last two years, with a major transfer of goods via Rafah (construction materials for

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<sup>46</sup> Gisha, *Disengaged Occupiers*, pp. 32, 36.

<sup>47</sup> Gisha & Physicians for Human Rights, *Rafah Crossing*, p. 145.

<sup>48</sup> Gisha, *Disengaged Occupiers*, p. 39.

<sup>49</sup> U.N. Office for the Coordination of Humanitarian Affairs – occupied Palestinian territory [O.C.H.A.], *Monthly Humanitarian Monitor*, available online, May 2011, p. 6.

<sup>50</sup> *Ibid.*, p. 7; Gisha, *Scale of Control*, p. 15.

<sup>51</sup> O.C.H.A., *Monthly Humanitarian Monitor*, May 2011, p. 6.

Qatarī-funded infrastructure projects in Gaza) occurring for the first time since before the disengagement in December 2012.<sup>52</sup>

There is speculation that Egypt still coordinates Rafah policy behind the scenes with Israel,<sup>53</sup> and this is probably true to some extent, given the linkages built between the two countries' security establishments over past decades, the influence of Israel's U.S. ally in Cairo, and the Egyptian government's own interests. However, I know of no hard evidence for this, and it seems clear that the new Egyptian government is taking its own, independent stance towards the Ḥamās government in Gaza without deference to Israel. In light of these developments, Gisha assessed in November 2011 that Israel had "significantly reduced" – but still "some" – control over the crossing. The main avenue of its control at this point is its power over the Palestinian population registry, which still determines who enters Gaza as a resident<sup>54</sup> (although Egypt and the Ḥamās government can and do allow entry by other categories of people as visitors).<sup>55</sup> The question of the population registry is significant, but Israel's power over Rafah crossing at this point seems best characterizable as influence, rather than effective control.

To summarize, the years after 2005 saw two major overall developments. First, Israel withdraw its settlements and permanent troop presence, but did not otherwise let go of its effective control over Gaza. The disengagement could be characterized as a redeployment of troops to positions of control around Gaza. Because of this continued control, the international community did not accept that the occupation of Gaza had ended. Second, a series of events reduced Israel's control over the southern border, to the point that Israel did not really have effective control over the Rafah crossing anymore. There were other major developments in Gaza during this time period, most of which support the argument that Gaza is still occupied. They will therefore be reviewed in the following chapter. The key point here is that, from 2005–12, despite the other ways in which Israel kept its control in place, one access point to the outside world did shift from Israel's authority into Palestinian hands.

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<sup>52</sup> *Idem, Humanitarian Monitor: Monthly Report*, December 2012, available online, pp. 1, 2, 3–4.

<sup>53</sup> Personal observations and conversations, Cairo, Rafah crossing, and Gaza City, June 2011 – July 2012.

<sup>54</sup> Gisha, *Scale of Control*, pp. 16, 17–8.

<sup>55</sup> Personal observations and conversations, Cairo, Rafah crossing, and Gaza City, June 2011 – July 2012.

## CHAPTER III

### IS GAZA STILL OCCUPIED?

#### *Factors Suggesting that Gaza Is Still Occupied*

This chapter will review factors supporting the argument that Gaza is still occupied. The main support for this argument is the fact that Israel has kept external control of Gaza in most ways, making the withdrawal most like a redeployment to an “external envelope,” in the words of the Disengagement Plan quoted above. This chapter will describe the means through which that external envelope is maintained in greater detail, as well as the incursion into Gaza’s internal space that continues to occur.

First there should be noted the more purely legal argument that Gaza remains occupied because it is part of the same territory, legally speaking, as the still-occupied West Bank. The territorial unity and integrity of the West Bank and Gaza have been recognized by the U.N. Security Council<sup>56</sup> and also by Israel in the major treaties of the Oslo process during the 1990s.<sup>57</sup> These treaties were also, as the Israeli Supreme Court has held, “transformed into Israeli internal law by adequate legislation.”<sup>58</sup> The Court has also confirmed that Gaza and the West Bank are a unified territory, even after the Palestinian civil war that divided them in 2007.<sup>59</sup> Regarding Gaza as still occupied on this basis, without more, would be somewhat formalistic, but this territorial connection

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<sup>56</sup> See e.g. U.N. Security Council Resolution 1860, adopted 14–0–1 (U.S. abstaining) 8 January 2009 at the 6063<sup>rd</sup> meeting, in *Resolutions and Decisions of the Security Council: 1 August 2008 – 31 July 2009* (New York: United Nations, 2009) (supplemental volume to *Security Council, Official Records*), U.N. doc. S/INF/64, pp. 5–6, preambular ¶ 2, at p. 5.

<sup>57</sup> Declaration of Principles on Interim Self-Government Arrangements with attached Annexes and Agreed Minutes, signed by Israel and the Palestinian Liberation Organization (P.L.O.) on 13 September 1993, in *International Legal Materials*, vol. 32, no. 6, November 1993, pp. 1527–41, Art. IV, Annex II, ¶ 6, at pp. 1528, 1537; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip with selected attached Annexes and Maps, signed by Israel and the P.L.O. on 28 September 1995, in *International Legal Materials*, vol. 36, no. 3, May 1997, pp. 557–649, Arts. XI:1, XVII:1(a), XXXI:7–8, Annex I, Arts. I:2, I:4, XIII:11, at pp. 561, 564, 568, 569, 586.

<sup>58</sup> Israeli High Court, *Gaza Coast Regional Council*, ¶ 4 at p. 361.

