

## OCCUPIED OR NOT: THE QUESTION OF GAZA'S LEGAL STATUS AFTER THE ISRAELI DISENGAGEMENT

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In September 2005, Israel withdrew its army and dismantled all of its settlements in the Gaza Strip, claiming that Gaza's occupation had come to an end. Yet Israel did retain control over Gaza's border crossings, aerial and water space; leading to claims by the Palestinian side as well as some international scholars that the Israeli occupation had not come to an end. The following note will examine these arguments and will take the position that the current status of the Gaza Strip is a *sui generis* one, where positive law, applied *in globo*, cannot provide an adequate approach. As such, any Israeli obligations in post-disengagement Gaza should be seen under the prism of natural law.

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## I. INTRODUCTION

In September 2005, after thirty-eight years of occupation, Israel withdrew its army from the Gaza Strip ("Gaza" or "the Strip") and evacuated all of its settlements, retaining control over the Strip's naval and aerial space as well as its crossings.<sup>1</sup> While Israel did contend that its occupation of the area had come to an end, Israeli control over the Strip's naval and aerial space sparked a debate among Israelis and Palestinians, as well as international legal scholars, as to whether Israeli occupation of the Strip had truly ended.<sup>2</sup>

The following article will present the various arguments and take the position that post-disengagement Gaza should be seen as a legal hybrid, due to the factual complexities that modern international humanitarian law has to face. While not occupied by Israel, Gaza cannot be considered "non-occupied" because of Israel's exertion of a certain degree of control over the area, as well as for reasons pertaining to protection of the local population's rights. This article will argue that due to the *sui generis* status of post-disengagement Gaza, a positivist branch of international law, such as international humanitarian law or human rights law, does not apply *in globo* and thus any Israeli obligations in the Gaza Strip should be perceived as based on natural law.

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<sup>1</sup> ISRAEL PRIME MINISTER'S OFFICE, THE CABINET RESOLUTION REGARDING THE DISENGAGEMENT, (Jun. 6, 2004), available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm>.

<sup>2</sup> See *infra* Part II.B.

## II. THE GAZA STRIP AND ITS LEGAL STATUS BEFORE AND AFTER 2005

### A. Status of the Gaza Strip from 1948 until 2005

The Gaza Strip, located between Israel and Egypt, occupies an area of three hundred and sixty square kilometers and is the most densely populated area in the world.<sup>3</sup> After the establishment of the State of Israel in 1948, the area remained under Egyptian control, yet Egypt never annexed it.<sup>4</sup> In 1967, after the Six Day War, the area passed to Israeli control.<sup>5</sup>

The fact that Egypt never annexed the territory led Israel to argue that the Fourth Geneva Convention did not apply to the territory during the first years of the Israeli occupation of the Strip.<sup>6</sup>

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<sup>3</sup> Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUMANITARIAN L. 369, 369-71 (2006).

<sup>4</sup> Robert A. Caplen, *Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defense as Interpreted by the International Court of Justice at the Hague*, 18 FLA. J. INT'L L. 679, 689 (2006).

<sup>5</sup> Shany, *supra* note 3.

<sup>6</sup> The Israeli argument was that since Article 2(2) of the Fourth Geneva Convention states that the provisions of the convention relate only to the occupation of territories of a High Contracting Party, the provisions of the convention did not apply to Israeli's activities in the West Bank and the Gaza Strip. See Fourth Geneva Convention Relating to the Protection of Civilian Persons in Time of War art. 33(1), Aug. 12, 1949, 75 U.N.T.S. 287. Israel contended that this was due to the fact that the West Bank and Gaza Strip were not part of Egypt or Jordan; as Egypt did not annex any part of the Gaza Strip and Jordan's annexation of the West Bank was not acknowledged by any countries other than Great Britain and Pakistan. See JULIUS STONE, NO PEACE-NO WAR IN THE MIDDLE EAST 39 (1969); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 108 (1993) (analyzing the Egyptian and Jordanian positions towards the Gaza Strip and the West Bank, respectively); Barry A. Feinstein & Justus R. Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT'L L. REV. 391 (2005); Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968) (providing a thorough analysis of the Israeli argument on the non applicability of the Geneva Conventions in the territories captured in 1967). See also Meir Shamgar, *The Observance of International Law in the Administered Territories* ISR. Y. B. HUM. RTS. 262 (1971) [hereinafter Shamgar, *Administered Territories*]; Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485 (1990); JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 177-78, 209, n.2 (1981); EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL 51 (1990); AMNON RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 262-66 (5th ed. 1996) (in Hebrew); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 62-66 (1990) [hereinafter Roberts, *Prolonged Military Occupation*]. See also Nicolas Haupais, *Les Obligations De La Puissance Occupante Au Regard de La Jurisprudence Et De La*

Due to the fact that international humanitarian law applies to the status of an occupation, the Israeli stance implicitly objected to the characterization of its presence in the Gaza Strip and the West Bank as an "occupation." Indeed, for years the official Israeli stance was that the territories captured in 1967 were "disputed" and not "occupied."<sup>7</sup>

Yet, Israel did agree to a *de facto* application of the humanitarian provisions of the Fourth Geneva Convention; without, however, specifying which provisions would apply.<sup>8</sup> Following in the footsteps of the Israeli Government, the Israeli Supreme Court referred to provisions of the Fourth Geneva Convention in various cases concerning the legality of Israel's measures in the specific territories.<sup>9</sup>

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*Pratique Recentes* [The Obligations of the Occupying Power With Regard to the Jurisprudence of Recent Practices], 111 REVUE GENERALE DE DROIT INT'L PUB. 117, 123-24 (2007) (Fr.) (discussing contrasting views on why Israel should not apply the Fourth Geneva Convention in the West Bank); David John Ball, *Toss The Travaux? Application of the Fourth Geneva Convention To The Middle East Conflict-A Modern (Re)Assessment*, 79 N.Y.U. L. REV. 990 (2004).

