

# Is Gaza Occupied? Redefining the Legal Status of Gaza

Elizabeth Samson

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# IS GAZA OCCUPIED?

## REDEFINING THE LEGAL STATUS OF GAZA

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## **Is Gaza Occupied? Redefining the Legal Status of Gaza**

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### **INTRODUCTION**

Many attempts have been made over the years to resolve the Israeli-Palestinian conflict by setting terms upon which both parties can agree. Israel and the Palestine Liberation Organization (PLO) entered into several agreements since 1993 which had all been designed to advance the process of transitioning the occupied territories to autonomous rule while taking into account Israel's national security concerns. Despite these efforts there has been a political deadlock, particularly since the commencement of the Second Intifada – or Palestinian uprising – in 2000. With security breaches increasing since 2000 and an escalation of attacks on the Israeli civilian population emanating from the Gaza Strip,<sup>1</sup> the Israeli Cabinet decided in 2004 to disengage from Gaza with the specific intent to no longer occupy the territory.<sup>2</sup>

On September 12, 2005, the last Israeli soldier left the Gaza Strip, and there has been no official Israeli military or civilian presence in the territory since that time. Nonetheless, the United Nations has been reluctant to accept that Gaza is no longer occupied, with a spokesman for UN Secretary General Ban Ki-Moon declaring in January 2009 that “the UN defines Gaza, the West Bank, and East Jerusalem as occupied Palestinian territory. No, that definition hasn't changed.”<sup>3</sup>

This paper explores the definition of “occupied territory” under international law and contends that the term “occupied territory” no longer applies to Gaza after Israel's disengagement. Although the United Nations still maintains that Gaza is occupied, under both the literal and interpreted applications of the definition of occupation,

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characterized by what is termed “effective control,” Gaza is not occupied territory pursuant to the standards set forth in international law and doctrine.

While this paper will make mention of the viewpoints about whether Israel has, indeed, been an occupying power under international law, the intent of the research is not to dispute the long-accepted assertion in the international community, and which has also been supported by judicial decisions of Israel’s own Supreme Court, that Gaza has been considered occupied. In dealing with that reality as it is, the paper seeks to provide a comprehensive legal analysis to establish that, despite whatever previous classifications have been applied to Gaza, Gaza is presently not an occupied territory.

The purpose of this paper is: (1) to establish that Israel presently does not exercise “effective control” over Gaza and, therefore, does not occupy it, and in doing so (2) to provide a comprehensive analysis to lay the groundwork to redefine the official status of Gaza as a “*sui generis* territory” for the intermediate period between the previous Palestinian occupation and any prospective future statehood.

The existence of an Israeli presence in Gaza has been used by Palestinians living in the territory to justify attacks against Israel. As a consequence of the attacks that have emanated from Gaza, Israel withdrew from the territory in order to end its legal obligations as an occupier of Gaza. Gaza’s status as a “*sui generis* territory” will not only eliminate the existence of the occupation of Gaza as a justification for attacks that are initiated against Israel. It will also consequently provide greater legitimacy for Israel’s acts of self-defense against hostile terrorist networks that use Gaza as a base of operations.

It is, therefore, imperative that the official legal status of Gaza be changed. The analysis in this paper will combine a practical and a legal approach that will give strength to the political argument in support of that change, while recognizing the legal implications and that what is ultimately needed is a political solution.

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Part I provides the historical backdrop against which the contemporary situation in Gaza should be analyzed. This Part traces the history of Gaza from Biblical times until the Israeli disengagement in 2005.

Part II examines the legal sources that are relevant to this paper. The first subpart addresses the sources of occupation in international law and defines the term “effective control” as the standard for determining the existence of an occupation. As many arguments throughout this paper are dependent on the premise that the several agreements that Israel and the Palestinian Authority have signed are binding under international law, the second subpart makes the argument that the Vienna Convention on the Law of Treaties provides the authority to assert that agreements between states and non-state actors or “other subjects of international law” have the same force as treaties and are, therefore, binding. The UN Security Council, reflecting the impression of the international community that the agreements are binding, has called upon the parties to implement them.

Part III establishes that, despite disagreement about whether Gaza has ever been occupied, Israel’s courts have supported the notion that Israel has, indeed, been an occupier. In order to make the argument that Gaza’s status must be changed from that of an occupied territory, it is necessary to recognize that the territory had been occupied in the past. This section puts forth the various assertions that have been made as to why Israel is still exercising “effective control” over Gaza and why the occupation persists, even after disengagement. A three-part “effective control” test is also laid out and will be the benchmark against which each of the assertions will be measured.

Part IV systematically dismantles each of the assertions regarding “effective control” from the previous section. By combining legal analysis and interpretation with an examination of the facts, the subparts assess the arguments relating to each assertion and explain why they fail the “effective control” test that is outlined in Part III.

Part V explores the ways in which to end an occupation and determines that absence of “effective control” over Gaza is a legally

sufficient indication that occupation has officially ended. Furthermore, that element combined with the existence of the Palestinian Authority as the indigenous government endorsed by the population which is recognized by the international community lends additional weight to the conclusion that occupation is over. As occupation of Gaza is determined by this analysis to have ended, the paper posits that the new legal status of Gaza should be that of a “*sui generis* territory” administered by the Palestinian Authority.

This paper concludes with a recommendation that Gaza should have a new intermediate legal status – “*sui generis* territory” – to formally relieve Israel of the obligations of an occupier while moving the Palestinian people in the direction of complete autonomy which will lay the groundwork for the establishment of a Palestinian state that will exist peacefully beside Israel.

## **I. A BRIEF POLITICAL AND TERRITORIAL HISTORY OF GAZA**

The Gaza Strip, a coastal territory along the Mediterranean Sea bordered by Israel and Egypt, is internationally recognized as part of the Palestinian Territories.<sup>4</sup>

The first historic mention of Gaza is in the Hebrew Bible, in *Genesis* 10:19: “The different tribes of the Canaanites spread out until the Canaanite borders reached from Sidon southwards to Gerar near Gaza.” Gaza is mentioned again around the fifteenth century BC in *Judges* 16:25-30, which tells of Samson whose story is inextricably linked with Gaza. Samson was delivered into bondage in Gaza by Delilah and he died toppling the Temple of the god Dagon there as revenge on the Philistines for gouging out his eyes. Gaza was mentioned again in the story of the prophet Amos (*Amos* 1:6) who condemned the people of Gaza for trading in slaves and told its people that they had sinned and that God would bring fire upon the city walls.

In the eleventh and twelfth centuries the Crusaders contested and sometimes controlled Gaza.<sup>5</sup> In 1517 the Ottoman Empire conquered the territory,<sup>6</sup> but Ottoman rule over Gaza was interrupted in 1799 when Gaza City was temporarily conquered by Napoleon’s invading



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armies.<sup>7</sup> In 1832, Mohammed Ali, known as the founder of modern Egypt, brought Gaza under Egypt's sway.<sup>8</sup> This event is significant because it marks the beginning of modern Egypt's influence over Gaza. Later recaptured by the Ottoman Empire, the Ottomans permanently lost Gaza to the British during World War I in the Third Battle of Gaza on November 7, 1917.<sup>9</sup> After the war, Gaza became part of the British Mandate of Palestine in 1922 under the authority of the League of Nations.<sup>10</sup> The territory remained under British mandatory control until the dissolution of the Mandate of Palestine in May 1948.<sup>11</sup>

On the eve of Israel's independence in November 1947, the United Nations issued a Partition Plan for Palestine<sup>12</sup> which recommended dividing<sup>13</sup> the remaining territories of the Mandate of Palestine into two states, one Jewish and one Arab, with Gaza becoming part of the Arab state. The Jewish authorities in Palestine accepted the UN's plan, while Arab representatives in Palestine, as well as the Arab states, rejected it. After Israel declared its independence in May 1948, the Egyptian army invaded the area from the south, thus commencing Israel's War of Independence. That event was followed by invasions from the other neighboring Arab countries of Jordan, Syria, and Lebanon.

The territory of the Gaza Strip as it is now known was the product of the subsequent 1949 Armistice Agreement between Egypt and Israel.<sup>14</sup> The Agreement established that the border of the Gaza Strip was "dictated exclusively by military considerations" and was "valid only for the period of the Armistice" without "establish[ing], recognis[ing], strengthen[ing], or [] weaken[ing] or nullify[ing], in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine." Egypt imposed a military government on Gaza from 1949 until 1967<sup>15</sup> but never purported to annex it. In June 1967, as a consequence of the Six Day War, Israel gained control of Gaza, and the Israeli military – the Israel Defense Forces (IDF) – remained the authority in Gaza until 1994. On September 13, 1993, Israel and the PLO signed the 1993 Declaration of Principles on Interim Self-Government Arrangements ("Oslo Accords")<sup>16</sup> leading to the transfer of governmental authority to a newly established Palestinian Authority the next year. After the

signing, most of Gaza, with the exception of the Israeli settlement blocs and military areas, came under Palestinian control.<sup>17</sup>

As a consequence of the Second Intifada which erupted in September 2000 and wreaked havoc on Israel for several years with rocket attacks and suicide bombings emanating from Gaza (as well as the West Bank) at the direction of Fatah, Hamas and Islamic Jihad, the Israeli government voted in February 2005 to unilaterally disengage from the territory.<sup>18</sup> The Disengagement Plan stipulated that all Israeli settlements in Gaza and the Israeli-Palestinian Erez Industrial Zone should be dismantled, military bases removed, and all 9,000 Israeli settlers be relocated from Gaza.<sup>19</sup>

So the question remains – if Israel has withdrawn from Gaza and the Israeli cabinet formally declared an end to Israeli military rule in the Gaza Strip in September 2005, why is the territory still considered occupied?

## **II. INTERNATIONAL LAW RELATIVE TO THE RELATIONSHIP OF ISRAEL AND GAZA**

### **A. Sources of Occupation Law and “Effective Control”**

The laws of occupation are derived from two primary sources – the Regulations annexed to the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land (“Hague Regulations”)<sup>20</sup> and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”).<sup>21</sup>

The Hague Regulations codified the rules of customary international law on armed conflict and addressed international occupation law in Section III entitled “Military Authority Over the Territory of the Hostile State.” The laws address what happens after hostilities end and an occupation begins. This section deals with various aspects of occupation from its commencement to the responsibilities of the occupier, as well as limitations on the occupier’s behavior.

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The Hague Conventions and the annexed Hague Regulations had been drafted in a time when wars were primarily fought by soldiers in a combat zone. That dynamic changed during the two World Wars because new tactics were used that directly affected the civilian populations.<sup>22</sup> In addressing the changes on the battlefield, the Fourth Geneva Convention was written to supplement the Hague Regulations<sup>23</sup> by filling in the areas in which the Hague Regulations fell short with respect to civilians. The Fourth Geneva Convention included provisions regulating the behavior of states towards civilian populations during wartime; one part of the Convention further delineated states' obligations to civilians in the event of an occupation.<sup>24</sup>

Some of the obligations in occupied territories outlined in the Fourth Geneva Convention include:

- Protecting children and providing facilities for their care and education. Taking any necessary measures to facilitate the identification of children, to assist orphaned children, and to provide preferential treatment to children under 15 years, expectant mothers, and mothers of children under seven years;<sup>25</sup>
- Providing food and medical care to the population, as well as ensuring sufficient hygiene and public health standards;<sup>26</sup>
- Allowing humanitarian aid shipments such as food, clothing and medical supplies, for the benefit of the population and facilitating the accessibility of such shipments;<sup>27</sup> and
- Prohibiting destruction of any property unless it is absolutely necessary by military operation.<sup>28</sup>

Notwithstanding these obligations, the Fourth Geneva Convention makes little mention of the geographic reach of the responsibilities of an occupying force. The Hague Regulations vaguely addresses the issue of scope by stating that occupation exists only in areas where authority is “established” and “can be exercised.”<sup>29</sup>

Beyond these two sources, international law provides little guidance on what constitutes an occupation. However, the term “effective control” is consistently applied in the case law and state practice to

assess the exercise of authority in a territory and, therefore, the existence of an occupation. In the context of international occupation law, “effective control” is a term of art with no definite source, but it has developed as the standard that combines the conditions for occupation outlined in the Hague Regulations and the Fourth Geneva Convention. The Hague Regulations, Article 42, states that “a territory is considered occupied when it is actually placed under the authority of the hostile army” and that “[t]he occupation extends only to the territory where such authority can be established and can be exercised.”<sup>30</sup> Article 6 of the Fourth Geneva Convention merely describes the legal duties of an occupier as existing only to the extent that the state in power “exercises the functions of government in such [occupied] territory.”<sup>31</sup>

To expand upon those requirements, the case of *United States v. List et al.* (“*Hostages* case”) before the United States Military Tribunal at Nuremburg after World War II provides legal precedent for a more comprehensive interpretation. The tribunal held that the established government of the territory must be fully replaced by the occupier in order for occupation to obtain.

