

## The mythical post-2005 Israeli occupation of the Gaza Strip

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Consistent with the resolution of the government of Israel and the proclamation of the Military Commander, in 2005 Israel withdrew all Israeli military forces from Gaza, forcibly removed all Israeli civilians, and dismantled its military administration in the entirety of the Gaza Strip. In addition, Israel abandoned its presence in the ‘Philadelphi Corridor’ – the border area between the Gaza Strip and Egypt. Notwithstanding this complete withdrawal from Gaza, a number of legal advocacy groups, UN organs and other observers have continued to opine that Gaza is under Israeli occupation. This article examines the validity of claims that Israel still ‘occupies’ Gaza under the laws of war and occupied territory. The article concludes that such claims are without any basis in international law. It should be emphasized that this article assumes, *arguendo*, that prior to 2005, Gaza was territory belligerently occupied by Israel; it does not enter into the disputes about whether Gaza should have been considered occupied territory from 1967 to 2005.

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### Israeli withdrawal in 2005

In 2003, then-Prime Minister of Israel Ariel Sharon proposed a ‘disengagement plan’ under which Israel would withdraw from the Gaza Strip without waiting for a peace agreement with the Palestinians.<sup>1</sup> Israel finalized the terms of its withdrawal during the course of 2004–2005, and carried out the withdrawal during 15 August–12 September 2005.<sup>2</sup>

Early versions of the withdrawal plan were not clear about the scope of the withdrawal. Israeli government decisions had envisioned a phased withdrawal in which each phase would be followed by a deliberative period to examine the results.<sup>3</sup> Similarly, early versions of the withdrawal plan envisioned a continued Israeli presence in the Philadelphi corridor (the strip surrounding the Gaza–Egypt border area).<sup>4</sup> However, ultimately, Israel withdrew completely from Gaza, and did not leave behind any forces in the border area between Gaza and Egypt.

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On 11 September 2005, as the last forces were leaving Gaza, the Government of Israel adopted the following resolution:

*Resolution 4235 of the Government of Israel in re Conclusion of the Israeli presence in Gaza Strip and in 'Philadelphi Corridor' of 11.9.03*

[The government] decides (unanimously), to end the Israeli presence in the Gaza Strip and in 'Philadelphi Corridor' as follows. In accordance with Government resolution 1996 of 6.6.2004 *re the Disengagement Plan*, the IDF will withdraw its forces from the territory of the Gaza Strip, including from the area of the border between the Gaza Strip and Egypt ('Philadelphi Corridor').

Withdrawal of the forces will be executed according to a timetable to be fixed by the Defense Establishment, taking into consideration operational needs in the area.

Upon withdrawal of IDF forces from these territories, responsibility for them will be transferred to the Palestinian authorities and the Military Government in the Gaza Strip area will end. The Defense Establishment, in coordination with the Justice Ministry, will take the necessary measures in order to formally annul the Military Government.<sup>5</sup>

One day later, on 12 September 2005, the Military Commander of the Gaza Strip issued a proclamation ending Military Government in Gaza, as follows:

1. In accordance with the resolution of the Government of Israel of September 11, 2005 the forces of IDF left the areas of Gaza Strip and transferred the control of these areas to the Palestinian Council.
2. From the end of this day, the Military Government in Gaza Strip has ended. Major General Dan Harel, Commander of IDF forces in Gaza Strip, September 12, 2005.<sup>6</sup>

And, indeed, on 12 September 2005, after the army completed its eviction of all Israeli civilians, the last Israeli soldier left Gaza.<sup>7</sup>

Upon the Israeli withdrawal, Gaza had six land border crossings: one (Rafah) along its border with Egypt, and five (Erez, Sufa, Kerem Shalom, Nahal Oz and Karni) along the border with Israel. On 20 September 2005, the Israeli Ministry of Interior classified the five Gaza–Israel crossings as 'border stations' marking international ports of entry into and exit from Israel.<sup>8</sup> As the Rafah border was under Egyptian–Palestinian control, the Interior Ministry did not make any decisions regarding the status of Rafah. As Israel had completely withdrawn from Gaza, it maintained soldiers only on the Israel side of Israel–Gaza border crossings, and it had no personnel stationed anywhere in the Rafah border crossing, or, indeed, anywhere along the Egypt–Gaza border.

On 15 November 2005, Israel and the Palestinian Authority reached two agreements regarding the border controls of Gaza: the Agreement on Movement and Access, and the Agreed Principles for Rafah Crossing.<sup>9</sup> Israel agreed not to interfere with the operation of a to-be-constructed Gazan seaport, subject to security agreements. Israel also agreed to discuss security arrangements and other issues related to the operation of a Gazan airport.<sup>10</sup> However, security

arrangements were never concluded, and Israel continues to patrol the coastal waters and airspace of Gaza. No international seaports or airports are currently operational in Gaza, and Israel blocks most international maritime travel to and from local Gazan seaports.<sup>11</sup>

The 15 November agreements also established security provisions for the Egyptian–Palestinian border crossing in Rafah. According to the agreements, security for the Rafah border crossing was to be overseen by European observers, and the Palestinians were to take various steps including ‘prevent[ing] the movement of weapons and explosives’. Israel was also permitted a live video feed and the right to object to person crossings, with ultimate authority to rest with the Palestinian Authority.<sup>12</sup> In the wake of Hamas’ takeover of Gaza, European observers fled their posts.<sup>13</sup> Egypt has of its own accord often kept the Rafah crossing closed,<sup>14</sup> although it has repeatedly opened it up for passage for civilians<sup>15</sup> and for Hamas terrorists.<sup>16</sup> Israel continues to have no presence at the Rafah crossing.<sup>17</sup>

The Palestinians, first under Fatah-dominated Palestinian Authority rule and now under Hamas, control access to the Gazan side of border crossings and they have used this control to limit the travel of political opponents,<sup>18</sup> and to impose exit permit limitations.<sup>19</sup>

### **Since the Israeli withdrawal**

Shortly after the Israeli withdrawal, the Palestinian terrorist group Hamas took control of the Gaza Strip. In elections on 25 January 2006, approximately four and a half months after the withdrawal from Gaza, Hamas won 74 of 132 seats in the Palestinian Authority legislature.<sup>20</sup> Hamas’ victory included receipt of the majority of votes cast in the Gaza Strip.<sup>21</sup> On 29 March 2006, Hamas’ Ismail Haniya was sworn in as prime minister by Palestinian President Mahmoud Abbas.<sup>22</sup> A Hamas government held power for approximately a year until Hamas reached a unity agreement with its rival organization Fatah.<sup>23</sup> Fatah and Hamas then ruled jointly from March to June 2007.<sup>24</sup> In June 2007 Hamas took sole power in Gaza by force of arms; it has held power in Gaza since then.<sup>25</sup>

Naturally, the election of Hamas affected the likelihood of successful negotiation of security agreements regarding Gaza. Hamas is an organization chartered in 1988 with the explicit aim of destroying Israel and waging war against the Jewish people.<sup>26</sup> The charter specifies that Jews are duplicitous and evil, and that Jews must ultimately be annihilated on judgement day.<sup>27</sup> In addition, the charter rejects all negotiation, specifying that ‘so-called peaceful solutions’ contradict the principles of Hamas and there is ‘no solution for the Palestinian question except through Jihad’.<sup>28</sup> In the wake of its election victory, Hamas reiterated its aims, rejecting any possibility of peace with Israel.<sup>29</sup> Throughout its history Hamas has also utilized terrorism against Israel as a tactic for achieving its aims. Hamas has carried out numerous suicide bombings, rocket attacks and other murderous strikes against civilian Jewish Israeli targets.<sup>30</sup>

In the years since the Israeli withdrawal, Palestinian forces in Gaza have continued to attack Israel. Most of these attacks have been rocket and mortar strikes on Israeli civilians (an average of more than two per day),<sup>31</sup> but Palestinians have also carried out sniper attacks and armed incursions into Israeli territory, the most famous of which was a raid on an Israeli position near Kerem Shalom on 25 June 2006, in which the assailants killed two Israeli soldiers and kidnapped a third – Gilad Shalit, who was thereafter held hostage.<sup>32</sup> As a result of the Palestinian attacks, Israel has engaged in occasional counterstrikes, some involving infantry and armoured incursions into Gaza, but more generally by means of targeted airstrikes.<sup>33</sup> In addition, Israel launched two major military operations against Palestinian forces: Operation Summer Rains in June 2006 in response to the Gilad Shalit kidnapping,<sup>34</sup> and Operation Cast Lead in December 2008<sup>35</sup> in response to Palestinian rocket and mortar attacks launched after Hamas ended an Israeli–Palestinian ceasefire and launched a series of attacks on Israeli civilians, in what Hamas called ‘Operation Oil Stain’.<sup>36</sup>

Notwithstanding the constant attacks on Israelis from Gaza, Israel has not returned any permanent military or civilian presence to Gaza.

In addition, notwithstanding the Palestinian attacks from Gaza, Israel has continued to provide a variety of goods and services to the Palestinian civilian population in Gaza. Israel provides electricity, fuel, food and other humanitarian services, and it permits numerous Gazans to enter Israel for medical care.<sup>37</sup> Israel does not receive full payment for these goods and services; some are paid for by third parties.

### **The laws of occupation**

To evaluate the status of Gaza since 2005, it is necessary to acquaint ourselves with the laws of belligerent occupation. The laws of occupation are outlined in two major treaties: the Fourth Geneva Convention of 1949,<sup>38</sup> and the Regulations attached to the Fourth Hague Convention of 1907.<sup>39</sup>

Territory is considered occupied when the armed forces of one state take control of the territory of another state without permission.<sup>40</sup> According to the Fourth Geneva Convention, the occupation continues so long as the occupying state ‘exercises the functions of government in such [occupied] territory’.<sup>41</sup> The Hague Regulations state this rule more broadly: territory is occupied for so long as the occupying forces have ‘established and can ... exercise’ their authority.<sup>42</sup>

Legal authorities generally summarize these rules together as stating that occupations begin with the consolidation of ‘effective control’ by the occupier and end when occupying forces no longer maintain ‘effective control’ over the territory.<sup>43</sup> In the words of Yoram Dinstein, ‘effective control is a *conditio sine qua non* of belligerent occupation’.<sup>44</sup>

As the tribunal at Dijon found in the 1945 trial of Carl Bauer, Ernst Schrameck and Herbert Falten, the mere presence of forces in territory is not

sufficient to create a state of occupation, since the 'setting up and maintenance of an actual and effective occupying administration makes the difference between occupation and mere invasion'. In addition, as the Nuremberg Tribunal ruled in the case of Wilhelm List and others (the Hostages Case):

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.<sup>45</sup>

Thus, not only is it true that 'when the occupant withdraws from a territory or is driven out of it, the occupation ceases to exist', but also 'the status of occupation ceases to exist' where occupation forces are present but 'control of an occupied territory is disputed by the force of arms, and consequently, already at the stage in which the occupant's authority is at stake'.<sup>46</sup> Furthermore, there is no occupation where there is a local independent civil government. Only if 'the civil government [is] eliminated' will 'the area will be said to be occupied'.<sup>47</sup>

Four points bear particular emphasis here. First, if a local government is able to exercise its authority independent of the putative occupier, there is no state of occupation. Effective control requires the *substitution* of the authority for the authority of the local forces. As Hersch Lauterpacht put it in the British Forces Manual, for an occupation to exist, 'the legitimate government should, by the act of the invader [occupier], be rendered incapable of publicly exercising its authority within the occupied territory'.<sup>48</sup> Indeed, as the Bauer case demonstrates, if the authority of the occupier is sufficiently challenged by local forces, even if there is an occupation military administration, the status of occupation ends.

