

Applicability of the Laws of Occupation to the 2008 Conflict in Gaza

by

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ABSTRACT

On December 27, 2008, Israel began a military campaign codenamed Operation Cast Lead with an aerial bombardment of the Gaza Strip. On January 3, 2009, Israel expanded its aerial assault with a ground invasion. Military operations continued until January 18, 2009, when Israel implemented a unilateral cease fire and withdrew its forces. When the hostilities had ended, between 1,166 and 1,440 Palestinians had been killed as a result of Israeli attacks, two-thirds of whom are estimated to be civilians. Ensuing allegations of international human rights (IHR) and international humanitarian law (IHL) violations were widespread.

Amidst these claims, the United Nations Human Rights Council (UNHRC) commissioned a fact-finding team, headed by South African jurist Richard Goldstone, to investigate whether the laws of war were infringed upon. Their findings, published in a document known colloquially as the Goldstone Report, allege a number of breaches of the laws of occupation, yet give a cursory treatment to the preliminary question of the applicability of this legal regime. This paper seeks to more comprehensively assess whether Gaza could be considered occupied territory for the purposes of international humanitarian law during Operation Cast Lead. In doing so, this paper focuses on exactly

what triggers and terminates the laws of occupation's application, rather than the rights and duties derived from the laws of occupation.

This paper proceeds with a brief discussion of the history of the Gaza occupation, including Israel's unilateral evacuation of ground troops and settlements from within Gaza in 2005, a historic event that sparked renewed debate over Israel's status as an Occupying Power vis-à-vis Gaza. The following section traces the development of the laws of occupation in instruments of IHL. The next section considers the relevant international case law on occupation. The following section synthesizes the various criteria from the IHL treaty and case law for determining the existence of a situation of occupation, and considers their application to the Gaza Strip during Operation Cast Lead. The concluding section argues that Israel maintained the status of Occupying Power during Operation Cast Lead, and discusses the legal implications of such a determination.

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Background

The Gaza Strip fell under British occupation and military administration following the collapse of the Ottoman Empire in 1917, during the First World War. ¹ British rule over the Gaza Strip was formalized in June 1922 under the League of Nations Mandate system, which dismembered the newly defunct Ottoman territories and conferred their control to various Allied powers. ² British control of the Gaza Strip continued until 1947, when the British declared they were resigning from the Mandate and handing the matter over to the United Nations. The General Assembly held lengthy deliberations, and on November 29, 1947, passed Resolution 181 (II), which would partition Mandatory Palestine into a Jewish State and a Palestinian Arab State.

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¹ Charles Smith, *Palestine and the Arab-Israeli Conflict* (Bedford: St. Martin's, 2001), pp. 106-107

² Palestine Royal Commission Report Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, July 1937, Cmd. 5479. His Majesty's Stationery Office., London, 1937, available at:
<http://unispal.un.org/UNISPAL.NSF/0/88A6BF6F1BD82405852574CD006C457F>

³ General Assembly Res. 181 (II), UN GAOR 2nd Session, UN Doc. A/310 (1947)

The first Arab-Israeli war immediately followed the partition, lasting from December 1947 to July 1949. During the course of the war, Israeli forces commandeered a further twenty-two percent of Mandatory Palestine than would have been allotted in the United Nations partition plan.⁴ The remaining territories - the West Bank and Gaza Strip - were allotted to Jordanian and Egyptian administration, respectively.⁵ Egyptian administration of the Gaza Strip continued until the Six Day War in July of 1967, when Israel seized control of the Gaza Strip (and the West Bank, Golan Heights and Sinai Peninsula) and established a military government there.⁶

Following the 1967 war, Israel maintained that because it had not displaced a recognized sovereign Palestinian state in taking control of the Gaza Strip, that the territory was “administered” by Israel, but not “occupied” within the scope of international law.⁷ However, that

⁴ Sami Hadawi, *Palestinian Rights and Losses in 1948: A Comprehensive Study* (London: Saqi Books, 1988), pp. 81.

⁵ *Ibid* 1, at pp. 203

⁶ Meir Shamgar, “Legal Concepts and Problems of the Israeli Military Government Military Government in the Territories Administered by Israel,” *Israel Yearbook on Human Rights* (1982): pp. 13

⁷ This argument has been referred to by legal scholars as the “missing reversioner thesis.” It was expounded in a number of legal articles published in Israel and the United States in the 1970s . See Yehuda Blum, “The Missing Reversioner: Reflections on the Status of Judea

position was rejected by most authorities.⁸ Indeed, Israel's presence in the Gaza Strip was seen internationally as that of an Occupying Power, triggering the rules of international law pertinent to situations of belligerent occupation. This view has been reiterated by the International Court of Justice,⁹ the Oslo Accords,¹⁰ the Israeli Supreme Court,¹¹ the UN Security Council,¹² the UN General Assembly¹³ and the U.S. State Department.¹⁴

and Samaria," *Israel Law Review* (1968): pp. 279; Meir Shamgar, "The Observance of International Law in the Occupied Territories," *Israel Yearbook on Human Rights* (1971): pp. 262

⁸ The "missing reversioner thesis" was expressly rejected by the International Court of Justice in the Wall Advisory opinion. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 166 (July 9)

⁹ *Ibid*

¹⁰ Palestinian Liberation Organization – Negotiation Affairs Department, "The Israeli 'Disengagement' Plan: Gaza Still Occupied," (2005) [citing Agreement on Preparatory Powers and Responsibilities (Aug. 9, 1994), Art. XIII, §§ 4-5]

¹¹ Ayub, et al. v. Minister of Defense, et al, 606 Il. H.C. 78; Adjuri v. IDF Commander, 7015 Il. H.C. 02, 7019 Il. H.C. 02 (2002); and 2056 Il. H.C. 04 (2004))

¹² S.C. Res. 1544, U.N. Doc. S/RES/1544 (May 19, 2004),

¹³ G.A. Res. 58/292, U.N. Doc. A/RES/58/292 (May 17, 2004)

¹⁴ U.S. Department of State, "Country Report on Human Rights Practices: Israel and the Occupied Territories," (Feb. 25, 2004), available at: <http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm>

However, Israel's status as an occupying power became less certain in 2005, when Israel dismantled its settlements and withdrew its forces from its permanent military bases inside Gaza. In the aftermath of the withdrawal, the question of the legal status of the Gaza Strip as occupied territory became the subject of renewed debate. Israel maintained that its "withdrawal" from Gaza should end any charge of a continuation of its then thirty-eight year occupation of the territory.¹⁵

That debate was further fueled by a series of developments in Gaza over the next two years. In January of 2006, less than a year after Israel's "disengagement" Gaza, Hamas claimed seventy-six of the 132 parliamentary seats in the Palestinian Legislative Council elections, giving the party the right to form the next cabinet under the

¹⁵ Israel Ministry of Foreign Affairs, "The Disengagement Plan – General Outline," (Apr. 18, 2004), available at: <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Dise+ngagement+Plan+-+General+Outline.htm>

"Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below. Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of Gaza Strip territory which have been evacuated. As a result, there will be no basis for claiming that the Gaza Strip is occupied territory."

Palestinian Authority's president, Mahmoud Abbas.¹⁶ The United States, European Union and Israel immediately imposed severe economic sanctions on the Palestinian territories.¹⁷ They demanded that Hamas recognize the state of Israel, renounce the use of violence and honor previous Palestinian-Israeli peace agreements.¹⁸ The sanctions included an Israeli freeze of \$700 million in tax revenue payments to the Palestinian Authority, and a tightening of restrictions on movement of people and goods within, into, and out of the Gaza Strip.¹⁹²⁰ The Palestinian Authority, which relies heavily on international aid for day-to-day administration of the Occupied

¹⁶ *Who are Hamas?*, BBC News, January 4, 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/1654510.stm

¹⁷ *Ibid*

¹⁸ Al Jazeera English, *Hamas: Profile of the Palestinian Political Movement*, available at: <http://english.aljazeera.net/news/middleeast/2009/08/200982775839489403.html>

¹⁹ Heller, Jeffery, *Israel frees funds for Abbas; Hamas calls it bribery*, Reuters, June 24, 2007, available at: <http://www.reuters.com/article/2007/06/24/idUSL24549103>

²⁰ BBC News, *Hamas dismisses Israeli sanctions*, February 20, 2006, available at: <http://news.bbc.co.uk/2/hi/4731058.stm>

Palestinian Territories, soon fell into a severe financial crisis as a result of the economic sanctions. ²¹

It was at this time that political tensions between Hamas and rival party Fatah began to simmer. By June 2007, Hamas and Fatah fought one another in armed skirmishes in the streets of the West Bank and Gaza for control of the territories. ²² In early 2007, the two parties agreed to form a unity government in a bid to reclaim international aid, taking office on March 17, 2007. ²³ However, the fragile coalition succumbed to fissures and in June of 2007, Hamas forcibly seized

²¹ *Ibid* 18

²² *Ibid* 18

²³ World Bank, "West Bank and Gaza Country Brief," (2008), available at: <http://go.worldbank.org/Q8OGMLXI40>

control of the Gaza Strip.²⁴ Prime Minister Mahmoud Abbas of the Fatah party cemented his control of the West Bank in response.²⁵

With Hamas establishing themselves as the sole ruling party in the Gaza Strip, Israel moved to further isolate the group, tightening economic sanctions, cutting off electric power to the area and launching military strikes inside Gaza.²⁶ Additionally, the Israeli government issued a declaration on September 19, 2007 stating that Gaza had become a “hostile territory” under the control of Hamas.²⁷ Nonetheless, in early 2008, Hamas and Israel arrived at an informal

²⁴ Some reports indicate Hamas’ Gaza coup d’état was actually a pre-emption of a feared Fatah coup. See David Rose, *The Gaza Bombshell*, Vanity Fair, Apr. 8, 2008, available at:

<http://www.vanityfair.com/politics/features/2008/04/gaza200804>

“Wurmser accuses the Bush administration of “engaging in a dirty war in an effort to provide a corrupt dictatorship [led by Abbas] with victory.” He believes that Hamas had no intention of taking Gaza until Fatah forced its hand. “It looks to me that what happened wasn’t so much a coup by Hamas but an attempted coup by Fatah that was pre-empted before it could happen,” Wurmser says.”

²⁵ *Ibid* 18

²⁶ BBC News, *Details of Gaza blockade revealed in court case*, May 3, 2010, available at: http://news.bbc.co.uk/2/hi/middle_east/8654337.stm

²⁷ Israel Ministry of Foreign Affairs, Press Release, “Security Cabinet Declares Gaza Hostile Territory,” September 19, 2007, available at: <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>

truce agreement, which came into effect on June 19, 2008. ²⁸ The truce lasted from June 2008 to early November of that same year, and brought substantial calm to Southern Israel and the Gaza Strip. ²⁹

Israel has repeatedly claimed that Operation Cast Lead was the result of Hamas' violation of the terms of the truce, which called for an end to rocket attacks emanating from Gaza into Southern Israel. ³⁰

²⁸ Isabel Kershner, "Israel Agrees to Truce with Hamas on Gaza," *The New York Times*, June 18, 2008, available at: http://www.nytimes.com/2008/06/18/world/middleeast/18mideast.html?_r=3&fta=y

²⁹ See Kanwisher, N., Haushofer, J. & Biletzki, A., "Reigniting Violence: How Do Ceasefires End?," *The Huffington Post*, Jan. 6, 2009, available at: http://www.huffingtonpost.com/nancykanwisher/reigniting-violence-how-d_b_155611.html

"The ceasefire was remarkably effective: after it began in June 2008, the rate of rocket and mortar fire from Gaza dropped to almost zero, and stayed there for four straight months."

³⁰ See Tzipi Livni, Israel Minister of Foreign Affairs, "Briefing in Sderot – Opening Remarks," Dec.28, 2008, available at: http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/FM_Livni_briefing_Sderot_Opening_remarks_28-Dec-2008.htm

"Just to remind you, the calm that was achieved through the initiative of the Egyptians six months ago worked for a few weeks, and then Hamas deliberately violated this truce by targeting Israel on a daily basis, by smuggling weapons into the Gaza Strip, by continuing to keep Gilad Shalit in captivity and refusing to accelerate the negotiations to release him, by not coming to Cairo in order to do so - because they had this feeling that the Israelis are going to do nothing, and that the Arab world is going to do nothing and, at the end of the day the international community will put pressure on Israel. I hope that they are mistaken. This is something that we need to prove to

Indeed, rockets attacks from the Gaza Strip increased in the weeks preceding Operation Cast Lead's commencement on December 27.³¹ However, one finds that the escalation in rocket fire only occurred after an Israeli operation on November 4 which killed six Palestinian militants inside Gaza.³² Prior to this operation, rocket attacks from Gaza had nearly ceased entirely, toting up to one a month in July, September and October and eight in the month of August.³³ In the words of the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center, Hamas was "careful to maintain the ceasefire," and "tried to enforce the terms of the arrangement on the other terrorist organizations to prevent them from violating it."³⁴

them during these days. And Israel has paid the price for its restraint."

³¹ *Ibid* 29, at Figure 1

³² Omar Sinan, " Hamas Fires Rockets at Israel After Airstrike," *The Washington Post*, Nov. 5, 2008, at A10

³³ *Ibid* 29

³⁴ Israel Intelligence Heritage and Commemoration Center, "The Six Months of the Lull Arrangement," December, 2008, available at: http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf

Even so, on November 4, Israel went forward with the Gaza raid, killing six Palestinian militants inside Gaza and bringing to an end a four-month period of calm. In reprisal, Hamas resumed rocket attacks, launching 126 in November and 98 in December.³⁵ On December 19, the truce between Israel and Hamas formally expired, with Hamas leaders offering to consider renewing the truce if Israel lifted its blockade of the Gaza Strip, which had been in effect for 18 months prior.³⁶

Eight days later, on December 27, 2008, Israel's UN Ambassador sent a letter to the Secretary General of the United Nations, stating "after a long period of utmost restraint, the government of Israel has decided to exercise, as of this morning, its right to self-defense." That morning, Israel launched a military offensive in the Gaza Strip by air, inflicting massive damage on Gaza's already dilapidated

³⁵ Israeli Intelligence and Information Center, "Intensive rocket fire attacks against the western Negev population," Dec. 21, 2008, pp. 6, available at:
http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e018.pdf

³⁶ "Hamas 'May Extend' Truce if Israel Ends Siege, Stops Attacks," *The Daily Star*, Dec. 24, 2008, available at:
http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=98679

infrastructure, thereby initiating Operation Cast Lead.³⁷ At a second stage, Israeli ground troops entered into the Gaza Strip and some even penetrated as far as Gaza City.³⁸ The operation continued until Israel implemented a unilateral ceasefire on January 18, 2009.³⁹

Since the end of the Operation Cast Lead, a number of commissions of inquiry have traveled to Gaza to assess whether the laws of war were infringed upon. Many of these inquiries have alleged breaches of the laws of occupation, while giving a cursory treatment to the preliminary question of the applicability of this legal regime. This article will not assess the conduct of Operation Cast Lead, as this question was examined at length in the Arab League report, the Goldstone report and by various human rights organizations. Rather, this paper seeks to answer the question of whether Gaza could be

³⁷ Taghreed el-Khodary and Isabel Kershner, "Israeli attack kills scores across Gaza," *The New York Times*, December 27, 2008, available at: <http://www.nytimes.com/2008/12/28/world/middleeast/web28mideast.html>

³⁸ Ethan Bronner, "Israeli ground invasion cuts Gaza in two," *The New York Times*, January 4, 2009, available at: <http://www.nytimes.com/2009/01/04/world/africa/04iht-gaza.4.19076000.html>

³⁹ Joshua Mitnick, "Israel agrees to unilateral Gaza cease-fire; Vows to defend itself," *The Washington Times*, January 18, 2009, available at: <http://www.washingtontimes.com/news/2009/jan/18/israel-agrees-to-unilateral-gaza-cease-fire/>

considered occupied territory for the purposes of international humanitarian law during Operation Cast Lead, as this question is critical to deciphering the legal regime applicable to Gaza, Israel's obligations under international law towards Gaza's inhabitants, and is of substantial relevance in any proceedings seeking to enforce humanitarian law by addressing alleged war crimes entailed in Operation Cast Lead through international criminal law.

International Humanitarian Law

International humanitarian law (IHL) is “a set of rules, which seek, for humanitarian reasons, to limit the effects of armed conflict.”

⁴⁰Also known as the laws of war, IHL's historical roots can be traced to the rules of ancient civilizations and religions. In fact, it is one of the oldest codified branches of international law, with universal codification dating back to the 19th century. ⁴¹

Ever since, States have agreed to a set of rules in order to “protect persons who are not or are no longer participating in the

⁴⁰ International Committee of the Red Cross, “Legal Fact Sheet: What is International Humanitarian Law?,” July 31, 2004, available at: [http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm?](http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm)

⁴¹ *Ibid*

hostilities and restrict the means and methods of warfare.”⁴² As Christopher Greenwood put it, these rules strike “a compromise between military and humanitarian requirements. [They] comply with both military necessity and the dictates of humanity.”⁴³ Accordingly, the various rules and obligations of IHL on States are only triggered in the context of armed conflict.

