

## GAZA A YEAR AFTER “DISENGAGEMENT”: THE LEGAL AND FACTUAL LANDSCAPES

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*Throughout Israel’s 39-year occupation of the Occupied Palestinian Territory (OPT), Palestinians have longed for the time when they would be free to control their own destiny. Indeed, Palestinians are the only people of the mandate and trust periods who have yet to achieve independence.<sup>1</sup>*

*When Israel evacuated its settlers and redeployed its troops from Gaza in August and September 2005, Palestinians were hopeful that “disengagement” would signal a move towards renewed efforts at achieving a comprehensive peace and ending the occupation that began in 1967. At the same time, Palestinians feared that Israel still intended to control Gaza and its inhabitants, albeit in a more convenient, less costly manner for Israel.*

*More than one year on, Palestinian fears have been confirmed. Israel continues to subject Palestinians living in Gaza, like those in the West Bank, to its control. Gazans require Israel’s consent to travel to and from Gaza, to take their goods to Palestinian and foreign markets, to acquire food and medicine, and to access water and electricity. Without Israel’s permission, the Palestinian Authority (PA) cannot perform such basic functions of government as providing social and health services, providing security, setting immigration policy, developing the Palestinian economy and allocating resources.*

*Israel unreasonably demands that the PA shoulder the responsibilities of a government without allowing it to exercise the powers of one. Palestinians are willing to assume responsibility for their destiny but cannot do so until Israel gives up the reins of government. Until that day, Israel as the occupying power is responsible for the welfare of the Palestinian population, including that in Gaza.*

### I BACKGROUND<sup>2</sup>

International humanitarian law (IHL), comprised primarily of the *Hague Regulations*<sup>3</sup>, the *Fourth Geneva Convention*<sup>4</sup> and *Additional Protocol I*<sup>5</sup>, much of which are declaratory of customary international law, sets out the rights and duties of powers towards each other and towards their populations in times of armed conflict and/or occupation.

Occupation law is a subset of IHL that applies to a territory when it is occupied by a foreign power. The prevailing assumption underlying an occupation is that the interests of the foreign occupying power compete with those of the lawful sovereign and of the occupied population. Occupation law thus prescribes rules for the protection of the occupied territory and its population from potential abuses of power by the foreign power’s military.

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<sup>1</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 2006) at 567.

<sup>2</sup> For details, see PLO Negotiations Affairs Department, “The Israeli “Disengagement” Plan: Gaza Still Occupied” (September 2005), online: PLO Negotiations Affairs Department <[http://www.nad-plo.org/inner.php?view=facts\\_gaza\\_GAZA%20STILL%20OCCUPIED](http://www.nad-plo.org/inner.php?view=facts_gaza_GAZA%20STILL%20OCCUPIED)>.

<sup>3</sup> 1907 *Hague Convention IV Respecting the Laws and Customs of War on Land*, 18 October 1907, U.K.T.S. 9 (1910) [*Hague Regulations*].

<sup>4</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. (1950) 287 [*Fourth Geneva Convention*].

<sup>5</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 12 December 1977, 1125 U.N.T.S. (1979) 3 [*Additional Protocol I*].

In June 1967, the Israeli military took control of Gaza and the West Bank, including East Jerusalem (together “OPT”). Since then, Israel has maintained actual and effective control over the OPT and the indigenous Palestinian population. Consequently, Israel belligerently occupies the OPT as a matter of law. This has been the position of the United Nations (UN) Security Council, the UN General Assembly, the International Court of Justice (ICJ), the International Committee of the Red Cross and the Israeli High Court of Justice.

In its original Disengagement Plan, published 28 May 2004, Israel claimed that “there w[ould] be no basis to the claim that [Gaza] is occupied land” upon implementation of the Plan.<sup>6</sup> A subsequent version of the Plan, published a month later, was more equivocal, declaring instead that “[t]he completion of the [P]lan w[ould] serve to dispel the claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.”<sup>7</sup>

Notwithstanding such declarations or the evacuation of its settlers and redeployment of its troops, Israel continues to maintain effective control over Gaza and thus continues to bear the legal responsibilities of an occupying power.