... [A]n 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>32</sup>

As there are no precise guidelines for what “effective control” entails, determining what does, in reality, constitute “effective control” is a complex analysis of the facts on the ground as well as the laws applicable to each circumstance. Furthermore, Gaza’s territorial status as a non-state does not allow for a more simple application of the relevant international laws. This paper addresses both of these challenges in later sections.

## **B. Legality of the Agreements between Israel and the Palestinians**

The purpose of the 1907 Hague Convention was to establish agreements to reduce suffering caused by future wars and to codify the rules of warfare in the event that a war could not be prevented with the intention that state sovereignty would be preserved if a state was defeated on the battlefield.<sup>33</sup> The idea was that, even after a defeat, unless the conquering state annexed the territory, the losing state retained sovereignty and the right to return to a peaceful state and the status quo ante.<sup>34</sup> While Gaza's status quo ante was that of administered territory and not statehood, in this context the notion can be taken to mean a return to a peaceful condition characterized by the establishment of self-government in some form. In recognition of these principles and that the ultimate objective of an occupation is to enable the territory that is occupied to eventually self-govern and live peacefully with its neighbors, Israel entered into several bilateral agreements with the PLO to facilitate a transfer of power to the Palestinian Authority.<sup>35</sup>

According to Article 47 of the Fourth Geneva Convention, protected persons may not be deprived of "the benefits of the [ ] Convention by any ... agreement concluded between the authorities of the occupied territories and the Occupying Power ...."<sup>36</sup> In light of this, it has been contended that the following agreements only amount to self-administration agreements between the occupier and the local authorities in the occupied territories. This notion is easily dispelled by the preamble to the Oslo Accords which states:

The Government of the State of Israel and the P.L.O. team ... representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process. Accordingly, the, two sides agree to the following principles ...<sup>37</sup>

It is clear that the purpose of the Oslo Accords, essentially the foundation document for all agreements to come, was not to delimit the rights of an occupied people, but rather to begin to move the two entities forward in a process that would lead to peace and security, and to create terms upon which both parties could rely with regard to their respective responsibilities.

The Oslo Accords laid the groundwork for Israel's transfer of control over parts of the West Bank and Gaza to the newly created Palestinian Authority which would be responsible for administering the territory under its own rule. The Declaration of Principles also provided for the future negotiation of an interim agreement to settle many of the details of responsibility and transfer of powers that were not covered therein. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo II")<sup>38</sup> was concluded in 1995 and primarily provides further details for the establishment of the Palestinian Council, which was first raised in the Oslo Accords, such as the transfer of authority to the Council, its structure, and powers and responsibilities. Among other items, Oslo II also contained provisions relating to redeployment of Israeli military forces and security arrangements for Israel.

Prior to the signing of Oslo II, the Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area of 1994 ("Gaza-Jericho Agreement"),<sup>39</sup> was concluded as a follow-up to the Declaration of Principles and provided many of the particulars relating to the responsibilities of Israel and the Palestinian Authority. The Gaza-Jericho Agreement was eventually superseded by Oslo II.<sup>40</sup>

Two later agreements – the Wye River Memorandum of 1998 ("Wye River Memo")<sup>41</sup> and the Sharm el-Sheikh Memorandum of 1999 ("Sharm el-Sheikh Memo")<sup>42</sup> – were both concluded with the purpose of implementing Oslo II. The Sharm el-Sheikh Memo was also intended to implement all the other "prior agreements" between Israel and the Palestinians since the signing of the Oslo Accords in September 1993.<sup>43</sup>

The strength of the arguments to be made in this paper is dependent upon the assumption that these agreements are legally binding under

international law. Questions have been raised as to whether the agreements are binding because they were not “concluded between States” – the PLO is not the government of a sovereign state – as required by the Vienna Convention on the Law of Treaties (VCLT).<sup>44</sup> However, the absence of statehood of one or both parties does not entirely diminish their responsibilities under international law.

The VCLT states “[t]he fact that the present Convention does not apply to international agreements concluded between *States and other subjects of international law* or between such other subjects of international law ... *shall not affect ... [t]he legal force of such agreements[.]*”<sup>45</sup> An agreement between Israel and the Palestinians may not be permitted the formal title of a treaty under the VCLT, but the agreements have the potential to be enforced nonetheless.<sup>46</sup>

It has also been contended that the Oslo Accords and its subsequent agreements are no longer relevant due to failure of implementation. However, just as the VCLT applies to any international treaty between States parties, failure of implementation does not automatically nullify an agreement between a state and another subject of international law and does not lessen its weight. Remedies for breach of the agreements are also covered by Article 3(b) of the VCLT entitled “International agreements not within the scope of the present Convention” which states “[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ... shall not affect [...] the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention[.]”<sup>47</sup> The failure to implement the agreements allows the aggrieved party to invoke the same remedies for breach as under the VCLT – “terminating the treaty or suspending its operation in whole or in part.”<sup>48</sup> While the right of termination is available to both Israel and the Palestinians, neither party has exercised that right.

That the agreements between Israel and the Palestinian Authority are perceived as binding is also evidenced by the fact that the UN Security Council, reflecting the sentiments of the international community, has urged the parties on several occasions to implement

their terms. The Security Council issued a resolution in 1994 to encourage the “implementation of the declaration of principles ... without delay,” and in 1996 the Security Council “urg[ed] the parties to fulfill their obligations, including the agreements they reached.” And as recently as June 26, 2009, the Quartet on the Middle East – four entities involved in mediating the peace process: the United States, Russia, the European Union, and the United Nations – called upon Israel and the Palestinians to implement their obligations. All of these efforts that have been facilitated by the UN indicate that the UN sees the agreements as binding because they have created responsibilities for both parties that need to be enforced.<sup>49</sup>

The ability to execute the agreements between Israel and the Palestinians remains a challenge, but the provisions both parties continue to uphold, particularly the ones that are pertinent to the arguments in this paper, still apply. The agreements may ultimately not prove to serve as a direct path to peace for Israel and statehood for the Palestinian people, but the contracts that they have created and the rights that they granted to the parties endure, insofar as both parties act in good faith.<sup>50</sup>

### **III. OCCUPATION OF GAZA AND THE ARGUMENTS FOR “EFFECTIVE CONTROL”**

The international law of occupation as applied to the situation in the Palestinian Territories has often been questioned. Under Israel’s interpretation, the occupation provisions of the Hague Regulations and the Fourth Geneva Convention refer only to territory of “High Contracting Parties,” i.e., state parties to the treaties. Indeed, the international law of occupation has traditionally been understood to only apply to the relationships between sovereign states.<sup>51</sup> Prior to Israel’s entry into the Gaza Strip in 1967, however, Gaza was not the sovereign territory of any state party to the treaties. Turkey had renounced sovereignty in 1923, Britain never acquired sovereignty but instead ruled the territory under a League of Nations Mandate, and Egypt never claimed to have acquired sovereignty after its capture of the territory in 1948. Thus, Gaza has no permanent sovereign status and “belongs” to no one. In light of this, and due to a general lack of clarity as to what exactly constitutes “effective



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control,” it is understandable that there has been some ambivalence among the Israeli government, policy community and public as to whether Israel has occupied Gaza.

Notwithstanding this ambivalence, the international community, spearheaded by the United Nations, has repeatedly declared the West Bank and Gaza to be occupied and Israel has, de facto, conceded the point. From 1967 until 2005, Israel imposed a military administration on Gaza (and continues to do so in parts of the West Bank) and required itself, by means of military orders, to grant civilians the humanitarian protections outlined in the international law of occupied territories. In cases before the Israeli Supreme Court, the Israeli government has consistently agreed to concede, *arguendo*, the question of occupation, and have the Court rule on the assumption that the West Bank (and, until 2005, Gaza) is governed by the international law of occupation. Indeed, this concession is so deeply rooted in Israeli legal practice that in the 2002 Israeli Supreme Court case of *Ajuri v. the Commander of IDF Forces in the West Bank*, Justice Aharon Barak, President of Israel’s Supreme Court, blandly asserted in his decision that “Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power”<sup>52</sup> without citation or government objection.<sup>53</sup>

Understanding that occupation cannot continue indefinitely and that the situation as it was functioning posed an ongoing security challenge for the Israeli military and a constant danger to the Israeli civilian population, Israel withdrew from Gaza in September 2005 with the intent that the Palestinian leadership would have complete authority in the territory and that Israel would no longer have any obligations as an occupier.<sup>54</sup> Nevertheless, it has been argued that the occupation of Gaza continues in spite of Israel’s disengagement from the territory because Israel has retained “effective control” over Gaza.<sup>55</sup> Since the disengagement from Gaza, Israel has maintained that it no longer has authority in Gaza, thus ending the occupation of the territory.<sup>56</sup>

Israel's detractors have put forth the following assertions as to why "effective control" persists.

- Israel patrols Gaza's territorial waters and maintains exclusive control in the air space over Gaza;<sup>57</sup>
- Israel controls the entire Israeli border with Gaza including the Erez, and Karni border crossings;<sup>58</sup>
- Israel is said to "control" Egypt's border with Gaza, including the Rafah border crossing;
- Israel supplies Gaza with electricity, fuel, telecommunications services, water, and sewage removal and is said to "control" the administration of these services in Gaza;<sup>59</sup>
- Israel maintains a population registry of Gazans and collects, on behalf of the Palestinian Authority, taxes on goods bound for Gaza passing through Israeli ports and is, therefore, said to "control" Gaza's tax system and population registry;<sup>60</sup>
- Israel has identified security considerations and reserved for itself the right to re-enter Gaza for broadly self-defined "self-defense"; and
- Israel has the "ability" to exercise power over Gaza.

It has been said that it will be more likely that Israel will be viewed as having ended the occupation if it has fewer restrictions on Gaza than it does at present.<sup>61</sup> However, the mere existence of restrictions on a territory does not necessarily indicate an occupation, and so it is important to be clear about what an exercise of "effective control" requires. Having influence over, responsibility for, restrictions on, or command of certain activities or resources is not an automatic indication of the level of "effective control" that is necessary to invoke the laws of occupation. This distinction is often not made clear by the various international organizations and the media who consistently misapply the term "effective control" in the context of an occupation and continue to disseminate information that supports incorrect and perhaps even misleading conclusions.

This paper proposes a three-part test that must be applied to assess the existence of "effective control" over a territory that is derived from the standards set forth in the Hague Regulations, the Fourth Geneva Convention, and the *Hostages* case. The test analyzes whether:

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1. the territory is “actually placed under the authority of the hostile army[.]” and the “authority has been established and can be exercised[.]”<sup>62</sup>
2. the state in power “exercises the functions of government in such territory[.]”<sup>63</sup> and
3. the authority of the occupier is “to the exclusion of the established government.”<sup>64</sup>

Each of these requirements must be evaluated in light of the existing facts surrounding each circumstance and the relevant international agreements and laws pertaining thereto. If a circumstance fails any of the requirements of the “effective control” test, it follows that “effective control,” and consequently an occupation, does not exist.

### IV. DISMANTLING THE ARGUMENTS FOR EFFECTIVE CONTROL

Whether Israel is exercising “effective control” over Gaza is a matter of legal interpretation combined with factual analysis. The following reasoning indicates how none of the assertions of Israeli authority in Part III, even in combination, rise to the level of “effective control” under the legal test, thereby demonstrating that Israel’s relationship with Gaza is not subject to the laws of occupation.

#### A. Authority over Gaza’s Territorial Waters and Air Space

Israel’s authority in the sea and air is not an exercise of “effective control” for two reasons. First, control over adjacent waters and air space does not constitute “effective control” over Gazan land. Second, Israel’s control is neither complete nor hostile. Israel also does not exercise total control over the sea because it has allowed Gazan authorities and civilians access to several nautical miles off Gaza’s coast. Such control as Israel does exercise is based on negotiated agreements between Israel and the PLO, which grant Israel exclusive rights to the air space over Gaza, as well as significant control over adjacent waters.

### *1. Territorial Waters*

By way of background, the range of territorial sea – the belt of water immediately adjacent to the coast of a nation – was at one point determined by range of vision, and was later amended to three nautical miles based on the range of cannon fire. The United Nations Convention on the Law of the Sea (“UNCLOS”) ultimately determined the range to not exceed twelve nautical miles.<sup>65</sup>

The general rule of international law assigns sovereign authority to the territorial sea to the state that is sovereign over the territory. This principle is laid out in Article 1(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone<sup>66</sup> which states that “[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.”<sup>67</sup>

Despite Gaza’s lack of sovereignty, Article XVII(2)(a) of Oslo II granted the Palestinian Authority control over Gaza’s territorial waters.<sup>68</sup> It can be argued that, in light of the sovereignty principle as it pertains to the law of the sea, access to territorial waters are inherent in statehood and the parties could not assign control over the territorial sea to Gaza. In recognizing that granting control was an allowance and not an automatic right for Gaza, the agreements also allowed the Israelis to override that control in the event of a threat to Israeli security.