Armed Conflict

The generally accepted test for determining the existence of armed conflict was stated in *Prosecutor v. Tadić*.⁴⁴ In the *Tadić* decision, the International Criminal Tribunal for Former Yugoslavia (ICTY) Appeals Chamber defined the contours of “armed conflict,” holding that:

“An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such conflicts

⁴² *Ibid*

⁴³ Christopher Greenwood, *The Handbook of International Humanitarian Law Vol. 1* (UK: Oxford University Press, 2008), pp. 37.

⁴⁴ See *Kevin Sullivan's Interview with University College London Lecturer and International Law Specialist Douglas Guilfoyle*, available at: http://www.realclearworld.com/blog/2010/06/what_is_hamas_ctd.html

and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”⁴⁵

The jurisprudence of the ICTY in the *Tadić* case represents an important contribution to the definition of “armed conflict” in IHL. Not only did the Tribunal uphold that armed conflict must be initiated to trigger the application of IHL, but that IHL’s application can continue well beyond the cessation of hostilities.

The Laws of Occupation

While the initiation of armed conflict suffices to trigger IHL’s application, an additional series of laws dealing specifically with situations of belligerent occupation are triggered may also apply. The rules of this body of law are found primarily in two treaties: the Regulations annexed to the Fourth Hague Convention of 1907⁴⁶ and in the Fourth Geneva Convention of 1949 Relative to the Protection of

⁴⁵ *Prosecutor v Tadic* (Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-9-1-AR72 (2 October 1995) paragraph 70

⁴⁶ Convention IV Respecting the Laws and Customs of War on Land, signed at The Hague, October 18, 1907

Civilian Persons in Time of War.⁴⁷ Article 42 of the Hague Regulations provides some basic direction for the set of conditions required to trigger the laws of occupation. It states that:

“Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territories where such authority is established, and can be exercised.”⁴⁸

The description of a territory as occupied derives from the principle that sovereign territory cannot be annexed through the use of force. Accordingly, any territory that has fallen under the control of a belligerent is deemed as occupied territory until a post-war agreement determines its status.⁴⁹

Under the laws of occupation, an Occupying Power’s activities are regulated to guarantee the protection of the rights of the local population of the territory.⁵⁰ These rules seek to regulate the Occupying Power’s behavior in order to ensure that life in the occupied

⁴⁷ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1948, entered into force October 21, 1950, 75 U.N.T.S. 287

⁴⁸ *Ibid* 46, at Article 42

⁴⁹ J.G. Starke, *Introduction to International Law*, 8th ed. (London: Butterworths, 1977), pp. 597-598

⁵⁰ Shane Darcy, “In the Name of Security: IDF Measures and The Laws of Occupation,” *Middle East Policy* Vol. 10 (November 26, 2003): pp. 58

territory persists as unaffected as possible, stemming from the fact that the occupation has displaced the preceding government.⁵¹ Article 43 of the Hague Regulations, as the foundation of these rules, commands the occupying power “take all the measures in his power to restore, and ensure, as far as possible, public order and safety.”⁵²

Article 43 of the Hague Regulations also demands the Occupying Power respect, “unless absolutely prevented, the laws in force in the country.”⁵³ Article 44 of the Hague Regulations prohibits “any compulsion on the population of the occupied territory to take part in military operations against its own country.”⁵⁴ The Geneva Convention contains a similar article, Article 51, which expressly prohibits forcing the occupied population to serve in the military of the occupying power.⁵⁵ In addition, Article 46 of the Hague Regulations calls on the occupying power to respect “family honor and rights, the lives of individuals and private property, as well as religious

⁵¹ *Ibid* 46 at Article 43, speaking of “the authority of the legitimate power having in fact passed into the hands of the occupant.”

⁵² *Ibid* 46, at Article 43

⁵³ *Ibid* 46, at Article 43

⁵⁴ *Ibid* 46, at Article 44

⁵⁵ *Ibid* 47, at Article 51

convictions and liberty of worship.”⁵⁶ Article 53 of the Fourth Geneva Conventions also prohibits the destruction of the property, unless as an absolute military necessity, reinforcing the rule already laid down in the Hague Regulations’ Article 46.⁵⁷ Articles 27 and 49 of the Fourth Geneva Convention prohibit the inhumane treatment of protected persons,⁵⁸ and individual or mass forcible transfer or deportations of civilians,⁵⁹ respectively.

An Occupying Power also has certain affirmative duties under the Fourth Geneva Convention, such as the obligation to guarantee the proper functioning of child-care and education institutions;⁶⁰ the Occupying Power must ensure the food and medical supplies of the population;⁶¹ the Occupying Power must maintain medical and

⁵⁶ *Ibid* 46, at Article 46 (1)

⁵⁷ *Ibid* 47, at Article 53

⁵⁸ *Ibid* 47, at Article 27

⁵⁹ *Ibid* 47, at Article 49

⁶⁰ *Ibid* 47, at Article 50

⁶¹ *Ibid* 47, at Article 55

hospital services;⁶² and the Occupying Power must allow national Red Cross societies to carry out their activities.⁶³

At this juncture, it is worth noting that the drafters of the Geneva Conventions, well aware of the prolonged tendency of peace negotiations, ensured that a series of specific obligations on Occupying Powers persisted well beyond the “general close of military operations.” Article 6 of the Fourth Geneva Conventions states that:

“In the case of occupied territory... the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”

It can be surmised that the drafters of the Hague Regulations and Geneva Conventions set out to provide considerable protections for civilian populations under occupation. The laws of occupation demand a number of essential affirmative duties on the Occupying Power in order to protect the population under occupation, while also giving leeway to the legitimate security concerns of the Occupying Power. The following section will consider how the laws of occupation in IHL treaties have developed, tracing how they have viewed both the

⁶² *Ibid* 47, at Article 56

⁶³ *Ibid* 47, at Article 63

definition of occupation and the question of determining when occupation is established.

Treaty Law

Article 42 of the Hague Regulations provides that:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁶⁴

The Brussels Declaration of 1874

The above article, which is itself a rule of customary international law,⁶⁵ has origins in an earlier document known as the Project of an International Declaration concerning the Laws and Customs of War, also known as the Brussels Declaration of 1874.⁶⁶ The Brussels Declaration was the product of an attempt by Czar Alexander II of Russia in 1874 to bring together delegates from the European powers to draft an international agreement concerning the laws and customs of war.

⁶⁴ *Ibid* 47, at Article 42

⁶⁵ Judgment and Sentences of the Nuremberg International Military Tribunal, October 1, 1946 (1947) 41 AJIL 1, 172, pp. 248 - 249

⁶⁶ Project of an International Declaration concerning the Laws and Customs of War (Brussels 27 August 1874), at Article 1

Participants in the drafting of the Brussels Declaration conference held lengthy deliberations on the specific meaning of belligerent occupation and the question of when such an occupation is actually established. The bulk of the participants' interactions centered on the minimum level of authority required for an occupant's power to be considered established. For instance, Major-General de Leer, the Russian delegate at the Brussels conference, argued that:

"Occupation should be deemed to be established when one part of the occupying army has secured its positions and its line of communication with other corps. That being done the army is in a position to hold its own against the attacks of the army of the occupied territory, and against the rising of the population. If it cannot carry out this double object it is shorn of authority." ⁶⁷

In response, the German delegate, General de Voigts-Rhetz, warned of the dangers of associating the existence of occupation with visible military power too closely. He explained that:

"If it be laid down that occupation only exists where the military power is visible, that will be encouraging insurrections, and if it be admitted that the inhabitants have a right to rise... as soon as the authority of the occupier is no longer visible, insurrections will break out, followed by cruel repressions, and the war will become barbarous." ⁶⁸

⁶⁷ Accounts and Papers of the House of Commons, Volume 41, Session: February 5 - August 1875 Session, pp. 236

⁶⁸ *Ibid*, at pp. 237

In other words, Voigts-Rhetz made the case that a territory would not have to be physically occupied in order to trigger the laws of occupation. Colonel Hammer, the delegate from Sweden, argued that:

“To keep [an occupation] up, it is not necessary to employ a large number of troops; one man, provided he be respected, a post or telegraph office, a Commission of any kind established in the district, and performing its functions without opposition, would suffice; in a word, what is required is some fact proving that the territory, as such, can be under the military domination of the enemy.”⁶⁹

The delegate from the Netherlands, M. van Lansberge, disagreed. He argued that:

"It cannot be admitted that the presence of a single individual - of a single postmaster, for instance - is sufficient to perpetuate the right of occupation. This mode of holding a district would be too easy. The occupier must always be in sufficient force to put down an insurrection should one break out."⁷⁰

For General Voigts-Rhetz, the power of an Occupying Power could be considered established when:

“The Occupying Power may be considered practically established when the [occupied] population is disarmed, either by giving up its arms, or by having them taken from them, or again when the flying columns are traversing and the country and establishing relations with local authorities... There is, therefore, a distinction to be made: the population either rises during the

⁶⁹ *Ibid*

⁷⁰ *Ibid*

occupation, in which case it is subjected to the laws of war, or else it commences rising when the enemy is retreating, in which case it cannot be punished.”⁷¹

The varied views at the conference do not support a single agreement on the minimum level of authority required. Rather, they support the view that the drafters agreed that an Occupying Power does not necessarily have to control every single part of the occupied territory. In the words of the delegate from Russia, Baron Jomini, “a province cannot be occupied at all points; that is impossible.”⁷²

In the end, the Brussels Declaration conference unanimously adopted a declaration, which included the definition of occupation which appears verbatim in today's Article 42 of the Hague Regulations. It states:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁷³

⁷¹ *Ibid*, at pp. 238

⁷² *Ibid*, at pp. 237

⁷³ *Ibid*, at pp. 248

However, this Declaration failed to provide the basis for a treaty, as steps by the Russian government to study such a possibility proved unsuccessful.⁷⁴

The Oxford Manual of 1880

After the failure of the Brussels Declaration to produce a treaty, the Institute of International Law (IIL) sponsored a draft code for governments to include in their military manuals. The draft was written by the President of the International Committee of the Red Cross (ICRC), Gustave Moynier, and was subject to deliberation by the IIL's membership. In the end, the IIL adopted a final draft at a gathering in Oxford in September of 1880. It contained Article 41, which states:

'Territory is regarded as occupied when, as the consequence of invasion of hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.'⁷⁵

⁷⁴ D.A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (New York: Columbia University Press, 1949): pp. 25 – 26

⁷⁵ Manual of the Laws and Customs of War at Oxford, "The Laws of War on Land," International Committee of the Red Cross, International Humanitarian Law - Treaties and Documents

The Oxford Manual's definition of occupation is fairly restrictive compared to the one contained in the Brussels Declaration. The Oxford Manual requires an occupation to follow an invasion by hostile forces. The other requirements of the Oxford Manual include the displacement of the authority of the preceding state, as well as the position of the invading state to maintain order in the territory. Regarding the latter, it should be emphasized that the text mentions the Occupying Power's *ability* to exercise authority, not the actual exercise of authority. If the Occupying Power is in such a position, and the other criteria are satisfied, then there is an occupation. In which case, "the occupant should take all due and needful measures to restore and ensure public order and public safety." ⁷⁶

After the adoption of the Oxford Manual's final draft, the IIL appealed to a number of European governments to incorporate a military manual similar to the Oxford Manual in their national legislation. However, most states paid no attention to that request. ⁷⁷

(September 9, 1880), available at:
<http://www.icrc.org/ihl.nsf/WebART/140-80042?OpenDocument>

⁷⁶ *Ibid*, at Article 43

⁷⁷ Marten Zwanenburg, "The Law of Occupation Revisited: The Beginning of an Occupation," *Yearbook of International Humanitarian Law* Vol. 10 (2007): pp. 104

The Hague Regulations of 1899 and 1907

The Brussels Declaration and Oxford Manual were both important precursors to the Hague Peace Conferences of 1899 and 1907. Participants at the 1899 Hague Peace Conference sought to renew the project commissioned in the earlier Brussels Declaration. Fittingly then, the Brussels Declaration served as the foundation for the Hague Peace Conference and the deliberations that ensued on the provisions relating to occupation. While in the end, the participants unanimously adopted verbatim the text from Article 1 of the Brussels Declaration, the deliberations regarding the definition of occupation resembled those having taken place at in Brussels in 1874.

For instance, the German delegate, Colonel Gross von Schwarzhoff, asked that the second paragraph, which states that “occupation extends only to the territory where such authority has been established and can be exercised,” be stricken out. He argued that the removal was necessary to provide for the case in which:

“...a belligerent has effectively established his authority in a territory, but in which communications between the army or the occupying bodies and the other forces of the belligerent are

interrupted and in which uprisings occur in that territory and are momentarily successful." ⁷⁸

The Russian delegate, Colonel Gilinski, supported Schwarzhoff's view, emphasizing from the military standpoint that:

"An army considers a territory occupied when it finds itself therein either with the bulk of its troops or with detachments, and when the lines of communication are insured. On this territory the occupying army leaves troops to protect its communications in the rear. These troops are often not very numerous, so that an uprising becomes possible. However, the fact of such an uprising breaking out does not prevent the occupation from being considered actually existing." ⁷⁹

Other delegates, however, did not share this view. The delegate from the Netherlands, General den Beer Poortugael, considered Schwarzhoff's proposal too broad, arguing that:

"An occupation can be recognized only when the authority of the belligerent is actually established." ⁸⁰

Referring to the IIL's Oxford Manual, the delegate from Belgium, Chebalier Descamps, noted that:

⁷⁸ Carnegie Endowment for International Peace, *The proceedings of the Hague Peace Conference of 1899: Translation of the Official Texts* (New York: Oxford University Press, 1920), pp. 509

⁷⁹ *Ibid*, at p. 510

⁸⁰ *Ibid*

"The Institute of International Law went further than the Brussels Conference and placed more restrictions on the notion of occupation. [Descamps] reads Article 41 of the Oxford Manual containing the definition of 'occupied territory.'" [Descamps] thinks that the omission of paragraph two would be contrary to all established ideas. It is impossible to recognize an occupation which does not exist. What must be absolutely preserved is the notion of occupation." ⁸¹

The delegate from Siam, Edouard Rolin, proposed a compromise that would reproduce, with slight modifications, Article 41 of the Oxford Manual.

"Territory is considered occupied by the enemy State when, as the consequence of invasion by hostile forces, the State to which this territory belongs has actually ceased to exercise its ordinary authority therein. The limits within which this state of affairs exists determine the extent and duration of the occupation." ⁸²

For Rolin, after an invasion of hostile forces, "the retirement of the legal authorities may best serve to determine whether there is occupation." ⁸³ After such a withdrawal of the local authorities, "there is no longer more than one single authority that can be exercised, and that is the authority of the [Occupying Power]." ⁸⁴

⁸¹ *Ibid*, at p. 510

⁸² *Ibid*, at p. 511

⁸³ *Ibid*

⁸⁴ *Ibid*

The delegate from Belgium, Auguste Beernaert, disagreed, stating that:

"The definition of [the Brussels Declaration of] 1874 is preferable. The retirement of the legal authorities is a negative event which may very easily occur without there being an occupation." ⁸⁵

Beernaert's criticism was shared by the other Belgian delegate, Chevalier Descamps, who observed that:

"According to Mr. Rolin's wording, there might be an occupation without the territory's really being occupied." ⁸⁶

Ultimately, the delegate from France, Leon Bourgeois, observed that:

"All the propositions thus far made in regard to Article 1 relate only to its details and not to its general idea... It would seem [to me] more prudent to preserve the wording adopted in [the Brussels Declaration of] 1874 after mature deliberations by all the representatives of the different powers. It would not be desirable to give Article 1, the pinnacle, as it were, of our work, a new, hastily prepared, and certainly incomplete definition which might give rise to serious difference of interpretation." ⁸⁷

⁸⁵ *Ibid*

⁸⁶ *Ibid*

⁸⁷ *Ibid*, at p. 512

At the suggestion of Bourgeois, the drafters unanimously decided to defer to Article 1 of the Brussels Declaration without any change as Article 42 of the 1899 Hague Regulations.⁸⁸

It may be surmised from the Hague Peace Conference deliberations that the participants widely agreed that the Occupying Power must have at least some presence in the occupied territory. Only the statements of Rolin, the delegate from Siam, depart from this requirement. Instead, Rolin's proposal bases the existence of occupation on the withdrawal of the occupied territory's local authorities. It may also be said that, just as with the Brussels Declaration deliberations in 1874, no clear agreement was reached on the minimum level of authority an Occupying Power must exercise in the occupied territory.

The Second Hague Peace Conference of 1907 adopted the verbatim Article 42 of the 1899 Hague regulations without deliberation.

The Geneva Conventions of 1949

The subject of occupation was later assumed by the drafters of the 1949 Geneva Conventions. While the Fourth Geneva Conventions

⁸⁸ *Ibid*

of 1949 did not depart from the definition of occupation provided in the Hague Regulations, it did add a number of provisions regulating the relationship between an occupying power and a local population. In addition, the 1949 Geneva Conventions included broad protections to civilians by emphasizing their protected status the moment they fall into the hands of an Occupying Power of which they are not nationals.