## II OCCUPATION IS ABOUT EFFECTIVE CONTROL

### *General principles*

At the core of the concept of occupation is the idea of effective control. An occupation exists when a foreign state has the power to control a territory and its population in lieu of the lawful sovereign. The *Hague Regulations* speak of occupation in terms of “territory ... placed under the authority of a hostile army”<sup>8</sup> and “the authority of the legitimate power ... pass[ing] into the hands of the occupant.”<sup>9</sup> The *Fourth Geneva Convention* speaks of the occupying power “exercis[ing] the functions of government in [the occupied] territory.”<sup>10</sup>

International jurisprudence also places effective control at the core of the doctrine of occupation. In the *Hostages* case, the Nuremberg Tribunal stated that “an occupation indicates the exercise of governmental authority to the exclusion of the established government.”<sup>11</sup> Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) has noted that one indicator of the establishment of the occupant’s authority is that “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.”<sup>12</sup>

<sup>6</sup> Para. II.A.3, online : PLO Negotiations Affairs Department <[http://www.nad-plo.org/inner.php?view=palisraeli\\_gaza\\_doc\\_gazaplanp](http://www.nad-plo.org/inner.php?view=palisraeli_gaza_doc_gazaplanp)>.

<sup>7</sup> *Disengagement Plan* (6 June 2004), para. 1.Six, online : Israeli Prime Minister’s Office <<http://www.pmo.gov.il/PMOEng/Communication/DisengagemePlan/displan060604.htm>> [*Disengagement Plan*].

<sup>8</sup> *Supra*, note 3, Art. 42.

<sup>9</sup> *Ibid.*, Art. 43.

<sup>10</sup> *Supra*, note 4, Art. 6.

<sup>11</sup> *Trial of Wilhelm List and Others (the Hostages Trial)*, Part III, US Military Tribunal Nuremberg, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. VIII, 1949 at 55-56, online: <<http://www.ess.uwe.ac.uk/WCC/List3.htm>> [*Hostages*].

<sup>12</sup> *Prosecutor v. Naletilic & Martinovic* (2003), Case No. IT-98-34-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I), online: United Nations <<http://www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf>> [*Naletilic*], rev’d on other grounds (2006), Case No. IT-98-34-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: United Nations <<http://www.un.org/icty/naletilic/appeal/judgement/nal-aj060503e.pdf>>.

Traditionally, this ordinarily meant that the occupant would establish some kind of administration over the territory it occupies. However, in December 2005, the ICJ ruled that Uganda would be deemed an occupier of Congolese territory if Ugandan forces “had substituted their own authority for that of the Congolese Government”, stating that “whether or not Uganda had established a structured military administration of the territory occupied”<sup>13</sup> was irrelevant.

*The effectiveness, not the form, of military control is what's important*

It has been argued by some that a necessary element of an occupation is a permanent military ground presence in the territory concerned. Occupation law, however, does not prescribe the precise form of the military force through which a state is to assert its control. What matters for the definition of occupation is the effectiveness of the foreign power's control.

In the *Hostages* case, the Nuremberg Tribunal took the view that Germany was indeed an occupant of Yugoslavia, Greece and Norway, including of areas controlled by resistance groups at various times, because Germany could “at any time [it] desired assume physical control of any part of the country.”<sup>14</sup> Similarly, the ICTY recognized that the authority of an occupant may be established when “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.”<sup>15</sup>

Legal scholars take a similar view,<sup>16</sup> some asserting that a power may exert sufficient military control through its air force to assert its authority.<sup>17</sup> This is consistent with “a more general tendency to think of the laws of war as a set of minimum rules to be observed in the widest possible range of situations, and not to worry excessively about the precise legal definition of military occupation.”<sup>18</sup>

### III ISRAEL EFFECTIVELY CONTROLS GAZA

Notwithstanding its “disengagement”, the actual scope of Israel's control over Gaza and its population is considerable. In many spheres, Israel exercises governmental authority and denies the Palestinians fundamental powers of government or otherwise obstructs their exercise. Indeed, the ability of the Palestinians to exercise any authority is in fact dependent in large measure upon the continued willingness of Israel to allow them to do so.