Second, the territorial scope of occupied territory is determined by the areas under actual control of occupying forces, and not by the territorial boundaries of the state whose territory is occupied. Thus, for example, in the case of *Congo v. Uganda*,<sup>49</sup> the ICJ did not consider all of the Congo to be occupied, or even all of the territories within the lines of Uganda's military presence. Rather, as the Hague Regulations state, only territory which is under effective control of the occupier is considered occupied.

Third, the touchstone of occupation is 'effective control' by occupying forces. This is a term recognized by legal authorities although it is not found in the relevant treaties, and it is measured primarily by control over government and exercise of its functions. For example, in determining whether portions of the Democratic Republic of Congo were occupied by Uganda, the International Court of Justice stated it could find territory occupied only if 'the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.<sup>50</sup> The ICJ determined that Uganda was in control of certain areas where it exercised authority as a result of its direct administration of the territory, including redividing provinces, appointing and dismissing governing officials and stationing troops throughout the area.<sup>51</sup> The 'omnipresence' of troops was not

necessary to establish occupation, so long as Uganda maintained enough troops in order to substitute their own authority for that of the local government.<sup>52</sup> However, there is no record of any case of territory being considered occupied with no troops present anywhere in the contiguous bloc of allegedly occupied territory. As Dinstein writes, 'it is palpable that the Occupying power must deploy "boots" on the ground'.<sup>53</sup>

Fourth, an occupation ends when an occupying state exits the territory, as stated by the Bauer case, or where it no longer has effective control of the territory, meaning that it no longer exercises the functions of government in place of the local state or where there is an alternative independent local civil government. These are issues of fact.<sup>54</sup> If an occupier, in fact, has effective control, and the other legal conditions of 'occupation' are met, then it occupies the territory even if it denies doing so. Likewise, once an occupier ceases to have effective control, it no longer occupies the territory, even if others insist that the occupation has continued.

### **Applying the laws of occupation to Gaza**

Since Israeli forces entered Gaza during the Six Day War in 1967, pro- and anti-Israel advocates have argued about whether the Gaza Strip should be considered occupied territory. As there was little question that Israel exercised effective control over Gaza after 1967 (at least until 1994, when the Palestinian Authority first entered Gaza), disputes focused on whether Gazan territory was territory of a state at all. Under the Israeli interpretation, since Gaza was not sovereign territory of Egypt and was, in fact, an unresolved portion of the Mandate of Palestine (which had been established in 1922 to facilitate the reestablishment of the Jewish homeland), it could not be considered territory under Israeli occupation.<sup>55</sup> As such, it was argued, the territory could not be belligerently occupied. A secondary debate developed in the wake of the 1993 peace agreement between Israel and the Palestine Liberation Organization (better known as the first Oslo Accord, or formally as the Declaration of Principles) and the subsequent handover of governing authority in the Gaza Strip to the autonomous Palestinian Authority in 1994.<sup>56</sup> It was argued that even if the Gaza Strip had been occupied by Israel from 1967 to 1994, Israel surrendered effective control in 1994, and therefore had ended any occupation.<sup>57</sup>

To avoid entering into these complex issues, this article assumes that Gaza was legally considered belligerently occupied by Israel from 1967 until 2005. In other words, it assumes *arguendo* that Gaza should either have been considered the territory of a state other than Israel, or that the laws of occupied territory do not require that occupied territory be considered the territory of a state other than the alleged occupier. Moreover, it assumes *arguendo* that, notwithstanding the presence of the Palestinian Authority, Israel maintained effective control of Gaza from 1994 to 2005.

Thus assuming *arguendo* that Israel occupied Gaza from 1967 to 2005, did Israel remain the occupier after its withdrawal in 2005? The answer, clearly, is no. After its withdrawal, Israel had no military government in Gaza, and no troops in Gaza. It has no forces permanently present in Gaza and no means of exercising effective control.

Since 2005, Israel has not, in fact, exercised effective control over Gaza. Israel does not and cannot appoint or dismiss local Gazan governing officials. Indeed, Israel strongly opposes the current Hamas regime in Gaza.<sup>58</sup> Israel does not administer government services in Gaza. It does not have police in Gaza. It does not levy taxes in Gaza. It does not provide social services in Gaza. It has no courts in Gaza. It operates no schools in Gaza. It establishes no governing structures in Gaza and appoints no officials. Were Israel to issue orders to the government or population of Gaza, one can safely assume that such orders would be ignored.

By contrast, the Palestinian Authority, first under Fatah, and then under Hamas, is fully able to exercise its authority in the Gaza Strip. Hamas has police forces,<sup>59</sup> courts,<sup>60</sup> and jails.<sup>61</sup> It operates schools,<sup>62</sup> electronic media<sup>63</sup> and social services.<sup>64</sup> It regulates business activities and establishes banks,<sup>65</sup> and it maintains land registries.<sup>66</sup> It levies taxes.<sup>67</sup> It controls its own borders.<sup>68</sup> It even imposes a dress code.<sup>69</sup> In sum, it has a functioning and fully independent local civil government, buttressed by armed forces.

Moreover, since 2007 and the Hamas takeover of government, it is impossible to claim even a fictitious legal connection between the actual functioning governing authority in Gaza and the State of Israel. While the Palestinian Authority is formally subject to Israeli authority under the largely defunct Oslo Accords,<sup>70</sup> Hamas does not accept that it is bound by the Oslo Accords and does not submit to Israeli authority in any respect in Gaza.<sup>71</sup> Rather, as even the 2009 Report of the United Nations Fact Finding Mission on the Gaza Conflict (hereinafter, the Goldstone Commission report) acknowledged, '[s]ince July 2007, ... the Hamas-led authorities in Gaza have been responsible for the civilian administration of Gaza. For instance, they employ civil servants and workers, run schools, hospitals, traffic police and the administration of justice'.<sup>72</sup>

As the 2008–2009 fighting in Gaza demonstrated yet again, the functions of government in Gaza are fulfilled by Hamas, not by Israel. It is evident that Israel cannot dispatch troops and expect instantaneous control. Hamas, not Israel, administers the territory of Gaza. Should Israel wish to reintroduce its control over Gaza, it would face fierce military resistance and it would have to engage in very intensive and bloody military action.

According to newspaper reports, the Palestinian Authority acknowledges that it alone (under Fatah and then under Hamas) has had sole effective authority in Gaza since 2005; indeed, this acknowledgement played a key role in Palestinian Authority arguments that it was entitled to accept the authority of the International Criminal Court over alleged war crimes that took place during the 2008–2009 fighting in Gaza.<sup>73</sup>

In short, the facts, as acknowledged by both the Palestinian Authority and by Israel, clearly demonstrate that Israel has not had effective control over the Gaza Strip since 2005. Israel does not have a permanent troop presence in Gaza. Israel has not displaced local authority; there is a functioning local independent civil government in Gaza. Legally, therefore, Israel cannot be viewed as occupying Gaza.

### **Claims that Gaza is occupied**

Notwithstanding the clear and indisputable legal conclusion that Israel does not occupy Gaza, many groups continue to assert that Israel does occupy Gaza.

#### ***Claude Bruderlein***

A briefing paper by Claude Bruderlein published by his Harvard Programme on Humanitarian Policy and Conflict Research in September 2004 sounded many of the claims that will be discussed in this section.<sup>74</sup> Bruderlein's briefing paper, published before the withdrawal, and consequently without full possession of the facts, apparently inspired many of the legal errors in an October 2004 PLO report that would in turn serve as the template for the claim that Israel continues to occupy Gaza.

These errors, such as the mistaken idea that border controls constitute 'effective control', are discussed more fully below, in the discussion of the PLO report. Bruderlein's conclusion, however, bears particular notice. While Bruderlein insinuated support for several incorrect arguments that would be used to argue for continued Israeli occupation of Gaza, Bruderlein also intimated that if Israel withdrew from the Philadelphi corridor (something Israel ultimately did, although it was unplanned at the time of Bruderlein's report), Israel would have met the legal conditions for withdrawing from the territory.<sup>75</sup>

Curiously, at this point, Bruderlein equivocated and refused to draw the conclusion that Gaza would remain occupied post-withdrawal. Instead, Bruderlein suggested an entirely new, unsupportable theory that '[i]n the absence of a determination by the UN Security Council or other authoritative international body on the end of occupation in the Gaza Strip, the situation in Gaza is likely to remain one of occupation'.<sup>76</sup>

The notion that the UN Security Council, or any other international body, has the authority to transform a situation where a state lacks effective control over a territory into a belligerent occupation is at odds with existing law. Nothing in the UN Charter grants the Security Council such authority. Nothing in the Hague Regulations or Fourth Geneva Convention authorizes the Security Council or any other body to make binding decisions about what constitutes an occupation. Indeed, even Bruderlein acknowledges elsewhere in the paper that 'the beginning and end of occupation, being ultimately questions of fact, do not hinge upon the decision or determination by external authority'.<sup>77</sup> Thus, where the facts clearly indicate that Gaza is not occupied, as is the case today, international law

considers the territory not to be occupied, and the refusal of UN bodies or any other organization to recognize those facts and their legal implication does not magically transform Gaza into Israeli-occupied territory.