<sup>7</sup> Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government-The Initial Stage*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 13 (Meir Shamgar ed., 1982); Kenneth Anderson, *Israel's Views of the Application of IHL to the West Bank and Gaza Strip*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 54 (Roy Gutman et al. eds., 2007), available at <http://www.crimesofwar.org/the-book/Israels-view-applicability.html>.

<sup>8</sup> Shamgar, *Administered Territories*, *supra* note 6, at 262; Legal Consequences from the Construction of a Wall in the Palestinian Occupied Territory, 2004 I.C.J. 136, ¶ 93 (Jul. 9) [hereinafter Legal Consequences]; CLAUDE BRUDERLEIN, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, POLICY BRIEF: LEGAL ASPECTS OF ISRAEL'S DISENGAGEMENT PLAN UNDER INTERNATIONAL HUMANITARIAN LAW 3 (2004) [hereinafter HARVARD POLICY BRIEF ON ISRAEL'S DISENGAGEMENT PLAN], available at <http://www.reliefweb.int/library/documents/2004/hvu-opt-20oct.pdf>.

<sup>9</sup> See e.g., HCJ 2056/04 Beit Sourik Village Council v. Israel 58(5) PD 807, ¶ 23 [2004] (Isr.), where the Court assumed that the "the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review"; see also HCJ 4764/04 Physicians for Human Rights v. Commander of IDF Forces 58(5) PD 385, ¶ 19 [2004] (Isr.) (holding that the Fourth Geneva Convention applies in the IDF operations in the Gaza Strip). For the Court's established jurisprudence of rejecting the *de jure* application of the Geneva Conventions, see HCJ 606/78 Ayoub v. Minister of Defense 33(2) PD 113 [1978] (Isr.); HCJ 390/79 Dwaikat v. Israel 34(1) PD 1 [1979] (Isr.); HCJ 698/80 Kawasme v. Minister of Defense 35(1) PD 617 [1980] (Isr.); HCJ 393/82 Jam'iyat Ascan El Malmun el Mahduleh el Masauliyeh v. Commander of IDF Forces 37(4) PD 785, 794; HCJ 7015/02 Ajuri v. IDF Commander 56(6) PD 352, 364 [2002] (Isr.); and HCJ 3278/02 Ctr. for the Defense of the Individual v. Commander of IDF Forces 57(1) PD 385, 396 [2002] (Isr.). See also HCJ 393/82 Jam'iyat Ascan El Malmun el Mahduleh el Masauliyeh v. Commander of IDF Forces 37(4) PD 785, 793 [1982] (Isr.) for Judge Barak's summary of the Su-

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Despite the Israeli position, the international community has always viewed the territories captured in 1967 as “occupied”<sup>10</sup> and the Geneva Conventions—encapsulating to a large extent international customary law<sup>11</sup>—as applying, not only *de facto*, but also *de jure*.<sup>12</sup> As such, it should come as no surprise that the International-

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preme Court's position that while the Hague Regulations are part of customary law applicable in Israel;

[T]he same does not apply to the Geneva Convention . . . which even if applicable to Israel's belligerent occupation of Judea and Samaria . . . constitutes above all else a constitutive convention which does not adopt existing international customs, but generates new norms whose application in Israel demands an act of legislation.

<sup>10</sup> See generally S.C. Res. 1544, U.N. Doc. S/RES/1544 (May 19, 2004); G.A. Res. 58/292, U.N. GAOR, 58th Sess., U.N. Doc. A/Res/58/292 (May 17, 2004) for decisions relevant to the “occupied” status of captured territories issued by the various U.N. bodies. See also Legal Consequences, *supra* note 8, at ¶ 93, (stating the relevant pronouncement of the International Court of Justice in its advisory opinion on Israel's security fence).

<sup>11</sup> See Gen. Comm. of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary- IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51

(Jean S. Pictet ed., 1958) for a vast bibliography on the issue. See also R. Yingling and R. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 411 (1952); GEORG SCHWANZERBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 165 (1968); Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y. B. HUM. RTS. 106, 111-12 (1979); Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 23-24 (Dieter Fleck ed., 1995).

<sup>12</sup> See S.C. Res. 237, U.N. Doc. S/RES/237 (Jun. 14, 1967) stating that all the obligations [of the Fourth Geneva Convention] should be complied with by the parties involved in the conflict. A host of other United Nations resolutions have urged the Israeli government to accept the *de jure* application of the Geneva Conventions. See S.C. Res. 271, U.N. Doc. S/RES/271 (Sept. 15, 1969); S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979); S.C. Res. 681, U.N. Doc. S/RES/681 (Dec. 20, 1990); S.C. Res. 799, U.N. Doc. S/RES/799 (Oct. 6, 1992); S.C. Res. 904, U.N. Doc. S/RES/904 (Mar. 18, 1994). See also G.A. Res. 2252 (ES-V), U.N. Doc. A/RES/2252 (Jul. 4, 1967). See also U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987, “THE OCCUPIED TERRITORIES,” 1189 (1988), available at <http://www.arch>