<sup>59</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), ¶¶ 666–7, p. 277.

also has factual significance as long as Israel prevents movement between Gaza and the West Bank, as it has done since the start of the second *intifāḍah* in 2000.<sup>60</sup>

On the factual level, Israeli military incursions continue despite the removal of its permanent troop presence. During one period in the first half of 2010 sampled by the U.N., Israel Defense Forces (I.D.F.) incursions – which use military jeeps, bulldozers, tanks, and sometimes helicopters – were recorded an average of three times per week.<sup>61</sup> The Disengagement Plan suggested that Israel anticipated “taking of preventative steps as well as responding by using force against threats that will emerge from the Gaza Strip” after withdrawal. Israeli politicians including Prime Minister Ariel Sharon had considered that a benefit of disengagement would be greater freedom of military action in Gaza.<sup>62</sup> The Disengagement Plan describes these actions as “part of the basic right of self-defense,” but it is not clear that self-defense under international law allows military action of the sort Israel has undertaken; certainly “preventative steps” against “threats that will emerge” on an uncertain timeline are very controversial. Yoram Dinstein, who is perhaps the most respected Israeli scholar of international law today, regards this military component as “the most telling aspect of the non-termination of the occupation.” Though he considers Israel’s moves to be “in response” to Palestinian rocket attacks, he writes that “Israeli military incursions into various parts of the Gaza Strip (as well as air and naval strikes) have occurred relentlessly subsequent to the unilateral withdrawal” and considers this proof of continued occupation.<sup>63</sup> It is not only that these attacks are a way of imposing effective control; Israel’s continuing military operations in Gaza, if they

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<sup>60</sup> B’Tselem & HaMoked – Center for the Defense of the Individual, *One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan*, March 2005, available online, pp. 10–1.

<sup>61</sup> O.C.H.A. & U.N. World Food Program [W.F.P.], *Between the Fence and a Hard Place: The Humanitarian Impact of Israeli-Imposed Restrictions on Access to Land and Sea in the Gaza Strip*, August 2010, available online, p. 16. This is a count of border operations undertaken to raze lands and structures in the “buffer zone,” which is described below; air strikes and overflights are not included.

<sup>62</sup> Aronson, “Israel’s Disengagement,” p. 57; Ariel Sharon, “open letter” to Likud members, *Yedi’ot Aḥaronot*, as translated in “Polls, spins, scenarios and speculation,” *Mideast Mirror*, 30 April 2004 (accessed June 2013 via LexisNexis database; unpaginated).

<sup>63</sup> Dinstein, ¶ 670, p. 279.

have an international legal basis, might also be said to depend on occupation law,<sup>64</sup> which grants broad security powers.<sup>65</sup>

Military force is also used as part of a general policy of blockade. The military enforcement of the maritime blockade received international attention when Israel intercepted a flotilla of ships attempting to reach Gaza in May 2010 as a political protest against the Israeli policy. The Israeli navy's boarding of the *Mavi Marmara*, a Turkish vessel participating in the flotilla, resulted in the death of nine foreign nationals. This was the most violent incident associated with the sea blockade, but the policy also has an internal component which affects Gazan residents on a regular basis. Fishing along the Gazan coastline is limited to a box of sea space running north-to-south and extending to a depth of three nautical miles. The fishing area was progressively reduced by the Israeli navy after the start of the second *intifādah* in 2000, from the 20 nautical miles initially agreed to in a 1994 Israel-Palestinian Liberation Organization (P.L.O.) treaty, to six nautical miles by 2006, to the current three miles after 2008. The restriction of fishing space is enforced by live warning fire, direct targeting of boats, and confiscations and detentions. Casualties have occurred among Palestinian fishermen, and the policy has had a severe impact on the Gazan fishing industry, economically harming or displacing tens of thousands of people when the families of fishermen are taken into account.<sup>66</sup>

It is difficult to make out the security rationale for this internal aspect of the blockade. Israel cites concern about maritime arms smuggling as the reason for its naval deployment around Gaza. However, an enlarged fishing area could certainly be allowed while still preventing the entry of arms. Greater use of Israel's naval resources might be needed to monitor such an expanded fishing area, but the humanitarian needs of the population outweigh the military inconvenience. Under international law, coastal fishing vessels "are subject to the regulations of a belligerent naval commander . . . and to inspections," but not to capture or attack, on the grounds that "disruption of this fishing would give no substantial benefit to the belligerents but would harm the population." Regulation of coastal fishing "should be limited to what is necessary and should not in

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<sup>64</sup> Aronson, "Israel's Disengagement," pp. 56–7.

<sup>65</sup> See e.g. Geneva IV, Art. 5, ¶ 2, at p. 292.

<sup>66</sup> O.C.H.A. & W.F.P., pp. 9, 10–1, 12.

practice disrupt the activities of [fishing] vessels to such a degree that it would undermine the purpose” of protecting local livelihoods.<sup>67</sup>

Economic blockade has not yet been found to be unlawful, but it is an open question whether a blockade which harms the livelihood and development of the civilian population can really be squared with modern human rights and humanitarian law.<sup>68</sup> In any case, the blockade on Gaza does not resemble blockade as envisioned in the laws of war or seen in past state practice. The Gaza Strip was never allowed to develop an independent maritime trade under Israeli rule, or even to build a commercial port. In 2001, facilities set up preparatory to the building of a seaport were destroyed by Israel, and resumption of construction has been deterred because Israel will not give donors its assurance that a port project will not be attacked.<sup>69</sup> Furthermore, the blockade has been in effect continuously both before and after the 2005 withdrawal. Thus, despite the fact that there has been a state of armed conflict since 2000, the blockade on Gaza is not a temporary belligerent measure but a long-term means of control. It is therefore a factor weighing in favor of the argument that Gaza is still occupied.