Israel militarily asserts its control by air, sea and land. In particular, Israel:

- regularly patrols Gaza's skies with drones and blimps, monitoring ground activities,

<sup>13</sup> *Case concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, [2005] at para. 173 (I.C.J.), online: International Court of Justice <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>>. See also Adam Roberts, “What is a Military Occupation?” (1985) 55 B.Y.I.L. 249 at 284.

<sup>14</sup> *Hostages*, *supra* note 11.

<sup>15</sup> *Naletilic*, *supra* note 12, para. 217.

<sup>16</sup> Elbridge Colby, “Occupation Under The Laws Of War” (1925) 25 Colum. L. Rev. 904 at 908.

<sup>17</sup> Gerhard von Glahn, *The Occupation of Enemy Territory ... A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) at 28; and Timothy P. McIlmail, “No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes Over Bosnia and Iraq” (1994) 17 Loy. L.A. Int'l & Comp. L.J. 48 at 67-69.

<sup>18</sup> Roberts, *supra* note 13 at 256.

- patrols the waters off the coast of Gaza,
- controls Gaza's borders,
- has enforced a 9.5 km<sup>2</sup> area in northern Gaza as a "no go" zone since late December 2005,
- similarly, has declared the eastern part of Beit Hanoun a closed military area,
- has announced that Palestinians should keep at a distance of at least 150m from the perimeter in northern and eastern Gaza,<sup>19</sup>
- has had a regular ground presence in Gaza, particularly after June 2006, and
- has regularly carried out military offensives in Gaza with ground, air and naval units.

In these ways, Israel projects its power over all of Gaza.

### *Governance*

Israel literally obstructs the Palestinian legislature from passing laws. The current Palestinian cabinet has never actually met in one place because Israeli movement restrictions between Gaza and the West Bank confine ministers to one or the other. Dozens of Palestinian cabinet members and parliamentarians, including the Speaker and the Secretary-General of the Palestinian Legislative Council, have been detained in Israel for months. In Gaza, several ministries and public buildings have been shelled by Israel.<sup>20</sup> Such are the circumstances that it is near impossible for there to *be* a Palestinian government, let alone one that is empowered to look after its citizenry.

### *Taxation*

To a large extent, Israel continues to control the purse strings of the PA. Under the *Paris Protocol (1994)*,<sup>21</sup> which still applies in Gaza as well as the West Bank, Israel remains responsible for setting import policies applicable to the OPT and for collecting, on behalf of the PA, taxes, including Value Added Tax (VAT) and customs and purchase taxes, on goods imported into Gaza and the West Bank. These revenues constitute some 60 per cent of the PA's income from taxes, which the PA then invests back into administering the OPT. By the terms of the Protocol, Israel is to remit these monies to the PA every month.

However, since February 2006, Israel has refused to transfer the collected import taxes, which currently amount to hundreds of millions of dollars, to the PA (though it has used some of the monies to directly pay Israeli companies providing utilities to Palestinians). As a result, the PA has been unable to finance basic public services or to pay its civil servants.

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<sup>19</sup> Office for the Coordination of Humanitarian Affairs – OPT, *Humanitarian Briefing Notes* (1-7 November 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <<http://www.ochaopt.org/documents/WBN179.pdf>>.

<sup>20</sup> Ibrahim Gambari, *Briefing to the Security Council on the Situation in the Middle East by the Under-Secretary-General for Political Affairs* (22 August 2006).

<sup>21</sup> *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (28 September 1995), Annex V, online: PLO Negotiations Affairs Department <[http://www.nad-plo.org/listing.php?view=nego\\_nego\\_SiAgreem\\_si-agr](http://www.nad-plo.org/listing.php?view=nego_nego_SiAgreem_si-agr)> [*Interim Agreement*]. Although Israel may have allowed Palestinians to take Gaza out of the semi-customs union, established under the *Paris Protocol (1994)*, after "disengagement", breaking the semi-customs union in the existing circumstances was not really an option. Doing so would have devastated Gaza's already fledging economy, and economically and politically divided the OPT, because the OPT's economy has become so inextricably linked with Israel's due to economic policies Israel introduced in the OPT over the course of its occupation.