[ive.org/stream/countryreportson1987unit#page/1188/mode/2up](http://www.arch) (clarifying the position of the United States in favor of the *de jure* application of the Geneva Conventions). See also Legal Consequences, *supra* note 8, ¶¶ 94-95 for the position of the International Court of Justice. For criticism of the Israeli stance of the *non-de jure* application of the Fourth Geneva Convention among international law scholars, see Yoram Dinstein, *Judgment Regarding Pithat Rafiah* (in Hebrew), 3 IYUNEI MISHPAT 938 (1974); Roberts, *Prolonged Military Occupation*, *supra* note 6, at 85; W. Thomas Mallison & Sally V. Mallison, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 262 (1986); Richard Falk & Burns Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 132 (Emma Playfair ed., 1992); Yuval Shany, *Israeli Counter-Terrorism Measures: Are They "Kosher" Under International Law?*, in TERRORISM AND

al Court of Justice, the international community's main judicial body, took such a stance in its advisory opinion on Israel's security fence.<sup>13</sup>

Once conceded that the Fourth Geneva Convention provisions did apply *de jure*, Israeli settlements established in the West Bank and the Gaza Strip, principally on security considerations as defense assets,<sup>14</sup> but later also on ideological grounds, were condemned as illegal and as violations of article 49(6) of the Fourth Geneva Convention. Specifically, the settlements were seen as violations of article forty nine's prohibition on the transfer of an occupying power's civilian population to an occupied territory.<sup>15</sup>

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INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96, 101-02 (Michael Schmitt & Gian Luca Beruto eds., 2003), <http://web.ihl.org/ihl/Album/terrorism-law.pdf>.

<sup>13</sup> Legal Consequences, *supra* note 8, ¶¶ 78, 120.

<sup>14</sup> Mark Tessler, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 466 (1994).

<sup>15</sup> See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention], available at <http://www.unhcr.org/refworld/docid/3ae6b36d.html>. See also European Council, The Venice Declaration on the Middle East ¶ 9 (June 13, 1980), available at <http://www.knesset.gov.il/proc>

<http://www.knesset.gov.il/proc> docs/venice\_eng.htm. See also Declaration by the Presidency on Behalf of the European Union on Israeli Settlement Activities, Brussels Council of the European Union (Apr. 4, 2001), available at [http://www.fmep.org/settlement\\_info/settlement-freeze/declaration-by-the-presidence](http://www.fmep.org/settlement_info/settlement-freeze/declaration-by-the-presidence)

[http://www.fmep.org/settlement\\_info/settlement-freeze/declaration-by-the-presidence](http://www.fmep.org/settlement_info/settlement-freeze/declaration-by-the-presidence); Int'l Comm. of the Red Cross, *Statement by the International Commission of the Red Cross to the Conference of High Contracting Parties to the Fourth Geneva Convention* ¶ 5 (Dec. 5, 2001), available at <http://www.icrc.org/>

<http://www.icrc.org/> Web/eng/siteeng0.nsf/htmlall/57JRGW. A wide range of U.N. Resolutions of the General Assembly as well as the Security Council address the topic at hand. See generally G.A. Res. 31/106A, U.N. GAOR, 31st Sess., Supp. No. 39, U.N. Doc. A/31/39, at 50 (Dec. 16, 1976); G.A. Res. 35/122B, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/48, at 90 (Dec. 11, 1980); G.A. Res.39/95C, U.N. GAOR, 39th Sess., 100th Mtg 103, U.N. Doc. A/RES/39/95, at 2 (Dec. 14, 1984); G.A. Res. 43/58C, U.N. GAOR, 43d Sess., Supp. No. 49, at 121-22, U.N. Doc. A/43/49, at 121 (Dec. 6, 1988); G.A. Res. ES-10/3, U.N. GAOR, 10th Emergency Special Sess., 5th Mtg, U.N. Doc. A/Res/ES-10/3, at 2 (July 30, 1997); S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/774/43/PDF/N9777443.pdf?OpenElement>;

S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/370/66/IMG/NR037066.pdf?OpenElement>;

S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/399/58/IMG/NR039958.pdf?OpenElement>;

S.C. RES. 471 U.N. Doc. S/RES/465 (June 5, 1980), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/399/64/IMG/NR039964.pdf?OpenElement>.

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Thus, throughout the post-1967 Israeli presence in the Gaza Strip, a legal certainty regarding the status of these territories existed. As long as they were considered "occupied," Israel and the international community were aware that the former had certain international obligations towards the Palestinian residents.<sup>16</sup>

*B. The Gaza Strip and its Legal Status after 2005*

*1. The Position of International Actors*

*a. The Israeli Stance*

The legal certainty of definite Israeli occupation of the Gaza Strip came to an end in 2005.<sup>17</sup> In September 2005, Israel implemented Prime Minister Sharon's plan of disengagement from the Gaza Strip, and Israel terminated all civilian and military presence in the area.<sup>18</sup> Moreover, the IDF order of 1967 establishing military rule in the Strip was revoked.<sup>19</sup> This act was accompanied by the official Israeli position that the completion of the disengagement signaled the end of Israel's occupation of Gaza, thus dispelling any claims of Israel's responsibility for the Palestinians in the

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<sup>16</sup> See *infra* section IV, for the disagreement between Israel and the international community regarding whether these obligations stemmed only from international humanitarian law or also extended to human rights law.

<sup>17</sup> As an interesting example of the blurred status of the Gaza Strip after Israel's disengagement, note the remarks of the Deputy-Attorney General of the State of Israel in front of the Knesset's Constitution and Law Committee. Deputy Attorney General Mike Blass, Comments to the Knesset Constitution and Law Committee, DK (2007) 255 (Isr.) (in Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/huka/2007-06-18.rtf>.