As with the maritime blockade, Israeli policy still restricts internal freedom of movement on a part of the Gaza Strip’s land, the “buffer zone” along the eastern and northern borders next to Israel. This policy too is actually one with older roots than the disengagement. In earlier years, it was implemented especially in the south around Palestinian Rafah, to separate the town – which straddles the border – from the side that falls on Egyptian territory.<sup>70</sup> The basic idea of the buffer zone is to clear a strip of land between Israel and Gaza of Palestinian structures, and then to prevent Palestinian movement in that area. On the borders shared with Israel, the buffer zone was expanded

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<sup>67</sup> International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, ed. Louise Doswald-Beck (Cambridge: Cambridge University Press, 1995), ¶ 47(g), Explanation ¶¶ 47.45–6, 47.49, 47.51, pp. 17, 133–4.

<sup>68</sup> See *ibid.*, ¶ 102, Explanation ¶¶ 102.1–4, pp. 27, 179 for a discussion concluding that economic blockade is still lawful but subject to the proportionality principle.

<sup>69</sup> Gisha, *Scale of Control*, p. 13; see also B’Tselem & HaMoked, pp. 60, 61.

<sup>70</sup> Akiva Eldar, “Under cover of revenge,” *Haaretz* online, 15 January 2002 (accessed March 2013); Ze’ev Schiff, “A shameful chapter in Israel’s history,” *Haaretz* online, 13 January 2002 (accessed March 2013); James Bennet, “Israeli Army Faces Storm For Attack on Arab Houses,” *New York Times* (late edition), 14 January 2002, p. A7; Doron Almog, *The West Bank Fence: A Vital Component in Israel’s Strategy of Defense*, Washington Institute for Near East Policy Research Memorandum No. 47, March 2004, pp. xii, 8.

progressively after the first *intifāḍah* began, until it reached its current depth – ranging from 700 to 1,500 meters at different points along the border – in 2008.<sup>71</sup> The buffer zone was completed during Operation Cast Lead, the major military attack on Gaza in winter 2008–9, when during the final days of the ground invasion Israel carried out extensive razing of land and structures along the borders.<sup>72</sup> The prohibition on movement in the buffer zone is enforced by live fire, which has often resulted in civilian casualties, including numerous deaths. The situation is complicated by the fact that Palestinian armed factions regularly operate in the border areas. The majority of those killed in the buffer zone are combatants, whereas the majority of those injured are civilians.<sup>73</sup>

The key fact about the buffer zone is that it was established inside Gaza rather than on Israel’s side of the border. Maj.-Gen. Doron Almog, a former head of the I.D.F. Southern Command (which is in charge of Gaza), describes this as a military doctrine of “territorial overcharge.”<sup>74</sup> This has substantial effects on Gaza’s internal situation. The buffer zone largely prevents access to 17% of Gaza’s land, including 35% of its arable land. The economic consequences, aside from their effect on productivity and development overall, directly affect the livelihoods of 12% of the population.<sup>75</sup> Outside of occupation law, which gives the occupying power broad authority to ensure security (including its own) in foreign territory, there is no basis in international law for a state to take such measures on territory outside its sovereign borders. (This does not mean, of course, that particular Israeli actions in Gaza are legal under occupation law, only that this branch of law provides the basis on which these kinds of measures would have to be justified.) This legal context, and the fact that the buffer zone policy is an exercise of Israel’s “clear ability to influence [ ] living conditions in Gaza,”<sup>76</sup> are major factors supporting the argument that Gaza is still occupied.

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<sup>71</sup> O.C.H.A. & W.F.P., pp. 5, 8, 12, 17.

<sup>72</sup> *Ibid.*, pp. 17, 23; International Crisis Group, *Gaza’s Unfinished Business*, Middle East Briefing No. 85, 23 April 2009, available online, p. 2.

<sup>73</sup> O.C.H.A. & W.F.P., pp. 13–5, 17–8.

<sup>74</sup> Almog, p. xii.

<sup>75</sup> O.C.H.A. & W.F.P., pp. 5, 10, 12, 19, 33.

Living conditions are negatively affected by the external closure, often called (including by Israeli sources) a policy of siege.<sup>77</sup> The maritime blockade has already been described. There is also a kind of aerial blockade, since Israel will not permit use of Gazan airspace by any planes but those of its air force. Israeli drones and jets overfly the Gaza Strip more or less continuously – on a weekly if not daily basis<sup>78</sup> – whether to bomb, to monitor events on the ground, or, in earlier periods, to intimidate and frighten the population.<sup>79</sup> The Israeli Air Force (I.A.F.) has argued since 2004 that today’s high technology allows it to take over many tasks “traditionally shouldered by ground forces,” including not only surveillance patrols but also territorial closure and even curfew enforcement. Maj.-Gen. Amos Yadlin, former I.A.F. Chief of Staff and later head of the I.D.F.’s Command and Staff College, has described this approach in terms of a new military doctrine: “Our vision . . . zeroes in on the notion of control. We’re looking at how you control a city, or a territory from the air when it’s no longer legitimate to hold or occupy that territory on the ground.” “Instead of sending a company into the Gaza Strip, for example, we can perform the mission with a helicopter from standoff ranges. . . . Through smart use of air power . . . you can impose a siege, loiter over an area, maintain a presence in an area, [or] prevent movement.” Maj.-Gen. Zeev Livne of Israel’s Ground Forces Command states that “there’s no doubt that technology has matured to the point that more massive control of territories can be imposed from the air.”<sup>80</sup> Israel is not yet imposing curfews from the air in Gaza, but it is plainly using drones to monitor the

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<sup>76</sup> Yuval Shany, “Binary Law Meets Complex Reality: The Occupation of Gaza Debate,” *Israel Law Review*, vol. 41 (2008), nos. 1–2, pp. 68–86, at p. 84.

