An Intimate Disengagement: Israel's withdrawal from Gaza, the Law of Occupation and of Self-Determination

*Iain Scobbie**

1 INTRODUCTION

As the final text of this article was being prepared, Israel launched Operation Summer Rain on 28 June 2006 in response to the taking of Corporal Gilad Shalit by Palestinian militants following an attack on Israel Defence Forces on 25 June 2006. At the time of writing (July 2006), Israel's military operations in Gaza are continuing, and the final outcome cannot yet be discerned. This is not the appropriate place to discuss the legality of these actions – whether those of Israel or those of armed Palestinian groups. As matters are still in a state of flux, it is premature to reach a definitive legal conclusion. Nevertheless, the deployment of Israel Defence Forces in Gaza has an obvious pertinence to the issue examined in this article, the international status of Gaza following Israel's apparent withdrawal in August 2005. Consequently, where necessary and relevant, a provisional and tentative legal assessment of the implications of Operation Summer Rain will be attempted.

2 THE ISSUE IN QUESTION

In August 2005, Israel evacuated its settlements and withdrew its land forces from Gaza. This was in accordance with its Revised Disengagement Plan of 6 June 2004,[1] the implementation of which was intended to ensure that:

> In any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there

* Sir Joseph Hotung Research Professor in Law, Human Rights and Peace Building in the Middle East, School of Oriental and African Studies, University of London.

1 Available at: <www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm>.

> are areas which will be part of the State of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.[2]

To this end, Israel claimed that its evacuation of Gaza had the consequence that there was no longer any permanent presence of Israeli security forces within Gaza.[3] Sub-section 1 of Section 3 (*Security Situation following the Relocation*), however, provides:

1. The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.
2. The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.
3. The State of Israel reserves its fundamental rights of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.

The primary implication of the Disengagement Plan was set out in Principle Six (Political and Security Implications) of the Revised Disengagement Plan. This provides:

> The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians within the Gaza Strip.

The meaning of Principle Six is intentionally ambiguous: it refers to the termination of Israel's responsibility for the population of Gaza, but says nothing about the status of the territory itself. Before the implementation of the Revised Disengagement Plan, Gaza was territory occupied by Israel: did the implementation of the plan entail a change in the international status of Gaza? In particular, once Israeli troops and settlers were withdrawn, was Gaza no longer occupied?

3 GAZA – OCCUPIED OR NOT OCCUPIED?

In anticipation of the implementation of the Revised Disengagement Plan, the Canadian Government's International Development Research Centre commissioned a report – the Aronson Report[4] – to examine the implications of disengagement. This noted that when then-Prime Minister Sharon initially announced the unilateral withdrawal plan in April 2004, one of the declared objectives was to end Israel's role and responsibility as the occupying power in Gaza. In particular, Article 2 of the 18 April 2004 Disengagement Plan provided that, the completion of withdrawal would mean that there would be "no permanent Israeli civilian or military presence" in the evacuated areas, and

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2 Revised Disengagement Plan, Section 1 (*Political and Security Implications*), Principle Three.
3 Revised Disengagement Plan, Section 2.A (*Main Elements: The Process*), Article 3.1, *The Gaza Strip.*
4 A "lightly edited version" of this report has been published as Aronson, G., *Issues arising from the implementation of Israel's disengagement from the Gaza Strip*, 34 Journal of Palestine Studies 49 (2005).

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therefore there would "be no basis for the claim that the Gaza Strip is occupied territory".[5] This express reference to Gaza as "occupied territory" was deleted in the 6 June 2004 Revised Disengagement Plan which was approved by the Cabinet.

The Aronson Report argues that one of the reasons for this deletion was that the Israeli Cabinet had received legal advice to the effect that any claim regarding the end of occupation could not be maintained while Israel remained in control of the Philadelphi corridor (the Salah al Din border road), essentially a buffer zone along the Egypt/Gaza border, and arguably also ports and airports. Retaining control of these areas was seen as enough to give Israel *de facto* control over the territory and thus maintain the occupation.[6] In the event, Israel reached an agreement with Egypt which took over security functions in the Philadephi Corridor,[7] but Israel remains in effective control of Gaza's airspace and maritime zones. Further, passage through the Rafah crossing between Gaza and Egypt is regulated by an agreement concluded between Israel and the Palestinian Authority, subject to an annexed statement of principles, and under the supervision of the European Union Border Assistance Mission.[8] Nevertheless, in a *Ha'aretz* article pubished in December 2004, Shavit Matias, the deputy to Israel's Attorney-General for international law was quoted as saying:

> When we quit Philadelphi, even if the Palestinians don't yet have a port or airport, the responsibility will no longer be ours. The area will not be considered occupied territory. When the Palestinians have a crossing to Egypt and additional options for transferring merchandise, even if there is no port yet, we have no responsibility.[9]

The question under consideration in this article is quite simple: is this view correct?

