

DISENGAGED OCCUPIERS:

THE LEGAL STATUS OF GAZA

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TABLE OF CONTENTS

EXECUTIVE SUMMARY [7]

CHAPTER 1: INTRODUCTION [17]

CHAPTER 2: ISRAEL CLAIMS IT OWES NO OBLIGATIONS TO GAZA RESIDENTS [21]

CHAPTER 3: ISRAEL CONTINUES TO EXERCISE EFFECTIVE CONTROL OVER GAZA [29]

A. Israel Controls Movement to and from Gaza via Land Crossings [32]

1. Control over Movement of People [32]
2. Control over Movement of Goods [41]

B. Israel Exercises Complete Control of Gaza's Airspace and Territorial Waters [47]

C. Israel Controls Movement Within Gaza through Periodic Incursions and a "No-Go Zone" [49]

D. Israel Controls the Palestinian Population Registry [50]

E. Israel Exercises Control over Gaza's Tax System and Fiscal Policy [54]

F. Israel Exercises Control over the Palestinian Authority and Its Ability to Provide Services to Gaza Residents [56]

CHAPTER 4: ISRAEL CONTINUES TO OWE OBLIGATIONS TO GAZA RESIDENTS UNDER THE LAW OF OCCUPATION [63]

A. The Definition of Occupation [64]

B. Israel Continues to Bear Responsibility Even if the Occupation of Gaza Is Effected through Nontraditional Means [66]

1. Under the Martens Clause and Israeli Law, Humanitarian Obligations Should be Interpreted Expansively and Purposively [66]

2. Technological Advances Have Reduced the Dependence on Ground Troops [69]

3. Interpreting Humanitarian Law Requires a Contextual Analysis [72]

C. Israeli Control of Gaza Meets the Criteria for Applying the Hague Regulations and Fourth Geneva Convention Regarding Occupation [75]

1. Occupation for Purposes of Humanitarian Law Is Determined By Effective Control and Does Not Require the Continuous Presence of Ground Troops [75]

2. Ending Occupation Requires Transfer Of Sovereign Authority – Or At Least Refraining from Interfering with Exercise of Governmental Authority [82]

D. Israel Would Owe Post-Occupation Obligations to Palestinians in Gaza [89]

E. Israel Owes Obligations to Gaza Residents under Human Rights Law and Israeli Law [92]

1. Obligations under International Human Rights Law [92]

2. Obligations under Israeli Law [94]

CHAPTER 5: CONCLUSION [97]

APPENDIX: DEFENSE MINISTRY LETTER RE: RAFAH CROSSING [102]

EXECUTIVE SUMMARY

ISRAEL CLAIMS IT OWES NO OBLIGATIONS TO GAZA
RESIDENTS

On September 12, 2005, Israel completed its disengagement plan by removing Israeli settlements and evacuating permanent military installations from Gaza. Upon that completion, Israel declared an end to the military government that had administered the Gaza Strip since Israel's capture of the territory in 1967. Three days later, in a speech before the United Nations General Assembly, Israeli Prime Minister Ariel Sharon declared "the end of Israeli control over and responsibility for the Gaza Strip."

While at the time, Israel refrained from declaring an end to the occupation, since then, in a series of statements made in Hebrew before Israel's Supreme Court, the Government of Israel has expressed the position that "disengagement" extinguished its legal obligations towards Gaza, thus leaving the running of Gaza and the fulfillment of obligations vis à vis Gaza residents – to the sole responsibility of the Palestinian Authority.

8

Israel's position is based on defining "effective control", the legal test for occupation in the international law, as dependent on a permanent ground troop presence in the territory.

This paper shows that in contrast to the rhetoric used to describe the disengagement plan, Israel has not relinquished control over Gaza but rather removed some elements of control while tightening other significant controls. Far from improving the economy and welfare of Gaza residents, Israeli actions since September 2005 – including severe restrictions on the movement of people and goods in and out of Gaza and an economic stronghold on the funding of civil services – have contributed to an economic and humanitarian crisis in Gaza not seen in the 38 years of Israeli control that preceded the withdrawal of permanent ground troops.