<sup>77</sup> See e.g. Dinstein, ¶ 668, p. 278; Bradley Burston, “Can the First Gaza War be stopped before it starts?,” *Haaretz* online, 22 December 2008 (accessed June 2013); Aluf Benn, “The legacy of the tahadiyeh,” *Haaretz* online, 27 July 2008 (accessed June 2013). On the other hand, Israeli legal scholar Solon Solomon argues that “Gaza cannot be deemed under a ‘siege’ for legal purposes because the laws pertaining to siege require that civilians be able to leave the besieged area. In the case of the Gaza Strip, very few residents have been allowed to leave, and only with Israeli permission.” Solomon, p. 81.

<sup>78</sup> Personal observations, Gaza City, June 2011 – July 2012.

<sup>79</sup> Chris McGreal, “Israeli clampdown amid rise in ‘sonic booms,’” *The Guardian* online, 31 October 2005 (accessed June 2013); *idem*, “Palestinians hit by sonic boom air raids,” *The Guardian* online, 2 November 2005 (accessed June 2013).

<sup>80</sup> Barbara Opall-Rome, “Israel AF Wants Wider Role in Anti-Terror War,” *Defense News*, vol. 19., no. 1, 5 January 2004, p. 4.



territory in ways incompatible with sovereign local control. Furthermore, the domination of Gazan airspace prevents the Strip from developing trade links with the rest of the world through civil aviation, in the same way that the sea blockade prevents development of maritime trade links. Gaza in fact had a functioning passenger airport for a few years, but it was rendered non-operational after the second *intifāḍah* broke out, first closed and later bombed by Israel.<sup>81</sup>

The total control over airspace and sea space, and the high level of control over land borders, mean that Israel has extensive power over Gaza's ability to carry out economic interactions with the outside world. This trade dependence is exacerbated by the lasting impact of Israeli policies from 1967 to 2005 which made Israel Gaza's only direct trading partner and its intermediary to the outside world.<sup>82</sup> Rafah was never used as an export terminal when it was under direct Israeli control (though it did handle a "relatively small" amount of imports).<sup>83</sup> Gaza's established trading links with the outside world are therefore all through Israel. Export trade could be redirected overland through Egypt, though this would presumably require new infrastructure at Rafah, and would not be ideal, since "[t]he geographic and economic links of Gaza are with Israel and not with Egypt, from which it is separated by scores of miles of desert."<sup>84</sup> Gazan imports and exports have been drastically curtailed by lengthy closures of the crossings on the Israeli border since 2000,<sup>85</sup> and alternative trade patterns which can fully meet Gazan needs without relying on Israel have not yet been established. In addition, the customs envelope which Israel maintains for both itself and the Palestinian territories, which the Disengagement Plan preserved, means that Israel collects the tariffs on imports for Gaza

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<sup>81</sup> B'Tselem & HaMoked, pp. 26, 27.

<sup>82</sup> Arie Arnon, "Israeli Policy towards the Occupied Palestinian Territories: The Economic Dimension, 1967–2007," *Middle East Journal*, vol. 61, no. 4, Autumn 2007, pp. 573–95, at pp. 585, 595.

<sup>83</sup> B'Tselem & HaMoked, p. 60; see also O.C.H.A., *Humanitarian Monitor*, December 2012, p. 4.

<sup>84</sup> Israeli Ministry for Foreign Affairs – Information Division, *The Gaza Strip: Aggression or Peace* (Jerusalem: Government Printer, n.d., ca. 1956/7), p. 7.

<sup>85</sup> B'Tselem & HaMoked, pp. 59–61.

and therefore continues to have partial fiscal control there.<sup>86</sup> However, as is described in the next chapter, Ḥamās has managed to establish an independent tax base in Gaza.

A characteristic common to these external economic controls is that they are legacy effects of the occupation up to 2005. Gaza is heavily dependent on Israel due to this very lengthy period of direct control, as is commonly recognized by Israeli analysts.<sup>87</sup> Furthermore, many post-disengagement actions have further reduced Gaza's ability to meet its own needs. In 2006, Israel bombed Gaza's power station, substantially reducing its output. It still has not been fully repaired, in part because of Israeli restrictions on movement of goods and people. The power station is Gaza's principal domestic source of electricity. The majority of its electricity still comes from Israel, which interlinked the Israeli and Palestinian electrical grids after 1967.<sup>88</sup> The destruction of infrastructure, government facilities, homes, and various civilian objects during Operation Cast Lead was extensive. A U.N. Development Programme official estimated afterwards that "even should Gaza's crossings be reopened fully and consistently remain that way, it would take five years to repair the damage – that is, to return the entity to the already degraded state in which it found itself after a punishing eighteen-month siege."<sup>89</sup> The historical dependency of Gaza on Israel, which was shaped by occupation policies, constitutes a further argument that Gaza is still under effective Israeli control and thus occupied territory by law.