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5 Available at: <http://electronicintifada.net/bytopic/historicaldocuments/264.shtml>; and also: <www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm>.

6 Aronson, above n. 4, pp. 49-50: see also Roy, S., *Praying with their eyes closed: reflections on the disengagement from Gaza*, 34 Journal of Palestine Studies 64 (2005), p. 70.

7 For an account of the basic principles of the Israel-Egypt "military arrangement" on the deployment of Egyptian border guards on the Egyptian side of the corridor, see the Israeli Cabinet Communique of 28 August 2005, available at: <www.mfa.gov.il/MFA/Government/Communiques/2005/Cabinet+Communique+28-Aug-2005.htm>.

8 The instruments dealing with the Rafah crossing – the 15 November 2005 Israel-PA Agreement on Movement and Access and annexed Agreed Principles for Rafah Crossing, and 23 November 2005 Agreed Arrangement on the European Union Border Assistance Mission at the Rafah Crossing Point on the Gaza-Egyptian Border (concluded at the invitation of Israel and the Palestinian Authority) may be found at: <www.nad-plo.org/listing.php?view=palisraeli_roadagree>; and at: <www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm>. See also, the EU Council press release 15011/05 (Presse 322) which gives an account of the mission of the Border Assistance Mission, available at: <http://register.consilium.eu.int/pdf/en/05/st15/st15011.en05.pdf>.

The crossing was closed by Israel following the capture of Cpl. Shalit. Israel claimed this was done to prevent him being smuggled into Egypt.

9 See Aronson, above n. 4, p. 51.

Commentators are divided on this. Some, such as Aronson, argue that because Israel retains a "security envelope" around Gaza, controlling who and what goes in and out of the territory, disengagement did not terminate occupation.[10] In contrast stand the revised views of Bruderlein on the nature of effective military control.[11] Bruderlein states that effective military control is essentially a question of fact, and is not dependent on the size and distribution of the occupying forces within a territory. He cites the *Tsemel* case before the Israel Supreme Court which held that occupation forces do not need to be in actual control of all the territory and population, but simply have the potential capability to do so.[12] This ruling is in accordance with the decision in the *List* case by the U.S. Military Tribunal at Nuremberg,[13] and also with the *Naletili and Martinovi* case before the International Criminal Tribunal for the Former Yugoslavia. In the latter, the Trial Chamber referred to an occupant having "a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt".[14] Nevertheless, Bruderlein continues, and this is the change introduced into the revised version, that,

> some form of military presence on land remains a necessary condition for an occupation, i.e. a military occupation cannot be solely imposed by the control of the national airspace by a foreign air force...or of the national seashore by a foreign navy. The law of occupation belongs historically to the law of land warfare which requires, at its core, a land-based security presence.[15]

Again the question arises: which view is correct? Is the question wider than one that is dependent simply on the law of land warfare? Bruderlein's positioning of occupation questions solely within this context may be seen as rather formalistic. It is important to bear in mind that the situation is not one of creating an occupation, which as a practical matter would appear to require

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10 Aronson, above n. 4, p. 51; see pp. 51-53.

11 See Bruderlein, C., *Legal aspects of Israel's disengagement plan under international humanitarian law*. <http://www.ihlresearch.org/opt/pdfs/briefing3466.pdf>. This paper was initially issued in, and is dated, November 2004 but at some later point it was revised, modifying the original analysis of "effective military control". The paper does not indicate that it has been amended and, moreover, it retains its original date. I am grateful to Anne Massagee for drawing this to my attention.

12 See Bruderlein, above n. 11, p. 9, n.14. *Tsemel v. Minister of Defence*, HCJ 102/82, 37(3) Piskei Din 365: also cited employing a more extended quotation in Lein, Y., *One big prison: freedom of movement to and from the Gaza Strip on the eve of the Disengagement Plan* (B'Tselem/HaMoked: Jerusalem: 2005; and <www.hamoked.org.il/items/12800_eng.pdf>) pp. 73-74. *Tsemel* is summarised in 13 *Israel Yearbook on Human Rights* 360 (1983), see pp. 362-363 in particular. This and the following cases dealing with "effective occupation" are discussed in more detail below.

13 See *Trial of Wilhelm List and others* (the *Hostages* trial), VIII Law Reports of Trials of War Criminals 34 (1949), pp. 55-56.

14 *Prosecutor v. Naletili and Martinovi*, Case No.IT-98-34-T (trial judgment, 31 March 2003), available at: <www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf>, p. 74, para. 217. In support of this ruling, the Trial Chamber cited as authority the United Kingdom's *Manual of military law of war on land*, Part III, paras. 502 and 506 (1958); the United States' *The law of land warfare: Field manual No. 27-10*, Chapter 6, para. 356 (1956); and the New Zealand Defence Force's *Interim law of armed conflict manual*, paras. 1302.2, 1302.3 and 1302.5 (1992).