Perhaps the source of Bruderlein's misstatement of the law is the Security Council's controversial resolution 1546 (2004), in which the Council 'endorsed' a new Iraqi government that would reassert full domestic sovereignty and 'welcomed' the attendant end of the belligerent occupation imposed by the United States and allied forces. Some commentators interpreted the resolution as asserting a new right to end an occupation by fiat of the Security Council.<sup>78</sup> However, this view is impossible to reconcile with the resolution itself – which does not assert such an authority, and instead recognizes what it takes to be facts – and with the absence of any treaty or customary source of authority in the Security Council. The better view is that the resolution did not affect the facts of the occupation, but simply indicated Security Council recognition of the fact that allied forces subsequently remaining in Iraq would be there by virtue of the consent of the Iraqi government, rather than as a result of a belligerent occupation.

In any event, even if it were true that the Security Council could, by fiat, end an occupation, this would not imply a Security Council ability to create an occupation *ex nihilo*s. There are many situations in which foreign troops can be present on a state's soil without there being a belligerent occupation. For instance, foreign troops may be present at the invitation of the state, as often happens, for instance, with UN peacekeeping forces. One might imagine a rule permitting the Security Council to grant authority in the name of the state for foreign forces to remain by invitation, thereby terminating an occupation. However, such a rule could not work in reverse. How would the Security Council transform the absence of foreign forces into a belligerent occupation? Such a power would essentially render it possible to declare every territory in the world occupied by anyone else, without any factual basis or judicial recourse.

### **PLO**

The root of claims that Israel occupies Gaza after the withdrawal seems to lie in a PLO legal opinion of October 2004, which asserted that, even after the Israeli withdrawal, Israel would have to still be considered as occupying Gaza.<sup>79</sup> As updated in September 2005,<sup>80</sup> the PLO's Negotiations Affairs Department opinion claimed that Gaza should be considered Israeli-occupied post-withdrawal due to three factors. First, citing Israel's assertion that it would retain the right of self-defence against attacks from Gaza, the PLO opinion claimed that Israel would 'retain the ability and right to enter the Gaza Strip at will'. Second, the PLO opinion claimed that 'Israel will retain control over Gaza's airspace, sea shore, and borders[;] . . . Israel will control all border crossings, including Gaza's border with Egypt. . . . Taken together, these powers mean that all goods and people entering or leaving Gaza will be subject to Israeli control'. Third, citing nothing in particular, the PLO opinion claimed that 'Israel will prevent Gazans from engaging in international relations'.

All three factors are tainted by misstatements of the facts, and together they do not demonstrate that Gaza is occupied by Israel according to international law. Let us begin with the PLO's claim of an asserted Israeli right of its forces to enter Gaza 'at will'. Nowhere in its claims regarding the withdrawal did Israel make any such claim. In fact, the language cited by the PLO as support for its statement says something quite different. The PLO cites a pamphlet issued by then Prime Minister Ariel Sharon to explain the 'disengagement plan' – the pamphlet was subsequently adopted by the Government – which says that the 'State of Israel reserves the basic right to self defence, which includes taking preventive measures as well as the use of force against threats originating in the Gaza Strip'.<sup>81</sup> Obviously, nowhere in this claim of self-defence does Israel assert a right to enter the Gaza Strip 'at will'. Furthermore, asserting a right of self-defence against threats does not transform the territory into 'occupied territory'. All states enjoy the right to self-defence, even where the threats emanate from another sovereign state.<sup>82</sup> The fact that Kuwait enjoys a right of self-defence against armed attacks emanating from Iraq, for example, does not transform Iraq into Kuwaiti-occupied territory.

Move forward to the final assertion of the PLO opinion that 'Israel will prevent Gazans from engaging in international relations'. As noted, the PLO opinion provides no document related to the withdrawal in which Israel makes such an assertion. Moreover, the assertion is not true. Obviously, the Palestinian Authority engages in international relations.<sup>83</sup> Hamas' takeover of Gaza after the withdrawal did limit the ability of Gaza's government to engage in foreign relations since most states will not openly recognize the authority of a terrorist organization like Hamas that seeks to destroy a member state of the United Nations.<sup>84</sup> Nonetheless, terror-supporting states like Syria have recognized the Hamas government's authority in Gaza, and they openly engage in diplomatic relations with the governing Palestinian authorities in Gaza.<sup>85</sup> Not only is Israel powerless to prevent such international relations, it has itself engaged in negotiations with the Hamas government by means of other states such as Egypt.<sup>86</sup>

Finally, consider the PLO's assertion that Israel controls all border crossings, including Gaza's border with Egypt, as well as Gaza's airspace and coastal waters. As noted previously, this is simply not true. Israel does not control the borders of Gaza; it controls only the Israeli side of Israel's border with Gaza. Egypt controls the Egyptian side of the Egyptian border with Gaza and Hamas controls access to the Gazan side of all of Gaza's land borders.<sup>87</sup> Obviously, controlling one side of a border does not make an occupation. Otherwise, one would have to consider Portugal Spanish-occupied territory on the grounds that Spain controls the Spanish side of the Portuguese–Spanish border. Indeed, the case for Spanish occupation of Portugal would be even stronger, since Spain controls the only land border to Portugal, while Gaza has a land border with Egypt. But even if it were true that Israel controlled all borders to Gaza, this would not make Israel the 'occupier' of Gaza because control of borders and airspace does not constitute effective control of territory. Israel's control of Gazan airspace and coastal waters does not prevent Hamas from exercising

authority within the Gaza Strip. Hamas polices the streets in Gaza, not Israel. Hamas runs the courts and jails, not Israel. Hamas operates schools, television and radio stations, not Israel. Control of a territory's airspace by another state is not unique in world history, and it has never previously been seen as transforming territory into occupied land. For instance, the UN Security Council-ordered no-fly zone in Libya<sup>88</sup> was not seen as transforming Libya into occupied territory. Indeed, commentators are quite clear in observing that '[s]upremacy in the air alone does not fulfill the requirements of actual occupation'.<sup>89</sup>

In its attempt to paint Israel as an occupier of Gaza, the PLO opinion resorts to misstating the law of occupation. Relying on the 1948 judgment of the Nuremberg Tribunal in the Hostages Case, the PLO opinion states that the proper test for occupation is not whether the putative occupier exercises effective control, but whether it has the ability to do so. In other words, the PLO opinion argues that an occupation exists whenever a state has the potential for effectively controlling territory.<sup>90</sup>

Not only does this misstate the law, it is obviously absurd. If the law of occupation transformed potential effective control into occupation, every case of military superiority would make territory occupied. Ireland would have to be considered territory occupied by the United Kingdom. Canada would have to be considered territory occupied by the United States. Lithuania would have to be considered territory occupied by Russia. Bangladesh would have to be considered territory occupied by China.

In fact, it is well recognized that the law of occupation requires effective control, rather than the potential for control. The PLO opinion relies on a misunderstanding of the Hostages Case. To see this, it is worth quoting from the Nuremberg judgment in full. The tribunal considered whether Greece and Yugoslavia could be considered occupied by Nazi Germany during the entire period of 1941–1944. One of the claims of the defendant Nazis was that Germany should not be considered an occupier because occasionally partisan forces were able to briefly control small areas of Greece and Yugoslavia until Nazi forces reasserted control of the area. The tribunal ruled against the defendant arguments, writing as follows:

It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. 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 any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.<sup>91</sup>

It should be evident that the Hostages Case did not alter the requirement that occupation can exist only where the putative occupier exercises effective control over the territory. The Nuremberg tribunal stated only that a temporary loss of control over small areas within a larger occupied territory does not end an occupation where the occupying forces control the bulk of the territory and may immediately reassert control.

This is far from the case in Gaza, where Israeli forces withdrew completely, local control has been firmly established for several years, and there is no surrounding occupied territory. Any attempt by Israel to reassert control would be fiercely resisted, and would necessarily be protracted. In sum, there is no legal or factual basis for the PLO opinion's claims that Gaza is occupied territory. Nonetheless, following the PLO's talking points, many individuals and organizations continue to argue that Israel is legally the occupier of Gaza. Like the PLO opinion, these arguments generally ignore or misstate most of the relevant facts, and argue for legal conclusions that are illogical and have no basis in international law or practice.

### *Iain Scobbie and Yoram Dinstein*

Interestingly, a modicum of support has appeared in the academic world for the PLO claim. Most of the support, unsurprisingly, has come from academics known for their advocacy for the Palestinian cause. For instance, Iain Scobbie opined that since Israel retains 'absolute authority over Gaza's airspace and territorial sea[, i]t is manifestly exercising governmental authority in these areas'. Scobbie then leaped to the conclusion that control of airspace must be considered to constitute effective control of the territory on the ground because 'air power and aerial surveillance are paramount'.<sup>92</sup> In making this assertion, Scobbie cited no precedent in which air control was seen as demonstrating effective authority sufficient to create a state of occupation. Nor did Scobbie address cases like Libya in which air control was *not* seen as establishing a state of occupation, or the considerable number of commentators who have noted that air control cannot be the basis of an occupation. Rather, Scobbie followed the PLO's assertion that potential control is the touchstone of occupation rather than active effective control. To bolster this misstatement of the law, Scobbie cited the *Prosecutor v. Naletilic and Martinovic* decision of the International Criminal Tribunal for the Former Yugoslavia. The case proves exactly the opposite of Scobbie's assertion.

In *Naletilic and Martinovic*,<sup>93</sup> the trial court ruled that something more than 'overall control' is required in order to prove that an occupation exists, and it provided a number of guidelines for showing that territory is occupied:

- 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;
- 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;

- the occupying power has issued and enforced directions to the civilian population.<sup>94</sup>

None of these guidelines suggests that potential control is sufficient to establish an occupation. In fact, quite the opposite is the case. The putative occupier must not only have control through its forces on the scene, it must also have rendered local authorities incapable of functioning, defeated local forces, and issued and enforced directions to the local civilian population. Israel does none of these things in Gaza. The inescapable conclusion is that Gaza is not occupied territory under the legal standard used in *Naletilic and Martinovic*.