The combined effect of these internal, external, and historical restraints on Gaza's independence is substantial. Yoram Dinstein writes that "When all this is tallied up . . . it should be palpable that the occupation cannot be viewed as over."<sup>90</sup> In light of the extensive control still existing, Israel's position that its occupation ended after the 2005 withdrawal has not been accepted by international bodies. The office of the U.N.

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<sup>86</sup> Gisha, *Scale of Control*, pp. 19–20.

<sup>87</sup> See e.g. Almog, pp. xiii, 11, 18; Solomon, p. 84; David Rosenberg, "Could they go it alone? The territories: economic scenario," *Jerusalem Post*, 23 November 1988, p. 7 (accessed via ProQuest database, February 2013).

<sup>88</sup> Gisha, *Scale of Control*, p. 22.

<sup>89</sup> International Crisis Group, *Gaza's Unfinished Business*, p. 1.

<sup>90</sup> Dinstein, ¶ 668, p. 278.

Secretary-General has stated that it still defines Gaza as occupied territory,<sup>91</sup> and that this definition would not change without a decision from the Security Council.<sup>92</sup> The Security Council has not yet addressed the issue,<sup>93</sup> though other U.N. bodies have made clear their position that Gaza is still occupied.<sup>94</sup> The Israeli legal scholar Solon Solomon summarizes that “the international community continued to treat the status of the Strip as if nothing had legally changed after Israeli disengagement.”<sup>95</sup>

### *Factors Suggesting that Gaza Is No Longer Occupied*

Although Israel has retained a large degree of control over Gaza in the ways described in the previous chapter, three things have changed in Gaza after the disengagement that shift power to the Palestinian society there in important ways. The first is that internal territorial continuity was achieved when the settlements and military facilities were removed. (Gazan space is still disrupted by the buffer zone discussed above, but this reduces territory rather than breaking it up.) The settlements and the military deployments around them separated Gazan localities from one another and divided the Strip into enclaves. Their removal is one key to the formation of a coherent and healthy economy.

The second important development is the changed situation at Rafah after the Egyptian revolution, also described above. The importance of Rafah was discussed within the Israeli government in the lead-up to its withdrawal. Because of the southern crossing’s significance for independent Palestinian control on the border, one Israeli official described a continued Israeli presence there as “tantamount to occupying the Gaza Strip as a whole.”<sup>96</sup> Now that the Israeli presence and its indirect control are both

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<sup>91</sup> Gisha, *Scale of Control*, pp. 29, 29n48.

<sup>92</sup> Josh Levs, “Is Gaza ‘Occupied’ Territory?,” CNN online, 6 January 2009 (accessed May 2013).

<sup>93</sup> Resolution 1860, adopted in 2009, states that “the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian State,” but did not directly address the issue of its current status. U.N. Security Council Resolution 1860, preambular ¶ 2, at p. 5.

<sup>94</sup> See e.g. U.N. Human Rights Council Resolution S-9/1, preambular ¶¶ 12, 14, operative ¶¶ 1–3, 6, 8, 11(a), 14, at pp. 153, 154, 155.

<sup>95</sup> Solomon, p. 68.

gone, Gaza has its own gateway to the outside world. It is not an ideal gateway – it leads directly into the Sinai desert, which is a poor trading partner and creates major transportation costs for goods which could be avoided if Gaza had its own ports – but it is half in Palestinian hands, and the other half is no longer in Israeli hands but in those of a partially sympathetic neighbor that is no longer joining in the siege policy. It does not make sense to speak of a siege – or at least not an effective siege – when there is a direct supply line which the enemy does not control. The siege on Gaza can in fairness be said to be over. What is left is an economically very damaging closure on all the other borders and means of access, but with an outlet point. There are still many restrictions at Rafah,<sup>97</sup> but current reports indicate that these problems are between the new Egyptian government and the Ḥamās government in Gaza, which now negotiate on the subject directly.<sup>98</sup>

The situation at Rafah is related to the general situation along the southern border, especially the tunnel economy that was built up in response to the siege. By now the tunnels are practically institutionalized. They operate on a large and efficient scale, and commerce through them can shift to bring in particular materials that are in demand but are not being allowed to enter via the Israeli-controlled crossings – for example, cars in recent years. Though they would not be sufficient to supply the whole economy, their operations are large enough to fill specific sectoral gaps.<sup>99</sup> Most recently, for example, they have been bringing in construction materials – banned by Israel – on a very large scale.<sup>100</sup> The shift to more sector-specific items like this became possible after mid-2010, when the internationally-demanded relaxation of Israeli restrictions allowed the tunnel economy to shift focus and become more than just an emergency measure to cope with the siege. A second important factor is the decline in Israeli efforts to disrupt the tunnel economy. Regular airstrikes on the tunnel area around Rafah have noticeably declined in

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<sup>96</sup> Aronson, “Israel’s Disengagement,” p. 52.

<sup>97</sup> O.C.H.A., *Humanitarian Monitor*, December 2012, p. 3; Gisha, *Scale of Control*, pp. 15–6; personal observations and conversations, Cairo, Rafah crossing, and Gaza City, June 2011 – July 2012.

<sup>98</sup> See e.g. *Monthly Humanitarian Monitor*, May 2011, p. 6.

<sup>99</sup> Personal observations and conversations, Gaza City and Rafah, June 2011 – July 2012.