Deputy Attorney Mike Blass asked the Committee to approve the exemption of the Gaza Strip from these territories captured in 1967, where Israeli law provisions were extended to Israeli citizens. *Id.* He stressed that "from a legal point of view [the Gaza Strip] has to be closed, so that a soldier will know that he should refrain from going out there, since it is not like Judea and Samaria, where there has to be free movement, but it [the Gaza Strip] is something else," without elaborating more on the legal status of the area. *Id.*

<sup>18</sup> While the disengagement plan was executed by Ariel Sharon's administration, it has to be emphasized that the particular decision to disengage Gaza culminated a debate that had been ranging in the Israeli government for more than ten years, regarding Israel's macro-term attitude towards Gaza. See Caplen, *supra* note 4, at 700.

<sup>19</sup> *Exit of IDF Forces From the Gaza Strip Completed*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Sep. 12, 2005), <http://www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm>.

Gaza Strip.<sup>20</sup> Similar contentions were voiced not only by Israeli officials,<sup>21</sup> but also by international legal experts in the academic world, stressing that the Israeli occupation of the Gaza Strip had thus come to an end.<sup>22</sup>

In a 2007 case before the Israeli Supreme Court, the Israeli government clarified that it did not view the Gaza Strip as an occupied territory; instead viewing it under the same lens as any international actor, and according it treatment under the standards applicable to sovereign states.<sup>23</sup> While the Israeli Supreme Court did not explicitly declare that the Gaza Strip should no longer be considered occupied by Israel, it implicitly recognized this fact by stating that effective Israeli control of the Strip—one of the main elements of the law of occupation—did not exist after 2005.<sup>24</sup>

#### b. The Palestinian Stance

The Palestinians took a different stance, arguing that Gaza should still be considered occupied because Israel controlled its air

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<sup>20</sup> *The Cabinet Resolution Regarding the Disengagement Plan*, art. 1(6), ISRAELI MINISTRY OF FOREIGN AFFAIRS (June 6, 2004) [hereinafter *Disengagement Plan*], available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6+June+2004.htm>. See also HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 8, at 5.

<sup>21</sup> See *Panelists Disagree Over Gaza's Occupation Status*, UNIVERSITY OF VIRGINIA LAW SCHOOL (Nov. 17, 2005), [http://www.law.virginia.edu/html/news/2005\\_fall/gaza.htm](http://www.law.virginia.edu/html/news/2005_fall/gaza.htm) (where Capt. Osnat Davidson, Head of the Infrastructure Section of the International Law Department in the Israeli Defense Forces Military Advocate General Corp, took the position that Israel is not responsible for Palestinians in Gaza).

<sup>22</sup> Ruth Lapidot, *Unity Does Not Require Uniformity*, BITTERLEMONS.ORG (Aug. 22, 2005), <http://www.bitterlemons.org/previous/bl220805ed30.html#pal2>; see also Information for Ruth Lapidot, THE JERUSALEM INSTITUTE FOR ISRAEL STUDIES, [http://www.jiis.org/?cmd=researchers.133&act=read&id=85&page\\_id=43](http://www.jiis.org/?cmd=researchers.133&act=read&id=85&page_id=43) (last visited Nov. 1, 2010).

<sup>23</sup> Respondents' Writ at 2, H CJ 9132/07 Al-Bassiouni et al. v. Prime Minister of Israel, (November 1, 2007), [http://www.gisha.org/UserFiles/File/Legal%20Documents%20fuel%20and%20electricity\\_oct\\_07/state\\_response\\_2\\_11\\_07.pdf](http://www.gisha.org/UserFiles/File/Legal%20Documents%20fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf). Israel has clarified that it does not view the Gaza Strip as a State. See *The Operation in Gaza: Factual and Legal Aspects* ¶ 30, ISRAELI MINISTRY OF FOREIGN AFFAIRS (July 29, 2009), [http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Operation\\_Gaza\\_factual\\_and\\_legal\\_aspects\\_applicable\\_legal\\_framework\\_5\\_Aug\\_2009.htm](http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_applicable_legal_framework_5_Aug_2009.htm) (stating that the Israeli Ministry of Foreign Affairs considers, "[T]he Gaza Strip [ ] neither a State nor a territory occupied or controlled by Israel.").

<sup>24</sup> For a thorough analysis of the effective control requirement as well as the pronouncement of the Israeli Supreme Court, see *infra* Part III.

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space, territorial sea waters, and international border crossings even after the withdrawal of all of its armed forces and the destruction of Israeli settlements.<sup>25</sup> Moreover, the Palestinians stressed that the Gaza Strip and the West Bank constituted one territorial unit under the Oslo Accords—implying first that any Israeli withdrawal from only one of the two territories could not on its own affect the unit's legal status—and second, that the status of the unit would not be changed by any Israeli withdrawal from Palestinian population centers.<sup>26</sup>

The position taken by the Palestinians should be understood in light of fears that recognition of the Israeli disengagement plan in Gaza would be equal to recognizing the termination of occupation through unilateral means. Specifically, Palestinians feared that recognition of the Israeli disengagement plan would also acknowledge that an occupying power can legitimately and unilaterally withdraw from occupied territory without any negotiations with the occupied peoples.<sup>27</sup> For political reasons, the Palestinians

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<sup>25</sup> PLO NEGOTIATION AFFAIRS DEPARTMENT, THE ISRAEL "DISENGAGEMENT" PLAN: GAZA STILL OCCUPIED (Sep. 2005), available at <http://www.nad-plo.org/inner.php?view=disengagem> ent\_Fact\_GAZA%20STILL%20OCCUPIED; *Panelists Disagree Over Gaza's Occupation Status*, UNIVERSITY OF VIRGINIA LAW SCHOOL, *supra* note 21; Saeb Erekat, *Gaza Remains Occupied*, BITTERLEMONS.ORG (Aug. 22, 2005), <http://www.bitterlemons.org/previous/bl220805ed30.html> #pa12; *Palestinian FM: Pull Out Will Not End Gaza Occupation*, DAILY STAR, (Aug. 9, 2005), [http://www.dailystar.com.lb/article.asp?edition\\_id=10&categ\\_id=2&article\\_id=17458](http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=17458).