*External security*

Israel prevents Palestinians from securing themselves from external threats.<sup>22</sup> In particular, Israel prohibits the PA from having Palestinian defence forces,<sup>23</sup> a navy, or any foreign security presence<sup>24</sup> in the OPT, explicitly reserving for itself responsibility for “external security”.<sup>25</sup>

*Internal security*

While Israel has allowed Palestinians to police Palestinian territory to some extent, it retains overall control of internal security through strict controls and restrictions over PA security forces. Indeed, Israel severely impairs the effectiveness of these forces by placing restrictions on the kinds and quantities of arms, ammunition and equipment the PA can obtain and by impairing the PA’s ability to pay wages to force members.<sup>26</sup> Israel has also been disrupting the Palestinian police force’s deployment through its enforcement of its “no go” zone in northern Gaza. Israel also interferes with the Palestinian police force’s jurisdiction, entering Gaza in overt and covert operations to “arrest” and to extra-judicially assassinate Palestinians purportedly suspected of committing crimes in or affecting Israel.

*Foreign relations*

Israel does not allow the PA to establish normal diplomatic relations with third states via embassies and consulates or to otherwise conduct its own foreign relations.<sup>27</sup> As mentioned earlier, Israel prohibits the PA from entering into any kind of security arrangement with a third party for Gaza without its consent.

*Air space*

Israel prevents the PA from making use of its air space for domestic, commercial or any other purpose, reserving to itself “exclusive authority in Gaza air space”.<sup>28</sup> Moreover, Israel regularly uses the air space to conduct military operations and to monitor activities on the ground.

*Territorial Waters*

Under the Interim Agreements, Israel retained exclusive control of two narrow areas 20 nautical miles long, one immediately north of Egypt’s territorial waters and the other immediately south of Israel’s territorial waters. Palestinians’ use of, and access to, the remaining territorial waters sandwiched between these two strips are subject to restrictions. Palestinian boats are prohibited from going out beyond a prescribed distance, and foreign vessels are prohibited from coming within 12 nautical miles off the coast. Furthermore, the Israeli navy retains the right to “take any measures necessary against vessels suspected of ... any... illegal activity.” The Interim Agreements provided for a Palestinian Coastal Police, but with very narrow powers. The Disengagement Plan preserved these restrictions.

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<sup>22</sup> “The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.” (*Disengagement Plan, supra* note 7, para. 3.One.2)

<sup>23</sup> *Interim Agreement, supra* note 21, Art. XIV(3) and Annex 1, Art. II(1)(a).

<sup>24</sup> *Disengagement Plan, supra* note 7, para. 5.

<sup>25</sup> *Interim Agreement, supra* note 21, Arts. X(4) and XII(1).

<sup>26</sup> *Ibid.*, Art. XIV(4) and Annex I, Art. IV(5) and (6).

<sup>27</sup> *Ibid.*, Art. IX(5).

<sup>28</sup> *Disengagement Plan, supra* note 7, para. 3.One.1.

In practice, Israel has maintained even tighter control over Gaza's territorial waters. From late June to late October 2006, the Israeli military imposed a complete ban on fishing off the Gaza coast. In late October 2006, Israel partially relaxed the ban.<sup>29</sup> The fishing industry has been crippled with no fish reaching the local market, and 3,000 licensed fishermen unable to support their 35,000 dependents.<sup>30</sup> The Israeli military has fired on and destroyed boats, and killed fishermen who have gone out to sea despite the ban.<sup>31</sup> Furthermore, the Palestinians cannot develop maritime trade opportunities or develop natural resources located within the territorial waters without Israel's permission.

*Points of entry/exit and trade*

Israel effectively controls every point of entry/exit – and, thus, all trade – to and from Gaza. This has had tremendous effects on different sectors of the Gazan economy, including health (see below) and agriculture<sup>32</sup>.