15 Bruderlein, above n. 11, p. 9.

the use of ground forces to create and maintain control,[16] but rather is whether an existing occupation has been terminated or maintained. Termination could well involve different considerations: the conditions required to end an occupation are not as clearly delineated in the governing instruments as those which determine whether and when an occupation has been established. As von Glahn comments, "most books on international law make little mention of the intricate and numerous problems arising at the end of...military occupation".[17]

6 EFFECTIVE CONTROL AND THE CHANGED NATURE OF WARFARE

When the Hague Regulations were adopted in 1907, aerial warfare was (at most) rudimentary, although Article 25 prohibited the attack or bombardment of undefended towns, villages, dwellings and buildings "by whatever means". This phrase was intended to encompass aerial warfare. On the same day the Conference adopted its various Conventions, 18 October 1907,[60] it also adopted Declaration XIV prohibiting the Discharge of Projectiles and Explosives from Balloons. This prohibited "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature". Although technically still in force, this Declaration has few parties and has been rendered obsolete by subsequent practice.

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57 *Prosecutor v. Naletili and Martinovi*: <www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf>, p. 74, para. 217.

58 *Anglo-Czechoslovak and Prague Credit Bank v. Janssen* (Australia: Supreme Court of Victoria, 1943), 1943-45 Annual Digest 43, p. 47.

59 On the interpretation of this provision, see Pictet, above, n. 22, pp. 21-22.

60 The Wright brothers' first flight of 39 metres, which lasted 12 seconds at an altitude of just over 3 metres, took place on 17 December 1907.

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Oppenheim-Lauterpacht indicates that international law is indifferent as to the manner by which authority is exercised over occupied territory,[61] and von Glahn thinks it at least theoretically possible that an occupation may be maintained through the control of the adversary's airspace.[62] Bruderlein, on the other hand, argues that land-based forces are indispensable for an occupation, which cannot be created by an adversary's control of airspace or maritime zones.[63] There is some virtue in Bruderlein's claim; he correctly notes that the no-fly zone over southern Iraq[64] did not amount to belligerent occupation, but should there not be a difference between the creation of an occupation and its subsequent maintenance? If, once an occupation is established, effective control lies in the capacity to make the authority of the occupying power felt within a reasonable time or, in the words of Israel's High Court, to "maintain control only by means of regular combat units", then is there any reason why this should not be done through aerial warfare? Indeed, the importance of air power was stressed by Major General Amos Yadlin in 2004 after he became head of Israeli military intelligence. An Israeli air force officer, he stated:

> Our vision of air control 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.[65]

Further, at least in the circumstances of Gaza, only to consider Israel's withdrawal of ground troops and continued control of its airspace in isolation is to ignore the wider context.

7 EFFECTIVE CONTROL AND GAZA – THE WIDER CONTEXT

Apart from the military method by which effective control may be exercised and Israel's enforcement of its "security envelope" around Gaza – its control of terrestrial borders, whether as principal or through the agency of Egypt and the E.U.'s Border Assistance Mission, and of Gaza's maritime zones and airspace – other issues are relevant to determine whether Gaza remained occupied after implementation of the Disengagement Plan.

An assessment of these issues must proceed at two distinct normative levels. General international law is relevant to the analysis of the situation not simply for Israel and Palestine but, importantly, also for third States. Equally pertinent, however, are the specific bilateral obligations assumed by Israel and Palestine

61 Oppenheim-Lauterpacht, above, n. 21, p. 35.
62 von Glahn, above, n. 16, pp. 28-29.
63 Bruderlein, above, n. 11, p. 9.
64 For an account, see Malone, D.M., *The International Struggle over Iraq: Politics in the U.N. Security Council 1980-2005* (Oxford U.P.: Oxford: 2006) 97-101; and also Schmitt, M.N., *Clipped wings: effective and legal no-fly zone rules of engagement*, 20 Loyola LA *International and Comparative Law Journal* 727 (1997-98).
65 Quoted in Li, D., *The Gaza Strip as laboratory: notes in the wake of disengagement*, 35 Journal of Palestine Studies 38 (2006), p. 48.

as a result of the instruments adopted during the Oslo process.[66] The 1969 Vienna Convention on the Law of Treaties does not govern the Oslo instruments because one of the parties, the Palestine Liberation Organisation, is not a State. The Vienna Convention consciously adopted a restricted definition of treaties for its purposes, reflected in Article 1 which expressly provides: "The present Convention applies to treaties between States."[67] Further, Article 2.1.a defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Article 3 of the Vienna Convention, however, provides that the Convention does not prejudice the legal force of "international agreements concluded between States and other subjects of international law", nor the application to them of rules contained in the Convention which have customary status.[68] On the basis of customary law, Watson convincingly argues that the Oslo instruments are binding bilateral treaties.[69]

Further, neither Israel nor Palestine has claimed that the 1995 Israel-Palestine Liberation Organisation Interim Agreement, in particular, has terminated as the result of the operation of the customary law of treaties following alleged material breach or by the operation of the *clasula rebus sic stantibus*.[70] Indeed, Section 1 (*Political and Security Implications*) Principle Seven of the Disengagement Plan expressly contemplates the continued applicability of these instruments:

> The process set forth in the plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply.