Article V(3)(a) of the Gaza-Jericho Agreement gave Israel the authority over “external security”<sup>69</sup> of the territories which extends to the territorial waters off Gaza’s shore. Oslo II elaborated upon that notion by giving Israel the exclusive responsibility to protect itself from the air and sea. Chapter 2, Article XII(1) of Oslo II states that “... Israel shall ... carry the responsibility for defense against external threats ... from the sea and from the air ... and will have all the powers to take the steps necessary to meet this responsibility.”<sup>70</sup>

Although Gaza does not have an automatic right of access to its adjacent waters according to the Geneva Convention on the Territorial Sea and the Contiguous Zone, Israel has, in fact, allowed

the Palestinians in Gaza access to the waters for fishing and other ecological purposes. Before 2000, the Palestinians had access to the full twelve nautical miles of territorial waters in accordance with the UNCLOS, but after the start of the Second Intifada in 2000 it was reduced to six nautical miles and then three in January 2009 because of Israel's continued external security concerns about the smuggling of weapons and ammunition into the Gaza Strip by sea.<sup>71</sup>

Israel's command of Gaza's territorial waters is in line with international law and is not an exercise of "effective control" over Gaza. The fact that Israel has entered into agreements with the Palestinian Authority on the subject of territorial waters demonstrates that Israel's actions were not "hostile" as required by Article 42 of the Hague Regulations and the first part of the "effective control" test. In light of these facts, Israel has gone beyond what is required with respect to international law by relinquishing the territorial sea to the Palestinians while still maintaining external security in accordance with their mutual agreements.

## 2. *Air Space*

Similar to the argument regarding the territorial waters, as Gaza is not a state it is not entitled as of right to the airspace above it. The 1944 Convention on International Civil Aviation ("Chicago Convention") articulates the principle of sovereignty stating "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."<sup>72</sup> Notwithstanding the sovereignty principle, Article XII of the Gaza-Jericho Agreement outlined the agreed terms by which the Palestinian Authority would, indeed, be able to operate air traffic out of the Gaza Airport while taking into account Israel's security concerns<sup>73</sup> as well as air safety because Gaza covers a very small geographic area. But, as seen in the previous section on territorial waters, Oslo II also gave Israel exclusive responsibility to defend itself from air<sup>74</sup> in order to guard its external security. Moreover, Chapter 3, Article XVII(5) of Oslo II allows Israel the authority over the air space in accordance with the other provisions of Oslo II which states that "[t]he exercise of authority with regard to the electromagnetic sphere and air space shall be in accordance with the provisions of this Agreement."<sup>75</sup>

Looking at other factual scenarios, many countries have restrictions on their access to air space based on mutual agreements which would not be a form of occupation. For instance, as a result of security arrangements created by the 1979 Treaty of Peace between Israel and Egypt,<sup>76</sup> Egypt has limitations on its aerial sovereignty in Sinai. In addition, to prevent air collisions, many of the smaller European states must coordinate their air traffic with their larger neighbors to prevent mid-air collisions, and, therefore, do not have the exclusive right to control their air space. The cooperation between states in both of those scenarios does not pose a threat to state sovereignty or governmental authority.<sup>77</sup>

There are also instances whereby a restriction on access to water or air by one power over another cannot be deemed to indicate that “effective control” is exercised over the subject territory. Rather, the command was taken in an effort to force an opposing government to change its policies, and was not necessarily an indication of intent to occupy the territory.

For example, during the Cuban Missile Crisis in 1962, in order to prevent Cuba from importing nuclear-tipped ballistic missiles from the USSR, the United States imposed a “quarantine” around Cuba using naval and air units. The United States argued that this was not an act of war, while the communist countries protested that a blockade was, indeed, an act of war. No country argued that by imposing a quarantine America had somehow occupied Cuba. Though the United States did have enough control to ultimately encourage Cuba and the USSR to change their policies, it did not have nearly enough control to displace the Cuban government.

During the 1990s, the United States and the United Kingdom maintained a “no-fly-zone” over Iraq to exclude the Iraqi air force from northern and southern parts of the country, without authorization from the United Nations Security Council.<sup>78</sup> They also imposed a sanctions regime that was enforced with naval power.<sup>79</sup> It has never been argued that the United Kingdom and the United States had occupied Saddam Hussein’s Iraq in the 1990s.

In another scenario, the United States' victory over Serbia during the Clinton Administration was celebrated as the first war won almost entirely from the air. However, this measure of control was not "effective" – it was enough destruction to convince the Serbian government to have a reversal of its policies towards the Albanians residing in its territory, but it was not enough control to supplant the Serbian government and directly impose America's policies on the Serbian people.

Command of the water adjacent to and air over a territory may confer some measure of control, but this falls far short of "effective control" within the meaning of the law of occupation. Similar to the aforementioned examples, Israel's command of the air over Gaza and the waters next to it is not sufficiently comprehensive to indicate an exercise of the "functions of government," required by the second part of the "effective control" test. And, as seen in the section on territorial waters, the fact that Oslo II grants Israel the exclusive right to aerial defense undermines the "hostility" requirement of the first part of the test. It follows that restriction on access to territorial waters and air space does not constitute "effective control" of Gaza.

## **B. The Border between Israel and Gaza**

### ***1. Borders and International Law***

The international law of borders is grounded in customary international law which dictates that a country has complete control over closing its borders to non-citizens. There is nothing in international law that requires a sovereign state to open its borders to the territories around it.<sup>80</sup> However, customary international law does draw a distinction between the general rules of borders and the duties of a state toward an individual at the border.<sup>81</sup> The international law governing border closure on the interstate level is generally accepted by the International Court of Justice (ICJ), but the law regulating border closure affecting individuals is still highly contested and is regulated by several treaties and practices establishing the rights of individuals under international law.<sup>82</sup>

Customary international law relating to borders evolved after World War II. The Universal Declaration of Human Rights (UDHR) was drafted in response to the atrocities committed during World War II in order to acknowledge the existence of basic human rights, including the right to move freely. Although not a treaty, the UDHR has been incorporated into international law as part of international custom. Article 13(1) of the UDHR provides that “[e]veryone has the right to freedom of movement and residence within the borders of each state.”<sup>83</sup> The UDHR also declares that “[e]veryone has the right to leave any country, including his own, and to return to his country.”<sup>84</sup> Freedom of movement is posited as occurring within the borders of a state and as the right to leave and return to one’s own country, but that right is not mirrored in a corresponding right of entry into another country. One state cannot send individuals across its border without permission from the neighboring state to receive them.<sup>85</sup> The fact that an independent state still has the authority to close its borders at any time, with or without cause is reflected in human rights law by the failure of the so-called right to “freedom of movement” to emerge as an enforceable right *between* states. However, the UDHR offers exceptions to the rule for asylum seekers<sup>86</sup> and refugees.<sup>87</sup>

## ***2. The Crossings***

There are three primary crossing points from Gaza into Israel – Karni, Erez, and Rafah. In addition to those crossings, there are three secondary crossings – Sufa in the south, now closed, had been open to Palestinians who were working on Israeli farms and was also used for cargo;<sup>88</sup> Nahal Oz is used as a fuel terminal; and Kerem Shalom in the south-east is used for the transfer of cargo.<sup>89</sup> Following Israel’s disengagement from Gaza in 2005, Israel and the Palestinian Authority achieved an agreement on border crossings to and from Gaza. The agreement details are contained in two documents. The first document is the Agreement on Movement and Access (AMA)<sup>90</sup> which allows the Palestinians and Egypt to control the Rafah crossing and allows for increased traffic through the Erez and Karni crossings which are managed by Israel. The second document is the Agreed Principles for Rafah Crossing (APRC)<sup>91</sup> which elaborates on the general provisions of the AMA.



## REDEFINING THE LEGAL STATUS OF GAZA

The Karni crossing is located in the north-eastern end of the Gaza Strip and is used as a cargo terminal for imports and exports. Karni is managed by the Israel Airports Authority. The crossing was opened in 1996, but since the Hamas takeover of Gaza in June 2007 Israel has mostly closed the crossing due to concerns about security breaches. Having previously been used for the passage of most forms of cargo, the crossing is now only used as a station for transporting wheat and animal feed through a conveyor belt.

The Erez crossing – the only pedestrian crossing from Gaza into Israel – is located in the northern end of the Gaza Strip and is managed by the IDF. During the comparatively calm years of the 1990s before the eruption of the Second Intifada, tens of thousands of Palestinians entered Israel every day through the Erez crossing, but after the Second Intifada began in 2000, Israel tightened security at the borders and presently only allows 5,000 Palestinians into Israel daily.<sup>92</sup>

Recognizing security risks that are raised from both successful and attempted attacks on the crossing points, and despite accusations of “collective punishment” of the Palestinian people because of the closures,<sup>93</sup> Israel has gone to great lengths to ensure that the population of Gaza receives necessary supplies and access to needed medical treatment. For instance, on June 8, 2009, 10 gunmen staged a failed assault at the Karni crossing, in which horses laden with explosives were used. Consequently, the IDF closed the Karni crossing, but redirected a shipment of 30,000 vaccines for foot-and-mouth disease to the Erez crossing. Because of concerns about an outbreak of the disease, 125,000 vaccines were also supplied to Gaza in the three months prior in three separate transfers.<sup>94</sup>

The Rafah crossing in the south is the sole major crossing point into Egypt from Gaza and is currently controlled by Egypt and the Hamas-led government of the Palestinian Authority. Israel has not exercised any control over the Rafah crossing since September 2005.<sup>95</sup>

The AMA specifies that the Rafah crossing shall be operated by “the Palestinian Authority on its side, and Egypt on its side.”<sup>96</sup> Commenting on the AMA and Palestinian control over Rafah,

Palestinian chief negotiator Saeb Erakat confirmed that “this is the first time in history we, [the Palestinians], will run an international passage by ourselves, and it’s the first time Israel does not have a veto over our ability to do so.”<sup>97</sup>

The APRC stipulated that there also be a role for a third party to monitor the Rafah crossing.<sup>98</sup> On November 21, 2005, the Council of the European Union agreed that the EU should undertake the third party role proposed in the APRC and, therefore, established the EU Border Assistance Mission at Rafah (EUBAM) to monitor the operations of the Rafah crossing.<sup>99</sup> Because of security considerations, EUBAM was based out of Ashkelon, Israel, rather than Gaza, and became operational on November 30, 2005.

After the disengagement from Gaza and the development of the AMA and APRC, relative optimism took hold in Israel, but that was stanching by three major regional events. First, Hamas – a globally recognized terrorist organization<sup>100</sup> – won Palestinian parliamentary elections in January 2006, which indicated that the prospect for a real partnership towards peace would be much more difficult to achieve.<sup>101</sup> Second, Hamas attacked Israel on June 25, 2006 and kidnapped Israeli Corporal Gilad Shalit. Due to the security breach, following the attack Israel closed its borders to Gaza. Finally, there was a Hamas-orchestrated explosion at the Rafah crossing on July 14, 2006. Israel was not in control of the Rafah crossing and, therefore, was powerless to stop the breach.

Egypt has largely kept the Rafah crossing closed since Hamas took control of Gaza in June 2007 because of concerns of a “spillover of Hamas-style militancy into Egypt.”<sup>102</sup> At that time, EUBAM also temporarily ceased operations<sup>103</sup> because of security concerns and the fact that the European Union, like Israel and the United States, has a policy not to permit direct contact with Hamas officials until it renounces terror, recognizes Israel’s right to exist, and honors past Palestinian agreements reached with Israel.<sup>104</sup> The Rafah crossing was last opened with the presence of the EUBAM on June 9, 2007. Since then, the mission has remained on standby, ready to re-engage in 24 hours while awaiting a political solution.<sup>105</sup>

While border control is, in fact, a function of government, Israel is exercising its own rights with respect to its own borders and not displacing Gaza's functioning government, thus undermining both the second and third parts of the "effective control" test. In monitoring and periodically closing its borders, Israel is acting within its rights under international law and the exceptions for refugees and asylum-seekers do not generally apply to the Palestinians in Gaza. In addition, the terms of the Gaza-Jericho Agreement and Oslo II grant Israel absolute authority over "external security" matters which would apply to Gaza's borders as well the air space and territorial waters.<sup>106</sup> This, once again, undercuts the "hostility" requirement of the first part of the "effective control" test.