*Existing points of entry/exit with neighbours other than Israel.* Rafah Crossing Point (Rafah), located along the Gaza-Egypt border, is the only crossing point that Gaza shares with a neighbour other than Israel. While the PA technically operates Rafah under the watch of European monitors, Israel demonstrably retains the *de facto* power to shut Rafah down completely. Israel has forced the near-complete closure of the crossing point since 25 June 2006 by preventing the European monitors, who reside in Israel, from accessing Rafah through Kerem Shalom Crossing Point (Kerem Shalom), in violation of the terms of the *Agreement on Movement and Access (AMA)*.<sup>33</sup>

<sup>29</sup> Office for the Coordination of Humanitarian Affairs – OPT, *The Humanitarian Monitor – OPT*, No. 6 (October 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/oPt\\_Humanitarian\\_Monitor\\_October06.pdf](http://www.ochaopt.org/documents/oPt_Humanitarian_Monitor_October06.pdf)>.

<sup>30</sup> Office for the Coordination of Humanitarian Affairs – OPT, *Gaza Strip: Situation Report* (7-24 August 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.humanitarianinfo.org/opt/docs/UN/OCHA/GazaStripOCHA%20sitrep\\_24August06.pdf](http://www.humanitarianinfo.org/opt/docs/UN/OCHA/GazaStripOCHA%20sitrep_24August06.pdf)>; and Office for the Coordination of Humanitarian Affairs – OPT, *Statement on Gaza by United Nations Humanitarian Agencies working in the occupied Palestinian territory* (3 August 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <<http://www.humanitarianinfo.org/opt/docs/UN/OCHA/JointstatementAug06-eng.pdf>>.

<sup>31</sup> Office for the Coordination of Humanitarian Affairs – OPT, *The Humanitarian Monitor – OPT*, No. 5 (September 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/oPt\\_Humanitarian\\_Monitor\\_September06.pdf](http://www.ochaopt.org/documents/oPt_Humanitarian_Monitor_September06.pdf)>; and Office for the Coordination of Humanitarian Affairs – OPT, *The Humanitarian Monitor* (December 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/Humanitarian\\_monitor\\_december\\_2006\\_english.pdf](http://www.ochaopt.org/documents/Humanitarian_monitor_december_2006_english.pdf)>.

<sup>32</sup> PLO Negotiations Affairs Department, *The Agreement on Movement and Access: The Costs of Non-Implementation* (updated November 2006), online: PLO Negotiations Affairs Department <[http://www.nad-plo.org/news-updates/FS%20AMA%20\(November%202006\)%20FINAL.pdf](http://www.nad-plo.org/news-updates/FS%20AMA%20(November%202006)%20FINAL.pdf)>.

<sup>33</sup> *Agreed Arrangement on the European Union Border Assistance Mission at the Rafah Crossing Point on the Gaza-Egypt Border* (23 November 2005), Arts. III(5) and IV(2), online: PLO Negotiations Affairs Department <<http://www.nad-plo.org/palisraeli/roadagree/agre2.pdf>> [EU-BAM Arrangement]. The EU-BAM Arrangement is a part of the *AMA* (15 November 2005), online: PLO Negotiations Affairs Department <<http://www.nad-plo.org/palisraeli/roadagree/Agreement%20Access.pdf>>.

Israel frequently closes Kerem Shalom under the pretext of receiving intelligence about a security threat, however the Israeli military has in fact called for the closure of Rafah to pressure the Palestinian civilian population (Avi Issacharoff, "Israel using Rafah crossing to pressure PA on Shalit release" in *Ha'aretz* (30 August 2006)).

Even when Rafah is open, Israel asserts its control over Rafah – a crossing that Israel does not share with Gaza – through the terms of the *AMA*. Most notably, Israel prohibits imports through this crossing point and monitors other activities at the crossing. The EU would not even deploy its monitors at Rafah without an invitation from Israel. Under the *AMA*, Israel is supposed to allow imports from and through Egypt into Gaza, initially through Kerem Shalom, a trilateral point between Gaza, Egypt and Israel, and eventually through Rafah itself. However, Israel, quite simply, has refused to respect this obligation.<sup>34</sup> Even if Kerem Shalom were open for imports, all aspects of clearance would occur under Israeli supervision.

*Existing points of entry/exit with Israel.* Gaza shares a primary crossing point, Karni, with Israel for the movement of goods. Even though the *AMA* prohibits Israel from closing, or otherwise obstructing the operation of, Karni,<sup>35</sup> Israel in fact completely closed the crossing point for export for 50 per cent of normal working days in the first year of the Agreement.<sup>36</sup> In the same period, an average of 18 trucks per day was processed through Karni for export.