<sup>26</sup> PLO NEGOTIATION AFFAIRS DEPARTMENT, *supra* note 25.

<sup>27</sup> Under the Oslo Agreements certain parts of the Gaza Strip and the West Bank were categorized as "A" areas. See Yoel Singer, *The Oslo Peace Process: A View From Within*, in NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY 17, 26 (Amos Shapira and Mala Tabory eds., 1999). In these areas, Israeli withdrawal and transfer of all responsibility in civilian and security matters to the Palestinian Authority did not signal the termination of occupation, even though no Israeli army or civilians resided in these territories. *Id.* There is a critical difference between the Oslo "A" areas and the status of the Gaza Strip, eighty percent of which was classified as an "A" area, after the Israeli disengagement. *Id.* Before, Israel had always contended that it had had residual jurisdiction, while in the disengagement plan, Israel marks a conceptual difference in this policy, by stressing that the plan signals the end of all permanent Israeli presence in the Strip and thus constitutes a denunciation of all claims of residual jurisdiction. *Id.* See also *Disengagement Plan*, *supra* note 20. See HCJ 1661/05 Regional Council Gaza Beach et al. v. Knesset 59(2) PD 481, 514 [2005] (Isr.) (recognizing that even Israeli jurisprudence regarded the Gaza Strip as an occupied territory prior to the disengagement, despite the majority of the territory being characterized as an "A" area. See Peter Malanczuk, *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485, 487 (1996) (noting that the West Bank and the Gaza Strip continued to be deemed

were reluctant to acknowledge an end to the Israeli occupation of the Gaza Strip; concerned with the possibility of a scenario where Israel would also unilaterally withdraw from the West Bank, accompanied by the annexation to Israel of large settlement blocs despite Palestinian opposition.<sup>28</sup>

c. The Stance of the International Community

Even after disengagement, non-governmental human rights organizations considered Gaza “occupied.”<sup>29</sup> However, the rest of the international community appeared reluctant to clarify its position on Gaza’s status in light of the Israeli-Palestinian disagreement on the issue. Instead, the international community continued to treat the status of the Strip as if nothing had legally changed after Israeli disengagement.

For example, although U.N. officials—such as the Special Rapporteur for the Occupied Territories—confidently stated that

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“occupied” under the Oslo accords). See Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISR. L. REV.* (2008) (arguing that the drafters of the disengagement plan wanted the Israeli withdrawal in 2005 to constitute a substantial legal change in the statutes of the specific territories, dissimilar from the “A” framework approach taken in the Oslo Agreements). See also Benjamin Rubin, *Gaza, Occupation and Post-Occupation Duties*, 18 (2010) (unpublished manuscript on file with the author).

<sup>28</sup> See e.g., Ghassan Khatib, *No Change*, BITTERLEMONS.ORG (Aug. 22, 2005), <http://www.bitterlemons.org/previous/bl220805ed30.html#pal2> (emphasizing that disengagement should be a step toward a gradual end of the occupation of all territory and that only the final outcome of a negotiation’s process can lead to a change in the legal status of the occupied territories). For a similar argument also see Egypt’s official position on the question of Gaza’s legal status after 2005:

[T]he unilateral Israeli withdrawal from the Strip did not lead to the liberation of the Strip from occupation . . . because the West Bank, the Gaza Strip and the East Jerusalem make up, together, one geographic unit that cannot be dealt with in a partial manner, doing so would a severe blow to its unity.

*Egypt’s Position on the Situation in Gaza and the Rafah Border*, EGYPT STATE INFORMATION SERVICE, <http://www.sis.gov.eg/en/Story.aspx?sid=3072>.

<sup>29</sup> *Israel: ‘Disengagement’ Will Not End Gaza Occupation*, HUMAN RIGHTS WATCH (Oct. 28, 2004), [http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-](http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation)

occupation. See SARI BASHI & KENNETH MANN, GISHA: LEGAL CENTER FOR FREEDOM OF MOVEMENT, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA* 49-55 (2007) [hereinafter GISHA, *THE LEGAL STATUS OF GAZA*], [http://www.gisha.org/english/reports/Report\\_for\\_the\\_we](http://www.gisha.org/english/reports/Report_for_the_we)

bsite.pdf. (illustrative of the position taken by Israeli NGO’s that disengagement in Gaza did not signal an end to occupation); B’TSELEM: THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *ONE BIG PRISON: FREEDOM OF MOVEMENT TO AND FROM THE GAZA STRIP ON THE EVE OF THE DISENGAGEMENT PLAN 74-75* (2005).