Furthermore, the assertion that Israel controls Rafah is false, as evidenced by the AMA and the APRC. On the basis of the abovementioned facts, the accusations that Israel is collectively punishing the entire population of Gaza for the acts of a few by closing its borders to the Palestinians appears to be politically motivated because in promulgating these accusations the fact that the Palestinians have another point of exit is never mentioned. Egypt to the south monitors the border crossing at Rafah and has chosen to close its doors as well because of its own security concerns. Israel's authority over Rafah is, therefore, neither "established" nor "exercised" as required by the Hague Regulations. For all of these reasons, Israel's actions on the border with Gaza, while arguably influential, do not give rise to the "effective control" required to qualify for an occupation under international law.

### **C. Gaza's Infrastructure**

#### ***1. Electricity, Fuel and Telecommunications***

A large share of electricity in Gaza is produced internally, and supplied by a single power plant operated by the Palestine Electric Company (PEC).<sup>107</sup> The PEC is a very profitable enterprise having earned \$6.3 million in 2008, up from \$4.4 million in 2007. Fuel for the plant is imported through Israel.<sup>108</sup> Different sources claim different percentages of electricity produced within Gaza, with estimates ranging from 25 to 50 percent. Pursuant to a part of the

Gaza-Jericho Agreement preserved by the Oslo II agreement,<sup>109</sup> the remainder is supplied by the Israeli Electric Company (IEC)<sup>110</sup> “[p]ending the establishment by the Palestinian Authority of an alternative system for the Gaza Strip ... and to that end shall enter into a commercial agreement with the IEC.”<sup>111</sup> In addition, the Agreement stipulates that the supply of fuel or gas will take into account Israeli standards of safety and security.<sup>112</sup> With regard to telecommunications services, the Oslo II agreement also provides for its supply based on a contract between the Palestinian Authority and a private Israeli company.

Pending the establishment of an independent Palestinian telephone network, the Palestinian side shall enter into a commercial agreement with Bezeq – The Israel Telecommunications Corp. Ltd. (herein, "Bezeq"), regarding supply of certain services in the West Bank and the Gaza Strip.<sup>113</sup>

It must be noted that telecommunications supply by Israel may be terminated once the Palestinian Authority establishes its own system.

In the past Israel has cut off or restricted electricity to Gaza which also affected telecommunications and the fuel supply needed for backup generators when power is lost. This occurred most recently during the conflict with Gaza in the winter of 2008-2009, although the electrical supply has been restored to pre-conflict levels. In addressing its security concerns, Israel has also limited fuel supply in retaliation for unlawful rocket attacks by armed groups which caused a lot of destruction in Israeli territory, most notably in 2007 after Hamas took power. In light of Israel’s ability to place these limitations on Gaza, Israel’s detractors argue that the restrictions are an indication of “effective control.”<sup>114</sup> However, Israel is not the only country that has placed restrictions on energy for political reasons, and doing so has not been deemed to be an exercise of “effective control.” Note the following examples.

Russia reduced the supply of gas to Ukraine in the winter of 2009 because of an escalation in a gas price dispute. As a result, gas supplies that are channeled to Europe via Ukraine were completely

shut down which prompted the European Union to call for an immediate solution. Europe imports 40 percent of its fuel from Russia so Russia's conflict with the Ukraine caused a serious energy crisis because the reduction also affected the supply of natural gas to the Czech Republic, Turkey, Poland, Hungary, Romania, and Bulgaria. Russia's reluctance to immediately resolve the dispute was argued to be a politically motivated move to send a message to Europe that Ukraine should not be integrated into the Euro-Atlantic zone but rather to remain within the Russian sphere of influence.<sup>115</sup>

In addition, the Arab members of the Organizations of the Petroleum Exporting Countries (OPEC) restricted the world's oil supply in 1973 to protest Western support for Israel during the Yom Kippur War.<sup>116</sup> During that time, after failed negotiation with the world's major oil companies, OPEC used their control over the world price-setting mechanism to quadruple the world's oil prices.

In neither of those cases did the United Nations or the international community assert that Russia and OPEC were exercising "effective control" over the territories to which they limited supplies. So, too, Israel in limiting energy supply to Gaza to achieve certain political ends, while perhaps causing a certain amount of difficulty for the population of Gaza, was not engaging in an exercise of "effective control."

The supply of electricity to Gaza is pursuant to a private contractual relationship that was created by the Gaza-Jericho Agreement and preserved by Oslo II which, once again, removes the element of hostility from the interaction between Israel and the Palestinians as required by the first part of the "effective control" test. The terms of the supply were not imposed by one party over the other – they were achieved through a series of contractual negotiations. Furthermore, supplying electricity to Gaza is not an attempt on Israel's part to exercise a "function of government" in Gaza. On the contrary. The Palestinian Authority is exercising its own governmental authority by negotiating and contracting for the supply of resources on behalf of its population. This indicates a failure of the third part of the "effective control" test because the Palestinian Authority has not been

“excluded” from power over its territory, but rather it has been empowered to act on behalf of the people of Gaza.

## ***2. Water Supply and Sewage Removal***

In 2004, prior to Israel’s disengagement from Gaza, Human Rights Watch released a statement saying that regardless of Israel’s withdrawal, Israel would still maintain control over many key aspects of Gaza including Gaza’s water supply and sewage networks.<sup>117</sup> This statement is patently incorrect, and as of the introduction of the Gaza-Jericho Agreement in 1994 and Oslo II which preserved that Agreement’s terms,<sup>118</sup> and until the present day, the supply of part of Gaza’s water is based on a contractual relationship with an Israeli company. Sewage removal has always been and remains the responsibility of the Palestinian Authority.<sup>119</sup> The Agreement states that “[t]he Palestinian Authority shall pay Mekoroth for the cost of water supplied from Israel and for the real expenses incurred in supplying water to the Palestinian Authority[,]”<sup>120</sup> and that “[a]ll relations between the Palestinian Authority and Mekoroth shall be dealt with in a commercial agreement.”<sup>121</sup>

The Palestinian Authority buys some of its water from Israel’s water authority, Mekoroth, and Gaza also has its own internal wells. Sewage removal in Gaza is handled internally and is not managed by any Israeli entity.<sup>122</sup> The Gaza-Jericho Agreement states “[a]ll water and sewage (hereinafter referred to as “water”) systems and resources in the Gaza Strip and the Jericho Area shall be operated, managed and developed (including drilling) by the Palestinian Authority, in a manner that shall prevent any harm to the water resources.”<sup>123</sup> The Agreement also states “[t]he Palestinian Authority shall take the appropriate measures to prevent the uncontrolled discharge in the Gaza Strip and the Jericho Area of sewage and effluence to water sources including underground and surface water and rivers, and to promote the proper treatment of sanitary and industrial waste water.”<sup>124</sup>

However, under the Gaza-Jericho Agreement one exception to total Palestinian control placed the management of water and sewage in the Israeli settlements and military installations in Gaza under the

authority of Israel through Mekoroth.<sup>125</sup> Israel's removal of the settlements and installations in 2005, therefore, completely cancelled any relationship Israel had to Gaza with respect to water supply and sewage removal. Gaza's internal wells and sewage treatment facilities are dependent on electricity and/or imported fuel, making the water supply linked to the energy supply.<sup>126</sup> Although water supply and sewage treatment can be affected by limitations on energy supply, that is not an indication of control over those functions.<sup>127</sup> In light of this, the "effective control" test fails in its entirety because the Palestinian Authority has complete control over this matter and not the Israeli government.

Now that Israel has fully withdrawn from Gaza, there are no grounds upon which to claim that Israel exercises any form of "effective control" over electricity, fuel, telecommunications, water supply, or sewage removal in Gaza, neither based on the international agreements entered into by Israel and the Palestinian Authority, the private contracts signed between Israeli and Palestinian entities, nor based on the facts on the ground.

## **D. Taxation and Population Registry in Gaza**

### ***1. Taxation***

Article VI(2) of the Oslo Accords provides that "authority will be transferred to the Palestinians on the ... sphere[s] ... [of] direct taxation[.]"<sup>128</sup> In addition, Articles V and VI of the Gaza-Jericho Agreement expanded upon the Oslo Accords and outlined the responsibilities of the Israelis and Palestinians with respect to direct and indirect taxation. For the most part, Israel and the Palestinian Authority each determine, regulate, levy and collect their own taxes,<sup>129</sup> "including income tax on individuals and corporations, property taxes, municipal taxes and fees."<sup>130</sup>

The Israeli government only collects taxes from those Palestinians who work inside Israel,<sup>131</sup> just as many states collect taxes from foreign workers who are employed within their territory. For instance, in the United States, foreign

workers are required to pay US taxes. There are exemptions for some taxes that foreign agricultural workers and non-resident aliens have from paying Social Security and Medicare taxes, but income taxes still apply, though the foreign workers may be taxed at graduated rates.<sup>132</sup>

Of the taxes that Israel collects from Palestinians employed in the state, Israel transfers nearly all the income taxes that are collected from Gaza residents back to the Palestinian Authority. Annex V, Article V (4) of Oslo II states:

Israel will transfer to the Palestinian Authority a sum equal to:

- a. 75 percent of the income taxes collected from Palestinians from the Gaza Strip and the Jericho Area employed in Israel.
- b. The full amount of income taxes collected from Palestinians from the Gaza Strip and Jericho Area employed in the settlements.<sup>133</sup>

Both the Israeli and the Palestinian tax administrations levy and collect VAT and purchase taxes on local production. Oslo II indicates the VAT rate to be 17 percent, but the Palestinian VAT rate was only 15-16 percent.<sup>134</sup> The provisions on both income tax and VAT are clearly favorable to the Palestinian Authority.

Israel also collects import tariffs on Gaza-bound goods that originate from beyond either Israel or the Palestinian Territories. It is important to note that Israel only collects taxes in situations emanating from economic activity within Israel, such as goods being transshipped through Israel and Palestinian employment in Israel. Israel does not collect any taxes relating to business activity or incomes in Gaza proper.<sup>135</sup>

Although it is indeed true that levying and collecting taxes is a function of government, the only taxes that Israel collects on behalf of the Palestinian Authority are the income taxes on Palestinian employees within Israel, a common and well-accepted international practice. As apparent from Oslo II, Israel and the Palestinian



Authority have responsibility for taxation in their respective areas, which undermines the “hostility” requirement of the first part of the “effective control” test. Moreover, Israel’s actions in that regard do not supplant the powers of the Palestinian Authority to collect their own taxes as required by the third part of the test. Therefore, the argument that Israel’s collection of some taxes does not demonstrate the level of “effective control” required for an occupation under international law.

## ***2. Population Registry***

Article VI(1)(d) of the Gaza-Jericho Agreement, entitled “Powers and Responsibilities of the Palestinian Authority,” grants the Palestinian Authority the “power to keep and administer registers and records of the population, and issue certificates, licenses and documents.”<sup>136</sup> Oslo II preserved the terms of the Gaza-Jericho Agreement in Annex 3, Article 28:

1. Powers and responsibilities in the sphere of population registry and documentation in the West Bank and the Gaza Strip will be transferred from the military government and its Civil Administration to the Palestinian side.
2. The Palestinian side shall maintain and administer a population registry and issue certificates and documents of all types, in accordance with and subject to the provisions of this Agreement. To this end, the Palestinian side shall receive from Israel the population registry for the residents of the West Bank and the Gaza Strip in addition to files and records concerning them....<sup>137</sup>

The assertion that Israel controls the population registry of the Palestinian Authority is, therefore, incorrect. The fallacy of this assertion is underscored by Article X(2)(f) of the Agreement entitled “Control and Management of the Passages” which states:<sup>138</sup>

In the Palestinian Wing, each side will have the authority to deny the entry of persons who are not residents of the Gaza Strip and West Bank. For the purpose of this Agreement, “residents of the Gaza

Strip and West Bank” means *persons who, on the date of entry into force of this Agreement, are registered as residents of these areas in the population registry maintained by the military government of the Gaza Strip and West Bank*, as well as persons who have subsequently obtained permanent residency in these areas with the approval of Israel, as set out in this Agreement.<sup>139</sup>

Furthermore, Article I(27)(a) of Annex II of the Gaza-Jericho Agreement relating to the “Population Registry and Documentation” requires that the Palestinian Authority “receive the existing population registry in the Gaza Strip and the Jericho Area, as well as files pertaining to the residents of these areas.”<sup>140</sup>

The Gaza-Jericho Agreement does allow Israel some involvement with monitoring the population registry and identification cards of the Palestinian Authority, but it does not control either of those functions. For example, when the Palestinians update their registry, Israel is supposed to be notified, in order to “ensure efficient passage procedures” between Gaza and the Jericho Area.<sup>141</sup> Israel also has legitimate security concerns that would require the establishment of a uniform system of identification so that they may have knowledge of who will be entering Israeli territory. This stipulation was laid out in the Agreement which requires that “[p]ossession of [an] identity card and, whenever necessary, of an Israeli entrance permit, shall be required for entry into Israel by residents of the Gaza Strip and the Jericho Area.”<sup>142</sup> Israel’s actions are reasonable security measures because Palestinians must cross through Israel to go from Gaza to the West Bank.