The *Naletilic and Martinovic* court did add the somewhat dubious argument that some individuals may enjoy the protections of the law of occupation even though the territory in which they are located does not fully meet the test of occupied territory. However, even under the court's expansive theory, individuals could only enjoy these protections if in 'the hands of the occupying Power'.<sup>95</sup> Essentially, this can happen in only one case, as described by the court: where a state has invaded and is on the verge of occupying territory, but has not yet consolidated its control sufficiently for the territory to be considered occupied.<sup>96</sup> Obviously, this is not the case in Gaza. Gazan residents are not 'in the hands' of Israel. Moreover, this expansive theory applies only to the *onset* of an occupation, as is clear from the court's reliance on the language of article 2 of the Fourth Geneva Convention.<sup>97</sup> The court did not address article 6 of the Fourth Geneva Convention which describes the laws of occupation once an occupation is under way; article 6 states that the relevant rules of occupation apply only so long as the occupier 'exercises the functions of government' in the occupied territory.<sup>98</sup> Thus, the expansive and controversial theory is irrelevant to the question of whether a purportedly previously existing occupation of Gaza continued after Israeli withdrawal.

In addition to erring over the law about control, Scobbie attempted to argue that Israel's 'absolute authority over Gaza's airspace and territorial sea' shows that it 'is manifestly exercising governmental authority in these areas' and that Israel therefore occupies the land of Gaza. This conclusion too is exactly the opposite of that dictated by international law. As noted previously, the Hague Regulations state that occupation extends only to that part of the territory under control of the putative occupier. Thus, even if Scobbie were correct that Israel should be considered an 'occupier' of Gazan airspace and coastal waters, this would not make the land of Gaza occupied. Moreover, as Yoram Dinstein writes, '[a]irspace – like the territorial and internal waters – is an appurtenance of the land territory. As such, belligerent occupation of the airspace is inconceivable independently of effective control over the subjacent land'.<sup>99</sup>

Yoram Dinstein's writings on Gaza present a more curious case. While Dinstein has long-held idiosyncratic beliefs opposing the Israeli government concerning the sovereign status of the West Bank and Gaza,<sup>100</sup> he is a respected authority on the laws of war. Yet in his *The International Law of Belligerent*

*Occupation*, Dinstein shockingly argues that Gaza remains occupied by Israel, notwithstanding that most of the arguments he adduces in favour of the dubious proposition are rebutted by Dinstein himself elsewhere in his book.

Dinstein presents three arguments in favour of the position that Israel occupies Gaza:<sup>101</sup> first, that Israel and the PLO agreed in the Oslo Accords to treat Gaza and the West Bank as a ‘single territorial unit’;<sup>102</sup> second, that Israel effectively controls Gaza due to its control over Gaza’s airspace, coastal waters and land borders and its supply of fuel and electricity; and, third, Israel’s alleged ‘belie[f] that it is free . . . to send back its armed forces into the area whenever such a move is deemed vital to its security’.

The third argument, of course, is identical to the one made by the PLO and equally groundless. Dinstein cites no source whatsoever in support of the allegation that Israel holds such a belief. Nor does Dinstein demonstrate that such a belief, if held, would constitute grounds for believing Gaza occupied. Dinstein states that ‘belligerent occupation is not contingent on maintaining a fixed garrison and it is enough for the Occupying Power to have the capacity to send detachments of troops, as and where required, “to make its authority felt”’.<sup>103</sup> Yet Dinstein cites nothing to show that Israel has any authority to make it felt in Gaza, or any policy of doing so. Moreover, as Dinstein states elsewhere, effective control is the *conditio sine qua non* of occupation,<sup>104</sup> and any Israeli belief that fails to translate into effective control is irrelevant.

Dinstein’s second argument is shockingly inconsistent with his own analysis elsewhere, as well as the facts. Dinstein acknowledges that Gaza has a border with Egypt, and that the border has been opened and used without Israel presence or oversight,<sup>105</sup> yet he still incorrectly maintains that Israel controls ‘all lawful entrance or exit of people and goods to and from the Gaza Strip’.<sup>106</sup> Worse, Dinstein fails to acknowledge what he wrote elsewhere in the same book:

it is palpable that the Occupying Power must deploy ‘boots’ on the ground in or near the territory that is under occupation. Belligerent occupation cannot rest solely on either naval power or air power, however formidable that may be . . . Belligerent occupation ‘once acquired must be maintained.’ . . . Should the Occupying Power be expelled from – or lose its grip over – an occupied territory, in whole or in part, the occupation in the area concerned is terminated.<sup>107</sup>

In other words, it is clear that the law of occupation states that any Israeli control over airspace, coastal waters and land borders cannot be a substitute for effective control. Without effective control over the land of Gaza, Israel is not an occupier, no matter how effectively it controls Gaza’s airspace, waters or external borders.

As for the Israeli supply of goods, Dinstein makes no effort to show that such supply demonstrates that Israel has effective control of Gaza. Rather, Dinstein cites an Israeli court case<sup>108</sup> which held that Israel did not occupy Gaza, but still had a duty to supply various goods to Gaza. Correctly noting that ‘the notion that a Belligerent Party in wartime is in duty bound to supply electricity and fuel to its enemy is plainly absurd’, Dinstein argued that the Court must have implicitly

agreed that Israel occupies Gaza notwithstanding the explicit holding of the Court to the contrary.<sup>109</sup> The better argument, of course, is that the Court simply erred in finding that Israel had a duty to supply the goods. And, as will be discussed below, there is no ground for believing that supplying goods in itself constitutes effective control. Certainly, Dinstein cites no such doctrine or case anywhere in his book.

Dinstein's first argument is the most peculiar of all. Whether Gaza and the West Bank are a single territorial unit or separate units is entirely irrelevant for the laws of occupation. As Dinstein himself notes elsewhere in the book, the boundaries of occupied territory are determined by the area subject to effective control, not by the legal boundaries of a territory.<sup>110</sup> If Dinstein is correct that the West Bank is occupied by Israel and that the West Bank and Gaza should be viewed as a single territory notwithstanding their physical separation, this does not automatically make Gaza occupied as well. Gaza would only be occupied if Israel exercised effective control over Gaza. Since Israel does not exercise such control, it does not occupy Gaza.

### *Gisha, Human Rights Watch and other NGOs*

In a lengthy 2007 position paper, the pro-Palestinian NGO Gisha maintained that Israel should be considered as occupying Gaza due to six factors: (1) Israel's alleged control over land crossings to and from Gaza; (2) Israel's control of airspace and coastal waters; (3) alleged Israeli control of movement within Gaza due to 'periodic incursions and a "No-Go Zone"'; (4) Israeli administration of a Palestinian population registry; (5) Israeli remittances to the Palestinian Authority of taxes collected on goods shipped to Gaza through Israeli ports; and (6) relative Palestinian poverty and the importance of Israeli financial aid to the Palestinian Authority.<sup>111</sup>

It should be noted that none of these factors demonstrates actual effective control by Israel. As previously noted, it is not true that Israel controls all land entry to and exit from Gaza; and the existing Israeli border controls, as well as air and sea controls, do not constitute effective control so as to transform Gaza into occupied territory. Indeed, in a March 2009 report, Gisha stepped away from its insupportable claims that Israel controls all land entry into Israel. While its 2007 paper falsely claimed that 'Israel also controls the movement of people between Gaza and Egypt via Rafah Crossing, the only operational Egypt-Gaza Crossing',<sup>112</sup> Gisha acknowledged in its 2009 paper that Egypt controlled its border crossings with Gaza and that Egypt has permitted crossings between Gaza and Egypt solely in coordination with Hamas.<sup>113</sup>

Gisha's description of Israel as controlling Gaza due to alleged control of 'the Palestinian Population Registry' is both factually and legally incorrect. Gisha claims incorrectly that Israel controls 'the' Palestinian Population Registry. Israel cannot prevent Hamas from maintaining a population registry and it has never attempted to do so. In fact, Gisha's March 2009 report acknowledged that Hamas

maintains a registry, on the basis of which it has issued its own identity cards to Gaza residents.<sup>114</sup> Israel maintains a separate Israeli-managed Palestinian population registry that it uses to make decisions regarding border crossings into Israeli territory and which was supposed to be used for the Rafah crossing under the November 2005 Israeli–Palestinian agreements. Thus, in saying that Israel maintains a population registry, Gisha is saying nothing more than that Israel controls its borders with Gaza in an orderly fashion and that Israel does not trust potential assertions by Hamas about the residential status of Gazans. But, as previously stated, border controls do not create an occupation.

Gisha's claim that Israel's control of movement within Gaza due to 'periodic incursions and a "No-Go Zone"' is more complex, and more deceptive. Upon closer examination, Gisha's claims turn out to be quite empty. Gisha's reference to 'No-Go Zones' is actually a misleading description of Israeli warnings to Palestinians not to approach too closely the empty areas directly adjacent to border fences between Israel and Gaza. Needless to say, these areas have no Palestinian residents. At best, Gisha might say that Israel 'occupies' the few metres adjacent to border fences, although it is far from clear that this territory is Gazan to begin with. More striking are Gisha's claims regarding Israeli defensive military measures. For instance, Gisha focused on several Israeli incursions during Operation Summer Rains in 2006 in which Israeli troops entered the Gaza Strip and briefly set up camp. Focusing on these brief moments of intense fighting, Gisha claims that 'ground forces have been operating throughout Gaza ... closing areas to travel, forcing families out of their homes ... and issuing orders to the civilian population to stay away from areas of fighting'.<sup>115</sup> But as noted previously, cases like Naletilic and Martinovic make it clear that temporary control of areas during battle do not constitute 'occupation' and it is simply not true that the periods of intense fighting in Operation Summer Rains and Operation Cast Lead are representative of the general state of affairs in Gaza. Other than brief periods of intense fighting, Israeli troops have not operated throughout Gaza, and have not had any control over where civilians live or move. Gisha acknowledges that the true basis of its claim that Israel occupies Gaza is Israel's 'military superiority'.<sup>116</sup> However, as noted earlier, military superiority is not the legal test for occupation under international law.

Gisha's claims about Israeli remittances are similarly factually and legally inaccurate. According to the terms of the Israeli–Palestinian peace agreements known as the Oslo Accords, and in particular the so-called Paris Protocol of 1994,<sup>117</sup> Israel agreed to give to the Palestinian Authority value added tax and customs duties assessed on goods imported through Israel and ultimately transferred to the Palestinian Authority. Israel has withheld these funds from Gaza since the Hamas takeover,<sup>118</sup> as required by international law, which forbids the provision of financial support to terrorist organizations,<sup>119</sup> although it has given funds to the Palestinian Authority, which has, in turn, transferred funds to Gaza. But this hardly constitutes 'control [over] the tax system' of Gaza. Israel does not and cannot impose any taxes inside Gaza. Israel is also unable

to interfere with any taxes imposed by the government of Gaza on its citizenry, including income tax, sales taxes, property taxes and any other kind of duty or tax. And, indeed, Hamas imposes various taxes on the citizenry of Gaza.<sup>120</sup> It is true, of course, that assessing taxes is a classic governmental duty, and if Israel had completely supplanted the ability of the local government of Gaza to tax, this would constitute an interesting indication regarding occupation. However, given that Hamas does impose taxes in Gaza, and Israel imposes none, this is yet further proof that Gaza is not occupied territory.