Article 4 of Geneva Convention IV states:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁸⁹

Additionally, the Conventions’ drafters clearly intended to ensure the applicability of the Convention to occupations occurring in the absence of any state of war. During the 1949 Conference, participants unanimously voted to adopt Article 2, stating that:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or 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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁹⁰

⁸⁹ *Ibid* 47, at Article 4

⁹⁰ *Ibid* 47, at Article 2

The first sentence of the article clarifies that the Convention covers occupations occurring during hostilities but outside of a state of war. The second sentence ensures that the scope of the law of occupation cover situations where the occupation occurs without a declaration of war and without armed resistance.

In light of these extensions of the scope of the laws of occupation, the Commentary to the Fourth Geneva Convention makes the case that “occupation” as used in the Convention has a broader meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. The Commentary bases this claim on the personal scope of the treaty, arguing that occupation as used in this context:

“...has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of Article 42... the relations between the civilian population of a territory and troops advancing in to a territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.”⁹¹

⁹¹ J. Pictet, *Commentary; IV Geneva Convention, Relative to the Protection of Civilian Person in Times of War* (Geneva: ICRC, 1958), pp. 60

However, it must be noted here that apart from the inclusion of occupations meeting no armed resistance, there is no evidence in the *travaux préparatoires* of the Geneva Conventions indicating the participants intended to depart from the previously accepted notion of occupation in the Hague Regulations. This suggests that the definition of occupation in the Conventions is not more expansive, but rather, matches that in the Hague Regulations' Article 42 identically. This view is confirmed by the fact that, as this paper will demonstrate in subsequent sections, contemporary international jurisprudence continues to rely on the Hague Regulations' definition of occupation in determining the applicability of the Geneva Conventions.

Additional Protocol I

The first article of Additional Protocol I states that the Protocol applies in the situations referred to in Article 2 of the Geneva Conventions. Accordingly, the designation of occupation remains the same as that used in the Geneva Conventions. However, Article 1(1) of Additional Protocol widens the scope of application to include:

“...armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on [the] Principles of International Law concerning Friendly Relations

and Co-operation among States in accordance with the Charter of the United Nations.”⁹²

The Protocol does not explicitly define the term “alien occupation,” however, commentators have defined the term in the following manner:

"This term is meant to cover cases in which a High Contracting Party occupied territories of a State which is not a High Contracting Party, or territories with a controversial international status, and to establish that the population of such territory is fighting against the occupant in the exercise of their right to self-determination."⁹³

The purpose of Article 1(4), then, is to ensure that the law of occupation covers situations in which a territory, before being occupied, was not universally viewed as the territory of a High Contracting Party. The most obvious examples are the Gaza Strip and the West Bank, in which Israel argued that because it had not displaced a recognized sovereign state in taking control of territory, that the laws of occupation did not apply.⁹⁴

⁹² Article 1(1), Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 609, entered into force December 7, 1978

⁹³ M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Nijhoff, 1982), pp. 52.

⁹⁴ *Ibid* 7

Overview

The preceding sections should demonstrate that the concept of occupation referred to in the Geneva Conventions and Additional Protocol I is based on the concept of occupation contained in the Brussels Declaration of 1874. The *travaux préparatoires* of these IHL treaties establish two basic elements of occupation; (1) the occupied population's deprivation of their former government's ability to publicly exercise its authority; (2) and the Occupying Power's position to substitute its own authority for that of the former government.⁹⁵ As underscored in the words "actually" and "in fact," which appear so often in the provisions of the aforementioned IHL treaties, both of these determinations are largely factual findings.

The second element, regarding the ability of the Occupying Power to substitute its authority, proves the more difficult to determine. It would not suffice for an Occupying Power to simply issue a declaration that a territory has been occupied. The IHL treaties state that the Occupying Power's authority must actually be established. In view of that, many legal scholars have argued that the concept of

⁹⁵ United Kingdom Ministry of Defense, "Manual of the Law of Armed Conflict," section 11.3, available at: <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/>

occupation parallels that of a blockade, in the sense that it only exists if it is effective. For instance, following the adoption of the Hague Regulations, TJ Lawrence argued that:

“...occupation on land is analogous to blockade at sea; and as blockades are not recognized unless they are effective, so occupation must rest on effective control. Its rights are founded on mere force, and therefore they cannot extend beyond the area of available force. But the force need not be actually on the spot. The country embraced within the invader’s lines may be very extensive, and the bulk of his troops will, of course, be found on its outer edge opposing the armies of the invaded state. Any territory covered by the front of the invaders should be held to be occupied, but not territory far in advance of their main bodies. The fact that it is penetrated here and there by scouts and advance guards does not bring it under firm control, and therefore cannot support a claim to have deprived the invaded state of all authority therein. But the rights of occupancy, once acquired, remain until the occupier is completely dispossessed.”

⁹⁶

Additionally, while the establishment of a military administration in an occupied territory is certainly an indication of the existence of occupation, it is not a requirement. Article 43 of the 1907 Hague Regulations sets out various obligations on the Occupying Power “to restore and ensure, as far as possible, public order and safety” in the occupied areas.⁹⁷ This undertaking may necessitate the

⁹⁶ TJ Lawrence, *The Principles of International Law* (London: Macmillan & Co., 1917), pp. 435 – 436.

⁹⁷ *Ibid* 46, at Article 43

creation of a military administration, however, taking upon this obligation only occurs after an occupation already exists. For the occupation to exist at all, it is only required that the Occupying Power be in a position to substitute its own authority for that of the displaced government. In other words, it is not the actual exercise of the Occupying Power's authority that determines occupation, but their ability to do so. If all that was required was that the Occupying Power exercise its authority, then an Occupying Power would be able to evade its obligations easily by not establishing the authority that it is in a position to exercise. Accordingly, it is not necessary for an Occupying Power to have ground troops present in the entire territory it occupies to be considered an occupation.

On this issue, commentator JM Spaight has argued that "while a commander is not required to picket the whole country and to garrison every hamlet, in order to establish his occupation, he must not proclaim as occupied a territory in which his troops have not, and could not, set foot."⁹⁸ Again, the parallel between the criteria for occupation and that for blockades is apt. JM Spaight writes:

⁹⁸ JM Spaight, *War Rights on Land* (London: MacMillan & Co, 1911), pp. 327.

“To establish an effective blockade there need not be a line of cruisers drawn across the mouth of a harbor, but there must be some force within striking distance, so as to make it difficult for any vessel to ‘run the blockade’ and gain entrance; and the same principle governs occupation.”⁹⁹

The instruments of IHL all seem to agree that the Occupying Power must have the ability in the occupied territory to establish its authority there for there to be an occupation. However, as the *travaux préparatoires* demonstrate, the criteria for determining when an occupation has begun is described very generally. Indeed, the provisions on the criteria for determining when an occupation begins were often the result of compromises agreed on by the participants at these conferences. For instance, the delegates at the Hague Regulations were unable to agree on a formulation and consequently, deferred to the wording of the earlier Brussels Declaration.

Where IHL treaties do not provide enough clarity, however, the practices of states are often consulted to fill in the blanks. However, national court hearings to apply rules of international law are beset by the fact that their judgments represent the perspective of only one party to the IHL instrument in question. Accordingly, they do not carry as much weight in an international context as the interpretation of an IHL instrument by an international court. These types of judgments

⁹⁹ Ibid, at pp. 328-329

are more protected from the criticism that they serve any government's political or legal agenda.

Case Law

The *Hostages* trial

The period immediately following World War II provided the first opportunity for judicial consideration of the laws of war relating to occupation. In the *Hostages* case, the American Military Tribunal brought high-ranking German military officers to trial for offenses committed by troops under their command in the course of the occupation of Yugoslavia, Albania, Greece and Norway.

Despite the vulnerability of national courts criticism mentioned above, the *Hostages* case has been frequently cited by international tribunals, and in consideration of its weight, will be discussed here. The trial is only international in that it was rooted in the Allied Control Council Law No. 10, regarding the Punishment of Persons Guilty of War Crimes or Crimes against Peace and Humanity. Control Council Law No. 10 was enacted shortly after the beginning of the Nuremberg Trial, and authorized every Occupying Power to try persons suspects of war crimes, crimes against peace and against

humanity independent of the International Military Tribunal in Nuremberg.¹⁰⁰

A number of the charges in the *Hostages* trial were for violations of the law of occupation. Accordingly, the Tribunal had to decide whether there was an occupation as defined by Article 42 of the 1907 Hague Regulations. Their ruling differentiated between the period of invasion and the period of occupation, holding that:

“The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.”¹⁰¹

The Tribunal ruled that nine days after the German invasion of Yugoslavia, “the powers of government passed into the hands of the

¹⁰⁰ Enactment and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority Germany (1945) Vol. 1, pp. 306-311

¹⁰¹ United States of America v Wilhelm List et al (Judgment) Case No 7 (19 February 1948) XI Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No 10, 757, 1243

German armed forces and Yugoslavia became occupied territory.”¹⁰² During the period of occupation armed resistance movements began to develop, eventually regaining partial control of the sections of the territories. However, the Tribunal ruled that “while it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at anytime they desired assume physical control of any part of the country.”¹⁰³ Thus, the Tribunal did not consider this sufficient to negate the existence of occupation.

The judgment in the *Hostages* trial reiterates the view that it is not required for an Occupying Power to maintain a military presence in every part of the territory for there to be an occupation. The Tribunal ruled that even if armed resistance forces recoup partial control of the territory, it has no effect on the status of the territory as occupied. This view parallels the deliberations of the Brussels Declaration and 1899 Hague Conferences.¹⁰⁴

The International Criminal Tribunal for the former Yugoslavia (ICTY)

¹⁰² *Ibid*

¹⁰³ *Ibid*

¹⁰⁴ *Supra* pp. 19 – 23.

Unlike the American Military Tribunal in the *Hostages* trial, the judgments of the ICTY represent an example of the interpretation of an international instrument by an international court. The ICTY's jurisdiction encompasses grave breaches of the laws and customs of war, which include occupation law. These breaches have been prosecuted before the tribunal in cases such as the trial of *Martinović* and *Naletilić*.

The indictment against *Martinović* and *Naletilić* included 22 counts, each alleging responsibility for having committed crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. Count 5, dealing with unlawful labor of civilians, Count 18, dealing with the forcible transfer of civilians and Count 19, dealing with the destruction of property, related to breaches of the law of occupation. Accordingly, the ICTY was forced to decide whether parts of Bosnian territory in 1993 and 1994 could be considered occupied.¹⁰⁵ The Tribunal ruled that:

“In the absence of a definition of “occupation” in the Geneva Conventions, the Chamber refers to the Hague Regulations and

¹⁰⁵ Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela" (Trial Judgement), IT-98-34-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 March 2003, available at: <http://www.unhcr.org/refworld/docid/41482f0a4.html> [accessed 24 March 2011]

the definition provided therein, bearing in mind the customary nature of the Regulations.

Article 42 of the Hague Regulations provides the following definition of occupation:

‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’

The Chamber endorses this definition.”¹⁰⁶

In other words, the Tribunal endorsed the definition of occupation contained in the 1907 Hague Regulations. The Tribunal argued that since the Geneva Convention represents a further codification of the obligations of the Occupying Power, in absence of a definition of occupation in the Conventions, the Hague Regulations’ definition could be used, bearing in mind the customary nature of the latter.

Furthermore, the ICTY outlined the following criteria to provide some basic direction in determining whether the authority of the Occupying Power has actually been established:

- “the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

¹⁰⁶ *Ibid* at pp. 73

- the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.”¹⁰⁷

These guidelines were derived mainly from various State practice, including the military manuals of the United Kingdom, the United States, New Zealand and Germany. It should be noted that the ICTY did not submit that all such criteria must be met for an occupation to be considered established. Rather, the ICTY considered the satisfaction of one or more of these criteria to be of assistance in making such a determination.

It should also be noted that the ICTY deliberated on the application of the laws of occupation to protected persons under the Geneva Convention IV. The Trial Chamber held that:

“The application of the law of occupation as it effects “individuals” as civilians protected under Geneva Convention IV does not require

¹⁰⁷ *Ibid* at pp. 73-74

that the occupying power have actual authority. For the purposes of those individuals' rights, a state of occupation exists upon their falling into "the hands of the occupying power."¹⁰⁸

In short, the ICTY adopted the view that the application of the laws of occupation to individual protected persons under GC IV does not require the Occupying Power to have actual authority. This was done in order to ensure the protection of civilians to the fullest extent possible, as, during an intermediate period, civilians may be left with less protections than they would have once an occupation is established. In that sense, it differs from its application under Article 42 of the Hague Regulations.

The International Court of Justice

The International Court of Justice (ICJ), as the primary judicial organ of the United Nations, is perhaps the most authoritative international court. The question of occupation has been considered by the ICJ in a recent case, the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.¹⁰⁹ This case began in 2003 at the request of the UN General Assembly's Tenth Emergency Special Session. It addressed:

¹⁰⁸ *Ibid* at pp. 75

¹⁰⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Rep. (2004) p[. 136

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”¹¹⁰

In considering the merits of the case, the ICJ commenced with a brief investigation of the legal status of the West Bank and Gaza. The ICJ referred to Article 42 of the 1907 Hague Regulations, and while Israel has not acceded to the Hague Convention, the ICJ did not consider this relevant on account of their customary international-law status. The Court had already held that the provisions of the Hague Regulations have become part of customary law in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.¹¹¹ The Court held that the Gaza Strip and West Bank “were occupied by Israel in 1967 during the armed conflict... Under customary international law, these were therefore occupied territories in which Israel had the status of an Occupying Power.”¹¹²

¹¹⁰ General Assembly Resolution ES-10/14 of 8 December 2003, UN Doc. A/RES/ES-10/14.

¹¹¹ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, at pp. 73

¹¹² See the *ICJ's ruling on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at paragraph 78

It can be surmised that the Court viewed the concept of occupation under the Geneva Conventions identically to the concept of occupation under the Hague Regulations.¹¹³ If this observation were not so, it would not be possible to explain the Court's reliance on the definition in Article 42 of the Hague Regulations to determine whether the provisions of occupation in the Geneva Convention are applicable to the West Bank and Gaza.

Overview

The above summation of international case law suggests a number of conclusions that have been similarly drawn from the IHL treaties consulted earlier.¹¹⁴ Firstly, the case law should demonstrate the international courts' repeated reliance on the definition of occupation contained in Article 42 of the Hague Regulations.¹¹⁵ Aside from the Geneva Conventions' extension of the scope of the laws of occupation to apply to occupations which are not met with resistance,

¹¹³ Apart from GC IV's application to territory occupied without armed resistance

¹¹⁴ *Supra* "Overview," pp. 34 – 38.

¹¹⁵ See the ICJ's ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; the ICTY's ruling in *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela"*; the Military Tribunal's decision in *United States of America v Wilhelm et al.*

the term occupation seems today to have the same meaning as it does in Article 42 of the 1907 Hague Regulations. ¹¹⁶

Secondly, the case law should demonstrate that two elements continue to form the basis for the determination of whether an occupation can be considered established. These concepts consist of a negative and a positive element. The negative element is that territory which has been occupied has been rendered incapable of exercising authority over the territory. The positive element is that the Occupying Power is in a position to exercise its own authority in the occupied authorities. This positive element is reiterated in Article 42 of the Hague Regulations' requirement that territory "is actually placed under the authority of the hostile army." ¹¹⁷

Finally, the case law should demonstrate that this control must be effective. In this context, effectiveness entails that the Occupying Power has, in the words of the ICTY, "a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the Occupying Power felt." ¹¹⁸ With that said, the case law shows

¹¹⁶ See the ICTY's Judgment in *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela"*

¹¹⁷ *Ibid* 46, at Article 42

¹¹⁸ *Ibid* 105

that the Occupying Power does not necessarily need to control every single part of the occupied territory for it to be considered occupied.¹¹⁹ Even if a resistance movement were to assume control over a portion of occupied territory, the territory is still considered occupied provided that the Occupying Power is able to take over control at any time.¹²⁰

As the ICJ's *Wall* judgment demonstrates, Israel satisfies the criteria for occupation with regard to the Gaza Strip up to 2005.¹²¹ The subsequent sections will consider the question of whether the same can be said during the period befalling Operation Cast Lead.