Control over the identification system and population registry was granted to the Palestinian Authority in order for it to exercise its governmental functions with respect to its own population. That control is not displaced by the Israeli government, thus failing the third part of the “effective control” test. And, as the hostility element of the first part of the test is not satisfied due to the existence of the agreements between the two parties, Israel’s involvement is minimal

at most and falls far short of that which is required to satisfy the required standards for “effective control.”

#### **E. Israel’s Security Considerations and Right to Re-enter Gaza**

The right of Israel to safeguard its national security is derived from the inherent the right to self-defense. Article 51 of the United Nations Charter guarantees UN Member states “the inherent right of individual or collective self-defense if an armed attack occurs against [them].”<sup>143</sup> The right of states to self-defense also extends to claims against non-state actors because Article 51 does not make a distinction between armed attacks by state actors and non-state actors.<sup>144</sup> Furthermore, after the terrorist attacks of September 11, 2001, the UN Security Council passed a resolution recognizing the inherent right of individual or collective self-defense in accordance with the UN Charter and encouraged states to combat “threats to international peace and security caused by terrorist acts.”<sup>145</sup>

The proposition that Israel’s general right to self-defense is an indication of “effective control” is clearly contrary to the position of the UN Charter and the Security Council. That right was recognized by and reflected in the agreements between Israel and the Palestinian Authority in the several clauses which grant Israel authority in the areas of external security.<sup>146</sup> The assertion that Israel has given itself overriding security considerations demonstrates a lack of appreciation for the dire threat that Israel faces from attacks that emanate from Gaza, and runs counter to the mutual understanding regarding Israel’s security concerns that form the backbone of each of the agreements between Israel and the Palestinians.

It has been posited that reserving the right to re-enter is also an indication that Israel still retains “effective control” over Gaza. However, reserving the right to re-enter a territory because of security considerations is a common reservation made by a withdrawing occupying power. Indeed, when the Allied forces left West Germany after signing the General Treaty ending the occupation of the territory in 1955, they included a clause in the treaty that also reserved certain emergency rights to the Allied powers in case of public disorder in

Germany. These rights were only suspended in 1968 when the Bundestag passed the German Emergency Laws.<sup>147</sup>

It must also be remembered that the goal of an occupation is to ultimately return the occupied territory to a peaceful situation after the end of a military conflict, and if threats continue to emanate from within that territory, re-entry can be deemed to be for the purpose of maintaining security or preventing chaos and not for the reassertion of occupation as seen in the above case. Israel indicated that the intention behind disengagement was for there to be “no basis for claiming that the Gaza Strip is occupied territory.”<sup>148</sup> The notion that the reservation of the right of re-entry was for Israel to maintain its occupational hold on Gaza contradicts the disengagement plan’s stated premise.

Emergency rights or reserving the right to re-enter, while requiring a belief that “effective control” would be possible in order to stop chaos from ensuing,<sup>149</sup> is not, in and of itself, tantamount to a continued exercise of “effective control” and occupation. The contentions regarding security and re-entry fail the third part of the “effective control” test which requires that the occupier actually exclude the government in power from exercising its authority. This concept will be developed further in the next section.

#### **F. Israel’s “Ability” to Exercise Power over Gaza**

The ability or potential to exercise “effective control” over a territory as the sole basis to claim the existence of an occupation has been discredited by the international courts.

Those who assert the position that the simple ability to control amounts to occupation often refer to citation of the case of *The Prosecutor v. Mladen Naletilic and Vinko Martinovic* before the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>150</sup> Paragraph 217 of the ICTY decision held that the establishment of authority can be determined by an occupying power having “a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.”<sup>151</sup> However, in referring to this clause, it is often removed from the

immediate surrounding context in the ICTY's official publication of the case. In addition to the above citation, the court also gave the following requirements in the very same section:

- 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...;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.<sup>152</sup>

Taken in the aggregate, the "capacity to send troops within a reasonable time" and the above terms may be combined to suggest the existence of "effective control," but each clause cannot individually be considered to make that determination. This is further reinforced by Paragraph 218 which states that "[th]e law of occupation only applies to those areas *actually controlled* by the occupying power and ceases to apply where the occupying power no longer exercises an *actual authority* over the occupied area."<sup>153</sup>

The International Court of Justice (ICJ) reaffirmed that position in the 2005 case of *Democratic Republic of Congo v. Uganda*.<sup>154</sup> The ICJ held that

In order to reach a conclusion as to whether a State ... is an "occupying Power" ... the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that 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.

Stressing the necessity of actual authority as opposed to potential authority,<sup>155</sup> the court's decision proves that the assertion that Israel's "ability" to exercise power over Gaza fails both the second part of the "effective control" test which requires that the authority has been established and can be exercised, and the third part of the test which requires substitution of the existing government by the authority of the occupier.

The ability to exercise power, by itself, does not give rise to "effective control." For the sake of argument, although it is theoretically possible, for instance, for South Africa to swiftly send its military into Lesotho, or for the United States to exert military influence over Canada or Mexico, or for the larger European countries like France or Germany to overtake the smaller ones like Luxembourg, Belgium, or the Netherlands, that is not necessarily an indication of "effective control." However, it would be doubtful that if Lesotho were posing the same security threats to South Africa that Gaza is posing to Israel, or if Canada were militarily hostile to the United States, or that the small European countries were arming to challenge the larger ones, the stronger states would allow those threats to become real dangers. While the potential to use force to control the territories may be present, only the actual use of force to exclude the governments of the other states can amount to an occupation. The same principle would apply to Israel's ability to use force against Gaza.

Furthermore, the exercise of "some" power does not give rise to an occupation. The Hague Regulations are triggered when the invader's functional control on the ground outruns the existing authority's formal control over the territory. The provisions define an occupier as possessing actual control that is adverse to the territory's official legal status.<sup>156</sup> Recalling the language of Article 43 of the Hague Regulations which states that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant" indicates that the invader must have a monopoly or near-monopoly on the use of force and have the ability to govern the civilian population.<sup>157</sup>

All other things being equal, Hamas, as the dominant political party of the Palestinian Authority and the governmental authority in Gaza since its takeover in June 2007, has a far greater "ability" to exercise

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control over Gaza than Israel does.<sup>158</sup> Israel's strike against Gaza in the winter of 2009 showed that while Israel can cause damage to Hamas specifically and Gaza generally, Israel did not upend or displace Hamas's administration, either militarily or politically.<sup>159</sup> In addition, if there was ever an airtight case that Israel does not have any real ability to rule over Gaza it would be exemplified by the fact that after Hamas won control over the Palestinian Authority and took command of Gaza in 2007, they ejected the Fatah party from the Gaza Strip – an act that Israel did not support.<sup>160</sup>

The ability or potential to exercise authority over Gaza satisfies no part of the “effective control” test. While potential for control may demonstrate the possibility of occupation, occupation will only exist when there is an actual fulfillment of the three requirements for “effective control” under international law.

### V. CHANGING THE STATUS OF GAZA

As it has been established that Israel no longer exercises “effective control” over Gaza, and Gaza is no longer occupied, the obvious question is: “if not occupied then what is its status?”

Oslo II, the Wye River Memo, and the Sharm el-Sheikh Memo, prohibit both parties from declaring a unilateral change of status of the Palestinian Territories. Oslo II states in Article XXXI(7), “Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”<sup>161</sup> The Wye River and Sharm el-Sheikh Memoranda both state “Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”<sup>162</sup>

Some scholars have taken this to indicate that Gaza must continue to be regarded as occupied despite Israeli withdrawal from the territory.<sup>163</sup> That assessment is incorrect. The text simply means that the Palestinian Authority cannot unilaterally declare statehood and Israel cannot unilaterally annex Gaza.<sup>164</sup> In the present situation, both Israel and the Palestinian Authority have pledged not to unilaterally

change the final status of Gaza or the West Bank “pending the outcome of the *permanent* status negotiations[.]”<sup>165</sup> However, those terms do not indicate a preclusion of the possibility of altering Gaza’s *temporary* status.

The agreements between Israel and the PLO firmly establish that both parties “view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.”<sup>166</sup> However, it may be argued that endowing the Palestinian Authority with absolute and uncontested control over part of its prospective territory allows them to demonstrate that they can function as a sovereign government at peace with its neighbors, thereby assisting it in laying the groundwork for declaring statehood at the conclusion of permanent status negotiations.

#### **A. An End to Occupation and a New Beginning**

Article VI of the Fourth Geneva Convention describes an occupation as ending “one year after the general close of military operations”<sup>167</sup> and when the “Occupying Power” no longer “exercises the functions of government in [the] territory.”<sup>168</sup> However, the Fourth Geneva Convention does not provide specific guidelines for how that determination is made.

There are four ways, in principle, that an occupation can end – loss of “effective control”; dissolution of the ousted sovereign – a practice that is no longer accepted as it is incongruent with the principle of self-determination; signing a peace agreement or armistice agreement with an ousted sovereign; or transferring authority to an indigenous government endorsed by the occupied population through referendum and by international recognition.<sup>169</sup>

The signing a treaty or some other international agreement could, indeed, signify the end to the occupation of Gaza, but an official agreement between Israel and the Palestinian Authority in that regard would only come at the conclusion of permanent status negotiations. Until that comes to pass, and in light of the absence of “effective control,” another status is needed for Gaza. To provide a solution to the political stalemate in Gaza and to pave the way for the



establishment of a viable Palestinian state that is at peace with Israel, it is imperative that the status be changed.

Although the factual and legal arguments in this paper have demonstrated that Gaza is no longer effectively controlled by Israel and that there has been a transfer of governmental authority to the Palestinian Authority which has been accepted as the indigenous government of the people, international recognition of the end of occupation of Gaza has not been forthcoming. While the absence of effective control is legally sufficient, in and of itself, to indicate the end of the occupation of Gaza, the recognition of that end by international legal experts is politically important for universal acknowledgement and acceptance of Gaza's changed status and of Israel's efforts to move the process forward.

#### **B. The Transition of Gaza from Occupied to *Sui Generis* Territory**

The status of Gaza has often been presented as an "either/or" scenario. *Either* Gaza is occupied by Israel *or* it is part of a state comprised of that territory and the West Bank. Statehood and occupation are not opposites, and there can be many alternatives to the choices that are presented above. Although determining the end of an occupation is not dependent upon a formal redefinition, this paper presents the recommendation that, in the case of Gaza, there should be a temporary or intermediate status that reflects the absence of occupation after disengagement as well as the exercise of Palestinian governance in the territory while awaiting the finalization of permanent status negotiations. The status of Gaza should be redefined as a "*sui generis* territory" under the governmental control of the Palestinian Authority.

*Sui generis*, meaning of its own kind or class, or unique in its characteristics, is a term of art. In international law, a *sui generis* territory is one that is of its own unique character by virtue of the fact that there are no similar scenarios to which it can be compared.

Though every territorial situation has some *sui generis* attributes, several unprecedented territorial situations have specifically been

described as *sui generis*, such as in Namibia,<sup>170</sup> Kosovo,<sup>171</sup> and the Russian territories of South Ossetia and Abkhazia,<sup>172</sup> though they have not had that title assigned to them as their official status. The only territory whose official legal name contains the term *sui generis* is New Caledonia, a French subdivision known as a “*sui generis* collectivity.”<sup>173</sup> New Caledonia is one of the 16 Non-Self-Governing Territories listed in 2002 by the United Nations General Assembly that are not considered occupied, but also do not have autonomous status.<sup>174</sup>

It had long been the official position of the Israeli government, supported by Israeli court decisions, that the situation in Palestinian Territories was *sui generis*<sup>175</sup> because it has never been the territory of a High Contracting Party<sup>176</sup> pursuant to Article 2(2) of the Fourth Geneva Convention.<sup>177</sup> This notion was first presented to legitimize Israeli retention of at least part of the territories conquered after the Six-Day War by asserting that since the territory was not a state it was not subject to the international law of occupation and, therefore, was not “occupied” but rather “disputed” or “administered.” Later Israeli Supreme Court decisions have rejected this idea and had, in fact, leaned in the direction of conceding that Israel’s relationship with the territories to be a belligerent occupancy.<sup>178</sup>

However, those later decisions were rendered before Israel’s 2005 disengagement from Gaza. The situation on the ground has shifted and, in the absence of “effective control,” the classification as a belligerent occupancy no longer applies. Distinct from earlier attempts to classify Gaza as not occupied, a new legal status – “*sui generis* territory” – is now appropriate for Gaza since Israel does not exercise “effective control” over the territory. Gaza remains a unique international territory whose temporary or intermediate status should be redefined as a “*sui generis* territory” while its permanent status is pending.