<sup>100</sup> O.C.H.A., *Humanitarian Monitor*, December 2012, p. 4.

the last two years. For the moment, it appears that Israel has abandoned its general effort to destroy the tunnels, and instead strikes them as a form of punishment during military escalations.<sup>101</sup> During an August 2011 escalation involving Israel and the smaller Gazan military factions, for example, an official explained that Israel wouldn't escalate the situation by bombing tunnels unless Ḥamās resumed launching rockets.<sup>102</sup>

The tunnels are also highly significant because they provide Ḥamās with a local tax base that cannot be touched by Israel. (The West Bank P.N.A.'s taxes come largely from customs and value-added excises, which Israel collects as the authority at the borders and which it has withheld from the Palestinian government to achieve political goals.)<sup>103</sup> Ḥamās now sees that it has a major interest in the tunnel system, which gives it greater freedom of action from Israel, major financial benefits, and an alliance with the wealthy business class that also benefits from the system.<sup>104</sup> The International Crisis Group recently made the important observation that even if Egypt and the Gazan government reach agreement to turn Rafah into a major commercial crossing, Ḥamās, “which stands to lose financially, might not follow through on closing the tunnels” as Cairo would prefer.<sup>105</sup> This new financial base, and the enhanced internal authority that it gives the Ḥamās government, are a major part of why the Gazan government has “attributes of sovereignty” and “exercises power of a kind that those in Ramallah [the capital of the West Bank P.N.A.] can only dream about.”<sup>106</sup>

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<sup>101</sup> Personal observations, Gaza City and Rafah, June 2011 – July 2012.

<sup>102</sup> Barak Ravid, “Netanyahu tells cabinet: Israel lacks legitimacy for major Gaza operation,” *Haaretz* online, 23 August 2011 (accessed June 2013).

<sup>103</sup> Gisha, *Scale of Control*, pp. 19–20.

<sup>104</sup> Personal observations and conversations, Gaza City and Rafah, June 2011 – July 2012.

<sup>105</sup> International Crisis Group, *Israel and Hamas: Fire and Ceasefire in a New Middle East*, Middle East Report No. 133, 22 November 2012, available online, p. 16n111.

<sup>106</sup> Geoffrey Aronson, “Is Avigdor Lieberman onto something in Gaza?,” *Foreign Policy* online (“Middle East Channel”), 29 July 2010 (accessed January 2013).

## CHAPTER IV

### LEGAL ASSESSMENT OF GAZA'S CURRENT STATUS

With the facts and background on hand, we can now consider the current status of the Gaza Strip under international law. A functional legal definition of occupation can be found in two articles from the 1907 Hague Regulations and one from the 1949 Fourth Geneva Convention. Article 42 of the Hague Regulations considers territory occupied “when it is actually placed under the authority of the hostile army.”<sup>107</sup> The following paragraph adds: “The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>108</sup> Article 43 reads: “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”<sup>109</sup> The Fourth Geneva Convention, in Article 6, similarly holds the occupying power responsible only “to the extent that such Power exercises the functions of government in [occupied] territory.”<sup>110</sup>

The language used in the treaties – “when . . . actually placed under the authority,” “extends only to,” “power having in fact passed into the hands,” “all the measures in his power,” “as far as possible,” “to the extent that” – suggests two things. First, that the existence of an occupation is a specifically factual test; and second, that it can be treated as a matter of extent or degree, a spectrum, a continuum, a variable range, etc. There is no need to treat it as an all-or-nothing status. Law journals sometimes use the metaphor of a light-switch for this strict categorical approach: it has only two positions, on or off.<sup>111</sup> An oddity in the scholarly legal discussion of Gaza so far has been the frequent assumption that occupation law can only offer this kind of binary test. Even some authors who see clearly that this binary approach is problematic in the real

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<sup>107</sup> Hague IV, Regulations Art. 42, ¶ 1, at p. 2306.

<sup>108</sup> *Ibid.*, Art. 42, ¶ 2, at p. 2306.

<sup>109</sup> *Ibid.*, Art. 43, at p. 2306.

<sup>110</sup> Geneva IV, Art. 6, ¶ 3, at p. 292.

<sup>111</sup> Shany, “Binary Law,” p. 73.

world still accept it without argument as the correct legal interpretation.<sup>112</sup> But the language of the legal instruments does not mandate this, and it is not an ideal approach for complicated real-world cases. The language from the treaties is much more compatible with the flexible approach. It is true that the Hague Convention linked its partial-occupation language to territory, but this does not automatically rule out a spectrum approach to occupation authority as well. If this point was in doubt before 1949, the language from Article 6 of the Fourth Geneva Convention adopted that year (quoted above) clearly allows for a partial approach to occupation authority. This approach would also seem to be implicit in the Geneva Convention's position that authority over education, child care,<sup>113</sup> medical establishments, and health and hygiene services<sup>114</sup> are not automatically taken over by the occupying power but should where possible be run in cooperation with local authorities. Interestingly, the Negotiations Affairs Department of the P.L.O., which generally argues that the disengagement from Gaza did not change the situation, has commented that "the absence of a 'permanent' Israeli military presence and illegal settlers will mark a significant change in Gaza's 37-year-history of belligerent Israeli occupation. The Fourth Geneva Convention does indeed contemplate changes in the *degree of occupation*."<sup>115</sup>

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<sup>112</sup> See e.g. *ibid.*, *passim*, esp. pp. 69, 76–7, 85–6; Solomon, *passim*, esp. pp. 70, 81, 85–9. These two pieces are notable because they find the binary approach to be highly problematic – it is the title subject of Shany's article – and yet they still assume without argument that it is legally valid. Most articles in legal journals do not question this approach at all, but simply aim for an argument of 100% or 0% occupied, according to the author's view. See e.g. Mustafa Mari, "The Israeli Disengagement from the Gaza Strip: An End of the Occupation?," *Yearbook of International Humanitarian Law*, vol. 8 (2005), pp. 356–68, *passim*, esp. pp. 366–7. Shany himself accepted the binary framework in his first article on post-disengagement Gaza. Yuval Shany, "Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement," *Yearbook of International Humanitarian Law*, vol. 8 (2005), pp. 369–83, *passim*, esp. p. 383.