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66 Principally, the 1993 Israel-Palestine Liberation Organisation Declaration of Principles on Interim Self-Government Arrangements, 32 International Legal Materials 1525 (1993); 1994 Israel-Palestine Liberation Organisation Agreement on the Gaza Strip and Jericho Area, 33 *ibid* 622 (1994); 1995 Israel-Palestine Liberation Organisation Interim Agreement on Implementation of the Declaration of Principles, 36 *ibid* 551 (1997); 1997 Israel-Palestine Liberation Organisation Protocol concerning the Redeployment in Hebron, 36 *ibid* 650 (1997); 1998 Israel-Palestine Liberation Organisation Wye River Memorandum, 37 *ibid* 1251 (1998); and 1999 Israel-Palestine Liberation Organisation Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments Signed and the Resumption of Permanent Status Negotiations, 38 *ibid* 1465 (1999).

67 See the Final Draft Articles and Commentary on the Law of Treaties adopted by the International Law Commission in 1966, reproduced Watts, A., *The International Law Commission 1949-1998* (Oxford U.P.: Oxford: 1999), Volume II, p. 619, *Commentary to draft Article 1*, para. 2.

68 See *Commentary to draft Article 3*, Watts, above, n. 67, pp. 626-627.

69 See Watson, G.R., *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford U.P.: Oxford: 2000) pp. 57-102, and his *The "wall" decisions in legal and political context*, 99 American Journal of International Law 6 (2005), pp. 22-24: see also Benvenisti, E., *The Israeli-Palestinian Declaration of Principles: a framework for future settlement*, 4 European Journal of International Law 542 (1993); but compare Sabel, R., *Review of Watson's "The Oslo Accords"*, 95 American Journal of International Law 248 (2001), pp. 249-251.

70 See, e.g. Watson, above, n. 69 (*Wall decisions*), p. 23.

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Nevertheless, the implementation of the Disengagement Plan expressly contemplates a unilateral change by Israel of the legal status of Gaza – "the State of Israel is required to initiate moves not dependent on Palestinian cooperation"[71] – which, as Principle Six states, aims to "dispel the claims regarding Israel's responsibility for the Palestinians within the Gaza Strip".

A belligerent occupant bears duties in relation to the territory and its people; for instance, under Article 43 of the Hague Regulations, the duty to maintain public order within the territory, and under Articles 55 and 56 of 1949 Geneva Convention IV, the duties of ensuring that food and medical supplies are available to the population and of ensuring and maintaining public health and hygiene within the territory "to the fullest extent of the means available to it". As implementation of the Revised Disengagement Plan aimed to divest Israel of these and its other responsibilities, Principles Six and Seven are surely contradictory. For instance, Article XXXI.7 of the 1995 Israel-Palestine Liberation Organisation Interim Agreement on the West Bank and the Gaza Strip, which was re-affirmed in Article V of the Wye River Memorandum,[72] provides:

> Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.

If Principle Six envisages a unilateral change effected by Israel in the status of Gaza, then this entails a breach of Article XXXI.7. It is difficult to see what guarantee against prejudice Principle Seven may afford in this eventuality.[73]

Crawford comments that the Oslo instruments "are remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties".[74] That Israel did not relinquish authority within the Occupied Territories is clear from the provisions of the 1995 Interim Agreement which established and yet simultaneously circumscribed the powers of the Palestinian Interim Self-Government Authority (styled "the Council" in the Agreement). Pending its creation, these powers are to be exercised by the

71 Revised Disengagement Plan, Section 1 (*Political and Security Implications*), Principle One.

72 The Israeli Cabinet approved the Wye River Memorandum on 11 November 1998. This decision is available at: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Government+Decision+on+the+Wye+River+Memorandum+N.htm>. It is worth noting that paragraph 8 of this decision provided: "The government asserts that a unilateral declaration by the Palestinian Authority on the establishment of a Palestinian state, prior to the achievement of a Final Status Agreement, would constitute a substantive and fundamental violation of the Interim Agreement. In the event of such a violation, the government would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security areas in Judea, Samaria and Gaza as it sees fit. Israel reiterates its position, in accordance with the Agreement with the Palestinian Authority, that the final status must be the result of free negotiations between the parties without the implementation of unilateral steps which will change the status of the area." For commentary on this, see Crawford, above, n. 35, p. 445.

73 It should also be recalled that Section 1 (*Political and Security Implications*), Principle Three envisages the maintenance of settlements in the West Bank and thus contradicts, e.g. Interim Agreement Article XXXI.5 which expressly reserves the question of settlements for the permanent status negotiations.