Finally, Gisha's claims about Gaza's relative poverty and the economic importance of financial aid from Israel are, for the most part, factually accurate, but legally irrelevant to the question of whether Gaza is occupied. It is true, for example, that many Gazans rely on foreign remittances for their livelihood as a result of Palestinian mismanagement of the economy as well as legal restrictions on the provision of aid to terrorist organizations like Hamas. However, the fact that Israel provides some of this financial aid hardly shows that Gaza is occupied by Israel any more than the fact that the United Kingdom provides aid proves that the UK occupies Gaza. Many states provide financial aid to many other states and organizations; never is it argued that the provision of this aid in combination with the relative poverty of the recipients of this aid demonstrates that territory is occupied.

Gisha cites no legal sources establishing that these kinds of Israeli measures constitute sufficient 'effective control' to constitute occupation. It makes no attempt to deal with the multiple legal sources indicating that there can be no occupation unless the occupying forces substitute for and completely displace local government. Gisha cites the Hostages Case, *Uganda v. Congo* and *Prosecutor v. Naletilic and Martinovic*, but mischaracterizes their holdings.<sup>121</sup> Gisha supplies no source that actually supports its approach to defining occupied territory. Without any legal source that serves to support Gisha's theory of 'effective control', Gisha adds a host of misstatements of fact to support its claim that Israel occupies Gaza. For instance, Gisha argues that 'Israel controls . . . the make-up of the Palestinian Authority [in Gaza], by virtue of its control over Palestinian elections'.<sup>122</sup> However, this is plainly untrue. Israel exercised no control over the vote in Gaza, or over Hamas' subsequent completion of its takeover by armed force. Israel plainly does not control the makeup of the Hamas government in Gaza.

In the absence of legal support for its position, Gisha implicitly acknowledges that its legal claims cannot be justified by existing law by appealing to its readers to 'reject formalism' and instead focus on what it calls the 'purpose' and 'spirit' of international law: to impose legal obligations on Israel.<sup>123</sup>

Human Rights Watch is another NGO which has maintained that Israel occupies Gaza. In October 2004, following the initial PLO opinion that Gaza would remain occupied post-Israeli withdrawal, Human Rights Watch issued its own shorter statement echoing the PLO's line by opining that Israel should be seen as an occupier based upon its 'control over Gaza's borders, coastline and airspace' and its alleged 'reserv[ation of] the right to launch incursions at will'.<sup>124</sup> HRW based its claim of alleged complete Israeli control of borders on its belief

that Israel would maintain control of the Philadelphi corridor on the Egyptian–Gazan border.<sup>125</sup> This turned out not to be the case, but HRW never updated its opinion, instead repeatedly asserting that ‘Israel remains an occupying power in the Gaza Strip because it continues to exercise effective control over Gaza’s airspace, sea space, and land borders’.<sup>126</sup> Of course, as previously noted, Israel does not control Gaza’s land borders; Israel only controls its own borders with Gaza. And, as noted, Israeli border controls along the Israel–Gaza border, even with land and sea control, do not constitute an adequate legal basis for asserting that Israel occupies Gaza. HRW cited no source for its claim that Israel asserted a right to launch incursions at will. Perhaps HRW’s claim was based on the similar PLO fabrication. In any case, no Israeli document concerning the Gaza withdrawal asserted any right to launch incursions at will.

In addition, HRW claimed that Israel should be seen as occupying Gaza because ‘Israel will continue to control Gaza’s telecommunications, water, electricity and sewage networks’.<sup>127</sup> This statement too is false. Israel has no control over Gaza’s internal telecommunications, water, electricity or sewage networks. Israel does not lay pipe or cable in Gaza, move it or maintain it. Israel does not connect any Gazan to telephone, water, electricity or sewage networks, and it does not disconnect any Gazan. The apparent source of HRW’s misrepresentation of the facts is two-fold. First, while Gaza controls its own telecommunications<sup>128</sup> and electricity networks,<sup>129</sup> each is connected to the Israeli network, and Bezeq (an Israeli telephone company) and the Israel Electric Company provide services to Gaza.<sup>130</sup> This fact, of course, does not mean that Israel ‘occupies’ Gaza any more than the connection of US and Canadian telecommunications networks means that the US occupies Canada. Second, Gaza has limited capacity to produce certain items internally, such as electricity and piping for sewage systems.<sup>131</sup> As a result, it imports Israeli electricity and fuel, and limited amounts of water, and it imports piping for sewage systems through Israel.<sup>132</sup> Israel has, for its part, curbed exports to Gaza through its territory, both as part of its economic sanctions programme against Hamas, and as a result of the diversion of material to terrorist uses. For instance, Hamas has diverted the use of metal pipes intended for upgrading the sewage system to the production of rockets and launchers to attack Israeli civilians.<sup>133</sup>

Legally, Gaza’s reliance on vital imported goods does not make it ‘occupied territory’. Israel is dependent on imported oil;<sup>134</sup> this does not make Israel territory occupied by OPEC states. Singapore requires imports from Malaysia to supply half its water;<sup>135</sup> this does not make Singapore Malaysian-occupied territory. Many countries lack self-sufficiency in vital goods and services; this hardly makes them ‘occupied territory’.

Like Gisha, Human Rights Watch did not cite any legal sources demonstrating that actions like those of Israel towards Gaza have been considered to constitute occupation at any other place or time in the world. Nor did HRW deal with the sources that clearly indicate that there can be no occupation unless local government is displaced by occupation forces.

In addition to the fact that the NGO's legal claims that Israel occupies Gaza have no basis in international law or fact, many of the claims are characterized by an apparent lack of good faith. The claimants use the alleged occupied status of Gaza selectively in order to raise claims against Israel, but then forget the claims when they are harmful to Israel's foes.

Generally, NGO claims that Gaza is occupied use this misstatement of the law in order to attempt to subject Israel to the duties of an occupying power. Human Rights Watch<sup>136</sup> and Amnesty International,<sup>137</sup> for example, argue that because Israel allegedly occupies Gaza, it is required to abide by the rules of international law that require occupying powers to provide various kinds of humanitarian aid, such as medical services, to the protected populations of occupied territories.

However, another basic duty of occupying powers under international law is the duty under Hague Regulation 43 to 'restore, and ensure, as far as possible, public order and safety'.<sup>138</sup> This duty is quite important in the laws of occupation. For instance, in the Hostages Cases before the Nuremberg tribunal cited by the PLO, the court emphasized that 'International Law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory'.<sup>139</sup> If groups like Gisha, Human Rights Watch and Amnesty International truly believed their specious claim that Israel 'occupies' Gaza, they would urge Israel to fulfil the requirements of Regulation 43 and use force in Gaza in order to displace Hamas and punish its criminal acts, as well as to police Gaza and enforce public order. Groups like Gisha, Human Rights Watch and Amnesty International would have to applaud Israeli incursions into Gaza and urge Israeli troops to remain in Gaza until the end of the 'occupation' while urging Israel to define its goals more broadly to include the deposing of Hamas. Needless to say, Gisha and other pro-Palestinian groups have not done so.

Numerous other organizations have issued opinions claiming that Gaza is occupied by Israel.<sup>140</sup> But, like all the opinions already discussed, they rely heavily on misstatements of the fact and law, and a stubborn refusal to apply the acknowledged legal standards of the law of occupation.

### *United Nations*

In continuing the fiction that Israel 'occupies' Gaza, UN bodies have echoed uncritically most or all of the factual errors and inaccurate legal arguments cited above. For instance, the Goldstone Commission reached the conclusion that Israel occupied the Gaza Strip on the basis of arguments that almost precisely tracked those of Gisha. For instance, the commission wrote: 'Israel continued to control Gaza's telecommunications, water, electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory.'<sup>141</sup> These statements are all false, as noted above. Ironically, the commission report included these statements even while acknowledging its

members had entered and exited the Gaza Strip through the Egyptian–Gazan border notwithstanding Israel’s refusal to facilitate their travel in any way.<sup>142</sup>

Like other UN bodies, the Goldstone Commission clouded the issue by jumbling up misstatements of fact with discussions of Israel’s theoretical powers under the Oslo Accords and later agreements. For instance, in order to maintain its transparently false claim that Israel controls the land borders to Gaza, the Commission stated that Israel controls ‘to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access’.<sup>143</sup> This argument is groundless. Even if the commission were correct in arguing that the agreement had left Israel in control of the Egyptian–Gazan border, that would be irrelevant today, with Hamas now governing Gaza and unwilling to implement the agreement. Because questions of occupation are questions of fact, control of borders and other relevant factors must be shown by actual facts, not defunct agreements that if hypothetically honoured would lead to an imagined set of affairs. Moreover, the commission’s characterization of the substance of the agreement is incorrect. Even if the Agreement were now being implemented, the Palestinian Authority, together with Egypt, would have ultimate control over the border crossing, not Israel.

Even more egregiously, the Commission cited the 1995 Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as ‘Oslo II’), as demonstrating that ‘ultimate authority . . . still lies with Israel’ since Oslo II reserved for Israel those ‘powers and responsibilities’ not transferred by agreement. Once again, even if the commission were correct in stating that the 1995 agreement left Israel in effective control of Gaza, this has nothing to do with the status of Gaza after Israel’s 2005 withdrawal, and Hamas’ 2007 takeover of the Gaza Strip. First of all, Hamas does not recognize the validity of the Oslo Accords and does not recognize any residual authority of Israel.<sup>144</sup> Thus, even if Israel had wanted, post-withdrawal, to maintain the authority it had under the Oslo Accords, it is unable to do so. Questions of occupation are questions of fact; thus, any occupation must be shown by actual control of the purported occupier, not defunct agreements that purport to show such control. Second, there is no reason to believe that Israel sought to maintain any powers and responsibilities post-withdrawal. None of the actions taken by Israel in 2004–2005 indicated any attempt to preserve powers theoretically reserved for it by Oslo II or other agreements. Instead, Israel announced that it was ending both its presence in and administration over Gaza, explicitly surrendering powers and assets reserved for Israel under the Oslo agreements.<sup>145</sup> The commission’s description of the Hamas government as ‘a de facto local administration, which carries out the functions and responsibilities in various areas transferred to the Palestine Authority under the Oslo Accords, to the extent that it is able to do so’<sup>146</sup> is absurd. The Hamas government is a local government holding power by virtue of elections and a coup, and it does not limit its activities to those defined by an agreement to which it was not party and which it does not accept.