Israel also continues to prevent the movement of goods between Gaza and the West Bank, in violation of the Interim Agreements<sup>37</sup> and the *AMA*.<sup>38</sup>

*Other points of entry/exit.* Israel prevents the establishment and/or operation of any additional points of entry/exit to and from Gaza. The *AMA* explicitly prescribes Rafah as the only crossing point along the Gaza-Egypt border.<sup>39</sup> Furthermore, Israel prevents the (re)construction and/or operation of an airport and seaport without its approval.

#### *Movement of people and immigration*

Israel regulates the movement of permanent residents of the OPT to and from Gaza through its *de facto* control of Rafah (see previous section).<sup>40</sup> Israel also controls the movement of foreigners in and out of Gaza. With few exceptions, it prohibits foreigners from entering Gaza through Rafah;<sup>41</sup> they may only enter Gaza through Erez, a crossing point shared with Israel. As a matter of fact, Israel kept Erez closed for much of 2006.

<sup>34</sup> *Agreed Principles for Rafah Crossing* (15 November 2005), online: PLO Negotiations Affairs Department <<http://www.nad-plo.org/paliraeli/roadagree/Agreed%20Crossing.pdf>> [APRC]. The APCR is a part of the *AMA*.

<sup>35</sup> *AMA*, *supra* note 33, Art. 2.

<sup>36</sup> See *The Agreement on Movement and Access: The Costs of Non-Implementation*, *supra* note 32.

<sup>37</sup> *Interim Agreement*, *supra* note 21, Art. XXIX and Annex I, Art. X.

<sup>38</sup> *Supra* note 33, para. 3.

<sup>39</sup> *APRC*, *supra* note 34, “General”.

<sup>40</sup> On 25 June 2006, Israel forced the closure of Rafah, stranding over 5,000 Palestinians on the Egyptian side of the Gaza-Egypt border. Only after 7 of them died while waiting for days with no shelter and inadequate water did Israel finally agree to reopen the border crossing for a matter of a few days in order to let the thousands return home. With few exceptions, Rafah has remained largely closed since that time, trapping Gaza’s 1.4 million Palestinians inside (Palestine Red Crescent Society; United Nations, *Eighteenth Report: Implementation of the Agreement on Movement and Access (12-25 July 2006)* (1 August 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <<http://www.humanitarianinfo.org/opt/docs/UN/OCHA/Movement%20and%20Access%20report%20No.%2018.pdf>>; *Gaza Strip: Situation Report* (7-24 August 2006), *supra* note 30); and Office for the Coordination of Humanitarian Affairs – OPT, *The Agreement on Movement and Access One Year On* (November 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/AMA\\_One\\_Year\\_On\\_Nov06\\_final.pdf](http://www.ochaopt.org/documents/AMA_One_Year_On_Nov06_final.pdf)>

<sup>41</sup> *APRC*, *supra* note 34, “General”.

Even when it is open, it is Israel – not the PA – that places restrictions on foreigners who want to enter Gaza by requiring them to apply for a special permit to enter Gaza.

Israel also controls immigration to the OPT, including Gaza.<sup>42</sup> The PA, quite simply, is not allowed to formulate and implement its own immigration policy. Specifically, the PA's right to grant permanent residency is limited to investors, to spouses and children of Palestinian residents, and to humanitarian cases. Even within these permitted categories, Israeli approval is always required. The PA is also obligated to give Israel updated information regarding Palestinian travel documents and identity cards and to inform Israel of every change in the Palestinian population registry. This Israeli control has a significant impact on hundreds of thousands of Palestinians, comprising the refugee and Diaspora populations, who, for any number of reasons, are not currently registered in the population registry and therefore cannot enter Gaza through Rafah.