As will be explained, completion of the disengagement plan has not absolved Israel of its obligations to permit and to facilitate the proper functioning of civilian life in the Gaza Strip. Israel continues to owe legal obligations to residents of Gaza in the significant areas in which their lives are subject to

EXECUTIVE SUMMARY

DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA

and affected by Israeli control. That responsibility exists under the international law of belligerent occupation, but it is also imposed by international human rights law and Israeli constitutional and administrative law. Israel is bound to respect the rights of Gaza residents in its control of Gaza's borders, population registry, tax system, and other areas, and it also owes positive duties to permit and to facilitate the proper functioning of civilian institutions in Gaza, pursuant to international humanitarian law.

Israel continues to control Gaza through an "invisible hand": control over borders, airspace, territorial waters, population registry, the tax system, supply of goods, and others. Gaza residents know that their ability to use electric lights, to buy milk, or to have the garbage collected depends on decisions made by Israel. At times, soldiers operate in the streets of Gaza, but even after they leave, Israeli control over the lives of Gaza residents remains constant, as we will show.

Gisha pursues three goals in issuing this paper:

1. To make the international community aware of Israel's position that Gaza is no longer occupied and that Israel no longer considers itself bound by the provisions of the Geneva Conventions and Hague Regulations concerning occupied territory in its treatment of Gaza residents;
2. To describe the ways in which Israel continues to control Gaza and therefore continues to owe legal obligations to Gaza residents, obligations which must be fulfilled in order for civilian life in Gaza to be sustained and developed;
3. To provide a resource for scholars, lawyers, humanitarian aid workers, and policy-makers concerned about the humanitarian situation in Gaza and the rights of Gaza residents whose lives are influenced by Israeli control.

ISRAEL CONTINUES TO EXERCISE EFFECTIVE CONTROL OVER THE GAZA STRIP

Israel's withdrawal of settlements and its permanent military ground installations from the Gaza Strip did not end Israeli control of Gaza but rather

9

EXECUTIVE SUMMARY

changed the way in which such control is effectuated. These forms of control have contributed to an unprecedented deterioration in the economic and social welfare of Gaza residents.

Israel continues to control Gaza through:

- Substantial control of Gaza's land crossings;
- Control on the ground through incursions and sporadic ground troop presence ("no-go zone");
- Complete control of Gaza's airspace;
- Complete control of Gaza's territorial waters;
- Control of the Palestinian population registry (including who is a "resident" of Gaza);
- Control of tax policy and transfer of tax revenues;
- Control of the ability of the Palestinian Authority to exercise governmental functions;
- Control of the West Bank, which together with Gaza, constitute a single territorial unit.

10

A. Israel Controls Movement to and from Gaza via Land Crossings

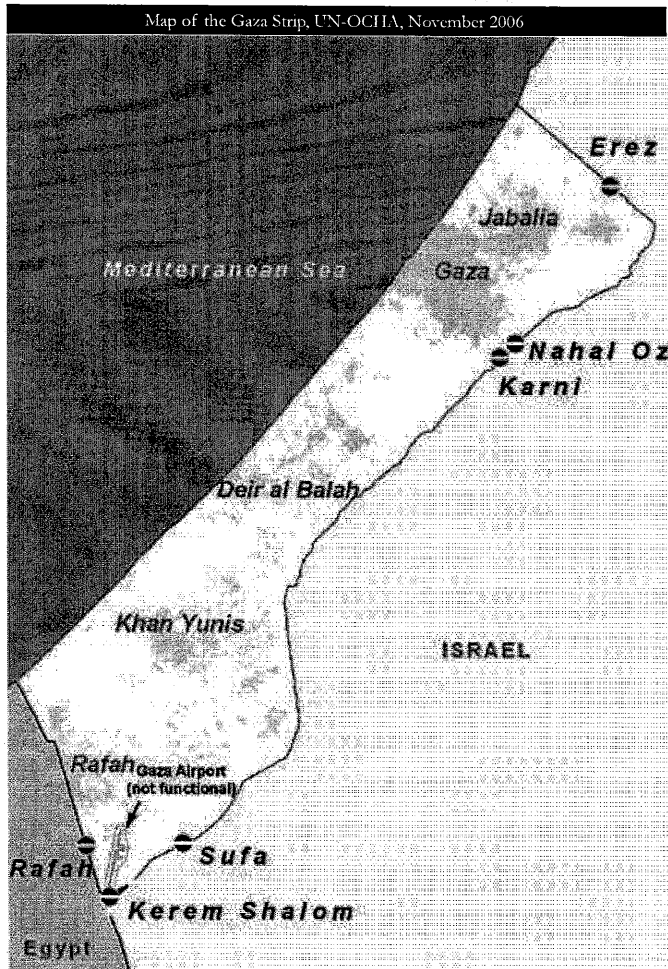
Despite disengagement, Israel retains control over Gaza's land crossings, including complete control over the entrance of foreigners and imports as well as ultimate control over the entrance and exit of all persons and goods by virtue of the ability to close all crossings into Gaza.