Like many of the NGOs, the Goldstone Commission's commitment to the theory that Gaza is occupied by Israel was inconsistent with other claims against Israel made by the commission. For instance, the Goldstone Commission, in order to bolster a claim that Hamas constitutes a political party in large part immune from attack, described some Hamas armed forces in Gaza as the 'police' forces of the 'Gaza authorities', interested solely in the maintenance of domestic order.<sup>147</sup> Likewise, the Commission described Hamas as 'the de facto government authority in Gaza' that 'employ[s] civil servants and workers, run[s] schools, hospitals, traffic police and the administration of justice'.<sup>148</sup> At the same time, the Goldstone Commission denied that Hamas had effective control over Gaza, instead attributing such control to Israel. Needless to say, both positions cannot be true.

One of the most startling arguments made by the Goldstone Commission report is a variant on Bruderlein's claims about the power of the UN Security Council to create an occupation by declaration or non-declaration. The Goldstone Commission argued that Gaza should be considered occupied by Israel, *inter alia*, because 'the international community continues to regard it as the occupying power'. Naturally, the commission adduced no authority for the proposition that a declaration of 'the international community' has the authority to create a legal status of occupation, where the facts show otherwise. And indeed, the commission produced no evidence of such an international consensus either. Instead, the commission cited in support of its claim of an international consensus the very resolution that appointed the investigatory committee to begin with.<sup>149</sup>

In short, there is little in UN reports to suggest any reasoned argumentation in favour of the position that Gaza is Israeli-occupied territory.

## **Conclusion**

It is evident that any fair examination of the law and facts leads to the conclusion that Israel has not occupied Gaza since 2005. Hamas, not Israel, exercises the functions of government in Gaza. Hamas, not Israel, has effective control over the territory. Thus, legally, it is impossible to argue cogently that Israel 'occupies' Gaza.

While a number of NGOs and UN organizations continue to claim that Israel 'occupies' Gaza, such assertions are in plain contradiction of the law and facts, and testament to the degree to which some are willing to distort the standards of international law in service of a political agenda concerning Israel.

Other arguments in favour of the continued Israeli occupation of Gaza may be asserted in better faith, but with no more legal support. Simply put, the law and facts cannot support the myth of an Israeli occupation of Gaza following its 2005 withdrawal and the 2007 Hamas takeover.

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### Notes

1. Address by Prime Minister Ariel Sharon at the Fourth Herzliya Conference (Speech, IDC Herzliya, Herzliya, Israel, December 18, 2003), <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2003/Address+by+PM+Ariel+Sharon+at+the+Fourth+Herzliya.htm>.
2. Greg Myre, "Israel Lowers Its Flag in the Gaza Strip," *New York Times*, September 12, 2005, <http://www.nytimes.com/2005/09/12/international/middleeast/12mideast.html>.
3. Jane Hutcheon, "Sharon Pressured Over Disengagement Plan," *ABC News*, May 24, 2004, <http://www.abc.net.au/news/stories/2004/05/24/1114953.htm>.
4. "Prime Minister Ariel Sharon's Four-Stage Disengagement Plan," *Ha'aretz*, May 28, 2004, <http://www.haaretz.com/hasen/spages/432763.html>.
5. Israel Ministry of Foreign Affairs, *Exit of IDF Forces from the Gaza Strip Completed*, September 12, 2005, <http://www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm>.
6. *Ibid.*
7. Linda Gradstein, "Last Israeli Troops Exit Gaza Strip," *Morning Edition*, NPR, September 12, 2005, <http://www.npr.org/templates/story/story.php?storyId=4841877>.
8. Reuters, "Israel Says it Sets International Border with Gaza," *Seattle Times*, September 21, 2005, [http://seattletimes.nwsourc.com/html/nationworld/2002511777\\_mideast22.html](http://seattletimes.nwsourc.com/html/nationworld/2002511777_mideast22.html).
9. Israel Ministry of Foreign Affairs, *Agreed Documents on Movement and Access from and to Gaza*, November 15, 2005, <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm>.
10. *Ibid.*
11. "Gaza Relief Boat Damaged in Encounter with Israeli Vessel," *CNN*, December 30, 2008, <http://www.cnn.com/2008/WORLD/meast/12/30/gaza.aid.boat/index.html>.
12. Israel Ministry of Foreign Affairs, *Agreed Documents on Movement and Access from and to Gaza*, November 15, 2005, <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm>.
13. Yaakov Katz, "IDF May Have to Parachute Food to Gaza," *Jerusalem Post*, June 22, 2007, <http://www.jpost.com/servlet/Satellite?cid=1182409612085&pageName=JPost%2FJPArticle%2FShowFull>.
14. Yaheli Moran Zelikovich, "Gaza Students Stuck in Strip," *Ynet News*, October 21, 2009, <http://www.ynetnews.com/articles/0,7340,L-3793623,00.html>.
15. "Gaza Crossing reopens for Two Days," *BBC*, September 26, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/5370266.stm](http://news.bbc.co.uk/2/hi/middle_east/5370266.stm); Brenda Gazzar, "Egypt Opens Rafah Crossing for 3 Days," *Jerusalem Post*, February 23, 2009, <http://www.jpost.com/servlet/Satellite?cid=1233304843142&pageName=JPost%2FJPArticle%2FShowFull>;

- "Rafah to Open Saturday, Sunday for 2,400 Pilgrims Heading to Mecca," *Ma'an*, August, 14, 2009, <http://www.maannews.net/eng/ViewDetails.aspx?ID=219030>.
16. Yaakov Katz, "Israel Livid as Pilgrims Cross Rafah," *Jerusalem Post*, December 6, 2007, [http://www.jpost.com/servlet/Satellite?c=JPArticle&cid=1196847263033&pagename=JPost%2FJPArticle%2FShowFull;Yaakov Katz, Khaled Abu Toameh and Herb Keinon, "Israel Riled as Gazans Cross Rafah," \*Jerusalem Post\*, January 2, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1198517273811> \(updated January 3, 2008\); AFP, " Hamas Leader in Cario for Talks on Palestinian Unity," \*Yahoo! News\*, September 27, 2009, \[http://ca.news.yahoo.com/s/afp/090927/world/mideast\\\_conflict\\\_palestinian\\\_egypt\]\(http://ca.news.yahoo.com/s/afp/090927/world/mideast\_conflict\_palestinian\_egypt\).](http://www.jpost.com/servlet/Satellite?c=JPArticle&cid=1196847263033&pagename=JPost%2FJPArticle%2FShowFull;Yaakov%20Katz,Khaled%20Abu%20Toameh%20and%20Herb%20Keinon,%20%22Israel%20Riled%20as%20Gazans%20Cross%20Rafah,%22%20Jerusalem%20Post,January%202,%202008,%20http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1198517273811)
  17. Nidal al-Mughrabi, "Hundreds of Palestinian Pilgrims Return to Gaza," *Reuters*, January 2, 2008, <http://www.reuters.com/article/featuredCrisis/idUSL02221535>.
  18. Tim McGirk, "Fatah Conference Boosts Abbas but Peace May Remain Elusive," *Time*, August 12, 2009, <http://www.time.com/time/world/article/0,8599,1915783,00.html> (describing Hamas' refusal to permit Fatah members to exit Gaza).
  19. "Hamas to Issue Permits for Palestinians Leaving Gaza," *Alsharq Alawsat*, November 26, 2009, <http://aawsat.com/english/news.asp?section=1&id=18916>.
  20. "Palestinian Election: Results in Detail," *BBC*, February 16, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/4654306.stm](http://news.bbc.co.uk/2/hi/middle_east/4654306.stm).
  21. Palestine Central Elections Commission, *The Second 2006 PLC Elections: The Final Results for the Electoral Districts*, January 29, 2006, [http://www.elections.ps/admin/pdf/Final\\_Result\\_PLC\\_Dist\\_Seats\\_2\\_En.pdf](http://www.elections.ps/admin/pdf/Final_Result_PLC_Dist_Seats_2_En.pdf). Note that Hamas ran under the name 'Change and Reform' (see note 20).
  22. Greg Myre, "Hamas Cabinet is Sworn in, Widening Break with Israelis," *New York Times*, March 30, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9800-E6D91530F933A05750C0A9609C8B63>.
  23. Isabel Kershner and Steven Erlanger, "Palestinian Government is Approved, but Divisions Show Between Fatah and Hamas," *New York Times*, March 18, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9802E3DE1630F93BA25750C0A9619C8B63&pagewanted=all>.
  24. "Timeline: Hamas-Fatah Power Struggle," *Ha'aretz*, May 20, 2009, <http://haaretz.com/hasen/spages/1086885.html>.
  25. *Ibid.*
  26. The Covenant of the Islamic Resistance Movement, Article 7, August 18, 1988, [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp).
  27. *Ibid.*, arts. 7, 22 and 28.
  28. *Ibid.*, art. 13.
  29. "Hamas Reiterates it will not Recognize Israel, Warns Abbas to Behave," *Israel Insider*, February 9, 2006, <http://web.israelinsider.com/Articles/Security/7765.htm>.
  30. Israel Ministry of Foreign Affairs, *Hamas Terrorist Attacks*, March 22, 2004, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Hamas+terror+attacks+22-Mar-2004.htm> (listing attacks from 2000 to 2004).
  31. Israel Ministry of Foreign Affairs, *The Hamas Terror War Against Israel*, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm>.
  32. Herb Keinon, "PM: Hamas to Blame for Attack," *Jerusalem Post*, June 25, 2006, <http://www.jpost.com/servlet/Satellite?cid=1150885841743&pagename=JPost%2FJPArticle%2FShowFull>.
  33. Amos Harel, Mijal Greenberg and Yoav Stern, "IDF Kills at Least Eight Palestinians in Gaza Fighting," *Ha'aretz*, October 13, 2006, <http://www.haaretz.com/hasen/spages/774490.html>.