International Jurisprudence

The Legal Status of the Gaza Strip: 1967 - 2005

Israel occupied the Gaza Strip in the course of the Six Day War in June 1967.¹²² Soon after, it established a civil administration that assumed the responsibility for public services for the Palestinian

¹¹⁹ See the ICTY's Judgment in *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela"*; the Military Tribunal's decision in *United States of America v Wilhelm et al.*

¹²⁰ *Ibid*

¹²¹ See the ICJ's ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

¹²² *Ibid* 6

population.¹²³ In the course of the next 27 years, the Israeli civil administration managed public services in the Gaza Strip. That changed following the creation of the Palestinian Authority (PA) in 1994. The PA - which is the product of a series of agreements between the Israeli government and the Palestine Liberation Organization (PLO) between 1993 and 1998 known as the Oslo Accords - took over some of the administrative responsibilities in parts of the Gaza Strip.¹²⁴ However, the PA's limited exercise of power meant that the majority of the expenses for public services in the Gaza Strip were no longer paid being for by Israel through the civil administration.¹²⁵ The PA struggled to raise the enough money to cover these services

¹²³ Claude Bruderlein, "Policy Brief: Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law," *Harvard Program on Humanitarian Policy and Conflict Research* (2004): pp. 5, available at: <http://www.reliefweb.int/library/documents/2004/hvu-opt-20oct.pdf>

¹²⁴ Israel Ministry of Foreign Affairs, "Agreement on Preparatory Transfer of Powers and Responsibilities Between Israel and the PLO," (August 29, 1994), available at: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Agreement%20on%20Preparatory%20Transfer%20of%20Powers%20and%20Re>

¹²⁵ *Ibid*, at pp. 5-6

domestically, however, international donors agreed to generously support the PA over the next decade.¹²⁶

Notwithstanding the responsibilities of the new PA and support of international donors, Israel remained legally responsible for the welfare of the occupied population.¹²⁷ Moreover, the transfer of limited administrative powers to the Palestinian Authority in 1994 did not change the legal status of the Gaza Strip from 1994-2005.¹²⁸ A great deal of scholarship has been written on the status of the Gaza Strip as occupied territory during this period.¹²⁹ For present purposes, only the following needs to be said on this regard. From the point of view of international law, Israel's presence in the Gaza Strip throughout the entire period of 1967 to 2005 was resoundingly and internationally as

¹²⁶ *Ibid*

¹²⁷ *Ibid*

¹²⁸ *See* Wall Advisory Opinion, paragraph 78.

“Subsequent events in these territories, as described in paragraphs 75 to 77 [of the Advisory Opinion, pertaining to the conclusion of Israeli-Palestinian agreements since 1993, and the transfer of powers and responsibilities to the PA], have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.”

¹²⁹ *See* generally Shane Darcy, “IDF Measures and the Laws of Occupation,” *Middle East Policy* Vol. 10 (No. 4, 2003): pp. 58;

that of belligerent occupation.¹³⁰ This view has been reiterated in the four decades spanning this period by authorities such as the Red Cross, the High Contracting Parties to the 1949 Geneva Conventions and the ICJ.¹³¹

Likewise, it should also be noted that throughout this period, Israel disputed its status as an Occupying Power. The official position of the Israeli government was that the Gaza Strip was “administered” or “disputed” territory, as opposed to occupied territory, because neither Egypt nor Jordan had sovereignty over these territories (the Gaza Strip and West Bank, respectively) when their administrations were displaced during the Six Day War.¹³² Accordingly, Israel has challenged the *de jure* applicability of the Fourth Geneva Convention on the grounds they were not under the sovereignty of a High Contracting Party to the Geneva Conventions. However, this

¹³⁰ *Ibid* 9-14

¹³¹ See *Wall Advisory Opinion*, paragraphs 86-101, for summation of this discussion

¹³² See Israel Ministry of Foreign Affairs, “Forgotten Facts About the West Bank and Gaza Strip,” (February 2003), available at: http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/DISPUTE%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We

interpretation of Article 2 of the Fourth Geneva Convention was unanimously rejected by the ICJ in the *Wall* advisory opinion.¹³³

In the *Wall* advisory opinion, the Court found that the question of an occupied territory being under the sovereignty of one of the parties to the conflict is irrelevant to the determination of occupation.¹³⁴ This was a unanimous finding, as the lone dissenting judge, Judge Buergenthal, expressly concurred on this regard.¹³⁵ Accordingly, the *Wall* advisory opinion unanimously rejected Israel's challenge of the applicability of the Fourth Geneva Convention to the Palestinian territories, marking an authoritative recognition that Israel had the status of occupant in the West Bank, and by extension East Jerusalem and the Gaza Strip.

While the government of Israel has rejected the overall *de jure* applicability of the Fourth Geneva Convention, the Israeli judiciary has consistently supported the application of the 1907 Hague

¹³³ See the ICJ's ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

¹³⁴ *Ibid*, paragraph 101

¹³⁵ Declaration of Judge Buergenthal, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," paragraph 2, available at: <http://www.icj-cij.org/docket/files/131/1687.pdf?PHPSESSID=2a152471df38d78db492192eb11f33b0>

Regulations to the Gaza Strip. At various stages, the Israeli courts have recognized that the framework governing the Gaza Strip is that of belligerent occupation and that relevant customary laws are to be applied.¹³⁶ Additionally, the Israeli courts have stated that they will respect the “humanitarian provisions” of the Fourth Geneva Convention, although no actual list has ever been provided of what provisions those are.¹³⁷ The vast majority of states, almost all government experts and international scholars, the United Nations and ICRC have opposed the selective application of the Fourth Geneva Convention by Israel, arguing instead for the full *de jure* applicability to the Occupied Palestinian Territories.¹³⁸ The *Wall* advisory opinion reiterates the general view, affirming the full applicability of the Hague Regulations and the Fourth Geneva Conventions to the West Bank (and by extension the Gaza Strip). Accordingly, it is untenable

¹³⁶ See Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: CUP, 2009), pp. 12 – 30.

¹³⁷ Cf. D Kretzmer, *The Occupation of Justice* (Albany: SUNY Press, 2002).

“The Israeli authorities have not clarified what they perceive to be the ‘humanitarian provisions’ of GC IV.”

¹³⁸ *Ibid* 129, pp. 3

for Israel to challenge its status occupation with regard to the Gaza Strip up to 2004.¹³⁹

The Legal Status of the Gaza Strip: 2005 and beyond

On April 14, 2004, Prime Minister Ariel Sharon sent a letter to President George W. Bush outlining an initiative for the dismantlement of settlements and the gradual withdrawal of Israeli forces from permanent military bases inside the Gaza Strip.¹⁴⁰

President Bush welcomed the initiative, praising it as “a bold and historic initiative that can make an important contribution to peace.”

¹⁴¹ The so-called Disengagement Plan was, according to the Israeli Prime Minister, meant to “reduce friction between Israelis and Palestinians... improve security for Israel and stabilize [Israel’s] political and economic situation.”¹⁴²

¹³⁹ See the ICJ’s ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

¹⁴⁰ See the letter of Israeli Prime Minister Ariel Sharon to President Bush, (April 14, 2004), available at: www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Exchange+of+letters+Sharon+Bush+14+Apr+2004.htm

¹⁴¹ *Ibid*

¹⁴² *Ibid*

After the Prime Minister's own Likud party voted down the plan by a 20-point margin in a non-binding referendum in early May 2004,¹⁴³ the Israeli Prime Minister issued a revised version on June 6, 2004.¹⁴⁴ The Revised Disengagement Plan was passed by the Israeli Knesset on October 26, 2004, and approved by the Israeli cabinet on February 20, 2005.¹⁴⁵ The core component of the revised Plan was still a unilateral withdrawal of Israeli settlers from the Gaza Strip and four settlements in the northern West Bank.¹⁴⁶ Additionally, the Plan would order the withdrawal of the Israeli Defense Force (IDF) from all of the "evacuated" areas, the dismantlement of all military installations and redeployment of IDF forces outside these areas.¹⁴⁷

¹⁴³ Yoav Appel and John Vause, "Sharon Attempts to Regroup After Defeat," *CNN*, May 23, 2004, available at: <http://www.cnn.com/2004/WORLD/meast/05/02/sharon.referendum/index.html>

¹⁴⁴ Knesset, "*Disengagement Plan of Prime Minister Ariel Sharon - Revised*," (May 28, 2004), available at: http://www.knesset.gov.il/process/docs/DisengageSharon_eng_revised.htm

¹⁴⁵ Nina Gilbert, "Knesset Approves Disengagement Plan," *The Jerusalem Post*, Oct. 27, 2004.

¹⁴⁶ Eric Silver, "Sharansky Quits Over Gaza Withdrawal," *The Independent*, May 3, 2005.

¹⁴⁷ *Ibid* 144

On the other hand, the text of the revised Plan stipulates the continuance of Israel's military presence in the Gaza Strip in a number of ways. For instance, it specifies that Israel will continue to exercise security activity in the sea off the coast of the Gaza Strip.¹⁴⁸ This necessitates the continued presence of Israel's military in Gaza's territorial waters. The plan also stipulates that Israel will maintain exclusive authority over Gaza's airspace.¹⁴⁹ Again, this entails the continued presence of Israel's military in Gaza's skies. In addition, the text of the revised Plan stipulates that Israeli military forces will remain in the Egyptian-Gazan border area known as the Philadelpi Route,¹⁵⁰ and explicitly reserves the possibility that the area where Israel's military forces remain will be expanded when required by "security considerations."¹⁵¹ Finally, the text of the Plan lays down that Israel will continue to guard and monitor the rest of the external land perimeter of the Gaza Strip.¹⁵²

¹⁴⁸ *Ibid*, at paragraph 3.1, principle 1

¹⁴⁹ *Ibid*

¹⁵⁰ *Ibid*, at paragraph 6

¹⁵¹ *Ibid*

¹⁵² *Ibid*

Amid much media attention, Israel moved forward with the implementation of the Plan in 2005. On Monday, September 12, 2005, at approximately 7:00 A.M., the last convoy of Israeli Defense Forces (IDF) departed from the Gaza Strip. In a brief ceremony at one of the exit gates, IDF Briadier-General Aviv Kochavi proclaimed that “the responsibility for whatever takes place inside befalls upon the [Palestinian] Authority.”¹⁵³ That same day, the IDF Chief of Southern Command, Major-General Dan Harel, signed an official decree proclaiming the end of Israeli military rule in the Gaza Strip.¹⁵⁴ The original draft of the Disengagement Plan explicitly expressed the Israeli government’s view that the implementation of the Plan will end the status of the Gaza Strip as occupied territory, noting that:

“Upon completion of this process, there shall no longer be any permanent presence of Israel security forces or Israeli civilians in the areas of Gaza Strip As a result, there will be no basis for claiming that the Gaza Strip is occupied territory.”¹⁵⁵

¹⁵³ Yuval Shany, “Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement,” *Yearbook of International Humanitarian Law* Vol. 8, (2005): pp. 369

¹⁵⁴ IDF Spokesperson, Israel Ministry of Foreign Affairs, “Exit of IDF Forces from the Gaza Strip Completed,” (September 12, 2005), available at: <http://www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm>

¹⁵⁵ Israel Ministry of Foreign Affairs, “The Disengagement Plan – General Outline,” (Apr. 18, 2004), available at:

Israel's Revised Disengagement Plan, like the original draft, similarly disavows Israel's continued obligations toward the inhabitants of the Gaza Strip, stating that:

“The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.”¹⁵⁶

This statement expresses the continued view of the Israeli government that the implementation of the Disengagement Plan will mark the end of the occupation of the Gaza Strip, since the occupation is the basis of Israel's responsibilities toward the Palestinians in the Gaza Strip. The Palestinian Negotiation Affairs Department (PNAD), for their part, quickly responded at the time that, legally speaking, the status of the Gaza Strip would remain unchanged in the aftermath of the Plan's implementation.¹⁵⁷ The PNAD argued that:

<http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Diseengagement+Plan+-+General+Outline.htm>

¹⁵⁶ Israel Ministry of Foreign Affairs, “Revised Disengagement Plan,” (June 6, 2004), available at: <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm>

¹⁵⁷ PLO Negotiation Affairs Department, “The Israel “Disengagement” Plan: Gaza Still Occupied,” (September 2005), available at: http://www.nad-plo.org/inner.php?view=disengagement_Fact_GAZA%20STILL%20OCCUPIED

“Israel will retain effective military, economic, and administrative control over the Gaza Strip and will therefore continue to occupy the Gaza Strip—even after implementation of its “Disengagement Plan” as proposed. Because Israel will continue to occupy Gaza, it will still be bound by the provisions of 1907’s Hague Regulations, the Fourth Geneva Convention and relative international customary law.”¹⁵⁸

When do Military Occupations End?

The Hague Regulations

The conditions required to bring an end to occupation are closely linked with the conditions triggering the law of occupation’s application.¹⁵⁹ No article in the Hague Regulations explicitly refers to the conditions required for the termination of occupation. However, Article 42 does state that the law of occupation will continue to apply, regardless of whether the initial armed conflict ended,¹⁶⁰ as long as that the territory remains "under the authority of the hostile army," and wherein that authority has "been established and can be

¹⁵⁸ *Ibid*, at Section IV: Conclusion

¹⁵⁹ See Adam Roberts, “The End of Occupation: Iraq 2004,” *The International and Comparative Law Quarterly* Vol. 54, (January 2005): pp. 28-29; Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights,” *The American Journal of International Law* Vol. 100, No. 580 (2006): pp. 580, available at: http://ccw.modhist.ox.ac.uk/publications/roberts_militaryoccupation.pdf

¹⁶⁰ *Ibid* 47, at Article 6

exercised." ¹⁶¹ Reference must also be made to Article 6 of the Fourth Geneva Convention. This Article determines that the Convention ceases to apply to occupied territory upon one year of the general close of military operations. However, if the Occupying Power exercises the function of government in the Occupied Territory, a series of provisions of the Convention continue to apply. ¹⁶²

Criteria for the Termination of Occupation

The authorities discussed in the preceding sections of this paper should support the proposition that two elements lie at the core of when a territory can be considered occupied: a) the Occupying Power's ability, or position, to exercise its authority within the territory and; b) that the indigenous authorities of the occupied territory have been rendered incapable of functioning publicly. ¹⁶³

Accordingly, this paper will use these two criteria's reversal as the basis for determining when an occupation has ended. When the conditions triggering the application of the law of occupation have been

¹⁶¹ *Ibid* 46, at Article 42

¹⁶² Jean Pictet, *Commentary on Geneva Convention IV of 1949, Relative to the Protection of Civilian Persons in Times of War* (Geneva: ICRC, 1958), pp. 58 – 59

¹⁶³ *Supra* "Overview," at pp. 46

negated, the occupation may be considered to have been terminated. From the perspective of IHL, the test for when the criteria apply is fundamentally a factual one.¹⁶⁴ Just as an occupant's formal proclamation of a territory as occupied has little bearing on the legal determination of the territory, an occupant's proclamation that a territory is no longer occupied is equally irrelevant.¹⁶⁵ It is the reality on the ground, and not the label, that matters. Thus, both the beginning and the end of occupation are ultimately questions of fact. The core elements of occupation must be evaluated in light of the existing facts pertaining thereto to arrive at the occupied status of a territory. If the test fails any of the core elements of occupation, it follows that occupation does not exist.

According to British scholar of international relations, Adam Roberts, the method through which the end of occupation typically occurs is when foreign troops leave.¹⁶⁶ However, Roberts is keen to point out that while "in many cases such a statement poses no problems. However, the withdrawal of occupying forces is not the sole

¹⁶⁴ *Supra* "Overview," at pp. 34

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid* 159, at pp. 28

criterion of the ending of an occupation.”¹⁶⁷ Indeed, from the perspective of IHL, the relevant criteria for the termination of occupation are clear.

As mentioned previously, under the framework of the Hague Regulations, a territory is no longer occupied when the occupying power can no longer exercise its authority. Only when, and where, the authority of the Occupying Power “has been established and can be exercised” does territory become subject to the law of occupation. The test of an Occupying Power’s ability, or position, to exercise this authority is often referred to as effective control in IHL literature.¹⁶⁸ The test of effective control test does not hinge on the military presence of the Occupying Power in all parts of a territory, but the extent to which an occupant, through its military presence, can exert effective control over the territory.

The international jurisprudence on occupation concurs in this regard. A critical recognition of the *Hostages* trial was that an Occupying Power can exercise effective control over an area without maintaining troop presence in parts thereof. Greece and Yugoslavia, which were outside of Germany’s actual control at various stages, were

¹⁶⁷ *Ibid*

¹⁶⁸ *Ibid* 123, at pp. 6

considered occupied territory by the military tribunal in Nuremberg, under the reasoning that “the Germans could at any time they desired assume physical control of any part of the [Greece and Yugoslavia].”¹⁶⁹

Once again, whether an Occupying Power has effective control is always a factual determination. In the case of the Gaza Strip, Israel’s claim that its occupation of the Gaza Strip has been terminated raises a number of questions. The following section will address the extent to which effective control has persisted in the aftermath of Israel’s so-called Disengagement Plan.