### *Health*

Israel is obstructing the PA's ability to provide health services in Gaza. Israel's withholding of customs revenues belonging to the PA is contributing to the PA's inability to pay medical staff. Moreover, some hospitals and primary healthcare clinics are understaffed because the Palestinian Ministry of Health is unable to provide transport to medical personnel.<sup>43</sup> Israel's control of the borders is contributing to the shortage of basic goods, including medicines and medical supplies, in Gaza. As a result, hospitals are reducing the types of services they provide, including diagnostic, optional surgical and out-patient services.<sup>44</sup> Israel's destruction of Gaza's only power plant (see below) caused a shortage of electricity and water, causing all public hospitals to use generators for the preservation of vaccines and food and for emergency operations.<sup>45</sup> Israel's control of the movement of people has significantly affected the ability of Gazans to obtain essential medical care not available in Gaza.<sup>46</sup>

### *Water*

The OPT shares surface water sources, namely the Jordan River and Wadi Gaza, and four groundwater aquifers with Israel. Under international law, Palestinians are entitled to their equitable share of water from these water sources. A necessary corollary to the right is that Israel must, at a minimum, co-operate with Palestinians through negotiations, through practical steps and otherwise, to facilitate the supply of water from those water sources to Palestinians. This is particularly true if it is not technically possible for Palestinians to extract the water from within their own borders. If the case were otherwise, the right to this critical shared resource would be meaningless.

Technically, it is not possible for Palestinians living in Gaza to access their entire equitable share of water from within Gaza's borders. To meet Gazans' need for water, they must arrange with Israel to extract their share of water from the various shared sources in Israel or

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<sup>42</sup> *Interim Agreement*, *supra* note 21, Annex III, Art. 28.

<sup>43</sup> Office for the Coordination of Humanitarian Affairs – OPT, *The Humanitarian Monitor – OPT*, No. 3 (July 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.humanitarianinfo.org/opt/docs/UN/OCHA/oPt\\_Humanitarian\\_Monitor\\_July06.pdf](http://www.humanitarianinfo.org/opt/docs/UN/OCHA/oPt_Humanitarian_Monitor_July06.pdf)>.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Office for the Coordination of Humanitarian Affairs – OPT, *Humanitarian Update* (September 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/OCHA\\_HUPProtectAccess\\_September06.pdf](http://www.ochaopt.org/documents/OCHA_HUPProtectAccess_September06.pdf)>.

the West Bank and then pipe it through Israeli territory to Gaza. To date, Israel has refused to discuss arrangements to enable Palestinians to access their rightful share through any of these means, citing water as a permanent status issue that can only be discussed in final status negotiations.

Israel even impedes the PA's ability to distribute water it extracts from the Coastal Aquifer within Gaza itself, and to properly treat water. Israeli military operations since late June 2006 have resulted in the destruction of water and wastewater infrastructure, including main water pipelines and sewage networks. For example, an air strike on the bridge between Nuseirat refugee camp and Moghraga village partially destroyed a water pipeline, completely cutting water supply to 155,000 people,<sup>47</sup> and two sewage pipelines in Nuseirat refugee camp. In addition to the direct physical damage caused to water-related infrastructure, the shortage of electricity precipitated by Israel's destruction of Gaza's only power plant has affected the normal operation of vital water and water treatment installations, such as wells and pumps.<sup>48</sup>

Because of this Israeli control, Gaza is facing a water crisis that has implications for the environment and for the health of its inhabitants.

### *Electricity*

Gaza currently has a single power plant of its own for the generation of electricity. On 28 June 2006, the Israeli army destroyed the substation of this power plant, which provided electricity to 43 per cent of the population.<sup>49</sup> As a result of the attack, supply of electricity to 1.4 million Gazans was disrupted, and, up until October 2006, Gaza had electrical power for only a few hours a day.<sup>50</sup> The shortage of electricity has impeded the ability of hospitals to provide services and has paralyzed water supply and water management facilities, as well as other public service institutions. In early October 2006, repairs on the power plant had begun.

## IV BILATERAL INSTRUMENTS DO NOT CONSTITUTE CONSENT TO THE OCCUPATION

As illustrated above, some of the ways in which Israel asserts control are laid out in bilateral instruments concluded between Israel and the Palestinians. In addition to IHL, the Interim Agreements, as amended by changes in factual circumstances such as the Gaza "disengagement", continue to govern the relationship between Israel and the Palestinian population in Gaza and the West Bank, to some extent. The Interim Agreements were

<sup>47</sup> Palestinian Monitoring Group, *Collective Punishment: Israel's Attack on the Gaza Strip*, Special Report (9 July 2006) at 5, citing Palestinian Coastal Municipalities Water Utility.