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Gaza remained occupied despite the Israeli disengagement,<sup>30</sup> when questioned on the subject, U.N. Secretary-General Ban Ki Moon declared that he was not in a position to comment on this legal matter.<sup>31</sup> The next day, it was pointed out to a U.N. spokesman that the Secretary-General seemed to have declared that the Gaza Strip was still considered occupied.<sup>32</sup> The issue culminated in a statement by the Secretary-General's spokesman that the official status of Gaza would change only by a decision of the U.N. Security Council.<sup>33</sup> Similarly, the U.N. Human Rights Council Resolution, which established a fact-finding mission in April 2009 to investigate the alleged perpetration of war crimes and crimes against humanity by Israel's "Cast Lead" military operation,<sup>34</sup> referred to Gaza as the "occupied Gaza Strip."<sup>35</sup> By comparison, the Head of the fact-finding mission, Justice Richard Goldstone, referred to "Gaza and the Occupied Territory" in his common press conference with the President of the Human Rights Council.<sup>36</sup> When asked whether he thought there was a distinction between the terms "occupied Gaza Strip" and "Gaza and the Occupied Territory," Justice Goldstone did not provide a direct answer, further evincing the unclear legal status of the Strip.<sup>37</sup>

Moreover, major international players like the United States did not adopt a clear stance on the Strip's legal status after the

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<sup>30</sup> See U.N. Special Rapporteur for the Occupied Palestinian Territories, *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 (Jan. 2007) (by John Dugard) (claiming that, "[s]tatements by the Government of Israel that the withdrawal ended the occupation of Gaza are grossly inaccurate . . . . In effect, following Israel's withdrawal, Gaza became a sealed off, imprisoned and occupied territory.").

<sup>31</sup> Josh Levs, *Is Gaza "Occupied" Territory?*, CNN.COM (Jan. 6, 2009), <http://www.cnn.com/2009/WORLD/meast/01/06/israel.gaza.occupation.question/index.html>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Human Rights Council Draft S-9/1, *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip*, 9th Special Sess., Jan. 12, 2009, A/HRC/S-9/L.1 (Jan. 12, 2009).

<sup>35</sup> *Id.*

<sup>36</sup> See Transcript of the Press Conference Held by the President of the Human Rights Council, Martin Ihoeghian Uhomobhi (Nigeria), and Justice Richard J. Goldstone, on the Announcement of the Human Rights Council Fact-Finding Mission on the Conflict in the Gaza Strip (Apr. 3, 2009), *available at* [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/PC\\_Transcript\\_3\\_April.doc](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/PC_Transcript_3_April.doc).

<sup>37</sup> *Id.*

Israeli disengagement. Thus, the U.S. State Department continued to include Gaza among the “occupied” areas in its official report on the status of human rights in Israel and the Occupied Territories.<sup>38</sup> Yet, when asked whether the U.S. State Department still considered Gaza occupied, a spokeswoman for the Department reserved the right to further research the matter and respond at a later date.<sup>39</sup>

## 2. *The Position of International Legal Theory*

Based on their conflicting interests, Israel, the Palestinians, and the international community all maintain differing opinions on the legal status of the Gaza Strip after Israeli disengagement. The question of Gaza’s legal status is also a matter of disagreement among legal scholars.<sup>40</sup> The critical issue complicating Gaza’s legal status is the fact that the international community recognizes only two scenarios: an occupation, or full sovereignty. International law never imagined a place like Gaza—a territory that is neither fully occupied nor completely sovereign.<sup>41</sup> As such, occupation has become the fallback position concerning Gaza’s status. This is due to the non-existence of Palestinian sovereignty and the fact that Palestinian independence was never proclaimed in the Gaza Strip after Israeli disengagement.

Yet, this dichotomy of either full “sovereignty” or “occupa-

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<sup>38</sup> U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2008: ISRAEL AND THE OCCUPIED TERRITORIES, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119117.htm>.

<sup>39</sup> Levs, *supra* note 31.

<sup>40</sup> For the view that Gaza is still under occupation, see Nicholas Stephanopoulos, *Israel’s Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT’L L. 524 (2006); Sara Roy, *Praying With Their Eyes Closed: Reflections on the Disengagement from Gaza*, 34 J. OF PALESTINE STUD. 65 (2005); Carey James, *Mere Words: “The Enemy Entity” Designation of the Gaza Strip*, 32 HASTINGS INT’L & COMP. L. REV. 643, 644 (2009). *But see* Shanny, *supra* note 27; Rubin, *supra* note 27, at 18. *Compare* David Luban, *Was the Gaza Campaign Legal?*, 31 A.B.A. NAT’L SECURITY L. REP. 5 (Jan./Feb. 2009) with Amos Guoira, *Response of Amos Guoira to David Luban’s Article Titled “Was the Gaza Campaign Legal?”*, 31 A.B.A. NAT’L SECURITY L. REP. 7 (Jan./Feb. 2009). *See also* Anthony D’Amato, *Hamas, the Gaza War and Accountability Under International Law*, JURIST (June 15, 2009), <http://jurist.law.pitt.edu/forumy/2009/06/hamas-gaza-war-and-accountability-under.php> (presenting an argument which while critical of the Israeli actions in Gaza, and seemingly siding with the fact that the Strip is still occupied due to Israeli control, ends with the phrase “And here I end with a question: are these Israeli controls tantamount to occupation?”).

<sup>41</sup> Caplen, *supra* note 4.

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tion” is not necessarily correct. In the past, international law has acknowledged other legal entities, which were not considered occupied, yet at the same time not deemed sovereign.<sup>42</sup> Moreover, a second factor complicating the question of whether Gaza should still be deemed “occupied,” relates to the issue of whether Israel exerts effective control over the territory.

According to international law, a territory is considered “occupied” as long as two conditions are met:

- (a) There is a foreign military presence in the specific territory, without the sovereign government’s consent; and
- (b) This military presence is exerting some form of control over the territory, without the approval or invitation of the sovereign authority.<sup>43</sup>

Since both conditions must be met,<sup>44</sup> an occupation does not exist if one does not hold true. In the case of the Gaza Strip, it is clear that the first criterion does not exist. Following disengagement, neither Israeli soldiers, nor Israeli civilians, remain in the Strip. As such, the debate over whether Gaza could be still perceived as “occupied” relates only to the second criterion, and the question of how much control Israel exercises over the Strip.