<sup>113</sup> Geneva IV, Art. 50, ¶¶ 1, 3, at p. 320.

<sup>114</sup> *Ibid.*, Art. 56, ¶¶ 1, 2, at p. 324.

<sup>115</sup> P.L.O. Negotiations Affairs Department, "Israel's 'Disengagement' Plan: Gaza Still Occupied," updated September 2005 version, posted online (accessed February 2013), at section II.C (emphases in original). It seems that the original version of this document, first issued in October 2004, went on to state that "Israel will continue to 'occupy' the Gaza Strip, but will only be bound to those aspects of the Geneva Convention within the ambit of its exercise of authority." Quoted in Aronson, "Israel's Disengagement," p. 55. This sentence does not appear in the updated version, and unfortunately the earlier version appears not to be available on the Department's website as of this writing (June 2013).

What is the existing degree of occupation? As discussed in the previous chapter, the most important change in authority is the shift of power over the southern border from Israel and a collaborating Egyptian government to Gaza and a realigned Egyptian government. That change means an end to the siege and an independent Gazan door onto the outside world. But the whole southern border with Egypt is only 10.8% of Gaza's perimeter, or 18.0% of its land perimeter.<sup>116</sup> With such a limited degree of international autonomy, Gaza is far from being a sovereign entity. The limited opening on the southern border may mean that the siege is over, but trade via sea and air is so important to modern states that a country does not have regular "freedom of movement" on the international scene without it.

Deciding the status of Gaza after 2011 depends on weighing these factors in particular against each other. It is this disruption of the Disengagement Plan's "external envelope" – the fact that Israel still controls all access *except for* one small area – that most complicates the balancing test. Analysis of this kind of reduced or partial form of occupation has not been widespread to date. As mentioned earlier, legal scholars have not answered the question outside of a binary framework. None of the law journal articles cited in this thesis takes a partial-occupation approach, or even accepts that such an approach is legally available. Most legal analyses of the new situation in Gaza came within the first five years of the Disengagement Plan's announcement. Little new commentary has appeared after the early months following Operation Cast Lead, which brought a new round of legal attention to this question because of its significance for the legal standards used to judge that military action. But the most important development concerning Gaza's status – the loss of Israeli control, direct or indirect, over the southern border – only developed afterwards, especially from May 2011 on. A general legal reappraisal is due because of this change.

Commentators not writing from an academic law background have also tended not to address the partial-occupation possibility. Geoffrey Aronson, considering these issues before the Disengagement Plan had been implemented, wrote that "If the security envelope is retained, . . . Israel would still qualify as the occupying power under the

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<sup>116</sup> My calculation, based on figures from Central Intelligence Agency, *World Factbook* online, s.v. "Gaza Strip" (accessed March–April 2013) ("Land boundaries" and "Coastline" under "Geography" section).



internationally accepted Hague standard insofar as it would still be exercising effective military control of the Strip.” But he did not analyze what would happen if Rafah was excepted from the envelope.<sup>117</sup> Sara Roy, on the other hand, has written that “Whether or not Israel eventually withdraws from the Philadelphi corridor” – another name for the Gazan-Egyptian border – “is ultimately irrelevant,” because its control “over Gaza’s airspace and territorial waters . . . translates into full control over the movement of people and goods into and out of the Strip.”<sup>118</sup> But that is an exaggeration. By definition, Palestinian control over a crossing point where Israel is absent means at least *some* control over movement of people and goods. Some nongovernmental organizations, perhaps because of their work on the ground, have taken the degree-of-occupation approach proposed here. Gisha, in particular, and also apparently the International Committee of the Red Cross, holds that “Israel’s responsibility for the Gaza Strip extends to the areas which Israel controls. . . . In the areas in which Israel gave up its control and allowed others to exercise control, its responsibility is reduced.”<sup>119</sup>

Plainly, Gaza is not a fully sovereign entity, though it has moved slightly closer to that status. The limits on its sovereignty come from military dominance by another country. Occupation law – interpreted flexibly, instead of on the binary model – is the body of law designed and best suited to cover this situation. There are other scenarios in which a country can be something less than a sovereign independent state – as part of a commonwealth or a trust territory, for example – but these are based on consent, which is itself a way of respecting sovereignty. A country can waive a part of its ordinary sovereignty in order to receive some benefit it sees in a different international arrangement. But when a country loses effective control over its national life to a foreign enemy’s military power, occupation is the best-developed international-law concept to govern the situation. If Gaza is not sovereign in many ways because of Israeli military power, then legally it makes most sense – and is really only fair – to hold that it is still

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<sup>117</sup> Aronson, “Israel’s Disengagement,” p. 51. Aronson does raise this issue, but his remarks are inconclusive. *Cf. ibid.*, pp. 51, 53, 58, 62.

<sup>118</sup> Sara Roy, “A Dubai on the Mediterranean,” *London Review of Books*, vol. 27, no. 21, 3 November 2005, pp. 15– 18, at p. 15.