34. "Israel Cabinet: IDF Gaza Operation Summer Rains to Continue," *Israel News Agency*, July 10, 2006, <http://www.israelnewsagency.com/cabinetisrael-gaza480710.html>.
35. "Operation Cast Lead," *Ynet News*, December 29, 2008, <http://www.ynetnews.com/articles/0,7340,L-3646673,00.html>.
36. "Hamas: 87 Shells Fired at Israeli Targets in 24 Hours," *Ma'an News Agency*, December 25, 2008, <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=34211>.
37. Israel Ministry of Foreign Affairs, *Humanitarian Aid to Gaza during IDF Operation*, January 18, 2009, [http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian\\_aid\\_to\\_Gaza\\_following\\_6\\_month\\_calm.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian_aid_to_Gaza_following_6_month_calm.htm).
38. Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949, 75 UNTS 287.
39. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regulations), October 18, 1907, 36 Stat. 2277, 1 Beavens 631.
40. The text of Article 42 of the Hague Regulations of 1907 reads "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."
41. See Geneva Convention (IV), (1949), art. 6.
42. Hague Convention (IV), Annex (Regulations), (1907), art. 42.
43. Eyal Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 1993), 4.
44. Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 43.
45. *United States of America v. Wilhelm List et al.*, 8 Law Reports of Trials of Major War Criminals 38, 55–56 (United Nations War Crimes Commission 1949).
46. The United Nations War Crimes Commission, Law Reports of Trials of War Criminals Vol. VIII 15–21 (1949), *Trial of Carl Bauer, Ernst, Schrameck and Herbert Falten*, [www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-8.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf).
47. *United States of America v. Wilhelm List et al.* (note 45).
48. Hersch Lauterpacht, *The Law of War on Land: Being Part III of the Manual of Military Law* (London: HMSO, 1958).
49. International Court of Justice (ICJ), *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (December 19, 2005), 2005 ICJ Rep. 116, <http://www.icj-cij.org/docket/files/116/10455.pdf>.
50. *Ibid.*, at 173.
51. *Ibid.*, at 168, 173, 175.
52. *Ibid.*, at 169.
53. Dinstein, *The International Law of Belligerent Occupation* (note 44), 44.
54. Wolff Heintschel von Heinegg, "Factors in War to Peace Transitions," *Harvard Journal of Law and Public Policy* 27 (2004): 843, 845.
55. Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," *Israel Law Review* 3 (1968): 279. For indication that the Government of Israel has adopted Professor Blum's thesis, see M. Shamgar, "The Observance of International Law in the Administered Territories," *Israel Yearbook on Human Rights* 1 (1971): 262.
56. Eyal Benvenisti, "Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements," *Israel Law Review* 28 (1994) 297. While Benvenisti held that Israel was no longer an occupier, he references an argument to the contrary. See Human Rights Watch, "Human Rights under Palestinian Partial Self-Rule," February 1995, 31, <http://www.hrw.org/en/node/78153>.

57. Benvenisti, "Human Rights under the Interim Agreements" (note 56), 307–16.
58. "Israel in 'All-Out War' with Hamas," *Al-Jazeera*, December 30, 2008, <http://english.aljazeera.net/news/middleeast/2008/12/2008122994140674153.html>.
59. Charles Levinson, "Hamas Police Lay Down Law in Gaza," *Telegraph*, July 1, 2007, <http://www.telegraph.co.uk/news/worldnews/1556185/Hamas-police-lay-down-law-in-Gaza.html>.
60. "German Conference Seeks to Bolster Palestinian Police, Courts," *Ha'aretz*, June 24, 2008, <http://haaretz.com/hasen/spages/995751.html>; Amira Haas, "Hamas Tightens Control on State Institutions in Gaza," *Ha'aretz*, November 12, 2007, [http://192.118.73.5/hasen/pages/ShArtStEng.jhtml?itemNo=933389&contrassID=1&subContrassID=1&title=%27Hamas%20tightens%20control%20on%20state%20institutions%20in%20Gaza%27&dyn\\_server=172.20.5.5](http://192.118.73.5/hasen/pages/ShArtStEng.jhtml?itemNo=933389&contrassID=1&subContrassID=1&title=%27Hamas%20tightens%20control%20on%20state%20institutions%20in%20Gaza%27&dyn_server=172.20.5.5); "Rafah Man Sentenced to Lifetime Hard Labor for Collaboration," July 19, 2009, *Ma'an News Agency*, <http://www.maannews.net/eng/ViewDetails.aspx?ID=213038>.
61. Al-Haq, "Overview of the Internal Human Rights Situation in the Occupied Palestinian Territory," press release, June 13, 2009, <http://www.alhaq.org/etemplate.php?id=456>.
62. "Hamas Purges Gaza Schools of Rival Fatah Teachers," *Fox News*, August 27, 2008, <http://www.foxnews.com/story/0,2933,411601,00.html>.
63. "Hamas Launches TV Station in Gaza," *BBC*, January 9, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/4596630.stm](http://news.bbc.co.uk/2/hi/middle_east/4596630.stm).
64. Kim Murphy, "Hamas Victory is Built on Social Work," *Los Angeles Times*, March 2, 2006, <http://articles.latimes.com/2006/mar/02/world/fg-charity2>; Council on Foreign Relations, "Backgrounder: Hamas," January 7, 2009, <http://www.cfr.org/publication/8968/>.
65. Yaakov Katz, "Security and Defense: Veiled Anxiety," *Jerusalem Post*, August 6, 2009, <http://www.jpost.com/servlet/Satellite?cid=1249418544493&pageName=JPost%2FJPArticle%2FShowFull>.
66. Cynthia Johnston, "In Gaza, Palestinians Pitch Tents to Claim Land," *Reuters*, October 21, 2005, available at [http://www.redorbit.com/news/health/279808/in\\_gaza\\_palestinians\\_pitch\\_tents\\_to\\_claim\\_land/](http://www.redorbit.com/news/health/279808/in_gaza_palestinians_pitch_tents_to_claim_land/).
67. Ali Waked, "Gaza: Hamas Imposes 'Koran Levy'," *Ynet News*, July, 2009, <http://www.ynetnews.com/articles/0,7340,L-3740684,00.html>.
68. While Egypt controls the Egyptian side of the Egypt–Gaza border, and Israel the Israeli side of the Israel–Gaza border, Hamas controls the Gazan side of the borders beyond the security zone. See "Hamas to Arrest Fatah Members Who Snuck Out," *Ma'an News Agency*, August 1, 2009, <http://www.maannews.net/eng/ViewDetails.aspx?ID=216058>. For additional sources see notes 18 and 19 above.
69. Diaa Hadid, "Hamas Dress Code Aims to Make Gaza More Islamic," *Associated Press*, July 28, 2009, available at <http://abcnews.go.com/International/wireStory?id=8188969>.
70. Benvenisti, "Human Rights under the Interim Agreements" (note 56), 299–303. f
71. "Who Are Hamas," *BBC*, January 4, 2009, <http://news.bbc.co.uk/2/hi/1654510.stm>; Bret Stephens, interviewed by Fareed Zakaria, *Fareed Zakaria GPS*, CNN, January 11, 2009, transcript available at <http://edition.cnn.com/TRANSCRIPTS/090111/fzgps.01.html>.
72. 2009 Report of the United Nations Fact Finding Mission on the Gaza Conflict (hereinafter, the Goldstone Commission report), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> at 381. The Goldstone Commission's argument that Gaza is nevertheless 'occupied' by Israel is discussed further *infra*.

73. Katrin Bennhold, "Could the I.C.C. Try Israel?," *New York Times*, February 1, 2009, <http://dealbook.blogs.nytimes.com/2009/02/01/could-the-icc-try-israel/>; John Quigley, "The Palestinian Declaration to the International Criminal Court: The Statehood Issue," *Rutgers Law Record* 35 (2009), <http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf>.
74. Claude Bruderlein, "Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law," Program on Humanitarian Policy and Conflict Resolution at Harvard University, November 2004, <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=774>.
75. *Ibid.*, 10.
76. *Ibid.*, 17.
77. *Ibid.*, 11.
78. Dinstein, *The International Law of Belligerent Occupation* (note 44), 273.
79. PLO Negotiations Affairs Department, *The Israeli "Disengagement" Plan: Gaza Still Occupied*, October 7, 2004, [http://www.nad-plo.org/print.php?view=facts\\_gaza\\_gazaplan](http://www.nad-plo.org/print.php?view=facts_gaza_gazaplan).
80. PLO Negotiations Affairs Department, *The Israeli "Disengagement" Plan: Gaza Still Occupied* (Updated September 2005), [http://www.nad-plo.org/print.php?view=facts\\_gaza\\_GAZA%20STILL%20OCCUPIED](http://www.nad-plo.org/print.php?view=facts_gaza_GAZA%20STILL%20OCCUPIED).
81. See Sharon's Gaza Disengagement Plan, May 28, 2004, Section III.A.3, [http://www.knesset.gov.il/process/docs/DisengageSharon\\_eng.htm](http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm).
82. UN Charter art. 51. Interestingly, the International Court of Justice has opined that a right of self-defence can only be asserted against sovereign states under this article. See International Court of Justice (ICJ), *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (July 9, 2004), 2004 ICJ Rep. 131, at 138–9, <http://www.icj-cij.org/docket/files/131/1671.pdf>. This claim is highly disputed. For judges sitting on the case See Judge Buergenthal's declaration, at 5–6, <http://www.icj-cij.org/docket/files/131/1687.pdf>; as well as Judge Higgin's separate opinion, at 33–4, <http://www.icj-cij.org/docket/files/131/1681.pdf>. For scholarly views see Sean D. Murphy, "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: an Ipse Dixit from the ICJ?," *American Journal of International Law* 99 (2005) 62. Gregory E. Maggs, "The Campaign to Restrict The Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and what the United States Can do about It," *Regent Journal of International Law* 4 (2006) 149. It should be noted that if the court's position is correct, the assertion of a right to self-defense is tantamount to accepting the sovereign independence of the territory against which the assertion is made.
83. For a list of countries that recognize a Palestinian State, see Palestinian National Authority, *International Recognition of the State of Palestine*, [http://web.archive.org/web/20060404211437/http://www.pna.gov.ps/Government/gov/recognition\\_of\\_the\\_State\\_of\\_Palestine.asp](http://web.archive.org/web/20060404211437/http://www.pna.gov.ps/Government/gov/recognition_of_the_State_of_Palestine.asp). For examples of the Palestinians engaging in foreign relations, see Zoi Constantine, "Protest Held Outside Embassy in Abu Dhabi," *The National*, December 28, 2008, <http://www.thenational.ae/article/20081229/NATIONAL/910317524/1041>; "Barakat Al-Farra Appointed PA Ambassador to Egypt," *Ma'an*, June 11, 2009, <http://www.maannews.net/eng/ViewDetails.aspx?ID=237493>; Mohammad Ben Hussein, "King Discusses Emerging Obstacles to Peace with Abbas, Mitchel," *Jordan Times*, November 3, 2009, <http://www.jordantimes.com/?news=21271>.
84. SC Res. 1373, U.N. Doc. S/RES/1373 (September 28, 2001) places member states under a Chapter VII UN Security Council mandate to combat international terrorism. For information regarding the boycott of Hamas, see Michael Jansen,