74 Crawford, above, n.35, p. 433.

Palestinian Authority.[75] In implementing the 1993 Declaration of Principles, the 1995 Interim Agreement did not transfer sovereignty to the PLO but simply created a temporary régime until the outcome of the final status negotiations.[76] This is clear at the outset of the Interim Agreement, as Article I.1 provides:

> Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.

Article III.6 restricts the jurisdiction of the Council to those matters specified in Article XVII. In principle, the Council's jurisdiction is specified in Article XVII.1:

> In accordance with the [Declaration of Principles], the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for:
> (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis: and
> (b) powers and responsibilities not transferred to the Council.

In relation to paragraph (a), Crawford points out that although this ostensibly defines the jurisdiction of the Palestinian Authority in "normal territorial terms", in practical effect its competence is restricted to "jurisdiction over Palestinians (and visitors)".[77] Further, Article XVIII.2 restricts the legislative power of the Council to matters over which it has jurisdiction, subject to the exigencies of paragraph 4.a:

> Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the [Declaration of Principles], this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*.

These provisions clearly demonstrate that the Palestinian Authority does not possess the exclusive governmental powers which are characteristic of sovereignty. One can only concur with the opinion of a former Legal Adviser to the Israeli Ministry of Foreign Affairs that, under the Declaration of Principles and thus throughout the interim period, "the Palestinian Council will not be independent or sovereign in nature". Moreover:

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75 1995 Interim Agreement, Article I.2 provides: "Pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority established in accordance with the Gaza-Jericho Agreement, which shall also have all the rights, liabilities and obligations to be assumed by the Council in this regard. Accordingly, the term 'Council' throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority."

76 On the status and powers of the Palestinian Authority under the Interim Agreement, see Dajani, O.M., *Stalled between seasons: the international legal status of Palestine during the interim period*, 26 *Denver Journal of International Law and Policy* 27 (1997), pp. 60-74.

77 Crawford, above, n. 35, p. 444.

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> the military government will continue to be the source of authority for the Palestinian Council and the powers and responsibilities exercised by it in the West Bank and Gaza Strip.[78]

Of particular note is the retention by Israel of competence over foreign relations by virtue of Articles IX.5 and XVII.1.a. Singer argued that this was crucial in denying Statehood to the Palestinian entity pending the outcome of the final status negotiations.[79]

Consequently, the Palestinian Authority – "an interim local government body with restricted powers"[80] – may best be seen as an administration to which the occupant has devolved competence. The drafters of Geneva Convention IV had envisaged that this could occur during a prolonged occupation, without terminating that occupation.[81] As Bruderlein notes, the end of occupation requires the termination of the military control of the Occupying Power over the governmental affairs of the occupied population that limits that people's right to self-determination.[82] This resonates with Judge Huber's definition of independence in the *Island of Palmas case*, namely "the right to exercise therein, to the exclusion of any other State, the functions of a State".[83] Obviously occupation turns this on its head, as occupation lies in the exclusion of the right of the territorial sovereign to exercise power on its territory. Thus, for instance, in his separate opinion in the *Armed activities on the territory of the Congo* case, Judge Kooijmans quoted with approval from the United States' *Manual on the Law of Land Warfare*:

> occupation presupposes a hostile invasion, resisted or un-resisted, as a result of which the invader has rendered the invaded government incapable of exercising its authority, and [secondly] that the invader is in a position to substitute its own authority for that of the former government.[84]

Given the restrictions on the powers of the Palestinian Authority in the Interim Agreement, if Principle Seven of the Disengagement Plan is to be taken at face value in its avowal that "the plan is without prejudice to the relevant

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78 Singer, J., *The Declaration of Principles on Interim Self-Government Arrangements: some legal aspects*: <gopher://israel-info.gov.il:70/00/mad/dop/ 940201s.dop>, on file with author. This article was also published by the International Association of Jewish Lawyers and Jurists in 1 Justice 4 (1994).

79 See Singer, J., *Aspects of foreign relations under the Israeli-Palestinian Agreements on interim self-government arrangements for the West Bank and Gaza*, 26 Israel Law Review 268 (1994), pp. 269-273.

80 Crawford, above, n. 35, p. 444.

81 See Pictet, above, n. 22, pp. 62-63, and pp. 272-276. As Dajani notes, above, n.76, pp. 77-78, there is a presumption against the creation of a new State on a territory under belligerent occupation. These are generally seen as puppet States which lack independence. See also Crawford, above, n. 35, pp. 78-83 and pp. 156-157; and Marek, K., *Identity and Continuity of States in Public International Law* (Droz: Geneva: 1968, 2nd Edn.), pp. 110-120. Dajani (at pp. 90-91) argues that separation between the PLO and Palestinian Authority preserves Palestinian negotiators' independence from Israel, and thus avoids the application of this presumption.