### III. THE EFFECTIVE CONTROL CRITERION IN INTERNATIONAL AND NATIONAL JUDICIAL BODIES: NORM AND APPLICATION IN THE QUESTION OF ISRAELI CONTROL OF GAZA AFTER 2005

#### A. *The Norm: Exercise of Control as a Criterion of Occupation Status*

Control over an area is one of the core aspects of the concept of occupation.<sup>45</sup> Article 42 of the Hague Regulations states that a

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<sup>42</sup> In existing international legal theory and practice, such a scheme can be found in the legal construction of a protectorate, namely a territory which is not deemed occupied or independent, but is administered by another state or an international organization. At first, the protectorate model may seem inapplicable to the case of Israel and the Gaza Strip, because the protecting power rules over the territory of the protectorate and this article argues the opposite regarding Israel’s rule of the Gaza Strip. However, the protectorate model illustrates that even conventional international law recognizes the possibility of a non-occupying power having legal obligations in a particular territory.

<sup>43</sup> 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 art. 42, Oct.18, 1907, 36 Stat. 2277 [hereinafter Fourth Hague Convention].

<sup>44</sup> HARVARD POLICY BRIEF ON ISRAEL'S DISENGAGEMENT PLAN, *supra* note 8.

<sup>45</sup> GEHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC

territory is considered occupied when it is placed under the authority of a hostile army and that occupation extends to the territory where such authority has been established and can be exercised.<sup>46</sup> As such, control over a territory can be actual—the “has been established” clause of article 42—or potential—the “can be exercised” clause of article 42. International and domestic jurisprudence is divided over which of the two parameters should be decisive in the determination of a territory as “occupied.” In other words, is it sufficient that a hostile army is not present in a territory, or should the fact that another state can exercise its authority over an area at any time, render the territory “occupied”?

On an international level, the International Court of Justice has emphasized the actual control requirement in its judgment on the question of whether certain areas of the Republic of Congo could be deemed occupied by the Ugandan army, noting that:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another 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.<sup>47</sup> (emphasis added).

In light of the Turkish invasion of Northern Cyprus in 1974 and the expulsion of the Greek Cypriot residents, the European Commission of Human Rights and the European Court of Human Rights have both had the opportunity to issue opinions on the importance of actual control of a territory. In 1976, the European Commission on Human Rights, reporting on the consolidated complaints of Cyprus against Turkey, noted that armed forces of a state not only remain under its jurisdiction when abroad, but actually bring into the state’s jurisdiction any other persons that the armed forces exercise authority over.<sup>48</sup>

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INTERNATIONAL LAW 774 (6th ed. 1992); HARVARD POLICY BRIEF ON ISRAEL'S DISENGAGEMENT PLAN, *supra* note 8.

<sup>46</sup> Fourth Hague Convention, *supra* note 43.

<sup>47</sup> Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. 26, ¶ 173 (Dec. 19).

<sup>48</sup> Cyprus v. Turkey, App. No. 6780/74, 6950/75, 1975 Y.B. Eur. Conv. On H.R. 112, reprinted in 62 I.L.M. 86 (1982).

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Almost twenty years later, the European Court held in *Loizidou v. Turkey* that Turkey exercised effective control over the northern part of Cyprus, based on: (1) the fact that a large number of Turkish troops were engaged in active duties in Northern Cyprus, and (2) the fact that Turkish troops prevented the petitioner from crossing the border into Northern Cyprus.<sup>49</sup>

In *Ocalan v. Turkey*, which dealt with Ocalan's arrest by Turkish agents in Kenya, the European Court of Human Rights asserted the existence of effective Turkish control over the petitioner.<sup>50</sup> The Court rejected Turkey's argument that Ocalan was not subject to its jurisdiction while outside its territory and emphasized that Ocalan was physically forced to return to Turkey by Turkish officials and was subjected to their authority and control following his arrest. Although not explicitly stated in the decision, it is clear that the intensity of the physical control exercised over Ocalan was the main reason for the different conclusions in these two cases.

In contrast, a number of international and Israeli decisions considered "potential control" the crucial factor in determining whether a territory is occupied. In *U.S.A. v. Wilhelm* the United States Military Tribunal at Nuremberg leaned towards the potentiality embedded in a foreign army's conquest and occupation of a territory.<sup>51</sup> In that case, the Tribunal had to decide whether Yugoslavia, Greece and Norway were "occupied" territories at the time the Germans committed crimes against the civilian population during the Second World War. The Tribunal found that an area could be considered "occupied" even though the occupying army had partially evacuated it, as long as the army could, at any time, assume physical control over the territory. In the Tribunal's words:

While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.<sup>52</sup>

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<sup>49</sup> *Loizidou v. Turkey*, (No. 15318/89), 1996-VI Eur. Ct. H.R. 2235-36.

<sup>50</sup> *Ocalan v. Turkey*, (No. 46221/99), 2003-IV Eur. Ct. H.R. ¶ 93.

<sup>51</sup> *United States v. Wilhelm List, et al.*, United Nations War Crimes Commission, 8 Law Reports of Trials of War Criminals 56 (1949).