## CONCLUSION

In recognizing the need for a political solution to the conflict with the Palestinians while balancing that recognition with Israel’s security considerations, the Israeli government withdrew all military and

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civilian personnel from Gaza in September 2005 in the hope that their initiative would end the occupation of the territory and be a positive step towards a resolution of the conflict. By applying the standards laid out in the Hague Regulations, the Fourth Geneva Convention and the precedent derived from the *Hostages* case to the situation in Gaza after Israel's disengagement, Gaza can no longer be considered occupied and "effective control," as the term of art is understood in the context of the laws of occupation, does not apply to the actions of Israel in relation to Gaza.

Although Israel's loss of "effective control" over Gaza is legally sufficient to indicate that the occupation of the territory has ended, there has been a reluctance on the part of the international community to accept the change in status. While it is not legally necessary to obtain international recognition of Israel's position, it is politically important for the absence of occupation to be acknowledged by international legal experts so that Israel would not be held to the more stringent legal requirements of an occupier and to lend greater legitimacy to Israel's acts of self-defense.

There are many who say that the Oslo Agreements are dead, that permanent status negotiations are elusive, that a two-state solution will never happen, and that peace will not come to the region. At this point the truth of those assertions is difficult to determine. What is clear, though, is that several of the provisions of the Oslo Accords, Oslo II, and the other agreements do apply. Going forward, it is imperative that Israel's actions in relation to Gaza be understood as grounded in their international legal rights, and based on international law pursuant to contracts signed between Israel and the Palestinians.

Redefining Gaza's status from an "occupied territory" to a "*sui generis* territory" in order to reflect the absence of "effective control" would be an affirmative step towards statehood for the Palestinian people and greater security for the people of Israel. The international community has generally taken a particular interest in resolving the Israel-Palestinian conflict. As such, recognizing the shift in Gaza's legal status would demonstrate appreciation for Israel's efforts to end its occupation of Gaza and which may ultimately provide a stabilizing force in the Middle East.

## Notes

<sup>1</sup> This paper uses the names “Gaza” and “Gaza Strip” interchangeably.

<sup>2</sup> The Disengagement Plan – General Outline, sec. 2(i)(3), Apr. 18, 2004, *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm>.

<sup>3</sup> Josh Levs, *Is Gaza ‘Occupied’ Territory?*, CNN, Jan. 6, 2009, *available at* [www.cnn.com](http://www.cnn.com). *See also* Benny Avni, “The O Word: Is Gaza Still Occupied Territory?” N.Y. SUN, Feb. 11, 2008.

<sup>4</sup> MARTIN GILBERT, *ISRAEL: A HISTORY* 491-2 (2008). In addition to the Gaza Strip, the territories also include the West Bank.

<sup>5</sup> NORMAN DAVIES, *EUROPE: A HISTORY* 358 (1998).

<sup>6</sup> ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 87 (1991).

<sup>7</sup> *Id.* at 265.

<sup>8</sup> *Id.* at 273.

<sup>9</sup> *Id.* at 318.

<sup>10</sup> GILBERT, *supra* note 4, at 42.

<sup>11</sup> *Id.* at 186.

<sup>12</sup> G.A. Res. 181 (II), (November 29, 1947).

<sup>13</sup> Article 10 of the U.N. Charter allows the General Assembly to discuss any matter within the ambit of the U.N. terms of reference and to make recommendations, but not binding decisions. Only the Security Council can make binding decisions. U.N. Charter art. 10.

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters. *Id.*

<sup>14</sup> The 1949 Armistice Agreements are a set of agreements negotiated bilaterally between Israel and its neighbors - Egypt, Lebanon, Jordan, and Syria - that ended the official hostilities of the 1948 Arab-Israeli War (1947-1949). *See* Armistice Agreement, Isr.-Egypt, Feb. 24, 1949, 42 U.N.T.S. 251; Armistice Agreement, Isr.-Leb., Mar. 23, 1949, 42 U.N.T.S. 287; Armistice Agreement, Isr.-Jordan, Apr. 3, 1949, 42 U.N.T.S. 303; Armistice Agreement, Isr.-Syria, July 20, 1949, 42 U.N.T.S. 327. Pursuant to these agreements, the Security Council, on August 11, 1949, issued a Resolution that, inter alia, “noted with satisfaction the several Armistice Agreements,” and found “that the Armistice Agreements constitute[d] an important step toward the establishment of permanent peace in Palestine and consider[ed] that these agreements supersede the truce provided for in Security Council resolutions 50 (1948) of 29 May and 54 (1948) of 15 July 1948.” Security Council Resolution Noting the Armistice Agreements and Reaffirming the Order to Observe an Unconditional Cease Fire Pending a Final Peace Settlement, S.C. Res. 73, U.N.

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Doc. S/RES/1376, (1949). The aforementioned armistice agreements have not been superseded by an authentic peace treaty, with the exception of the treaty between Israel and Egypt.

<sup>15</sup> During that time Israel occupied Gaza for four months during the 1956 Suez Crisis. International pressure led Israel to withdraw. *See* GILBERT, *supra* note 4, at 330.

<sup>16</sup> Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., September 13, 1993, 32 I.L.M. 1525 (1993) [hereinafter “Oslo Accords”]. *See also infra* note 37 and accompanying text.

<sup>17</sup> In September 1995, Israel and the PLO signed a second peace agreement, known as Oslo II, which extended the Palestinian Authority to most West Bank towns. The agreement also established an elected 88-member Palestinian National Council, which held its inaugural session in Gaza in March 1996. *See* Oslo II *infra* note 38 and accompanying text.

<sup>18</sup> It must be noted that disengagement is not a unilateral attempt to change Gaza’s formal legal status, an act that is prohibited by the various agreements between Israel and the Palestinian Authority. *See infra* Part V and accompanying notes.

<sup>19</sup> Israel’s Disengagement Plan: Renewing the Peace Process, Apr. 20, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan--+Renewing+the+Peace+Process+Apr+2005.htm>.

<sup>20</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land: 29 July 1899, 32 Stat. 1803, 1 Bevans 247, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429; and Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land: Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Regulations]. The purpose of the Hague Convention of 1899 was to ban the use of certain types of modern technology in war. The Convention also set up the Permanent Court of Arbitration. The 1907 Hague Convention expanded upon the 1899 Convention.

<sup>21</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, at art. 2, para. 2, (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention].

<sup>22</sup> Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Geneva Convention Still be Considered Customary International Law*, 189 MIL. L. REV. 51, 56-7 (2006), citing COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 303-8 (Jean S. Pictet et al. eds. 1958) [hereinafter GC COMMENTARY]; Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 113 (1978); ALLAN N. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 5 (1978).

<sup>23</sup> Fourth Geneva Convention, *supra* note 21, at art. 154.

In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land,

whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague. *Id.*

Section II of the Hague Regulations relates to “Hostilities” and Section III relates to “Military Authority over the Territory of a Hostile State.”

<sup>24</sup> Fourth Geneva Convention, *supra* note 21, at sec. III – Occupied Territories, arts. 55-57.

<sup>25</sup> *Id.* at art. 50.

<sup>26</sup> *Id.* at arts. 55-6.

<sup>27</sup> *Id.* at art. 59.

<sup>28</sup> *Id.* at art. 53.

<sup>29</sup> Hague Regulations, *supra* note 20, at art. 42. “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.” *Id.* See also *infra* Part III and accompanying notes.

<sup>30</sup> Hague Regulations, *supra* note 20, at art. 42.

<sup>31</sup> Fourth Geneva Convention, *supra* note 21, at art. 6.

Art. 6. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. *Id.*

<sup>32</sup> *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). See Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, Yearbook of International Humanitarian Law, Vol. 8 (2006).

<sup>33</sup> Lancaster, *supra* note 22, at 51, 53.

<sup>34</sup> EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 11 (1993).

<sup>35</sup> The agreements mentioned herein have been included as they pertain to Gaza. Another agreement, the Hebron Protocol, was not included as it makes no mention of Gaza and is not relevant the subject matter of this paper.

<sup>36</sup> Fourth Geneva Convention, *supra* note 21, at art. 47. Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68 (2008).

<sup>37</sup> Oslo Accords, *supra* note 16.

<sup>38</sup> Israeli-Palestine Liberation Organization Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. 31, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Oslo II].

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<sup>39</sup> Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., Annex IV, art. V, 4(a), May 4, 1994, 33 I.L.M. 622 [hereinafter Gaza-Jericho Agreement].

<sup>40</sup> Oslo II, *supra* note 39, at Preamble.

<sup>41</sup> Wye River Memorandum, Isr.-P.L.O., Oct. 23, 1998, 37 I.L.M. 1251 [hereinafter Wye River Memo].

<sup>42</sup> The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Isr.-P.L.O., Sept. 4, 1999, 38 I.L.M. 1465 [hereinafter Sharm el-Sheikh Memo].

<sup>43</sup> *See id.*

<sup>44</sup> Vienna Convention on the Law of Treaties, Art. 2(1)(a) 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980 [hereinafter VCLT]. Art. 2(1)(a) defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” *Id.*

<sup>45</sup> *Id.* at art. 3(a) (emphasis added).

<sup>46</sup> *See generally* GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (2000).

<sup>47</sup> VCLT, *supra* note 44, at art. 3(b).

<sup>48</sup> *Id.* at art. 60(1).

<sup>49</sup> John Quigley, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements Between Sovereigns and Intermediate Sovereigns: Article: The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT’L L.J. 717, 738, *citing* S.C. Res. 904, U.N. SCOR, 49th Sess., 3351st mtg., U.N. Doc. S/RES/904 (1994), reprinted in 33 I.L.M. 548 (1994), and S.C. Res. 1073, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1073 (1996).

<sup>50</sup> *See infra* Part IV and accompanying notes.

<sup>51</sup> Fourth Geneva Convention, *supra* note 21, at art. 2.

<sup>52</sup> *Ajuri v. The Commander of IDF Forces in the West Bank and Gaza Strip*, Case No. HCJ 7015/02 (2002) and *Ajuri v. The Commander of IDF Forces in Judeaea and Samaria*, Case No. HCJ 7019/02 (2002), ISR. L. REP. 1, 2. Furthermore, in the 1978 cases of *Ayub v. Minister of Defence* and *Matawa v. Minister of Defence*, Israel’s Supreme Court repeatedly referred to Israel as an “Occupying State” and “Occupying Power.” *Ayub, et al. v. Minister of Defence, et al.*, H.C. 606/78; and *Matawa, et al. v. Minister of Defence, et al.*, H.C. 610/78. And, in the 2004 case of *Beit Sourik Village Council v. The Government of Israel*, Justice Barak noted that Israel had been in belligerent occupation of the West Bank since 1967. Case No. HCJ 2056/04, Israel Supreme Court, 30 May 2004.

<sup>53</sup> *See generally* *Ajuri id.*

<sup>54</sup> Cabinet Resolution Regarding the Disengagement Plan, Government of Israel, as published by the Prime Minister’s office, June 6, 2004, at art. 6. “The completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.” *Id.*

<sup>55</sup> John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, U.N. Doc. A/HRC/4/17 (2007). Dugard maintains that because Israel controls the airspace over Gaza, the territorial waters next to it, the adjacent land crossing points of Rafah and Karni, and external borders that Gaza is effectively occupied. *Id.*

<sup>56</sup> High Court of Justice of Israel, in response to Petition number HCJ 9132/07, 28 October 2007.

<sup>57</sup> Human Rights Watch, *Israel/Egypt: Choking Gaza Harms Civilians*, February 18, 2009, available at <http://www.hrw.org/en/news/2009/02/18/israeleypt-choking-gaza-harms-civilians>. See also B'Tselem, *The Scope of Israeli Control in the Gaza Strip*, available at [http://www.btselem.org/english/Gaza\\_Strip/Gaza\\_Status.asp](http://www.btselem.org/english/Gaza_Strip/Gaza_Status.asp).

<sup>58</sup> *Id.*

<sup>59</sup> Human Rights Watch, *Israel/Egypt: Choking Gaza Harms Civilians*, February 18, 2009, available at <http://www.hrw.org/en/news/2009/02/18/israeleypt-choking-gaza-harms-civilians>.

<sup>60</sup> The Scope of Israeli Control in the Gaza Strip, B'Tselem, available at [http://www.btselem.org/english/Gaza\\_Strip/Gaza\\_Status.asp](http://www.btselem.org/english/Gaza_Strip/Gaza_Status.asp).

<sup>61</sup> Reut Institute, End of Occupation, 11 August 2004, available at <http://reut-institute.org/en/Publication.aspx?PublicationId=375>.

<sup>62</sup> Hague Regulations, *supra* note 20, at art. 42.

<sup>63</sup> Fourth Geneva Convention, *supra* note 21, at art. 6.