<sup>119</sup> Gisha & Physicians for Human Rights, *Rafah Crossing*, p. 149. The authors report that the Red Cross “has a similar position,” though a citation supporting this point is not provided. *Ibid.*, p. 149n12.

occupied in those ways. A 2008 article in the major Israeli law journal – by an author who in fact holds that the occupation is over – commented accurately that “Israel seeks to evade its responsibilities as an occupier but, on the other hand, to continue [to] control important aspects of life in Gaza.”<sup>120</sup> Such a strategy, which perpetuates injustice and leaves the Gazan population with dangerous gaps in its legal protection, should not receive legal approval.

Recognizing that Gaza’s status has shifted from one of full occupation has a number of legal implications. One is that responsibility for the population’s well-being has to be looked at on a case-by-case basis under the specific provisions of occupation law. Israel will only have responsibility for those areas, like electricity, where it continues to have power. Many sectors will fall under the full authority and responsibility of the Gazan government. Law and public order and the large majority of administrative functions are already in this category.

Another legal result, with far-reaching consequences, is that many military actions on both sides will no longer be governed by occupation law but by the regular law of armed conflict. Armed Palestinian acts, even when they only target military sites, are not likely to be characterizable as “resistance to occupation” under these circumstances. Without a specific link to some continued aspect of occupation, they become armed attacks across an international border, which have the potential to reach the level of aggression. On the other hand, Palestinian military actions may also, depending on circumstances, become “legitimate acts of self-defense across a border.”<sup>121</sup> Israeli military actions aiming to impose measures for its own security inside Gaza no longer have any legal legitimacy, since the occupying state’s security powers are linked to “fulfil[ing] its obligations” for the well-being of the population, “maintain[ing] the orderly government of the territory,” and protecting “the members and property of the occupying forces or administration” in such territory.<sup>122</sup> Israel might continue to take military action to protect areas where its administration of Gazan affairs still exists (to prevent attacks on the border crossings which it still operates, for example), but otherwise

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<sup>120</sup> Shany, “Binary Law,” p. 82.

<sup>121</sup> Aronson, “Israel’s Disengagement,” p. 57.

<sup>122</sup> Geneva IV, Art. 64, ¶ 2, at p. 328.

its use of force is limited by the ordinary law of self-defense, which does not allow for extraterritorial imposition of security measures. The legally permitted form of military action will also change. An occupying power's security authority is closer to a governmental policing framework than to the rules of war, focusing on steps such as detention and internment. The law of armed conflict, on the other hand, is about inflicting casualties on the enemy. Israeli military actions after disengagement – provided that they meet the requirements of self-defense – may therefore legally be much more violent, focusing on killing Gazan combatants rather than detaining them.

Clearly, many of the legal rules on government, the population's well-being, and armed conflict will shift with the new *status quo* in Gaza. A full discussion of these changes is beyond the scope of this thesis. Future legal analysis could usefully be focused on specific, provision-by-provision examination of the Geneva and Hague Conventions' rules on occupation and how they relate to the new situation in Gaza. This analysis would both provide answers to where responsibility and authority lies in particular areas, and help define the exact extent to which the occupation is still in place.

## CHAPTER V

### CONCLUSION: THE LEGAL DEBATE AND ITS PRACTICAL SIGNIFICANCE

This thesis has argued that, because of the factual changes occurring in Gaza after 2005 and particularly from 2011 on, a new legal reality of partial occupation should be recognized. This approach would be in accordance with the language of the relevant international treaties, would be able to respond in a nuanced way to a complex factual situation, and most importantly would give necessary legal protection to a population that has suffered far too much. Legal questions might seem abstract, but they can have concrete results. The improved climate in international law governing war and human rights is part of the reason why Israel has not “solved” its conflict with the Palestinians by expelling them completely, as happened in similar conflicts during earlier centuries. There are continued reasons for concern today if occupation law is pushed aside in Gaza. This branch of law, because it recognizes that control and responsibility must be linked, offers a higher standard of protection than the law of armed conflict which might otherwise govern all events in Gaza. As noted earlier, for example, Gaza is still dependent on Israel for most of its electricity. Yoram Dinstein comments that

The notion that a Belligerent Party in wartime is in duty bound to supply electricity and fuel to its enemy is plainly absurd. The sole reason for the existence of an obligation to ensure such supplies for the benefit of the civilian population – even at a minimal level – is that the occupation is not over.<sup>123</sup>

This is one of various cases involving responsibility for the well-being of the civilian population where the law of armed conflict would leave a dangerous gap.

Probably the failure to accept a mixed scenario – partial occupation, partial local control – comes from the ideological splits that often crop up around the Israel-Palestine conflict. It is true that the finding of partial occupation is not the neatest or most “satisfying” result. It leads to a more involved, case-by-case legal framework, instead of a global “bright-line” rule that can answer the question quickly and simply. But it is not *too* complicated to take this case-by-case approach, and it is not that the law cannot handle it. Many fields of law contain complexity and offer cases that cannot be decided

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<sup>123</sup> Dinstein, ¶ 669, p. 279.

with binary, bright-line rules. Constitutional law, for example, has to deal with divisions of power between governmental branches and confronts cases in which it is not always clear where one branch's authority ends and the other's begins. This offers a close analogy to the kind of analysis – looking closely at where control and responsibility are held – that is appropriate for the Gazan case. If legal authors have so far avoided this approach, then, it is most likely not because of legal necessity but because the ideological divide over the conflict has reached this field as well. My conclusion, however, is that the welfare of the population would be better served by a kind of law that can tackle nuances and mixed responsibility.

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