¹⁶⁹ *Ibid* 105, at pp. 55 - 56

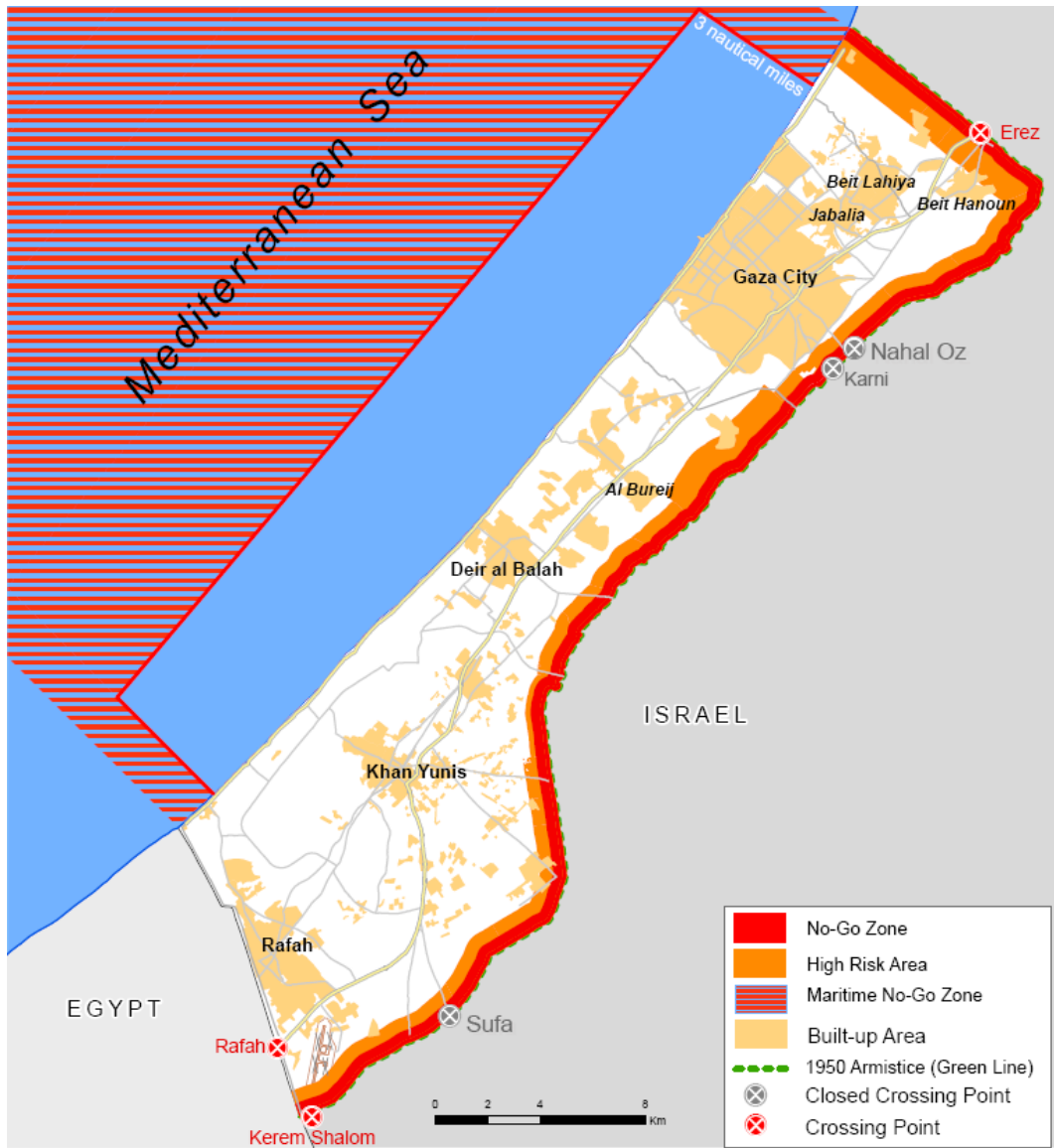


Figure 1. Map of the Gaza Strip ¹⁷⁰

Effective Control

¹⁷⁰ United Nations Office for the Coordination of Humanitarian Affairs - Occupied Palestinian Territory, “Easing the Blockade: Assessing the Humanitarian Impact on the Gaza Strip,” (March 2011), at pp. 3, available at: http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf

Gaza's Land Crossings

The entire land border of the Gaza Strip is enveloped by a separation barrier first constructed by Israel in 1994 on the 1950 Armistice (Green Line), and extended in 2005 to encompass the border between Gaza and Egypt.¹⁷¹ The structure of the fence is composed of wire fencing with posts, sensors and buffer zones aligning areas bordering Israel, and concrete and steel walls on lands bordering Egypt.

Since there has been no passage of people or goods into Gaza via sea or air has since Israel occupied the Gaza Strip in 1967,¹⁷² everything going in or out of Gaza takes place at one Gaza's land crossings. As of March 2011, pedestrian entry into the Gaza Strip by land is limited to two terminals; the northern Erez Crossing on the Israeli-Gaza border, and the southern Rafah Crossing on the Egyptian-

¹⁷¹ Anne Barnard, "Life in Gaza Steadily Worsens," *The Boston Globe*, October 22, 2006, available at: http://www.boston.com/news/world/middleeast/articles/2006/10/22/life_in_gaza_steadily_worsens/

¹⁷² Sari Bashi and Kenneth Mann, "Disengaged Occupiers: The Legal Status of Gaza," (January 2007): pp. 47, available at: <http://www.gisha.org/!UserFiles/File/Report%20for%20the%20website.pdf>

Gazan border.¹⁷³ The only other presently open terminal, the Kerem Shalom Crossing, is used only for cargo.¹⁷⁴

At the end of February 2011, the conveyer belt at the Karni crossing (used only for cargo) was shut down permanently.¹⁷⁵ This followed the closure of the rest of the Karni crossing in June 2007, the closure of the Sufa Crossing in 2008, and of Nahal Oz in January 2010.¹⁷⁶ As a result, all cargo seeking to cross the Gaza-Israeli border are currently limited to the Kerem Shalom crossing.¹⁷⁷

The Movement of People

The Erez Crossing

Despite Israel's evacuation of its permanent ground troops out of the Gaza Strip, Israel has continued to control significant aspects of life in the Gaza Strip, especially the movement of people via Gaza's land border crossings. The Erez crossing, nestled on the Israeli-Gaza border, is currently the only pedestrian terminal, besides Rafah, which

¹⁷³ *Ibid* 170, at pp. 2

¹⁷⁴ *Ibid*, at pp. 14

¹⁷⁵ *Ibid*, at pp. 14

¹⁷⁶ *Ibid*, at pp. 14

¹⁷⁷ *Ibid*, at pp. 14

allows Gaza's residents access to the outside world. In the post-Disengagement period, Israel has frequently used its full control over the Erez border crossings to impose arbitrary closures.¹⁷⁸

With very few exceptions, the movement of people out of Gaza through the Erez crossing is prohibited.¹⁷⁹ Only those who meet the government of Israel's criteria for an exceptional permit are allowed passage.¹⁸⁰ Acquiring the permit application has been described by the United Nations Office for the Coordination of Humanitarian Affairs of the occupied Palestinian territory (OCHA oPt) as "time consuming, arduous and uncertain."¹⁸¹ Additionally, applications submitted by Gaza residents who meet the established criteria are subject to denial on security grounds, a veto which is often exercised, without any elucidation on the details as to why.¹⁸² When an initial application is denied, the resident assumes the burden of proof of dispelling these

¹⁷⁸ Amnesty International, "Israel-Occupied Territories: Prolonged closure of the Gaza-Egypt border and arbitrary restrictions to freedom of movement should be lifted," (October 2005), available at: <http://web.amnesty.org/library/Index/ENGMDE150512005?open&of=E-NG-ISR>

¹⁷⁹ *Ibid* 170, at pp. 20

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

¹⁸² *Ibid*

claims, a process that often necessitates lengthy and costly follow-up.

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The difficulty associated with obtaining a permit was addressed in a statement by Israel's Prime Minister, Benjamin Netanyahu, in June 2010.¹⁸⁴ The document notes Israel's plans to "streamline the policy of permitting the entry and exit of people," and to "consider additional ways to facilitate the movement of people to and from Gaza."¹⁸⁵ However, observers on the ground have noted that in practice, very little has changed.¹⁸⁶ According to OCHA oPt, "only an insignificant increase was recorded in the volume of people traveling through the Erez crossing in the second half of 2010 compared to the previous half – from 106 to 114 persons a day."¹⁸⁷

The OCHA oPt has further noted that:

¹⁸³ *Ibid*

¹⁸⁴ Israel Ministry of Foreign Affairs, "Prime Minister's Office Statement Following the Israeli Security Cabinet Meeting," (June 20, 2010), available at: http://www.mfa.gov.il/MFA/Government/Communiques/2010/Prime_Minister_Office_statement_20-Jun-2010.htm

¹⁸⁵ *Ibid*, at #5

¹⁸⁶ *Ibid* 170, at pp. 20

¹⁸⁷ *Ibid*

“Gaps in the availability of key medical services, generated by decades of neglect and compounded since the imposition of the blockade, have created the need to refer patients to hospitals outside Gaza for specialized medical treatment. The process needed to obtain an exit permit adds anguish and stress to people already vulnerable due to illness. While the nature of this process has not changed since the relaxation announcement, the average rate of approval increased from 76 to 81 percent between the first and second halves of 2010. In other words, during the latter, one out of five patients still missed their hospital appointment because their permits were denied or delayed.”¹⁸⁸

OCHA oPt goes further in describing the effects of restrictions of travel on Gaza’s overall health, noting that:

“Specialized medical knowledge requires months and years of training in medical units that are only available in the West Bank, particularly in East Jerusalem. However, travel restrictions make access to such training impossible for most medical staff. Significant capacity shortages exist in the area of cardiovascular diseases, oncology, ophthalmology, orthopedics and neurosurgery, areas that accounted for the majority of referrals outside Gaza in the past five years. In the second half of 2010, a total of 44 medical staff members were issued permits to attend trainings outside Gaza, a significant increase compared to the previous six months (19 permits), but an insignificant fraction of the actual needs.”¹⁸⁹

The OCHA oPT’s report also discusses Israel’s policy regarding student access to universities outside the Gaza Strip.

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

“The policy regarding access for students to universities in the West Bank or elsewhere is even more restrictive; in 2010 only three such permits were granted. This policy is particularly detrimental in the case of students wishing to study academic disciplines available in West Bank universities but not in Gaza, such as dentistry, occupational therapy, medical engineering, veterinary medicine, environmental protection, human rights law, and chemistry (PhD level).”¹⁹⁰

In sum, the OCHA report concludes that "Israel continues to exercise effective control over the access of people to the outside world via Israel."¹⁹¹ This access has been subject to increasingly severe restrictions following the imposition of the blockade in June 2007.¹⁹² Indeed, the data on entry of persons into and out of the Gaza Strip indicates that post-blockade passage remains well below that of the pre-blockade period,¹⁹³ although the figures for preceding the 2007 blockade, but after the implementation of the 2005 disengagement were still "an insignificant fraction of the actual needs."¹⁹⁴

The Rafah Crossing

¹⁹⁰ *Ibid*, at pp. 21

¹⁹¹ *Ibid*, at pp. 20

¹⁹² *Ibid*

¹⁹³ *Ibid*, at pp. 21

¹⁹⁴ *Ibid*

The restrictions of persons through the Erez crossing, as well as Israel's gradual closure of the all the other pedestrian exit/entry terminals of the Gaza Strip, should be seen in the context of the dependency it has created for Gazans upon the Rafah crossing for access to the outside world. In the period following the 2005 Disengagement Plan, Israel has (at various stages) exercised both direct and indirect control of the Rafah crossing between Israel and Gaza, notwithstanding the fact that the crossing is not located on a border of Israeli territory.

In fact, directly after the Disengagement Plan's implementation, the Israeli armed forces retained their pre-Disengagement military presence and control of the Rafah border crossing.¹⁹⁵ During this period, Israel imposed the closure of the Rafah border crossing, resulting in damaging effects on the medical care, education and economy of the Gaza Strip.¹⁹⁶ This continued until November 2005, when an arrangement known as the Agreement on Movement and

¹⁹⁵ S.D. Dikker Hupkes, "What Constitutes Occupation? Israel as the Occupying Power in the Gaza Strip after Disengagement," *Netherlands Quarterly of Human Rights* Vol. 28, Issue 2 (2008): pp. 73

¹⁹⁶ Al-Dameer Association for Human Rights in Gaza, "Israeli Occupation Forces Leave Its Posts in Gaza Strip," (September 2005), available at: http://www.aldameer.org/index.php?action=details&id=news&code=54&sid=000009_000185_000198&language=2

Access (AMA) was reached between Israel and the Palestinian Authority.¹⁹⁷ The terms of the AMA call for the Palestinian Authority to operate the Rafah Crossing with the support of the European Union Border Assistance Mission (EUBAM) and under the surveillance of Israeli video-monitors.¹⁹⁸

Although the language of the AMA indicates that Israel's role in the Rafah crossing would be largely advisory, in practice, Israel has exercised significant residual control over the entry of persons into Gaza via Rafah to this day. With very few exceptions, entry into Gaza through the Rafah crossing is limited to "Palestinian residents" (those registered under the Israeli-controlled Palestinian population registry and who hold Palestinian identity cards).¹⁹⁹ Moreover, Israel reserves the right to block the entrance of any Palestinian residents whom

¹⁹⁷ United Nations Office for the Coordination of Humanitarian Affairs, "The Agreement on Movement and Access," (November 2005), available at:
http://www.ochaopt.org/documents/AMA_One_Year_On_Nov05_final.pdf

¹⁹⁸ EU Press Release, "Summary of remarks by EU HR Javier SOLANA on the agreement on Rafah," (November 15, 2005), available at:
http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1021&lang=NL&mode=g

¹⁹⁹ *Ibid* 186

Israel considers to be “terrorist activists.”²⁰⁰ Additionally, even in the excepted categories (diplomats, foreign investors, foreign representatives of recognized international organizations and humanitarian cases) the ability of a foreigner to cross the Rafah terminal is subject to Israeli veto.²⁰¹

Throughout the post-blockade period, Israel closed the Rafah border crossing entirely, with the exception of an extremely limited passage of people and cargo. Israel’s justifications for the closure were that, given the absence of security personnel loyal to the Palestinian Authority on the Gaza side of the crossings, it could not allow the

²⁰⁰ Letter from Ron Roman, IDF Spokesman to Sari Bashi, from Jan. 29, 2006, detailing categories of persons permitted to cross via Rafah Crossing. According to the letter:

"The Crossing is intended for movement by holders of Palestinian ID cards only. Passage through the Crossing by those who are not holders of Palestinian ID cards is permitted, according to the agreement, in a number of exceptional categories:

- A. Diplomats
- B. Foreign Investors
- C. Foreign Representatives of Recognized International Organizations
- D. Humanitarian Cases.

As a general matter, at Rafah Crossing, there is no prohibition on passage by holders of Palestinian ID cards, with the exception of terrorist activists."

²⁰¹ *Ibid* 178, at 4

opening of the passenger crossing at Rafah.²⁰² Ever since, Israel has prohibited all entry into or out of Gaza, except “via sporadic, ad hoc crossing for humanitarian cases... Since March 2008, Rafah has opened approximately once per month, each time permitting hundreds of Palestinian ID card-holders and Egyptian citizens to enter and leave Gaza.”²⁰³ These figures are derived from Gisha, an Israeli NGO which focuses on Gaza residents’ freedom of movement. The figures from the OCHA oPt vary slightly, noting that the Rafah crossing “opened erratically, usually no more than two-three days every month.”²⁰⁴

The passage of persons via Rafah improved slightly following the flotilla incident in early June 2010,²⁰⁵ when Egypt eased their policy regarding the opening of the Rafah crossing between Gaza and Egypt. According to Gisha, the Legal Center for Freedom of Movement:

²⁰² Israel Defense Ministry, “Letter from Asaf Barhel, Coordination for Government Activities in the Territories to Adv. Noam Peleg of Gisha,” (July 15, 2007).

²⁰³ Gisha – the Legal Center for Freedom of Movement, “Gaza Closure: Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip,” (December 2008), at pp.2

²⁰⁴ *Ibid* 170, at pp.21

²⁰⁵ See generally Edmund Sanders, “Israel criticized over raid on Gaza flotilla,” *Los Angeles Times*, June 1, 2010, available at: <http://articles.latimes.com/2010/jun/01/world/la-fg-israel-clash-20100601>

"Egypt, which has the physical capacity to open Rafah Crossing, closes it as the result of pressure exerted on it by Israel and other parties in order to promote its own interests, not to recognize the Hamas government in the Gaza Strip and not to allow a connection between it and Egyptian entities that oppose the government. The closure of the Gaza Strip and the suffering of its residents create pressure on Egypt to open the crossing, and it does so for humanitarian purposes, sporadically and ad hoc, informing Israel of these openings. Those openings satisfy the travel needs of only a fraction of the residents of Gaza." ²⁰⁶

Nonetheless, Egypt's minor ease of restrictions on passage through the Rafah crossing in June 2010 has lead the OCHA oPt to note that:

"Since early June 2010, the [Rafah] crossing has operated six (later reduced to five) days a week, on a regular basis. This change improved the access of the population to the outside world, but only for those defined as 'humanitarian cases', including mostly patients and students, as well as foreign passport holders. Overall, in the second half of 2010, an average of 315 people crossed Rafah in each direction every day, less than half the equivalent figure in the first five months of 2006 (650), before restrictions at this crossing started." ²⁰⁷

In sum, although Israeli forces are no longer stationed on the Rafah crossing permanently, Israel has (both before, as well as after Operation Cast Lead) exercised indirect control over the Rafah

²⁰⁶ Gisha - the Legal Center for Freedom of Movement, "Rafah Crossing: Who Holds the Keys? - Summary," (March 2009), at pp. 7, available at: http://www.benor.co.il/Monitoring/Clippings/Rafah_Summary_Eng.PDF

²⁰⁷ *Ibid* 170, at pp. 21

Crossing. This control, in light of Israel's full control of all the other land passages, and the only other pedestrian crossing (Erez), further substantiate the view that its control over Gaza's pedestrian land crossings rises to the level of overall effective control.