<sup>64</sup> See *Hostages* case, *supra* note 32. The *Hostages* case set out a three-pronged test for occupation that required actual control, potential for control, and exclusion of the established government. The 2005 case of *Democratic Republic of Congo v. Uganda* rejected the use of potential for control as an indicator of effective control by applying a more restrictive reading of Article 42 of the Hague Regulations. Shany, *supra* note 32.

<sup>65</sup> United Nations Convention on the Law of the Sea, Sec. 2, Art. 3, Dec. 10, 1982, 1833 U.N.T.S. 3; 21 I.L.M. 1261 (entered into force Nov. 16, 1994), [hereinafter UNCLOS]. UNCLOS was adopted at the Third United Nations Conference on the Law of the Sea (UNCLOSIII) which took place from 1973 to 1982.

## Section 2. Limits of the Territorial Sea, Article 3 - Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention. *Id.*

<sup>66</sup> Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, at art. 1(1), 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311 (1958). See also Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1, 2 (1990).

<sup>67</sup> *Id.*



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<sup>68</sup> Oslo II, *supra* note 38, at art. XVII(2)(a). XVII(2)(a) states that “[t]erritorial jurisdiction includes land, subsoil and territorial waters, in accordance with the provisions of this Agreement.” *Id.*

<sup>69</sup> Gaza-Jericho Agreement, *supra* note 39, at art. V(3)(a).

<sup>70</sup> Oslo II, *supra* note 38, at art. XII(1) - Arrangements for Security and Public Order.

In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council shall establish a strong police force as set out in Article XIV below. Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility. *Id.*

<sup>71</sup> IRIN Humanitarian news and analysis, United Nations Office for the Coordination of Humanitarian Affairs, ISRAEL-OPT: Gaza fishing industry reeling, Mar. 12, 2009, *available at* <http://www.irinnews.org/report.aspx?ReportId=83422>. While the reduction in access to the adjacent waters because of Israel’s overriding security concerns may affect Gaza’s fishing industry, access to the sea is still permitted though much reduced.

<sup>72</sup> Convention on International Civil Aviation, signed at Chicago, at art. 1, December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591 [hereinafter Chicago Convention]. The Chicago Convention goes further in Article 2 to state that “For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.” *Id.* It must also be noted that the Chicago Convention applies only to civil aircraft and not state aircraft (used in military, customs, and police services), though it further states in Article 3(c) that “No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.” *Id.*

<sup>73</sup> Gaza-Jericho Agreement, *supra* note 39, at art. XII.

<sup>74</sup> See *supra* note 70 and accompanying text.

<sup>75</sup> Oslo II, *supra* note 38, at art. XVII(5).

<sup>76</sup> Egypt-Israel Treaty of Peace, Mar. 26, 1979, 18 I.L.M. 362 (1979).

<sup>77</sup> Dore Gold, *Legal Acrobatics: The Palestinian Claim that Gaza is Still “Occupied” Even After Israel Withdraws*, Vol. 5, No. 3, August 26, 2005.

<sup>78</sup> JEAN ALLAIN, INTERNATIONAL LAW IN THE MIDDLE EAST 160-1 (2004).

<sup>79</sup> BRUCE A. ELLEMAN, SARAH C.M. PAINE, NAVAL BLOCKADES AND SEAPOW 201-2 (2006).

<sup>80</sup> Justus Reid Weiner and Avi Bell, *International Law and the Fighting in Gaza*, Global Law Forum, Jerusalem Center for Public Affairs, May 1, 2009, at 16. Furthermore, the U.S. Supreme Court upheld the right of states to regulate and control the movement of persons across their borders stating that “every sovereign nation has the power, as inherent in sovereignty, and essential to its self preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe.” *Nishimura Eiku v. United States*, 142 U.S. 651, 659 (1892).

<sup>81</sup> See American Society of International Law, JOINT PROJECT ON THE GOVERNING RULES OF INTERNATIONAL LAW, THE MOVEMENT OF PERSONS ACROSS BORDERS 4 (Louis B. Sohn & Thomas Buergenthal eds., 1992). Much of the law governing borders is derived from customary law and usage. In 1992, the American Society of International Law conducted study of the generally accepted principles and rules of international law relating to the movement of persons across national borders. The study distinguished between law that has been generally accepted as customary international law by the International Court of Justice (ICJ) from law that is still in the process of emerging.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Art. 13 (Dec. 12, 1948) [hereinafter UDHR]. Although non-binding, the UDHR serves as persuasive authority governing a country’s border obligations.

<sup>84</sup> See THE MOVEMENT OF PERSONS ACROSS BORDERS, *supra* note 81, at 1-12.

<sup>85</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 12 (2005).

<sup>86</sup> Article 14(1) of the UDHR states that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” UDHR, *supra* note 83, at art. 14(1).

<sup>87</sup> The principle of non-refoulement also requires states to grant access to a territory to refugees who seek protection. Article 33(1) of the UN Convention relating to the Status of Refugees provides, “No contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention relating to the Status of Refugees, entered into force April 22, 1954, 189 U.N.T.S. 150.

<sup>88</sup> Sufa was closed by Israel on October 2007, was later reopened for the transfer of humanitarian assistance. It was closed again due to security concerns.

<sup>89</sup> Kerem Shalom also provides access to the EUBAM to enter the Rafah crossing point from Israel. See *infra* note 98 and accompanying text.

<sup>90</sup> Agreement on Movement and Access, Nov. 15, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm> [hereinafter AMA]. The negotiations for the AMA were facilitated by US Secretary of State Condoleezza Rice, EU High Representative for the Common Foreign and Security Policy Javier Solana and the international community’s envoy for the Israeli disengagement from Gaza, James Wolfensohn.

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<sup>91</sup> Agreed Principles for Rafah Crossing, Nov. 15, 2005, *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm> [hereinafter APRC].

<sup>92</sup> Greg Myre, *Gaza Crossings: Choked Passages to Frustration*, N.Y. TIMES, Mar. 4, 2006, *available at* <http://www.nytimes.com>.

<sup>93</sup> This accusation is continuously promulgated by John Dugard, the Special Rapporteur to the Human Rights Council on the situation of human rights in occupied Palestinian territory. *See* Isabel Kershner, *Israeli Airstrike in Gaza Kills 2 Hamas Members*, N.Y. TIMES, Jan. 20, 2008, *available at* <http://www.nytimes.com/2008/01/20/world/middleeast/20mideast.html>.

<sup>94</sup> Yaakov Lappin, *After foiled Gaza attack, IDF says Hamas risking another Gaza offensive*, JERUSALEM POST, June 9, 2009.

<sup>95</sup> Israel also withdrew from the Philadelphi Route, which is a narrow strip adjacent to the Strip's border with Egypt, after Egypt's agreement to secure its side of the border, in order to avoid allegations that it was still in occupation of any part of the Gaza Strip. The Oslo Accords dictated that the Philadelphi Route remain under Israeli control to prevent the smuggling of materials (such as ammunition) and people across the border with Egypt. However, Egypt agreed to patrol its side of the border.

<sup>96</sup> APRC, *supra* note 91.

<sup>97</sup> Robin Wright & Scott Wilson, *Rice Negotiates Deal to Open Gaza Crossings*, WASH. POST, Nov. 16, 2005, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111500144.html>.

<sup>98</sup> APRC, *supra* note 91.

<sup>99</sup> EU Border Assistance Mission at Rafah Crossing Point, Mar. 2009, *available at* [http://www.consilium.europa.eu/uedocs/cmsUpload/090325%20FACTSHEET%20EUBAM%20Rafah%20-%20version%2010\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/090325%20FACTSHEET%20EUBAM%20Rafah%20-%20version%2010_EN.pdf) [hereinafter EUBAM].

<sup>100</sup> Hamas is considered a terrorist organization by Canada, the European Union, Israel, Japan, and the United States. Australia and the United Kingdom list the military wing of Hamas, the Izz ad-Din al-Qassam Brigades, as a terrorist organization.

<sup>101</sup> The Agreement on Movement and Access One Year On, Nov. 2006, *available at* [http://www.ochaopt.org/documents/AMA\\_One\\_Year\\_On\\_Nov06\\_final.pdf](http://www.ochaopt.org/documents/AMA_One_Year_On_Nov06_final.pdf) [hereinafter AMA One Year On]. Even though Hamas won the election, the Rafah crossing remained open nearly every day through June 25, 2006, aided in part by Mahmoud Abbas' Presidential Guard taking control of the crossing in April 2006.

<sup>102</sup> Philippe Naughton, *Gazans Pour Into Egypt After Militants Blast Hole In Border*, Jan. 23, 2008, *available at* [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article3236517.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article3236517.ece).

<sup>103</sup> EUBAM, *Temporary Suspension of Operations*, *available at* <http://www.eubam-rafah.eu/portal/en/node/399>.

<sup>104</sup> Calev Ben-David, *Analyze This: Waiting For the Call to Return to Rafah*, JERUSALEM POST, Apr. 21, 2008, *available at* [http://ue.eu.int/uedocs/cmsUpload/080421\\_JerusalemPost\\_Analyze\\_this-waiting\\_for\\_the\\_call\\_to\\_return\\_to\\_Rafah.pdf](http://ue.eu.int/uedocs/cmsUpload/080421_JerusalemPost_Analyze_this-waiting_for_the_call_to_return_to_Rafah.pdf).

<sup>105</sup> On May 19, 2008, the EU Council adopted a joint action extending the mandate of the mission until November 24, 2008 and on November 10, 2008, the Council extended the mandate of the EUBAM Rafah Mission until November 24, 2009. EUBAM, *supra* note 99.

<sup>106</sup> See *supra* Part IV(A), at note 50.

<sup>107</sup> Adam Entous, *War-ravaged Gaza power company pays shareholders*, REUTERS, Apr. 23, 2009, available at <http://www.reuters.com/article/middleeastCrisis/idUSLE319399> (notes the profitability of the Gaza power plant). The power plant was damaged by Israeli missiles in the latest round of fighting, but it appears that the damage is repairable. Martin Patience, *Gaza's Infrastructure Suffers*, BBC NEWS, June 29, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/5130510.stm](http://news.bbc.co.uk/2/hi/middle_east/5130510.stm).

<sup>108</sup> Entous *id.*

<sup>109</sup> Oslo II, *supra* note 38, at Annex III, art. 10.

<sup>110</sup> Patience, *supra* note 107, indicates that the IEC produces half of Gaza's electricity. But see *EU Confirms Halt to Gaza Fuel Aid*, BBC NEWS, Aug. 20, 2007, available at [http://news.bbc.co.uk/2/hi/middle\\_east/6954120.stm](http://news.bbc.co.uk/2/hi/middle_east/6954120.stm) (the plant produces "at least 25%" of electricity); Tani Goldstein, 'We're Supplying Electricity to Gaza Under Qassam Fire', YNetNews.com, Jan. 1, 2008, available at <http://www.ynet.co.il/english/articles/0,7340,L-3496729,00.html> (the Israel Electric Corporation supplies 70% and the Gaza plant supplies 30%). It is possible to reconcile these numbers taking into account that the plant has been damaged and repaired, and that demand has also probably varied.

<sup>111</sup> Gaza-Jericho Agreement, *supra* note 39, at art. II(24)(b). The section goes further to state that "[The] Agreement shall relate to the settling of debts; to IEC property; and to the maintenance of lines to Palestinian customers." *Id.*

<sup>112</sup> *Id.* at Annex II, art. II(36)(e). "Transfer of gas or fuel products through or to Israel and the West Bank shall be in accordance with Israeli standards concerning safety, security and environmental protection, and in accordance with the arrangements regarding entry into Israel." *Id.*

<sup>113</sup> Oslo II, *supra* note 38, Annex III, art. 36.

<sup>114</sup> World Health Organization, *Gaza Strip Health Cluster Weekly Bulletin No 2 – 4* (February 2009), available at [http://www.who.int/hac/crises/international/wbgs/sitreps/gaza\\_health\\_cluster\\_4feb2009/en/index.html](http://www.who.int/hac/crises/international/wbgs/sitreps/gaza_health_cluster_4feb2009/en/index.html). See also Human Rights Watch, *Israel: 'Disengagement' Will Not End Gaza Occupation*, Oct. 24, 2004, available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation>.

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<sup>115</sup> David Jolly and Andrew E. Kramer, *Ukraine says Russia halts all gas to Europe*, N.Y. TIMES, Jan. 7, 2009, available at <http://www.nytimes.com/2009/01/07/world/europe/07iht-08gazprom.19150762.html>; Ariel Cohen, *European Security and Russia's Natural Gas Supply Disruption*, The Heritage Foundation, Jan. 8, 2009, available at <http://www.heritage.org/research/russiaandeurasia/wm2194.cfm>.

<sup>116</sup> Deborah Halber, *Seventies oil crisis was a 'perfect storm' for U.S.*, Massachusetts Institute of Technology News Office, Mar. 23, 2007, available at <http://web.mit.edu/newsoffice/2007/jacobs.html>.