82 Bruderlein, above, n. 11, p. 1.

83 *Island of Palmas case* (United States/Netherlands, 1928), 2 Reports of International Arbitral Awards 829, p. 838.

84 Separate opinion of Judge Kooijmans, 45 International Legal Materials (2006) p. 360, para. 45.

agreements", then the Plan contains an intractable contradiction. It cannot both efface Israel's responsibilities for Gaza and yet maintain the legal integrity of the Oslo instruments.

If, however, implementation of the Disengagement Plan were to amount to a unilateral termination of occupation, all other things being equal, breach of treaty probably would not be fatal to an Israeli claim that it had successfully divested itself of responsibility for Gaza's population, even although this had been effected unlawfully in a manner which engaged Israel's responsibility. The legal consequences of breach of the Interim Agreement would, however, in principle only be relevant in the bilateral relations between Israel and Palestine. Palestine could choose either to pursue remedies available under Article XXI of the Interim Agreement,[85] or simply disregard the breach. For third States (and international organisations), breach of a bilateral agreement is a *res inter alios acta* in which they have no legal interest, and which entails no mandatory legal consequences for them.

8 TERMINATION OF OCCUPATION – A NEW NORMATIVITY?

Israel's obligations towards Gaza are not delimited solely by the law of occupation and the bilateral Olso instruments, but also by general international law.[86] It may be recalled that in the *Legal consequences of a wall* Advisory Opinion, the International Court of Justice authoritatively affirmed the entitlement of the Palestinian people to the right of self-determination, ruling that this had been recognised by Israel,[87] and moreover was a right *erga omnes* whose realisation all U.N. Member States had the duty to promote.[88] Disengagement concerns a possible change in the international status of territory. Given its status as an "essential principle" of contemporary international law, the principle of self-determination must play a significant role in the legal appraisal of disengagement, particularly in evaluating the implications for third States and international organisations.

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85 Article XXI (Settlement of differences and disputes) provides: "Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the [Declaration of Principles] shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely:
1. Disputes arising out of the application or interpretation of this Agreement or any related agreements pertaining to the interim period shall be settled through the Liaison Committee;
2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties.
3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee."

86 See Crawford, above, n. 35, pp. 448, n. 286.

87 43 *International Legal Materials* (2004), pp. 1041-1042, para. 118.

88 43 *International Legal Materials* (2004), pp. 1034, para. 88: see also, p. 1053, paras.155-156.

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The International Law Commission's exegesis of the Court's jurisprudence argues that self-determination is not simply an obligation *erga omnes* which all States must respect, but also that it has *ius cogens* status. In other words, that it is peremptory – States cannot derogate from its exigencies in their international relations.[89] Doctrine affirms that there is a conceptual connection between the two categories of obligations *erga omnes* and *ius cogens* norms, but does not conclusively affirm their coincidence.[90] De Hoogh underlines that obligations *erga omnes* are essentially connected with remedies available to States following a breach of international law, whereas the notion of *ius cogens* norms places emphasis on their substantive content.[91] When considering the impact of self-determination on the law of occupation, the issue is that of the influence of its substantive content – in particular all States' duty to promote respect for and realisation of this right – rather than the remedies to which they may have recourse following a denial of self-determination.

Termination of occupation, to be legally effective, must be in conformity with the requirements of self-determination. This is a matter of concern to all States. If the exigencies of self-determination are disregarded, then this breach of self-determination can only entail a duty for States of non-recognition of the illegal situation thus created, as well as a duty not to render aid or assistance in maintaining that illegal situation.[92] Nor would States be absolved of their duty to promote, through joint and separate action, the actual realisation of the right of the people entitled to self-determination.[93]

In the *Legal consequences of a wall* Advisory Opinion, the Court's elucidation of the implications of the Palestinian people's right to self-determination is rather terse and couched abstractly. This attracted criticism from within the Court itself. For instance, while endorsing the Court's affirmation of the Palestinian people's right to self-determination, Judge Higgins thought it "quite detached from reality for the Court to find that it is the wall that presents a 'serious impediment' to the exercise of this right".[94] Nevertheless, elsewhere

89 International Law Commission, *Report of the work of the 53rd session*, U.N. Doc.A/56/10, *Commentary to Article 40* of its *2001 Articles on Responsibility of States for Internationally Wrongful Acts, ibid* 282 at p. 284, para. 5: reproduced at: <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>, and also, Crawford, J, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge U.P.: Cambridge: 2002), pp. 246-247.

90 See, for instance, de Hoogh, A., *Obligations Erga Omnes and International Crimes* (Kluwer: The Hague: 1996), pp. 53-56, p. 91; and Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Clarendon Press: Oxford: 1997), Chapter Three, p. 182 and p. 190. See also, Scobbie, I., *Unchart(er)ed waters?: consequences of the advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory for the responsibility of the UN for Palestine*, 16 European Journal of International Law 941 (2005), pp. 949-952.