<sup>48</sup> Such Israeli actions are illegal. International humanitarian law prohibits the destruction of property except when "absolutely necessary by military operations." (*Fourth Geneva Convention*, *supra* note 4, Arts. 53 and 147. See also *Hague Regulations*, *supra* note 3, Art. 23(g); and *Additional Protocol I*, *supra* note 5, Art. 52(2)) Military necessity requires that the destruction be directed at a military target and that the military advantages reasonably anticipated from the destruction be proportionate to the civilian damages reasonably foreseen. (Jean S. Pictet, ed., *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 302. See also *Additional Protocol I*, Arts. 48, 51(4), 51(5) and 52(1)) In the case of doubt as to whether the property destruction is necessitated by military operations, the interests of the civilian population must prevail. (*Additional Protocol I*, *supra* note 5, Art. 52(3))

<sup>49</sup> Office for the Coordination of Humanitarian Affairs – OPT, *Gaza Strip: Situation Report* (30 June 2006), online: Office for the Coordination of Humanitarian Affairs – OPT <[http://www.ochaopt.org/documents/Gaza%20Strip%20OCHA%20sitrep\\_30June06.pdf](http://www.ochaopt.org/documents/Gaza%20Strip%20OCHA%20sitrep_30June06.pdf)>.

<sup>50</sup> *Humanitarian Update* (September 2006), *supra* note 46.

intended to formalize a period of transition from occupation and total Israeli control to complete Palestinian freedom and sovereignty. They were never intended to formalize Israel's residual control over Palestinians. Indeed, "[i]t is ... difficult to characterize the Palestinian-Israeli relationship as a 'delegation' of pre-existing Palestinian rights to Israel",<sup>51</sup> and it would be a complete mischaracterization of the Agreements to construe them as such. Palestinians never exercised those rights to be able to delegate them to Israel in the Agreements. *Israel*, as occupying power, exercised those rights and therefore could – and did – grant the PA whatever functions it chose to and retained the rest.<sup>52</sup> In any event, the control that Israel retained for itself in the Interim Agreements was meant to be temporary. It cannot be said, almost 15 years later, that the Palestinians agreed that such control be exerted over the long term.

Similarly, the *AMA* governs, among other things, certain aspects of movement and access to and from Gaza. The whole process of "disengagement" was imposed on Palestinians unilaterally. In this context, Palestinians entered into discussions with the Israelis to attempt to gain some control over their own lives and territory from Israel. In the end, Israel granted the PA only those functions it wanted to and retained the remainder.

## V POWER BREEDS RESPONSIBILITY

Occupation law takes a realistic approach to attributing responsibility for the welfare of the population of an occupied territory. At its core is the idea that power breeds responsibility. The *Hague Regulations* articulate this idea in the following terms: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [within certain parameters]."<sup>53</sup>

This idea also permeates the *Fourth Geneva Convention*. Article 6 prescribes that "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 [certain provisions of the] Convention."<sup>54</sup> Indeed, this article recognizes that an occupation may come to an end gradually through devolution of governmental powers from the occupying power to the lawful sovereign as was the case, for example, in Allied-occupied Germany after World War II.

This is consistent with the Nuremberg Tribunal's position in the *Hostages* case: "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."<sup>55</sup>

Since Israel continues to occupy Gaza, Israel is still bound by its obligations under conventional and customary international humanitarian law, including the *Hague Regulations* and the *Fourth Geneva Convention*, not to mention its obligations under other species of law.

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<sup>51</sup> Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford: Oxford University Press, 2000) at 71.

<sup>52</sup> "Israel shall transfer powers and responsibilities as specified in this Agreement ... Israel shall continue to exercise powers and responsibilities not so transferred." (*Interim Agreement*, *supra* note 21, Art. I(1)).

<sup>53</sup> *Supra*, note 3, Art. 43.

<sup>54</sup> *Supra*, note 4.

<sup>55</sup> *Supra*, note 11.

What this means for Israel is that it shall continue to be responsible for the welfare of Gazans so long as it continues to exercise control.