The Movement of Goods

After the Blockade

Israel's blockade of the Gaza Strip, instituted in June 2007, imposed a variety of severe restrictions on the passage of cargo through Gaza's terminals. A joint report published by Amnesty International UK, Oxfam, CARE International UK, Christian Aid, the Catholic Agency For Overseas Development (CAFOD), Medecins de Monde UK, Save the Children UK and Trocaire cataloged the movement of goods in and out of the Gaza Strip during the post-blockade period. ²⁰⁸ Regarding the passage of cargo carrying humanitarian supplies, the report notes that:

“The present definition of what constitutes essential humanitarian supplies into Gaza is seriously deficient. Humanitarian agencies in the Occupied Palestinian Territories

²⁰⁸ Oxfam, “The Gaza Strip: A Humanitarian Implosion,” (March 2008), available at: http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/gaza_implosion.pdf

(OPT) have compiled a list of specific humanitarian goods which are essential for the survival and sustainability of life for the majority of the population, especially the most vulnerable groups such as children, the sick and the elderly. Unfortunately the Government of Israel has not allowed these items to enter.”²⁰⁹

OCHA oPt has similarly criticized Israel’s restrictive definition of humanitarian supplies during this period, noting that:

“In general, only limited types of goods classified by the Israeli authorities as ‘basic humanitarian products’ (primarily food, fodder and hygiene items) were allowed into Gaza in the first two years of the blockade [June 2007 – June 2009].” ²¹⁰

This constriction on cargo occurred during this period in spite of the statements of the Israeli government following the arrangement of the AMA. Following the agreement, Israel made statements that the Karni crossing, “the commercial lifeline into the Gaza Strip,” ²¹¹ would be fully functional by the end of 2006 and that 400 export trucks could cross each day. ²¹² Yet, in the months preceding the 2007 blockade, “only around 250 trucks a day entered Gaza through the Karni

²⁰⁹ *Ibid*, at pp. 7

²¹⁰ *Ibid* 170, at pp. 4, paragraph 3

²¹¹ *Ibid*, at pp. 8

²¹² *Ibid*

crossing with supplies,”²¹³ and by March of 2007, “crossings like Kerem Shalom [were] only able to deal with a maximum of 45 trucks a day. In most cases, this number [was] barely reached.”²¹⁴

Israel has also imposed a blockade on exports traveling outside the Gaza Strip. Oxfam notes that in the post-blockade period, shortly preceding Operation Cast Lead:

“In June 2007, there were 748 truckloads of exports leaving Gaza for Israel and other countries. A month later there were none. In December 2007, after much international pressure, reduced [restrictions on the] quantities of strawberries and carnations were allowed out, but not enough to safeguard the livelihoods of Palestinian farmers.”²¹⁵

Oxfam further notes that:

“[During March 2008], 95 percent of Gaza’s industrial operations [were] suspended because they cannot access inputs for production nor can they export what they produce.”²¹⁶

The passage of fuel and electricity supplies was also subject to severe restrictions during the post-blockade period. According to Oxfam, in the months preceding Operation Cast Lead:

²¹³ *Ibid*

²¹⁴ *Ibid*

²¹⁵ *Ibid*, at pp. 9

²¹⁶ *Ibid*, at pp. 4

“Gaza’s main power plant [operated] on industrial diesel that [was] provided by the European Union as international aid to the Palestinian people. Yet the Israeli government prevent[ed] the EU from supplying any more than 2.2 million liters of oil a week, which [was] not sufficient for the power plant to operate at full capacity.”²¹⁷

This has, in turn, had devastating effects on the ability of Gaza’s power plant to export electricity. Oxfam notes that in the period preceding Operation Cast Lead:

“Since Israel destroyed the original transformers in June 2006, the plant’s export capacity has been reduced by almost two-thirds. Today Gaza’s power plant has the capacity to provide 80 mW of electricity but actually only generates 55-65mW due to the Israeli restriction on industrial fuel supplies.”

After June 2010

The June 2010 initiative which oversaw the supposed “streamlining” of Israel’s permit policy for the entry of pedestrians into and out of Gaza also included a series of measures intended to ease the cargo access restrictions Israel imposed in their June 2007 blockade.²¹⁸ These relaxations were intended, in the words of Israel’s Ministry of Defense, “to provide relief to the civilian population of the Gaza Strip,

²¹⁷ *Ibid*, at pp. 9

²¹⁸ *Ibid* 184, at #1 – 3

while preventing the entry of weapons and other materials that can be used to harm the citizens of Israel." ²¹⁹

The announcement of these measures fell on the heels of a gradual expansion of cargo permitted to be imported into the Gaza Strip, beginning in late 2009. ²²⁰ Beginning in late 2009, Israel began to allow a few additional types of cargo (including glass, wood and clothing) to enter the Gaza Strip through the crossings in limited quantities. ²²¹ The relaxation of cargo restrictions in June 2010 further saw the partial lifting on import restrictions, resulting in an increased availability of consumer goods and some raw materials within the Gaza Strip. ²²²

With that said, in February of 2011, OCHA oPt conducted an assessment of the measures, involving 80 interview with relevant

²¹⁹ State of Israel - Ministry of Defense, Coordinator of Government Activities in the Territories, "The Civilian Policy Towards the Gaza Strip," (June 2010), at pp. 2, available at: <http://www.pmo.gov.il/NR/rdonlyres/EBDB36CF-2BA0-4719-B532-F723C7CF2456/0/gazaENG.pdf>

²²⁰ *Ibid* 170, at pp. 2

²²¹ *Ibid*, pp. 4, paragraph 3

²²² *Ibid*

stakeholders and extensive field observations.²²³ Their published findings conclude that pivotal restrictions, in fact, remained in place.²²⁴ Notably, restrictions on the import of building materials (cement, gravel, steel bars, concrete blocks and asphalt, among others) were maintained.²²⁵ These items' importation remains prohibited as "dual-use" materials, despite the fact that neither Israeli legislation nor by any international standard recognize them as such.²²⁶

Additionally, OCHA oPT notes that a multi-layered system of Israeli approvals regulating the import of every individual consignment of cargo materials has remained in place:

"The import of industrial equipment and machinery has remained subject to multiple clearance requirements by the Israeli authorities, including for items not defined as 'dual-use'. These requirements have resulted in prolonged delays, unpredictability and higher costs, which became a discouraging factor for businesses in all sectors."²²⁷

²²³ *Ibid*

²²⁴ *Ibid*, at paragraph 1

²²⁵ *Ibid*, at paragraph 3

²²⁶ *Ibid*, at pp. 4, paragraph 2

²²⁷ *Ibid*, at pp. 6, paragraph 5

Additionally, key restrictions on the export of goods have continued.²²⁸ This is despite the plan's clear stipulation that export restrictions would be relaxed for furniture and textile products, however, this relaxation measure has yet to be implemented.²²⁹

Gaza's Airspace and Territorial Waters

The implementation of the Disengagement Plan in 2005 did nothing to alter Israel's complete control over Gaza's airspace and territorial waters, which Israel has maintained sole control of ever since 1967.²³⁰ In fact, the government of Israel expressly reserved its exclusive control of Gaza's airspace and territorial waters in the terms of the Plan.²³¹

Gaza's Airspace

²²⁸ *Ibid*, at pp. 3, paragraph 2

²²⁹ *Ibid*, at pp. 6, paragraph 2

²³⁰ B'tselem, "The Gaza Strip: Israel's Control of the Airspace and the Territorial Waters of the Gaza Strip," available at: http://www.btselem.org/english/gaza_strip/control_on_air_space_and_territorial_waters.asp

²³¹ *Ibid* 144, at 3.1

"Israel will hold sole control of Gaza airspace and will continue to carry out military activity in the waters of the Gaza Strip."

Ever since the implementation of the Plan, Gaza's airspace has continued to be used for Israeli military operations. Notably, for Israeli combat and intelligence-gathering aircraft to patrol daily flights over the Gaza Strip. ²³² Through this means, Israel monitors the actions on the ground in Gaza and may attack targets whenever it desires. ²³³ Indeed, under the terms of the 2005 Disengagement Plan, Israel specifically reserves the right to use force against Palestinians inside Gaza in terms of preventative and reactive self-defense. ²³⁴ Israeli warplanes and drones have regularly patrolled the skies of Gaza since the implementation of the Plan, monitoring activity on the ground and sometimes firing missiles intended to assassinate militants, but which often kill civilians as well. ²³⁵

Gaza's Airport

The Oslo Accords formalized Israel's full control over Gaza's airspace, while also establishing that the Palestinian Authority could

²³² *Ibid* 230, at paragraph 4

²³³ *Ibid*

²³⁴ *Ibid* 144, at #3.1.3 and #3.2.2

²³⁵ *Ibid* 172, at pp. 49

build an airport in the area.²³⁶ After Gaza Airport was built and opened in 1998, it provided a limited number of weekly flights to neighboring Arab countries.²³⁷ Passengers leaving from the airport were transported by bus to the Rafah crossing, where they underwent Israeli security checks in the same manner as those leaving for Egypt through Rafah by land would, before being taken back to the airport.

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Ever since October 8, 2000, however, Gaza's airport has been closed by Israel, and has not opened since.²³⁹ Additionally, the Israeli Air Force bombed the airport's runways in December of 2001.²⁴⁰ From the period of September 2000 through the implementation of the Disengagement Plan in 2005, the airport was used as an Israeli military base.²⁴¹ When the soldiers departed the airport during the Disengagement, it was widely reported that soldiers at the base had

²³⁶ *Ibid*

²³⁷ *Ibid*

²³⁸ *Ibid*

²³⁹ *Ibid*

²⁴⁰ *Ibid*

²⁴¹ *Ibid*

vandalized and destroyed the infrastructure.²⁴² After the arrival of the AMA in November 2005, Israel recognized the airport's importance, and made a commitment to discuss arrangements to reopen it with the Palestinians.²⁴³ However, no discussions on this matter have ever been held to this day and the airport remains closed.²⁴⁴

Due to Israel's exclusive control of Gaza's airspace, the Palestinian Authority cannot, on its own initiative, operate an airport. The situation infringes on the right to freedom of movement to and from Gaza and impairs the ability of Gazans to engage in foreign trade.

Gaza's Territorial Waters

Israel also retains control of Gaza's territorial waters. Israeli naval vessels regularly patrol Gaza's coast, interdicting sea vessels attempting to land and confiscating contraband such as weapons or narcotics.²⁴⁵ While there is no fence along Gaza's coastline, residents still do not have open access to the sea.²⁴⁶ Palestinians seeking access

²⁴² *Ibid*

²⁴³ *Ibid*

²⁴⁴ *Ibid*

²⁴⁵ *Ibid* 172, at pp. 49

²⁴⁶ *Ibid* 230

to the sea are required to obtain a permit from Israel, and those who successfully obtain a permit are restricted in the distance they can travel from the shore. ²⁴⁷ Israeli patrol boats have, at various times, fired at boats that exceeded this distance. ²⁴⁸

Just as with Israel's control of Gaza's airspace, the control of its sea space began with the occupation of the Gaza Strip in 1967, and has gradually solidified since through the Oslo Accords and implementation of the Disengagement Plan. The terms of the Oslo Accords allow for Gaza's fishing boats to travel twenty nautical miles (roughly thirty-seven kilometers) from the coastline, except for a few areas to which they were prohibited entry. ²⁴⁹ In practice, however, Israel did not issue permits to all applicants, and allowed fishing up to a distance of no more than twelve nautical miles. ²⁵⁰ Following the 2005 Disengagement plan, Israel reduced the fishing area even further and moreover, ever since the abduction of the soldier Gilad Shilat on

²⁴⁷ *Ibid*

²⁴⁸ *Ibid*

²⁴⁹ *Ibid*

²⁵⁰ *Ibid*

June 25, 2006, Gaza's fishermen have not been allowed to travel further than three nautical miles from the Gaza's coast. ²⁵¹

Gaza's Seaport

The story of Gaza's seaport follows a similar narrative as Gaza's airport. The agreements signed by the parties since the beginning of the Oslo peace process clearly indicate both sides agreed to work toward building and operating a seaport in Gaza. ²⁵² However, Israel bombed the seaport construction site in October of 2000 after infrastructure work for the port began earlier that year. ²⁵³ Consequently, donor states have cut off funding for the project, and no work has been done on the seaport ever since. ²⁵⁴

The terms of the AMA of November 2005 indicate that Israel agrees to allow renewal of construction work on the seaport. ²⁵⁵ Additionally, in order to assure foreign donors, Israel promised it would not attack the port again and would cooperate in establishing

²⁵¹ *Ibid*

²⁵² *Ibid*

²⁵³ *Ibid*

²⁵⁴ *Ibid*

²⁵⁵ *Ibid*

the security and other arrangements needed to operate it. However, no action has been taken in this matter to date. ²⁵⁶

Access Restrictions and “No-Go” Zones

The Israeli military enforces the access restrictions to “restricted areas” within the Gaza Strip. ²⁵⁷ These restricted areas include “no-go” areas and “buffer zones” within the territory of the Gaza Strip, in areas near the border where Israeli settlements were formerly located. ²⁵⁸ This is regularly done by means of firing “warning shots” at people entering the restricted areas, which frequently has resulted in civilian casualties. ²⁵⁹ OCHA oPt estimates that “restricted” land zones encompass 17 percent of the total land mass of the Gaza Strip, and at least 35 percent of its agricultural land. ²⁶⁰

Sonics Booms

²⁵⁶ *Ibid*

²⁵⁷ *Ibid*, at pp. 8, at (b)

²⁵⁸ Shane Darcy, “An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law,” *Journal of Conflict and Security Law* (2010): pp. 27

²⁵⁹ *Ibid* 172, at pp. 49

²⁶⁰ *Ibid* 170, at pp. 9, paragraph 3

According to Israeli human rights group B'tselem, Israeli air force jets have created sonic booms a number of times since the implementation of the Disengagement Plan.²⁶¹ A sonic boom is the high-volume, deep-frequency effect of low-flying jets traveling faster than the speed of sound. The Israeli government has used their air force jets to penetrate the sound barrier at low altitudes above Gaza's airspace, sending deafening shockwaves across the territory.²⁶²

The Israeli Air Force's low-altitude raids over the Gaza Strip were often conducted at night while Gazans slept in their beds.²⁶³ They were described by residents as like "being hit by a wall of air" that is literally "painful on the ears, sometimes causing nosebleeds and 'leaving you shaking inside.'" ²⁶⁴ This new mode of power has been described as a form of psychoactive trauma that produces powerful physiological and psychological effects. According to Steve Goodman, it

²⁶¹ B'tselem, "Sonic Booms Constitute Collective Punishment," (July 3, 2006), available at: http://www.btselem.org/english/Special/20060703_Supersonic_booms.asp

²⁶² *Ibid*

²⁶³ Chris McGreal, "Palestinians hit by Sonic Boom Air Raids," *The Guardian*, November 3, 2005, available at: <http://www.guardian.co.uk/world/2005/nov/03/israel>

²⁶⁴ *Ibid*

“creates a climate of fear through a threat that was... as unsettling as an actual attack. Indeed, the "undecidability between an actual or sonic attack is a virtualized fear... And yet the sonically induced fear is no less real. Such deployments do not necessarily attempt to deter enemy action, to ward off an undesirable future, but are as likely to prove provocative, to increase the likelihood of conflict, to precipitate that future." ²⁶⁵

Military Incursions

Between the period of the Disengagement Plan and Operation Cast, Israel has launched several large-scale military incursions involving ground troops into the Gaza Strip. For example, in June 2006, Israel invaded Gaza in a military campaign codenamed Operation Summer Rain. ²⁶⁶ During this invasion, at least 202 Palestinians, including 42 children, were killed in the three-month operation which included 247 aerial bombings. ²⁶⁷ According to the UN,

²⁶⁵ Steve Goodman, *Sonic Warfare: Sound, Affect, and the Ecology of Fear* (Massachusetts: The MIT Press, 2009).

²⁶⁶ The Electronic Intifada, “Israel Invades Gaza: Operation Summer Rain,” (June 27, 2006), available at: <http://electronicintifada.net/bytopic/442.shtml>

²⁶⁷ Itim, “UN: 202 Palestinians killed since operation 'Summer Rain'” *Haaretz*, August 27, 2006.

Israel destroyed 120 structures, including homes and shops, and damaged an additional 160 structures. ²⁶⁸

The Administration of Justice in Gaza

Although the implementation of the Disengagement Plan led to the repeal of the system of Israeli military orders applicable to Gaza, and, accordingly, the jurisdiction of Israeli military courts therein, “this has not resulted in full authority over matters relating to the administration of justice being transferred by Israel to the Palestinians.” ²⁶⁹ In 2006, Israel enacted the Criminal Procedure Law, ²⁷⁰ allowing it to incarcerate Palestinians from the Gaza Strip in detention facilities inside Israel, and prosecute them in Israeli civil courts. ²⁷¹ Originally, the scope of the bill was limited solely to non-

²⁶⁸ Medecins Sans Frontieres, "MSF Responds to 'Summer Rain' Operation in Palestinian Territories," (August 10, 2006).