.....● Control over Movement of People

Under the terms of the Nov. 15, 2005 Agreement on Movement and Access, entered into by Israel and the Palestinian Authority, the Palestinian Authority operates Rafah Crossing under the supervision of European Union monitors present at the crossing and Israeli security officials who monitor the operations via live video footage and supervision of passenger lists. Travel into Gaza from Egypt via Rafah is restricted to Palestinians registered in the Israeli-controlled Palestinian population registry. Therefore, foreigners may

DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA

Map of the Gaza Strip, UN-OCIA, November 2006



EXECUTIVE SUMMARY

enter Gaza only via Israeli-controlled crossings in the north.

Israel also exercises ultimate control over the entrance into and exit from Gaza of all persons, including Palestinian ID card holders, and has used that control periodically to close Gaza to the outside world. Israeli consent and cooperation are required for Rafah Crossing to open, because the agreement for opening the crossing requires the participation of Israeli, Palestinian, and European Union officials. Israel also controls whether EU monitors will reach Rafah by issuing security warnings, telling the EU monitors whether Rafah may open. Reports and internal military documents suggest that Israel has used the closure of the crossing to exercise pressure on Gaza residents, in order to bring about the return of the Israeli soldier captured on June 25, 2006. Indeed, in the first year following the completion of its disengagement program, Israel kept Rafah Crossing closed for 148 days, meaning that Gaza was cut off from the outside world 42% of the time.

.....● Control over Movement of Goods

12

Israel completely controls the import of goods into Gaza and exercises substantial control over exports from Gaza to third countries and to the West Bank. Israel has imposed severe restrictions on imports which have, at various points, caused shortages of basic goods that threatened the health and welfare of Gaza residents.

B. Israel Exercises Complete Control of Gaza's Airspace and Territorial Waters

Since occupying Gaza in 1967, Israel has exercised complete and exclusive control of Gaza's air space and territorial waters. There is no airport or sea port in Gaza and no passage for people or goods into Gaza via the sea or air.

C. Israel Controls Movement Within Gaza through Periodic Incursions and a "No-Go Zone"

Israel controls movement within the Gaza Strip through sporadic troop

• DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA •

presence and artillery fire from positions along its borders with Gaza. Since June 2006, Israeli troops have operated continuously in Gaza, including along Gaza's border with Egypt.

Israel controls a northern section of the Gaza Strip where it declared, in December 2005, a "no-go" zone by warning residents that they will be shot if found in that area. Additional no-go zones within the Gaza Strip are occasionally declared by Israel.

D. Israel Controls the Palestinian Population Registry

The definition of who is "Palestinian" and who is a resident of Gaza and the West Bank is controlled by the Israeli military. Even when Rafah Crossing is open, only holders of Palestinian ID cards can enter Gaza through the crossing, therefore control over the Palestinian Population Registry is also control over who may enter and leave Gaza. Since 2000, with few exceptions, Israel has not permitted additions to the Palestinian Population Registry. As a result, tens of thousands of Gaza residents, including women who entered Gaza on visitors' permits and married Gaza residents, are living in Gaza but cannot receive Palestinian ID cards. Thus, they are trapped in Gaza – if they leave they will not be permitted to return.