91 de Hoogh, above, n. 90, p. 53: compare Ragazzi, above, n. 90, p. 203 et seq.

92 Compare *Legal consequences of a wall* Advisory Opinion, 43 International Legal Materials (2004) p. 1053, para. 159.

93 Compare *Legal consequences of a wall* Advisory Opinion, 43 International Legal Materials (2004), p. 1034, para.88 and p. 1053, para. 156.

94 *Legal consequences of a wall* Advisory Opinion, separate opinion of Judge Higgins, 43 *International Legal Materials* 1058 (2004), pp. 1062-1063, para. 30: see pp. 1062-1063, paras. 28-31.

and also in the context of an argument on self-determination, Judge Higgins cautioned against:

> the pursuance of a policy of legal deconstructionism – the systematic attempt to empty everything of all substance and meaning. Resolutions must be shown to say nothing. Findings must be shown not to have been made. The substantive rights of others must be shown to amount to nothing more than United Nations procedures that may or may not be invoked, but which have no objective existence of their own.[95]

The question is therefore that of identifying the content of self-determination – the aspects of the "objective existence" of this right – relevant to the termination of occupation.

Like many legal concepts, self-determination designates a core content and an associated, yet integral, bundle of rights and duties. The core content is clear:

> all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[96]

Further:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.[97]

Following Drew's analysis,[98] self-determination has two distinct vectors. The classic formulation of its core content emphasises self-determination as process – the right freely to determine a political status – but this entails that self-determination must have a substantive content:

> the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people the right of "free choice" in the absence of more substantive entitlements – to territory, natural resources, etc – would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum. This is both explicit and implicit in the law. For example, implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set of resources...[T]he following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination...: (a) the right to exist – demographically and territorially – as a

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95 Professor Higgins, advocate for Portugal, *East Timor case* (*Portugal v. Australia*), Pleadings, CR.1995/13 (13 February 1995), p. 8, para. 1.

96 General Assembly resolution 2625 (XXV) (24 October 1970), *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*: affirmed *Legal consequences of a wall* Advisory Opinion, 43 International Legal Materials (2004), pp. 1034-1035, paras. 88-89.

97 General Assembly resolution 2625.

98 Drew C, *The East Timor story: international law on trial*, 12 European Journal of International Law 651 (2001).

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people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.[99]

In connection with the Israeli planned withdrawal from Gaza, two aspects of self-determination take on particular importance: the exercise of the process, of the free determination by the Palestinian people of its political status; and the substantive issue of the integrity of the self-determination unit.

Drew notes that:

> Despite its text book characterization as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory that what we traditionally consider to be "human rights".[100]

This uncontroversial view also found expression in Palestine's written statement to the International Court during the *Legal consequences of a wall* Advisory Opinion proceedings. Palestine repeatedly spoke of "the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".[101]

Similarly, in the *East Timor case* proceedings, Portugal underlined that self-determination has a territorial basis, and that its exercise simultaneously decides both the destination of the people and of the territory. Portugal described the relationship between the people and the territory as a "principle of individuality". This entails that the territory which is the basis of the right is legally distinct from any other territory and, moreover, is entitled to territorial integrity. It forms a single unit which must not be dismembered. Further:

> un territoire qui constitute l'assise du droit d'un peuple á disposer de lui même...ne peut changer de statut juridique que par un acte d'autodétermination de ce peuple. La Résolution 1541 du 17 décembre 1960 de l'Assémblée générale précise bien cette norme.[102]

Leaving to one side East Jerusalem, which Israel has purported to annex despite the protests of other States and the United Nations that this is illegal,[103] Israel and the Palestine Liberation Organisation have agreed that the West Bank

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99 Drew, above, n. 98, p. 663: paragraph break suppressed and notes omitted: for a similar affirmation of a substantive core content of self-determination, see Orakhelashvili, A., *The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions*, 16 European Journal of International Law 59 (2005), p. 64.

100 Drew, above, n. 98, p. 663.

101 See, e.g. *Legal consequences of a wall* Advisory Opinion Pleadings, Palestine Written Statement, p. 239, para. 548 and p. 240, para. 549.

102 *East Timor* Pleadings, Portuguese Memorial (18 November 1991), p. 195, para. 7.01: emphasis suppressed in quotation. See also *Legal consequences of a wall* Advisory Opinion Pleadings, League of Arab States Written Statement, p. 62, para. 8.2 and p. 76, para. 8.28.