²⁶⁹ *Ibid* 258, at pp. 26

²⁷⁰ Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provision) Law 5765-2006.

²⁷¹ *Ibid* 58, at pp. 26

residents of the State of Israel,²⁷² however, this statute was later amended.²⁷³

In spite of the bill's later amendment, many observers have noted the original bill's (enacted in the wake of the Disengagement Plan) inclusion of the statute was "born from a desire to retain direct control over aspects of the administration of justice in Gaza."²⁷⁴ Indeed, in practice, the revised version of the bill has nearly exclusively been applied against Gaza residents.²⁷⁵ According to the Knesset's estimates concerning the law, "over 90% of detainees (to which this law was applied) were from the Gaza Strip."²⁷⁶

Additionally, one must make note of the Internment and Unlawful Combatant Law,²⁷⁷ originally conceived in 2002 to legalize

²⁷² Criminal Procedure (Enforcement Powers – Detention) (Non-Resident Detainees Suspected of Security Offence) (Temporary Provision) Bill 5765-2005.

²⁷³ *Ibid* 258, at pp. 26

²⁷⁴ *Ibid*

²⁷⁵ *Ibid*

²⁷⁶ 'Report of the United Nations Fact Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc. A/HRC/12/48, 85, at paragraph 279

²⁷⁷ Internment of Unlawful Combatants Law 5762-2002. Later upheld as constitutional by the Israeli Supreme Court in *Crim. App.* [Criminal

the detention of Lebanese nationals as “bargaining chips” for the exchange of Israeli prisoners of war and bodies.²⁷⁸ Since the very day Israel completed its implementation of the Disengagement Plan, on September 12, 2005, the Israeli military authorities have issued detention orders under this law against Gaza residents.²⁷⁹ Israel has continued the practice of using this law to detain Palestinians in the Gaza Strip without trial.²⁸⁰ According to Adalah, a non-profit organization advocating the rights of the Palestinian minority inside Israel, at least 751 Palestinian residents of the Gaza Strip were incarcerated in Israel as of July 2009 through the law.²⁸¹

Palestinian Population Registry

Appeal] 6659/06, Riad ‘Ayad and Hassan ‘Ayad v State of Israel (11 June 2008) PD 44(1) 721.

²⁷⁸ *Ibid* 258, at pp. 27

²⁷⁹ *Ibid* 258, at pp. 27

“On 12 September 2005... the military authorities issued detention orders under the Internment of Unlawful Combatants Law against two Gaza residents.”

²⁸⁰ B’Tselem, “Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law,” (October 2009), at pp. 55 – 69.

²⁸¹ Adalah, “New Data on Palestinian Prisoners incarcerated in Israeli Prisons,” (July 2009), available at: http://www.adalah.org/newsletter/eng/jul09/New_Prisoner_Data_july_2009.pdf

During the period of Operation Cast Lead, and indeed presently, Israel has exercised control of Gaza's population registry.²⁸² Control of Gaza's population registry gives Israel the authority to determine legal residency in Gaza, thus allowing the Israeli military power to prevent the entrance into the Strip of Palestinians it chooses not to register.²⁸³ For that reason, even during the erratic periods when the Rafah crossing was open following the implementation of the Disengagement Plan and Operation Cast Lead, only holders of Palestinian identity cards were able to enter Gaza through the crossing. Accordingly, Israel's control over the Palestinian Population Registry also means control over who may enter and leave Gaza.²⁸⁴

While the terms of the Oslo Accords call for the transfer to the Palestinian Authority of "the power to keep and administer registers

²⁸² UN Human Rights Council, "Human rights situation in Palestine and other occupied Arab territories: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967," UN Doc. A/HRC/7/17, January 21, 2008, at pp. 8, available at: <http://www.unhcr.org/refworld/docid/47baaa262.html>

²⁸³ George Bisharat, "Israel's invasion of Gaza in International Law," *Denver Journal of International Law and Policy* (December 22, 2009): pp. 50

²⁸⁴ *Ibid* 268, at pp. 8, at (d)

and records of the population,”²⁸⁵ this power was limited to printing changes in the Palestinian Population Registry that Israel had already approved.²⁸⁶ According to the UN Human Rights Council, during the period between 2000 and Operation Cast Lead, Israel has not permitted additions to the Palestinian Population Registry, with very few exceptions.²⁸⁷

Palestinian Taxation System

Since 1994, Israel has continued to control the tax system in the Gaza Strip.²⁸⁸ Under the Paris Agreement between Israel and the PLO, Israel is responsible for setting the value-added taxes (VAT) and custom rates on goods intended for consumption in the Gaza Strip.²⁸⁹ The VAT and custom duties imposed on imports are collected by Israel on behalf of the Palestinian Authority, and transferred to the

²⁸⁵ Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Israel-P.L.O., Article 28, (Sept. 28, 1995), 36 I.L.M. 551 (1997), at Annex 5

²⁸⁶ *Ibid* 172, at pp. 54

²⁸⁷ *Ibid*

²⁸⁸ *Ibid* 230, at #5

²⁸⁹ *Ibid*

Palestinian Authority each month.²⁹⁰ This ability enables Israel to punish the Palestinian Authority by withholding the transfer of tax revenues collected on its behalf, a practice which Israel has exercised repeatedly according to Israeli Human Rights group B'tselem.²⁹¹

In addition, Israel controls the granting of exemptions from customs and VAT to non-profit organizations operating in the Gaza Strip who work toward vital humanitarian activities.²⁹² The significance of this power is difficult to understate. If a non-profit organization is not granted tax exemption, their ability to receive tax-exempt donations of equipment and materials is severely inhibited.²⁹³ As Israel has the final say on such approval, non-profit organizations in Gaza engaging in vital humanitarian activities would be forced to pay taxes as high as 100% in order to receive equipment donated from abroad.²⁹⁴

²⁹⁰ *Ibid* 172, at pp. 54

²⁹¹ *Ibid* 230, at #5

²⁹² *Ibid*

²⁹³ *Ibid*

²⁹⁴ *Ibid* 172, at pp. 54

Israel's full control over Gaza's "customs envelope," its collection of duties and VAT (based on Israel's rates) on behalf of the Palestinian Authority, and control over tax exemption status give it substantial power over economic and fiscal policy in Gaza. ²⁹⁵

Interference with the Exercise of the Occupied Governmental Authority

The Palestinian Authority's Finances and Ability to Provide Services to its Residents

In the wake of the Disengagement Plan's implementation, Israel claimed that it had unilaterally transferred control of services in the Gaza Strip to the Palestinian Authority. ²⁹⁶ However, this discards the number of ways Israel had, and continues to, exert control over the Palestinian Authority's ability to provide services to the Gaza Strip.

²⁹⁵ *Ibid* 172, at pp. 55

²⁹⁶ *See* Israeli High Court of Justice (HCJ) 11120/05 *Hamdan v. Southern Military Commander and related cases*, State's Response of Jan. 19, 2006, at paragraph 28

"With the abolition of the military government in Gaza and in light of the current security situation, the State of Israel bears no responsibility to take care of the various interests of Gaza residents... Insofar as the petitioners have complaints concerning the situation in the Gaza Strip and the conditions there, they should refer those complaints to the Palestinian Authority."

It is widely documented that the tax revenues Israel collects on behalf of the Palestinian Authority constitute a significant proportion of the Palestinian Authority's operating income.²⁹⁷ In the fiscal year of 2005, for example, these tax revenues amounted to 50 percent of the Palestinian Authority's operating income.²⁹⁸ During the post-Disengagement period, the Palestinian Authority required \$165 million a month to operate, sixty percent of which was required to pay its employees' salaries.²⁹⁹ When Israel withholds the transfer of these tax revenues to the Palestinian Authority, as it did in 2006 following the Hamas victory in the Palestinian Legislative Council elections,³⁰⁰ it has critical effects on the Palestinian Authority's ability to provide services to its residents and pay its employees.

The nonpayment of tax revenues in 2006 affected the Palestinian Authority's estimated 172,000 civil servants in Gaza and the West Bank, and the estimated one million residents who are

²⁹⁷ *Ibid* 172, at pp. 56

²⁹⁸ United Nations Office for the Coordination of Humanitarian Affairs, "Assessment of the Future Humanitarian Risks in the Occupied Palestinian Territory," (April 11, 2006), available at: <http://www.reliefweb.int/library/documents/2006/ocha-opt-11apr.pdf>

²⁹⁹ *Ibid*, at pp. 1

³⁰⁰ *Ibid*, at pp. 1

dependent on these salaries for their basic needs.³⁰¹ Accordingly, the number of Palestinian teachers and healthcare workers throughout Gaza has periodically struck, resulting in the shutting down of schools, municipal services and government offices in protest of the nonpayment of their salaries, beginning in September of 2006.³⁰²

Thus, control over the Palestinian Authority's tax revenues directly effects the provision of civilian services such as healthcare and education. While responsibility for these was formally transferred to the Palestinian Authority through the Disengagement Plan, Israel's continued withholding of tax revenues prevents the Palestinian Authority from exercise that responsibility.³⁰³

The Palestinian Authority's Ability to Engage in International Relations

The Palestinian Authority is also inhibited in its ability to conduct foreign relations, both by international agreement,³⁰⁴ and by

³⁰¹ See United Nations Office of Coordination of Humanitarian Affairs, "Protection of Civilians– Weekly Briefing Notes, (September 19, 2006)

³⁰² *Ibid* 172, at pp. 56

³⁰³ *Ibid* 172, at pp. 57

³⁰⁴ "Declaration of Principles on Interim Self-Government Arrangements," (Sept. 13, 1993), at Annex II, Art. 3(b)

virtue of Israel's control of the means necessary to conduct those relations. For instance, the necessary functions of traveling abroad or entering into and enforcing commercial and other agreements. ³⁰⁵

Overview

Despite Israel's evacuation of its permanent ground troops out of the Gaza Strip, Israel continues to control significant aspects of life in the Gaza Strip. This is especially true in regards to the border crossings of the Gaza Strip, which Israel maintains an exceptionally high level of control over. ³⁰⁶ With very few exceptions, the movement of people out of Gaza through the Erez crossing, the only pedestrian terminal on the Gaza-Israeli border, is prohibited. ³⁰⁷ Only those who meet the government of Israel's criteria for an exceptional permit are allowed passage, a process which is time consuming, arduous and uncertain. ³⁰⁸ Additionally, permit applications submitted by Gaza

“Structure, powers and responsibilities of the Palestinian authority in these areas, except: external security, settlements, Israelis, foreign relations, and other mutually agreed matters.”

³⁰⁵ *Ibid* 172, at pp. 88

³⁰⁶ *Supra* “Gaza’s Land Crossings,” at pp. 65

³⁰⁷ *Supra*, “The Erez Crossing,” at pp. 66

³⁰⁸ *Ibid*

residents who meet the established criteria are subject to arbitrary denial.³⁰⁹

The only other crossing allowing Gaza residents access to the outside world, the Rafah crossing, is located on the Gaza-Egypt border. While the terms an agreement reached following the Disengagement Plan call for the Palestinian Authority to operate this crossing, Israel continues to exercise significant residual control over Rafah.³¹⁰ Israel's consent is required for Rafah Crossing to operate at all, because the agreement for opening the crossing requires the participation of Israeli officials.³¹¹ Additionally, with very few exceptions, entry into Gaza through the Rafah crossing is limited to those registered under the Palestinian population registry,³¹² a registry which Israel controls.³¹³ Moreover, Israel reserves the right to block the entrance of any Palestinian residents whom Israel considers to be "terrorist activists."

³⁰⁹ *Ibid*, at pp. 30

³¹⁰ *Supra* "The Rafah Crossing," at pp. 70

³¹¹ *Ibid* 172, at pp. 12

³¹² *Supra* "The Rafah Crossing," at pp. 70

³¹³ *Supra* "Israel's Control of the Palestinian Population Registry," at pp. 40

³¹⁴ Accordingly, the opening of crossing to persons through Rafah has been resoundingly described as sporadic, ad hoc, and erratic,³¹⁵ opening between one and two or three days per month. ³¹⁶

Israel also maintains considerable control over the passage of goods through Gaza's border crossings. For example, Israel continues to restrict the import of building materials (cement, gravel, steel bars, concrete blocks and asphalt, among others). ³¹⁷ These items' importation remains prohibited as "dual-use" materials, despite the fact that neither Israeli legislation nor any international standard recognize them as such. ³¹⁸ Humanitarian supplies are not safe from Israeli restrictions, either, as Israel continues to only allow an extremely limited category of "basic humanitarian products" (primarily food, fodder and hygiene items) to enter into Gaza during the post-Disengagement period. ³¹⁹ Additionally, a multi-layered system of Israeli approvals regulating the import of every individual

³¹⁴ *Ibid*

³¹⁵ *Supra* "The Rafah Crossing," at pp. 70

³¹⁶ *Supra* "The Rafah Crossing," at pp. 70

³¹⁷ *Supra* "Israel's Control of the Movement of Goods"

³¹⁸ *Ibid*

³¹⁹ *Supra* "Israel's Control of the Movement of Goods"

consignment of cargo materials has remained in place for items not defined as “dual-use.”³²⁰ These multiple clearance requirements have resulted in prolonged delays, unpredictability and higher costs for Gaza’s businesses in all sectors.³²¹

Israel also heavily restricts the quantity of cargo allowed to be imported into Gaza. In the period following the Disengagement Plan, only around 250 trucks a day entered Gaza through the Karni crossing, the lifeblood of the Gaza Strip, with supplies.³²² By March of 2007, other cargo crossings like Kerem Shalom were only able to deal with a maximum of 45 trucks a day for a population of 1.5 million residents.³²³ In most cases, this number was barely reached.³²⁴ Additionally, Israel has continued to impose a blockade on exports traveling outside the Gaza Strip. For instance, in July of 2007, literally no truckloads of

³²⁰ *Ibid*

³²¹ *Supra* “Israel’s Control of the Movement of Goods”

³²² *Ibid*

³²³ *Ibid*

³²⁴ *Ibid*

exports left Gaza for Israel and other countries due to Israeli suspensions.³²⁵

The implementation of the Disengagement Plan in 2005 did nothing to alter Israel's complete control over Gaza's airspace and territorial waters, which Israel has maintained sole control of ever since 1967.³²⁶ Gaza's airspace has continued to be used for Israeli military operations.³²⁷ Notably, for Israeli combat and intelligence-gathering aircraft to patrol daily flights over the Gaza Strip. Through this means, Israel monitors the actions on the ground in Gaza and may attack targets whenever it desires (a practice Israel has not hesitated to exercise).³²⁸ Israeli warplanes and drones have regularly used Gaza's airspace since the implementation of the Plan to fire missiles intended to assassinate militants, but which often kill civilians as well.³²⁹ Additionally, it has been widely reported that Israel has also used Gaza's airspace to conduct mock attacks through its warplanes by

³²⁵ *Ibid*

³²⁶ *Supra* "Israel's Control of the Gaza's Air Space and Territorial Waters"

³²⁷ *Ibid*

³²⁸ *Ibid*

³²⁹ *Ibid*

making so-called sonic booms a number of times since the implementation of the Disengagement Plan. ³³⁰

Additionally, Israel retains control of Gaza's territorial waters. And Israeli naval vessels regularly patrol Gaza's coast, interdicting sea vessels attempting to land and confiscating contraband such as weapons or narcotics. ³³¹ Israel continues to restrict Gaza's residents access to the sea, requiring them to first obtain permits, and then restricting those who do obtain permits in the distance they can travel from the shore. ³³² Ever since June 25, 2006, Gaza's fishermen have not been allowed to travel further than three nautical miles from the Gaza's coast, and have sometimes been shot at for doing so. ³³³

The Israeli military also continues to enforce access to "restricted areas" within the territory of the Gaza Strip. ³³⁴ These restricted areas include "no-go" areas and "buffer zones" within the territory of the Gaza Strip, in areas near the border where Israeli

³³⁰ *Supra* "Sonic Booms"

³³¹ *Supra* "Gaza's Territorial Waters"

³³² *Ibid*

³³³ *Ibid*, at pp. 38

³³⁴ *Supra* "Access Restrictions and 'No-Go' Zones"

settlements were formerly located. ³³⁵ The enforcement of these zones is regularly done by means of firing “warning shots” at people entering the restricted areas, which frequently has resulted in civilian casualties. ³³⁶ The United Nations estimates that “restricted” land zones encompass 17 percent of the total land mass of the Gaza Strip, and at least 35 percent of its agricultural land. ³³⁷

It is also true that Israel has launched several large-scale military incursions involving ground troops into the Gaza Strip after the implementation of the Disengagement Plan. ³³⁸ For example, in June 2006, Israel invaded Gaza in a military campaign codenamed *Operation Summer Rain*. ³³⁹ During this invasion, at least 202 Palestinians, including 42 children, were killed in the three-month operation which included 247 aerial bombings. ³⁴⁰ According to the UN,

³³⁵ *Ibid*

³³⁶ *Ibid* 172, at pp. 49

³³⁷ *Ibid*

³³⁸ *Supra* “Israel’s Continued Military Incursions”

³³⁹ *Ibid*

³⁴⁰ *Ibid*

Israel destroyed 120 structures, including homes and shops, and damaged an additional 160 structures. ³⁴¹