13

E. Israel Exercises Control over Gaza's Tax System and Fiscal Policy

Israel controls the tax system in the territories of the Palestinian Authority, with the exception of direct taxes such as income tax and some kinds of value-added ("VAT") and customs taxation. This system affects civilian life in Gaza, including the ability of nonprofit organizations to receive tax-exempt donations of equipment or materials.

F. Israel Exercises Control over the Palestinian Authority and Its Ability to Provide Services to Gaza Residents

Israel exercises control over the ability of the PA to provide services to Gaza and West Bank residents and the functioning of its governmental institutions, including by control over the transfer of tax revenues which amount

• EXECUTIVE SUMMARY •

to 50% of the PA's operating income. Moreover, Gaza and the West Bank constitute two parts of a single territorial unit, with a unified and undifferentiated system of civilian institutions spread throughout Gaza and the West Bank, funded from the same central budget and run by the same undifferentiated central authority. Therefore, Israel's continued direct control over the West Bank is a form of indirect control over Gaza.

ISRAEL CONTINUES TO OWE OBLIGATIONS TO GAZA RESIDENTS UNDER THE INTERNATIONAL LAW OF OCCUPATION

Israel's contention that withdrawal marks the end of its obligations vis-à-vis residents of Gaza is founded upon an overly narrow understanding of occupation in the terms of international law as being defined exclusively by the continuous presence of troops in a given territory. Occupation, in fact, has long been understood in terms of the ability to exercise effective control over a territory, a concept that is intimately linked with, but not entirely dependent upon, military ground presence in the territory. The situation in Gaza indicates that Israel does exercise effective control over significant aspects of life in Gaza, and thus, in the areas in which it exercises such control, Israel owes obligations to Gaza residents under the international humanitarian law of occupation. Such responsibility will continue until Israel cedes effective control.

14

Gisha takes the position that the essence of the term occupation lies in the notion of control, that is, military control of the occupied territory by a foreign power.

The critical question is "how much" actual control yields a situation of occupation – a situation in which the foreign power exercises sufficient control as to incur obligations to residents of the territory subject to its authority. There are probably no bright lines to deal with this question. But on a case-by-case basis, we can identify where control by a foreign government over a territory not part of its sovereign land rises to the level of occupation. The level of control over Gaza, as this Paper argues, is quite clearly a factual instance of occupation.

• DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA

A secondary question is to what extent the obligations owed by the occupier are affected by the level of control exercised. Gisha's argument is that the withdrawal of settlers and permanent military installations from the Gaza Strip was a change in degree but not of kind: in some areas, the degree of Israeli control over life in Gaza diminished, without the kind of renunciation of control that would actually end Israel's obligations under international humanitarian law.

The development of technology has made it possible for Israel to assert effective control over significant aspects of civilian life in the Gaza Strip without a continuous military ground presence. Moreover, in evaluating Israeli control over Gaza, one should look not just at the military force, but also the administrative control created over the course of four decades of occupation, control which is nuanced but nonetheless tangible and significant. This administrative control of civilian life has intensified since the completion of Israel's disengagement plan.

The framework for interpreting Israel's obligations vis à vis Gaza residents must take into account the purpose of humanitarian law – to protect civilians – a purpose which tips the balance, in cases of doubt, in favor of applying protections for civilians. That purposive approach to questions of applicability of humanitarian protections is well-grounded in international humanitarian law and in Israeli law.

15

Furthermore, the purpose of humanitarian law argues against a binary, all-or-nothing approach to imposing humanitarian law duties and instead requires a careful look at the context in which control is exercised. Different levels of responsibility apply in various areas, commensurate with the scope of control. 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.

These legal and factual issues are explored in detail in the paper that follows.