103 For instance, for the views of the European Union, see, e.g. Marston, G. (ed.), *United Kingdom materials on international law*, 61 *British Yearbook of International Law* 463 (1990) p. 624; *ibid*, 62 *British Yearbook* 535 (1991), pp. 696, 697; and *ibid*, 64 *British Yearbook* 615 (1993), p. 724; for the United States' view, see 1976 *United States practice in international law*, p. 634, and for a consensus statement issued by the Security Council on 12 November 1976, see *ibid*, 711 at p. 712; see also, in particular, Security Council resolutions 476 (30 June 1980) and 478 (20 August 1980), and the review of Security Council action at *Legal consequences of a wall* Advisory Opinion, 43 International Legal Materials (2004), p. 1031, para. 75.

and Gaza form "a single territorial unit" whose integrity is to be preserved pending the conclusion of permanent status negotiations.[104] Consonant with the International Court's finding that the Interim Agreement affirmed the Palestinian people's right to self-determination,[105] this simply records the status and integrity of the West Bank and Gaza as a single self-determination unit, upon which the Palestinian people are entitled to exercise that right. Further, relying on the Interim Agreement, the Israel High Court has affirmed Israel's recognition of the unity of the West Bank and Gaza as a single territorial unit.[106]

In the case of withdrawal from Gaza, two aspects of self-determination assume fundamental importance: the substantive aspect of the territorial integrity of the self-determination unit; and the process aspect of the free expression of the will of the Palestinian people.

As Portugal declared in the *East Timor case* proceedings, the fundamental idea that dominates the exercise of the right of self-determination is that of freedom of choice:

> au sens où le choix accompli par la population concernée doit s'être effectué en l'absence de toute contrainte extérieure, notamment militaire.[107]

A situation imposed unilaterally by an occupant involves no choice on the part of the population entitled to self-determination, and thus cannot under any circumstances be considered as an exercise of that right. This does not observe – indeed it brazenly disregards – the process aspect of self-determination, and consequently cannot change the status of the territory in question. As Australia affirmed during the *East Timor case* proceedings, a State will:

> breach the obligation to respect the right of a people to self-determination if its conduct prevents or hinders the exercise by the people of a non-self-governing territory of their right freely to determine their future political status.[108]

Consequently, any claim that the international status of Gaza may be changed by virtue of unilateral action undertaken by Israel which does not take into account the free choice of the indigenous population is manifestly a breach of self-determination, in addition to a breach of the provisions of the Interim Agreement.

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104 See the 1993 Declaration of Principles on Interim Self-Government Arrangements, Article IV; and the 1995 Washington Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Article XI.1: for commentary, see Shehadeh, R., *From occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer: London: 1997), pp. 35-37.

The question of Jerusalem is, of course, a matter reserved for the permanent status negotiations, see the *Agreed minutes* to the Declaration of Principles on Interim Self-Government Arrangements, *Understanding in relation to Article IV*; and 1995 Interim Agreement, Articles XVII.1 and XXXI.5.

105 *Legal consequences of a wall* Advisory Opinion, 43 International Legal Materials (2004), pp. 1041-1042, para.118.

106 *Ajuri v. IDF Commander, HCJ 7015/02* (3 September 2002), [2002] IsrLR 1, opinion of President Barak, pp. 17-18, para. 22. See also Lein, above n. 12, pp. 20-21, who notes, *inter alia*, that Israel incorporated the Interim Agreement in its entirety into its military legislation in both the West Bank and Gaza, and that this legislation has not been revoked.

107 *East Timor* Pleadings, Portuguese Memorial, p. 91, para. 4.22.

108 *East Timor* Pleadings, Australian Counter-Memorial (1 June 1992), p. 167, para. 375.

To evaluate the self-determination issues that might be implicated in Israel's withdrawal by concentrating solely on Gaza is, however, to adopt too narrow a focus. To note that no self-determination process has taken place in Gaza is to consider only the procedural aspect of the right: it fails to consider its substantive content. One substantive aspect is decisive in evaluating the disengagement plan: the population of Gaza alone cannot exercise a right of self-determination. It possesses no such right: in the case of Palestine, that right belongs to the population of the territorial self-determination unit as a whole which comprises the West Bank (including occupied East Jerusalem) as well as Gaza. The territorial integrity of a self-determination unit[109] cannot be disrupted, particularly by a belligerent occupant:

> If an occupant controlled only part of a state and that part was not considered to be a distinct unit entitled to self-determination, the occupant would not be entitled to effect the secession of the occupied area (as in Northern Cyprus). Similar considerations imply that the occupant would not be entitled to establish a new government in such a region even if its inhabitants supported such an act.[110]

Whether one considers either the process aspect of self-determination, or the substantive aspect of the occupant's duty to maintain the integrity of the territory, Israel's unilateral withdrawal – insofar as this aims to change the international status of Gaza – either fails to observe the requirements of the former, or threatens to breach the latter, or both.[111] Accordingly, Israel's withdrawal does not respect the right of the Palestinian people to self-determination and thus is in breach of international law, whether respect for self-determination is conceived of as an obligation *erga omnes* incumbent upon all States or as a peremptory norm. Within the compass of the law of self-determination, what consequences flow for the international legal status of Gaza after Israel's withdrawal?