- “Egyptians Press EU and US to Reconsider Boycott of Hamas,” *Irish Times*, March 18, 2009, <http://www.irishtimes.com/newspaper/world/2009/0318/1224243006577.html>.
85. George Baghdadi, “Syria Congratulates Hamas on Gaza ‘Victory,’” *CBS News*, January 24, 2009, <http://www.cbsnews.com/blogs/2009/01/24/world/worldwatch/entry4750858.shtml>; Farid Ghadry, “From Hama to Hamas: Syria’s Islamist Policies,” *inFocus* 3, no. 1 (2009), <http://www.jewishpolicycenter.org/830/from-hama-to-hamas-syrias-islamist-policies>.
  86. Volker Windfuhr, Ulrike Putz, and Yassin Musharbash, “Egypt Gets Israel and Palestinians to Negotiating Table,” *Spiegel Online*, January 8, 2009, <http://www.spiegel.de/international/world/0,1518,600132,00.html>.
  87. AP, “Hamas Seizes Aid Meant for Red Crescent,” *Ynet News*, July 2, 2008, <http://www.ynet.co.il/english/articles/0,7340,L-3504227,00.html>; AP, “Fatah Activists Don Islamic Garb to Flee Hamas-run Gaza,” *Haaretz*, July 31, 2009, <http://www.haaretz.com/hasen/spages/1104394.html>.
  88. SC Res. 748, UN SCOR, 47th Sess., 3063d mtg., UN Doc. S/RES/748 (1992).
  89. Hans-Peter Gasser, “Protection of the Civilian Population,” in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (New York: Oxford University Press, 1995), 243.
  90. PLO Negotiations Affairs Dep’t (note 79).
  91. *USA v. Wilhelm List* [The Hostages Case], reprinted in *Law Reports of Trials of War Criminals* 3 (1949): 56.
  92. Iain Scobbie, “Is Gaza Still Occupied Territory?,” *Forced Migration Review* 26 (August 2006): 18, <http://www.fmreview.org/FMRpdfs/FMR26/FMR26full.pdf>.
  93. *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment in Trial Chamber, P 217 (March 31, 2003), [http://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf).
  94. *Ibid.* at 217.
  95. *Ibid.* at 219–21.
  96. *Ibid.*
  97. *Ibid.* at 219.
  98. Geneva Convention (IV) (1949), art. 6.
  99. Dinstein, *The International Law of Belligerent Occupation* (note 44), 48.
  100. See, for example, Yoram Dinstein, “Zion Will Be Redeemed by International Law,” *HaPraklit* 27 (1971): 573 (Hebrew).
  101. *Ibid.*, 276–80.
  102. Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995), article XI(1), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.
  103. Dinstein, *The International Law of Belligerent Occupation* (note 44), 279.
  104. *Ibid.*, 43.
  105. Dinstein states that the Gaza–Egypt border was breached in January 2008. *Ibid.*, 278. Dinstein does not acknowledge the numerous other crossings coordinated by Hamas and Egypt.
  106. *Ibid.*
  107. *Ibid.*, 44–45.
  108. HCJ 9132/07 *Ahmed v. Prime Minister* (Electricity and Fuel case) (2008).
  109. Dinstein, *The International Law of Belligerent Occupation* (note 44), 279.
  110. *Ibid.*, 45.
  111. Sari and Kenneth Mann, “Disengaged Occupiers: The Legal Status of Gaza,” Gisha, January 2007, 29–62, <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

112. *Ibid.*, 32.
113. Gisha and Physicians for Human Rights-Israel, "Rafah Crossing: Who Holds the Keys?," March 2009, 43, [http://www.clink.co.il/gisha/Rafah\\_Report\\_Eng.pdf](http://www.clink.co.il/gisha/Rafah_Report_Eng.pdf).
114. *Ibid.*, 61–2 (noting that in December 2007, Egypt permitted the crossing of 2200 Palestinians). Egypt has repeatedly permitted crossings since. For instance, in August 2009 it permitted the passage of 2400 persons. See "Rafah to Open Saturday, Sunday for 2,400 pilgrims heading to Mecca," *Ma'an*, August 15, 2009, [www.maannews.net/eng/ViewDetails.aspx?ID=219030](http://www.maannews.net/eng/ViewDetails.aspx?ID=219030).
115. Bashi and Mann, "Disengaged Occupiers" (note 111), 50.
116. *Ibid.*, 69–72.
117. Gaza–Jericho Agreement Annex IV: Protocol on Economic Relations, Isr.-PLO, art. VI, April 29, 1994, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Gaza-Jericho+Agreement+Annex+IV+-+Economic+Protocol.htm>.
118. International Monetary Fund, "West Bank and Gaza: Recent Fiscal and Financial Developments," 2006, [http://www.imf.org/external/np/wbg/2006/eng/rr/pdf/fis\\_1006.pdf](http://www.imf.org/external/np/wbg/2006/eng/rr/pdf/fis_1006.pdf).
119. See SC Res. 1373, UN Doc. S/RES/1373 (Sept. 28, 2001); reaffirmed by S/RES/1390/2002 (January 16, 2002).
120. Waked, Gaza: " Hamas Imposes 'Koran Levy'" (note 67).
121. Bashi and Mann, "Disengaged Occupiers" (note 111), 77–80.
122. *Ibid.*, 57.
123. *Ibid.*, 74–5.
124. Human Rights Watch, "Israel: 'Disengagement' Will Not End Gaza Occupation," October 28, 2004, <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation>.
125. *Ibid.*
126. Human Rights Watch, "Israel/Egypt: Choking Gaza Harms Civilians," February 18, 2009, <http://www.hrw.org/en/news/2009/02/18/israeleypt-choking-gaza-harms-civilians>.
127. See Human Rights Watch, "Israel: 'Disengagement' Will Not End Gaza Occupation" (note 124).
128. "Gaza Telecommunications Systems Offline," *Ma'an*, January 4, 2009, <http://www.maannews.net/eng/ViewDetails.aspx?ID=207488>; "Gaza at Risk of Telecom Blackout," *ITP*, January 6, 2009, <http://www.itp.net/542833-gaza-at-risk-of-telecoms-blackout->.
129. "Egypt to Increase Power Supply to Gaza," *Ma'an*, August 9, 2009, [www.maannews.net/eng/ViewDetails.aspx?ID=217713](http://www.maannews.net/eng/ViewDetails.aspx?ID=217713) (updated October 8, 2009), discussing Gaza's independent electricity generating capacity and plans for increased electricity importation from Egypt.
130. See "Financing Secured to Hook Gaza to Egypt's Electricity Grid," *Ynet News*, February 26, 2008, <http://www.ynetnews.com/articles/0,7340,L-3511497,00.html>; " Hamas Loses Gaza Cell Phone, Land Line Networks," *World Tribune*, January 7, 2009, [http://www.worldtribune.com/worldtribune/WTARC/2009/me\\_hamas\\_0020\\_01\\_08.asp](http://www.worldtribune.com/worldtribune/WTARC/2009/me_hamas_0020_01_08.asp).
131. See *supra* note 129.
132. Heather Sharp, "Guide: Gaza Under Blockade," *BBC*, June 15, 2009, [http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm).
133. Yaakov Katz, "Israeli Metal Used For Kassam Rockets," *Jerusalem Post*, March 4, 2007, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JParticle/ShowFull&cid=1171894568749>.

134. Daniel Engber, "Where Does Israel Get Oil?," *Slate*, July 14, 2006, <http://www.slate.com/id/2145704/>.
135. AP, "Singapore To Open First Desalination Plant in Bid for Water Self-Sufficiency," *ENN*, September 13, 2005, [http://www.enn.com/top\\_stories/article/2579](http://www.enn.com/top_stories/article/2579).
136. Human Rights Watch Oral Statement on Gaza to the UN Human Rights Council, Human Rights Watch, January 24, 2008, <http://www.hrw.org/en/news/2008/01/23/human-rights-watch-oral-statement-gaza-un-human-rights-council>.
137. Amnesty International, "Israel and the Occupied Palestinian Territories: Submission to the UN Universal Periodic Review," July 23, 2008, 4, <http://www.amnesty.org/en/library/info/MDE15/029/2008/en>.
138. Hague Convention (IV), Annex (Regulations) (1907), art. 43.
139. *USA v. Wilhelm List* [The Hostages Case] (note 91).
140. See for example Palestinian Centre for Human Rights, "Implementation not Impunity: International Humanitarian Law Still Not Being Applied to the Occupied Palestinian Territory," July 2005, 8, [http://www.pchrgaza.org/files/Reports/English/pdf\\_spec/PCHR%20Memorandum%20Implementation.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_spec/PCHR%20Memorandum%20Implementation.pdf); Euro-Mediterranean Human Rights Network, "Disengagement with Effective Control," October 2005, [http://en.euromedrights.org/index.php/publications/emhrn\\_publications/emhrn\\_publications\\_2005/3613.html](http://en.euromedrights.org/index.php/publications/emhrn_publications/emhrn_publications_2005/3613.html); B'Tselem, "2007 Annual Report: Human Rights in Occupied Territories," December 2007, 18, [http://www.btselem.org/Download/200712\\_Annual\\_Report\\_eng.pdf](http://www.btselem.org/Download/200712_Annual_Report_eng.pdf); Amnesty International, "The Conflict in Gaza: A Briefing on Applicable Law, Investigations and Accountability," January 2009, 7–8, <http://www.amnesty.org/en/library/asset/MD-E15/007/2009/en/4dd8f595-e64c-11dd-9917-ed717fa5078d/mde150072009en.pdf>.
141. Goldstone Commission report at 187.
142. *Ibid.*, at 8.
143. *Ibid.*, at 278.
144. "Who are Hamas" (note 71).
145. Israel Ministry of Foreign Affairs, *Exit of IDF Forces from the Gaza Strip Completed* (note 5).
146. Goldstone Commission report, at 280.
147. Goldstone Report, at 393–438.
148. *Ibid.*, at 383.
149. Goldstone Commission report, at 277 and n. 163.

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