<sup>117</sup> Human Rights Watch, *Israel: 'Disengagement' Will Not End Gaza Occupation*, Oct. 24, 2004, available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation>.

<sup>118</sup> Oslo II, *supra* note 38, Annex III, art. 40(3).

<sup>119</sup> Gaza-Jericho Agreement, *supra* note 39, at art. 31(a).

<sup>120</sup> *Id.* at art. 31(e).

<sup>121</sup> *Id.* at art. 31(f).

<sup>122</sup> *Id.* at art. 31(a). See also Erin Cunningham, *Gaza Collects So Much Rubbish*, Inter Press Agency, May 29, 2009, available at <http://ipsnews.net/news.asp?idnews=47021>.

<sup>123</sup> Gaza-Jericho Agreement, *supra* note 39, at art. 31(a).

<sup>124</sup> *Id.* at art. 35(c).

<sup>125</sup> *Id.* at art. 31(b). Article 31(b) states “As an exception to subparagraph a., the existing water systems supplying water to the Settlements and the Military Installation Area, and the water systems and resources inside them continue to be operated and managed by Mekoroth Water Co.” *Id.*

<sup>126</sup> Global Water Intelligence, *Mekorot restructuring plan gets the go-ahead*, April 2002, available at <http://www.globalwaterintel.com/archive/3/4/general/mekorot-restructuring-plan-gets-the-go-ahead.html> (notes that a Mekorot subsidiary supplies water to Gaza); Maher Najjar, *Fire and Water in Gaza*, WASH. POST, Nov. 27, 2007, at A17 (the head of Gaza’s Coastal Municipalities Water Utility says that power is needed to run Gaza’s wells and sewer facilities).

<sup>127</sup> See *supra* Part IV(C)(1) and accompanying notes regarding electricity.

<sup>128</sup> Oslo Accords, *supra* note 16, at art. VI(2).

<sup>129</sup> Gaza-Jericho Agreement, *supra* note 39, at art. V(1)-(3) and art. VI(1).

<sup>130</sup> *Id.* at art. V(1).

<sup>131</sup> *Id.* at art. V(4).

<sup>132</sup> See United States Internal Revenue Service regarding taxation of foreign agricultural workers and non-resident aliens, available at <http://www.irs.gov>.

<sup>133</sup> Oslo II, *supra* note 38, at Annex V, art. V(4).

<sup>134</sup> *Id.* at Annex V, art. VI(3).

<sup>135</sup> *Id.* at Annex V, art. V(1).

<sup>136</sup> Gaza-Jericho Agreement, *supra* note 39, at art. VI(1)(d).

<sup>137</sup> Oslo II, *supra* note 38, at art. 28 (1) and (2).

<sup>138</sup> *Id.* at art. X(2)(f).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> *Id.* at Annex II, art. I(27)(a).

<sup>141</sup> *Id.* at Annex II, art. II(27)(d) and (e).

<sup>142</sup> *Id.* at Annex II, at art. II(27)(c).

<sup>143</sup> United Nations Charter art. 51. Article 12 of the United Nations Draft Declaration on Rights and Duties of States of 1949 states that “[e]very State has the right of individual or collective self-defense [sic] against armed attack.” Draft Declaration on Rights and Duties of States, annexed to G.A. Res. 375 (IV), G.A.O.R., 4th session, at art. 12 (1949), available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2\\_1\\_1949.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf). The Draft Declaration was adopted by the International Law Commission at its first session in 1949 and it was submitted to the General Assembly as a part of the Commission’s report covering the work of that session. See also R.P. DHOKALIA, *THE CODIFICATION OF PUBLIC INTERNATIONAL LAW* 272 (Manchester Univ. Press, 1970).

<sup>144</sup> William V. O’Brien, *Reprisals, Deterrence, and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT’L L. 421 (1990); See also generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (4th ed. 2005).

<sup>145</sup> See S. C. Res. 1368, U.N. Doc. S/Res/1368, Sep. 12, 2001. “Determined to combat by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter.” *Id.* Relatedly, it is also interesting to note that the ICJ rejected Israel’s self-defense claim in its Advisory Opinion on Israel’s security fence.

<sup>146</sup> See *supra* notes 69-70 and accompanying text.

<sup>147</sup> *Human Rights and the Functioning of Democratic Institutions in Emergency Situations*, European Commission on Democracy through Law, 3-5 October 1996, No. 17 at 39. See also Bernhard Blumenau, *Sixty Years of the Federal Republic of Germany*, May 2009, available at <http://www.fondation-pierredubois.ch/Papiers-d-actualite/sixty-years-of-the-federal-republic-of-germany.html>.

<sup>148</sup> See Disengagement Plan – General Outline, *supra* note 2.

<sup>149</sup> *Human Rights and the Functioning of Democratic Institutions in Emergency Situations*, *supra* note 147, at 37.

<sup>150</sup> *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Mar. 31, 2003, Trial Chamber, ICTY.

<sup>151</sup> *Naletilic and Martinovic id.*, citing *Manual of Military Law of War on Land*, United Kingdom, Part III, 1958, paras 502, 506; *The Law of Land Warfare*, Field Manual No. 27-10, United States Department of the Army, July 18, 1956, at ch. 6, para. 356; *Interim Law of Armed Conflict Manual*, New Zealand Defence Force, Nov. 26, 1992, at paras 1302.2, 1302.3 and 1302.5.

<sup>152</sup> *Naletilic and Martinovic*, *supra* note 150, at para. 217.

<sup>153</sup> *Id.* at para. 218. (emphasis added).

<sup>154</sup> *Democratic Republic of Congo v. Uganda, Case Concerning Armed Activities in the Territory of the Congo*, December 19, 2005, 116 I.C.J. 2005, at para. 173.

<sup>155</sup> Shany, *supra* note 32.

<sup>156</sup> Hague Regulations, *supra* note 20, at arts. 42, 43, and 45.

<sup>157</sup> *Id.* at art. 43.

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<sup>158</sup> See Ethan Bronner, *Israel Speeds Withdrawal from Gaza*, N.Y. TIMES, Jan. 19, 2009, at A6. See also, Rami Almeghari, *Mohammad Awad: Hamas runs Gaza within an emergency plan*, International Middle East Media Center, Feb. 22, 2009, available at <http://www.imemc.org/article/58968> (pro-Palestinian news organization quotes Hamas leadership saying that Hamas “administers daily life” and provides services in Gaza using on-the-ground governing committees).

<sup>159</sup> See Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 18, 2009, at A1.

<sup>160</sup> *How Hamas took over the Gaza Strip*, BBC NEWS, June 15, 2007, available at [http://news.bbc.co.uk/2/hi/middle\\_east/6748621.stm](http://news.bbc.co.uk/2/hi/middle_east/6748621.stm).

<sup>161</sup> Oslo II, *supra* note 38, at art. 31(7).

<sup>162</sup> Wye River Memo, *supra* note 41, at art. 5; Sharm el-Sheikh, *supra* note 42, at art. 10.

<sup>163</sup> Nicholas Stephanopoulos, *Israel’s Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT’L L. 524, 525-6 (2006).

<sup>164</sup> Israel Ministry of Foreign Affairs, November 5, 2003, available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2003/11/Israel-the+Conflict+and+Peace+Answers+to+Frequency+2003.htm](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/11/Israel-the+Conflict+and+Peace+Answers+to+Frequency+2003.htm).

<sup>165</sup> Oslo II, *supra* note 38, at art. XXXI(7) (emphasis added); see also Wye River Memo, *supra* note 41, at art. V (“Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”); Sharm el-Sheikh Memo, *supra* note 42, at art. 10 (same).

<sup>166</sup> Oslo Accords, *supra* note 16, at art. VI; Oslo II, *supra* note 38, at art. XI(1); Gaza-Jericho Agreement, *supra* note 39, at Art. XXII(6).

<sup>167</sup> Fourth Geneva Convention, *supra* note 21, at art. 6.

<sup>168</sup> *Id.*

<sup>169</sup> Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation* (forthcoming in Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, Endreas Zimmermann and Thomas Giegerich, eds., 2009)

<sup>170</sup> CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION 103-4 (2008). See also, Namibia-UNTAG, available at [http://secint24.un.org/Depts/dpko/dpko/co\\_mission/untagFT.htm](http://secint24.un.org/Depts/dpko/dpko/co_mission/untagFT.htm). Namibia presented a unique case in international law that required intervention and administration by the United Nations. Formerly a German colony, South Africa occupied Namibia after World War I and administered it as a League of Nations mandate territory. The United Nations superseded the League of Nations in 1946 and declared the area a United Nations Trusteeship, but South Africa refused to relinquish its hold. In 1966, the U.N. General Assembly terminated the Mandate of South Africa to administer the territory, placing it under the direct responsibility of the United Nations, though South Africa still held the territory until 1988. On February 16, 1989, the Security Council implemented a settlement proposal for Namibia, a negotiated compromise, which led to an unusual, or *sui generis*, United Nations operation: the *de facto* occupying Power, South Africa, and the United Nations, the *de jure* authority, worked together to assist the Namibian people in

exercising their right of self-determination. On March 21, 1990, Namibia gained its independence. *Id.*

<sup>171</sup> James Hughes, *The Kosovo Precedent? Implications for Frozen Conflicts*, Mar. 23, 2007, LSE and UNDP Developments & Transitions, available at <http://developmentandtransition.net/index.cfm?module=ActiveWeb&page=WebPage&DocumentID=637>. The disputed Balkan state of Kosovo is governed in the majority by the partially-recognized Republic of Kosovo, a self declared independent state which has de facto control over the territory. Kosovo was under the administration of the United Nations Mission in Kosovo (UNMIK) after the 1999 NATO bombing of Yugoslavia until Kosovo's declaration of independence in February 2008. Kosovo is not recognized by neighboring Serbia, who considers Kosovo to be a U.N.-governed sovereign entity within its own territory. The conflict between Serbia and Kosovo has often been characterized as a *sui generis* circumstance that does not have implications for other conflicts. However, Russia and other states involved in the 'frozen conflicts' of the former Soviet Union, however, believe that the resolution in Kosovo will set a precedent and will establish 'common principles' for dealing with 'frozen conflicts'. *Id.* As of this writing, 62 states have recognized Kosovo.

<sup>172</sup> *Russian envoy: Ossetia, Abkhazia "sui generis" cases*, August 29, 2008, available at <http://www.greekembassy.org/embassy/Content/en/Article.aspx?office=1&folder=19&article=24156>.

<sup>173</sup> New Caledonia is said to be *sui generis* because it is the only French subdivision that is not a "territorial collectivity." A territorial collectivity within the French Republic is the generic name for all subnational entities and dependent areas which have an elected local government and, according to Article 72 of the French constitution, a "certain freedom of administration." New Caledonia was a French colony until 1946, then an overseas territory from 1946 to 1999. The Organic Law of March 19, 1999 changed the status to *sui generis* collectivity and allowed for the establishment of new institutions for New Caledonia including its Congress, Government, Customary Senate, and Economic and Social Council. In addition, the 1998 Noumea Accord, which prescribed the new status of *sui generis* collectivity to New Caledonia gave the area greater autonomy, set aside the opportunity for a referendum to take place between 2014 and 2019 which would decide whether to declare independence from France or to remain a *sui generis* collectivity. *Regions and Territories: New Caledonia*, Dec. 11, 2008, BBC NEWS, available at [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/3921323.stm](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/3921323.stm).

<sup>174</sup> Non-Self-Governing Territories Listed by General Assembly in 2002, available at <http://www.un.org/depts/dpi/decolonization/trust3.htm>. The sixteen territories are: Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, Guam, New Caledonia, Pitcairn, and Tokelau. *Id.*

<sup>175</sup> EMMA PLAYFAIR, INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, 464-5 (1992), citing *Mil. Pros. V. Suhadi S. H. Zuhad*, 47 ISR. L. REV. 490 (1974). See also, LISA HAJAR, COURTING CONFLICT 54 (2005).



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<sup>176</sup> At the time Israel commenced its presence in the West Bank and Gaza, the sovereignty over those two areas was unclear. Since 1948, Egypt controlled Gaza and did not incorporate it into Egyptian territory and did not declare sovereignty over the area as it considered it to be a part of Palestine and was retaining that status pending the establishment of a Palestinian state. Jordan had been in control of the West Bank since 1948 incorporating it into Jordanian territory and claiming sovereignty, but also pending the establishment of a Palestinian state. In 1988, when the Palestine National Council declared statehood for Palestine, Jordan relinquished its claim to the territory. Quigley, *supra* note 49, at 728.

<sup>177</sup> Fourth Geneva Convention, *supra* note 21, at art. 2(2).

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties....

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

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. *Id.*

<sup>178</sup> See *supra* note 53 and accompanying text.