Additionally, although the implementation of the Disengagement Plan led to the repeal of the system of Israeli military orders applicable to Gaza, and, accordingly, the jurisdiction of Israeli military courts therein, Israel continues to exercise authority over matters relating to the administration of justice in Gaza. ³⁴² This has been done through Israel enacting of the Criminal Procedure Law in 2006, ³⁴³ allowing it to incarcerate Palestinians from the Gaza Strip in detention facilities inside Israel, and prosecute them in Israeli civil courts. ³⁴⁴

Israel has also exercised control in this area through the Internment and Unlawful Combatant Law, originally conceived in 2002 to legalize the detention of Lebanese nationals as “bargaining chips” for the exchange of Israeli prisoners of war and bodies. ³⁴⁵ Since

³⁴¹ *Ibid*

³⁴² *Supra* “Israel’s Continued Administration of Justice in Gaza”

³⁴³ *Ibid*

³⁴⁴ *Ibid*

³⁴⁵ *Ibid*, at pp. 40

the very day Israel completed its implementation of the Disengagement Plan, on September 12, 2005, the Israeli military authorities have issued detention orders under this law against Gaza residents.³⁴⁶ Israel has continued the practice of using this law to detain Palestinians in the Gaza Strip without trial. At least 751 Palestinian residents of the Gaza Strip were incarcerated in Israel as of July 2009 through the law.³⁴⁷

As mentioned before, Israel's continues to maintain control over the Palestinian Population Registry. Control of Gaza's population registry gives Israel the authority to determine legal residency in Gaza, thus allowing the Israeli military power to prevent the entrance into the Gaza Strip of Palestinians it chooses not to register.³⁴⁸ According to the UN Human Rights Council, during the period between 2000 and Operation Cast Lead, Israel has not permitted additions to the Palestinian Population Registry, with very few exceptions.³⁴⁹

³⁴⁶ *Ibid*

³⁴⁷ *Ibid*

³⁴⁸ *Supra* "Israel's Control of the Palestinian Population Registry"

³⁴⁹ *Ibid*, at pp. 41

Since 1994, Israel has continued to control the tax system in the Gaza Strip through setting the value-added taxes (VAT) and custom rates on goods intended for consumption in the Gaza Strip.³⁵⁰ The VAT and custom duties imposed on imports are collected by Israel on behalf of the Palestinian Authority, and transferred to the Palestinian Authority each month.³⁵¹ This ability enables Israel to punish the Palestinian Authority by withholding the transfer of tax revenues collected on its behalf, a practice which Israel has exercised repeatedly.³⁵² In addition, Israel controls the granting of exemptions from customs and VAT to non-profit organizations operating in the Gaza Strip who work toward vital humanitarian activities.³⁵³ Accordingly, if a non-profit organization is not granted tax exemption, their ability to receive tax-exempt donations of equipment and materials is severely inhibited.

³⁵⁴

³⁵⁰ *Supra* “Israel’s Control of the Palestinian Taxation System”

³⁵¹ *Ibid*

³⁵² *Ibid*

³⁵³ *Ibid*

³⁵⁴ *Ibid*

Finally, Israel continues to impede the Palestinian Authority's ability to provide services to its residents.³⁵⁵ This is due to the fact that the Palestinian Authority relies on tax revenues, which Israel collects on its behalf, for their operating income.³⁵⁶ Accordingly, when Israel withholds the transfer of these tax revenues to the Palestinian Authority, as it did in 2006 following the Hamas victory in the Palestinian Legislative Council elections, it has critical effects on the Palestinian Authority's ability to provide services to its residents, including the provision of civilian services such as healthcare and education.³⁵⁷

Conclusion

Was the Gaza Strip Occupied Territory Operation Cast Lead?

It was established in earlier sections of this paper that Israel satisfied the criteria for occupation with regard to the Gaza Strip up to 2005.³⁵⁸ Additionally, it has been demonstrated that both the Hague Regulations and the Fourth Geneva Convention are *de jure* applicable

³⁵⁵ *Supra* "The Palestinian Authority's Finances and Ability to Provide Services to its Residents"

³⁵⁶ *Ibid*

³⁵⁷ *Ibid*

³⁵⁸ *Supra* "The Gaza Strip's Legal Status: 1967 – 2005"

to the situation in the Gaza Strip for this period.³⁵⁹ The remaining question, then, relates to whether Israel still retained effective control in the meaning of these instruments subsequent to the changed factual situation created by the Disengagement Plan.

Occupation, within the meaning of the Hague Regulations, exists when and where the authority of the Occupying Power has been established and can be exercised, a test that is often referred to as effective control. Regarding this matter, it is important to note that military presence is not, in itself, a necessary condition for the persistence of occupation.³⁶⁰ One is reminded of the words of the ICTY, stating that occupation exists when an Occupying Power has “a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the Occupying Power felt.”³⁶¹ In the context of Gaza, the question is not one “of creating an occupation, which as a practical matter would appear to require the

³⁵⁹ See the ICJ's ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

³⁶⁰ See the ICTY's Judgment in *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela"*; the Military Tribunal's decision in *United States of America v Wilhelm et al.*

³⁶¹ *Ibid* 105

use of ground forces to create and maintain control, but rather whether an existing occupation has been terminated or maintained.”³⁶²

Accordingly, the sections immediately preceding the present one sought assess whether Israel clung to enough military capability in and around Gaza to enforce its control following the 2005 Disengagement. The findings leave little doubt that Israel has - and in fact continues to - exercise considerable control over the Gaza Strip. Yet, the question of whether this control suffices to rise to that of belligerent occupation lingers.

Based on the findings in the previous sections of this paper, it is difficult to see how Israel’s continued level of control over the government functions of the Gaza Strip - and sufficient means to enforce this effective control when necessary - fail to meet the criteria for triggering the laws of occupation in the Hague Regulations and Fourth Geneva Conventions. When all the indicators are seen cumulatively – the limited control of the Palestinian Authority over key functions of government, its lack of control over international borders, sea and airspace, as well as the continued Israeli control of key security and welfare aspects of life in the Gaza Strip - the evidence

³⁶² Ian Scobbie, “An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination,” *Islamic Middle Eastern Yearbook* (May 11, 2004): pp. 6 – 7.

for effective control is overwhelming. Both of the essential elements of occupation (Israel's ability to exercise its authority, and the Palestinian Authority's inability to function publicly) are present in the Gaza Strip. In spite of Israel's disengagement, Israel continues to exercise powers that afford it the ultimate authority.

One of the chief reasons cited by those who would argue that this control does not amount to belligerent occupation is the existence of a local government within Gaza.³⁶³ However, this view discounts the *de facto* inhibition of the local government from exercising genuine sovereignty. Furthermore, as the Goldstone Report noted:

“As shown in the case of Denmark during the Second World War, the occupier can leave in place an existing local administration or allow a new one to be installed for as long as it preserves for itself the ultimate authority.”³⁶⁴

While the Palestinian Authority assumes a series of functions within designated zones in the Gaza Strip, it does so on the basis of the terms of the Oslo Accord agreement, while Israel retains for itself

³⁶³ See Yuval Shany, “The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v Prime Minister of Israel*,” *Hebrew University International Law Research Paper* (2009).

³⁶⁴ Report of the United Nations Fact Finding Mission on the Gaza Conflict, (September 15, 2009), UN Doc A/HRC/12/48, 85, at paragraph 279

“powers and responsibilities not so transferred.”³⁶⁵ Here, one is also reminded of the judgment of the Wall advisory opinion, which held that the limited transfer of powers and responsibilities by Israel under various agreements had “done nothing” to change Israel’s status as an Occupying Power vis-à-vis the West Bank and Gaza Strip.

The absence of any fixed Israeli military presence, government or administration in Gaza is another primary factor cited as evidence of a lack of Israeli effective control.³⁶⁶ Indeed, the situation in Gaza following the Disengagement Plan poses a challenge to the traditional understanding of occupation in some ways, but conforms to the occupation-related international jurisprudence, which has clearly established criteria for the existence of occupation that does not insist on a fixed presence or formal administration.³⁶⁷

Legal Implications

Reparations

³⁶⁵ *Ibid* 10, at Article 1 (1)

³⁶⁶ See the Judgment of the Israeli Supreme Court in *Bassiouni Ahmed et al v Prime Minister*, 9132/07, January 30, 2008, at paragraph 12

³⁶⁷ See the ICJ’s ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; the ICTY’s ruling in *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela"*; the Military Tribunal’s decision in *United States of America v Wilhelm et al*.

The designation of Gaza as occupied territory in the post-Disengagement Period is fundamental to the question of the legal framework applicable to the territory. If Gaza can be considered occupied, the extent of Israel's obligations under international law towards Gaza's inhabitants are apparent. It means that Israel "is bound by the provisions of international humanitarian law, particularly the Fourth Geneva Convention, which oblige the occupying power to provide for the humanitarian needs of the occupied people and to desist from collective punishment of the people in the name of self-defense." ³⁶⁸

As stated, the Fourth Geneva Conventions aim to protect the physical, economic and social needs of the civilian population. ³⁶⁹ This is apparent, for instance, in Article 50, which imposes the affirmative duty of an Occupying Power to facilitate the care and education of the children. ³⁷⁰ The same goes for the Occupying Power's obligation to ensure the food and medical supplies of the population in Article 55; ³⁷¹ the Occupying Power's obligation to maintain medical and hospital

³⁶⁸ *Ibid* 195, at pp. 1

³⁶⁹ *Supra*, at pp. 22

³⁷⁰ *Ibid* 47, at Article 50

³⁷¹ *Ibid* 47, at Article 55

services in Article 56;³⁷² and the Occupying Power must allow national Red Cross societies to carry out their activities under Article 63.³⁷³

The functions which these articles aim to ensure are a vital component of what functions should be under the effective control of an Occupying Power before an occupation exists under the Fourth Geneva Conventions.³⁷⁴ As Israel negatively influences the physical, economic and social wellbeing of the Gaza Strip's population with its military actions, control over the border, imports export, the freedom of movement within Gaza,³⁷⁵ Israel is bound by these responsibilities. With effective control, comes responsibility under the Fourth Geneva Conventions and the need for an Occupying Power to ensure these functions.

To the extent that these international obligations were breached by Israel during Operation Cast Lead, the principle that a State should repair the damage or loss caused is supported by international

³⁷² *Ibid* 47, at Article 56

³⁷³ *Ibid* 47, at Article 63

³⁷⁴ *Ibid* 51

³⁷⁵ *Supra* "Overview," at pp. 92

humanitarian law conventions. Article 91 of the Additional Protocol I to the Geneva Conventions (AP I) notes that:

“[A] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”³⁷⁶

Additionally, Rules 149, 150 and 158 of the ICRC study on customary international law outline the customary rules for state responsibility. Rule 149 notes that:

“[A] State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by

³⁷⁶ *Ibid* 92, at Article 91

private persons or groups which it acknowledges and adopts as its own conduct.”³⁷⁷

Rule 150 provides that responsible states are required to make reparations for loss or injury caused.³⁷⁸ Accordingly, Israel’s obligations to Gaza include; “(1) responsibility for actions taken by its officials and the Israeli Defense Force (IDF); (2) a duty to make reparations for any injury or loss caused to Gazans during Operation Cast Lead; and (3) a duty to investigate and prosecute any war crimes perpetrated by its officials and IDF officers both in Israel and, as the occupying power, in Gaza.”³⁷⁹

Regarding the second obligation, the Palestinian Authority has estimated the total cost of early recovery and reconstruction at US \$1,326 million in March 2009.³⁸⁰ The Goldstone Report reminds us that “To this amount should be added the indirect costs of the impact

³⁷⁷ Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I* (UK: Cambridge University Press, 2005), at pp. 530.

³⁷⁸ *Ibid*, at pp. 537

³⁷⁹ *Ibid* 283, at pp. 104

³⁸⁰ Palestinian National Authority, “Palestinian National Early Recovery and Reconstruction Plan for Gaza 2009-2010,” (March 2009), at pp. 11

on human and animal health, the environment and market opportunities. These losses are still to be estimated.”³⁸¹

Undermining the Claim of Self-Defense

The designation of Gaza as occupied is also critical in any proceedings which might seek to enforce humanitarian law by addressing Israel’s alleged war crimes through international criminal law. It can be argued that if Gaza can be considered occupied territory during Operation Cast Lead, that Israel may not be able to plead self-defense as justification for the military campaign. Arguably, self-defense cannot be invoked in relation to an attack that originates within territory a State occupies.³⁸²

The Chatham House Principles of International Law on the Use of Force in Self-Defense notes that “an armed attack is an attack directed from outside the territory controlled by the state.”³⁸³ Furthermore, the ICJ’s Wall advisory opinion notes that “unless an attack is directed from outside territory under the control of the

³⁸¹ *Ibid* 276, at pp. 399

³⁸² Victor Kattan, “Israel, Gaza, and Operation Cast Lead: Use of Force Discourse and Jus Ad Bellum Controversies” *The Palestine Yearbook of International Law* Vol. XV (June 21, 2009): pp. 108.

³⁸³ *Ibid*

defending State, the question of self-defense in the sense of Article 51 [of the U.N. Charter] does not normally arise.”³⁸⁴

Limitations on the Use of Force

While Gaza’s designation as occupied may have consequences for Israel’s right to invoke self-defender under Article 51 of the U.N.

Charter, Victor Kattan reminds us that:

“Not all defensive measures are measures taken in self-defense under Article 51 of the UN Charter. This is because self-defense is an exculpatory plea regarding resort to force in the first place, and not for an offense taken during an armed conflict.”³⁸⁵

In other words:

"Israel is employing a *jus ad bellum* (justifications for going to war) principle in a *jus ad bello* (principles governing the conduct of war) context—citing a ground for initiating conflict for its behavior in what is, legally and in fact, a continuing conflict. This does not mean that Israel, in principle, cannot use force to suppress violence emanating from either the West Bank or the Gaza Strip, or act to

³⁸⁴ *Ibid*

³⁸⁵ *Ibid*

protect its own civilian population. But as a matter of law, it must do this as an exercise of its right to police the occupied territories, and not as an exercise of the right of self-defense.”³⁸⁶

Accordingly, the designation of Gaza as occupied is relevant to the limitations of an Occupying Power’s right to use force. If Gaza can be said to be occupied territory during Operation Cast Lead, Israel may be restricted by the laws of occupation in their right to use force in maintaining public order in the territory it occupies. Israel, in its conduct of Operation Cast Lead, arguably vastly surpassed the limitations of acceptable, legal force for an Occupying Power.

The Crime of Aggression

Lastly, the status of the Gaza Strip may influence whether Israel’s attack on the Gaza Strip constitutes the crime of aggression. Bisharat observes that “there are only two exceptions to the general prohibition on the use of force in international affairs—military action taken with the approval of the UN Security Council and the use of force in self-defense.”³⁸⁷ As the Security Council did not authorize

³⁸⁶ *Ibid* 263, at pp. 64-65

³⁸⁷ *Ibid* 263, at pp.67

Operation Cast Lead,³⁸⁸ and if Israel is not able to claim self-defense, “Israel’s invasion of Gaza arguably amounts to aggression.”³⁸⁹

However, Bisharat notes that the determination of Gaza as occupied may not be positive for those seeking to allege Israel of it for Operation Cast Lead:

“[T]he charge of aggression may be inapposite for two... reasons: first... Gaza is not a state, and it is not clear that aggression can be committed against a non-state entity; second, whether or not Gaza is a state... it remains under Israeli occupation, and arguably, alleging aggression—like Israel’s claim to self-defense—improperly imports *jus ad bellum* principles into a context of an ongoing conflict. In this view, aggression, in essence, involves the unjustified initiation of war by one state against another state, not its continuation.”³⁹⁰

Empowering the Occupant

In addition to the affirmative duties imposed on the Occupying Power toward the civilian population, the Hague Regulations and

³⁸⁸ *Ibid*

³⁸⁹ *Ibid* 263, at pp. 68

³⁹⁰ *Ibid*

Fourth Geneva Convention also empowers an occupant to rights which may not always be positive for an occupied territory. For instance, the Hague Regulations' Article 43 permits the penal laws of an occupied territory to be "repealed or suspended by the Occupying Power... where they constitute a threat to its security or an obstacle to the application of the present Convention." ³⁹¹ Article 64 of the Fourth Geneva Convention also states that:

"The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." ³⁹²

However, the Commentary to the Fourth Geneva Convention clearly states that "these varied measures must not under any circumstances serve as a means of oppressing the population." ³⁹³ Article 78 of the Fourth Geneva Convention reiterates that principle, noting that if "the Occupying Power considers it necessary, for

³⁹¹ *Ibid* 47, at Article 64

³⁹² *Ibid* 47, at Article 64

³⁹³ Jean Pictet, *Commentary on Geneva Convention IV of 1949, Relative to the Protection of Civilian Persons in Times of War* (Geneva: ICRC, 1958), pp. 337.

imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”³⁹⁴ The impact of an Occupying Power’s security measures on an occupied population are further minimized under Article 47 of the Fourth Geneva Convention, which states that the civilian population “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention.”³⁹⁵

³⁹⁴ *Ibid* 47, at Article 78

³⁹⁵ *Ibid* 47, at Article 47