<sup>52</sup> *Id.* For an early 20<sup>th</sup> century scholarly position on this issue, see Colby Elbridge, *Occupation Under the Laws of War*, 25 COLUM. L. REV. 904, 908 (1925) (referring to the Prussian occupation of France in 1870-1871 and the fact that occupation was maintained "by the mere ability to assert essential power." Eldridge also cites the opinion of Percy

Another international body with penal jurisdiction, the International Court Tribunal for former Yugoslavia, held in *Prosecutor v. Naletilic* that one of the factors for determining the occupied status of an area is whether an occupying army has “the capacity to send troops within a reasonable time to make the authority of the occupying power felt.”<sup>53</sup>

In *Ilascu v. Moldova*, the European Court of Human Rights held Russia accountable for human rights violations that took place in Transdniestria; a region which seceded *de facto* from Moldova in 1990 yet was never annexed to Russia because of the latter’s decisive regional influence.<sup>54</sup> In that case, the Court viewed the effective control criterion through the prism of decisive Russian influence.<sup>55</sup> In other words, not as directly evident actual control, but as control which is exerted in a more subtle way. Such control brings us closer to the potentiality of its exercise, yet the Court opted to define it as actual.

In *Tsemel v. Minister of Defense*,<sup>56</sup> a case related to the Israeli occupation of Southern Lebanon, the Israeli Supreme Court established three criteria for an area to be deemed occupied: (1) the existence of a foreign army in the territory without the agreement of the sovereign state; (2) the inability of the sovereign state to exercise its sovereignty in the particular region; and (3) the ability of the hostile army, although not physically present in the area, to establish its dominion at any given time.<sup>57</sup>

#### B. Application: The Israeli Supreme Court and the Al-Bassiouni Case

Following Hamas’s takeover of Gaza, a daily barrage of rocket attacks against Southern Israel became the norm, and presented Israel with the question of how it would cope with this aggression. Justifying its position as self-defense,<sup>58</sup> Israel undertook large scale

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Bordwell, who in his 1908 book, the *Law of War Between Belligerents*, describes the Prussian occupation as one under which “one could go for miles within the occupied territory without seeing a single Prussian soldier.”)

<sup>53</sup> *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, ¶ 217 (Mar. 31, 2003).

<sup>54</sup> *Ilascu v. Moldova*, (No. 48787/99), 2004-VII Eur. Ct. H.R. 179, ¶ 392.

<sup>55</sup> *Id.*

<sup>56</sup> HCJ 102/82 *Tsemel v. Minister of Defense* 37(3) PD 365 [1983] (Isr.).

<sup>57</sup> *Id.*

<sup>58</sup> Sean Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22, 39 (2009). *Contra Israel’s Bombardment of Gaza is Not Self-Defense - It’s a War Crime*, THE SUNDAY TIMES, Jan. 11, 2009, <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>

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military operations which left behind large numbers of casualties, especially on the Palestinian side.<sup>59</sup> Apart from its armed response, the Israeli approach to the problem of Palestinian aggression, stemming from the Gaza Strip, has a particularly novice legal aspect. In September 2007 the Israeli Cabinet declared the Gaza Strip a "hostile territory."<sup>60</sup> Pursuant to this decision, the Israeli Defense Minister announced that electricity and fuel supplies provided by Israel to the Strip would be reduced, but not to a point that could cause a humanitarian crisis for Gaza's inhabitants.<sup>61</sup>

Israeli humanitarian organizations, arguing that such a policy constituted collective punishment and as such should be halted,

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(arguing that Israel does not have a right to self defense in the case of rocket attacks, because they do not amount to an "armed attack," in terms of scale and effect). *See also* Military and Paramilitary Activities In and Against Nicaragua, 1986 I.C.J. 103 (noting that the stance of the International Court of Justice is that a certain scale and degree is required for the criteria of an "armed attack" to be met); Platforms Case (Islamic Rep. of Iran v. U.S.), 2003 I.C.J. Reports 161, 191-92, 195-96. *But see* Christopher Greenwood, *The International Court of Justice and the Use of Force*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 381 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (providing extensive criticism on the position of the International Court of Justice). *See also* Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 119-20 (1987); W. Michael Reisman, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT'L L. 82, 89 (2003).

<sup>59</sup> For example, in early 2008, Israel launched a major military operation, leaving behind at least 60 Gazans dead. *See* Griff Witte, *60 Gazans Killed in Incursion by Israel*, WASH. POST, Mar. 2, 2008 at A1. In early 2009 a similar operation resulted in Palestinian casualties estimated to be from 1,100 to upwards of 1,400, including combatants, as well as 13 dead Israeli soldiers and civilians. *See* Ethan Bronner, *Israel Speeds Withdrawal From Gaza*, N.Y. TIMES, Jan. 19, 2009, available at <http://www.nytimes.com/2009/01/20/world/middleeast/20mideast.html>. *See* Steve Weizman, *Israeli soldiers: "No Clear Red Lines" in Gaza War*, AP, Jul. 16, 2009, available at <http://slumz.boxden.com/f5/jul-15-israeli-soldiers-no-clear-red-lines-gaza-war-1266477/> for disagreement over the exact number of Palestinian casualties and the percentage of combatants in the aforementioned figures. *See* Alan Baker, *The Forgotten Factor that so Skews Goldstone's Mission*, JERUSALEM POST, July 28, 2009, available at <http://www.jpost.com/Home/Article.aspx?id=150153> (discussing the fact that numbers cited by international organs do not clarify that a big percentage of these casualties were combatants).

<sup>60</sup> *Security Cabinet Declares Gaza Hostile Territory*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, (Sep. 19, 2007), [www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm); Herb Keinon, *Government Declares Gaza "Enemy Entity"*, JERUSALEM POST, Sep. 19, 2007 available at <http://www.jpost.com/home/article.aspx?id=75699>.

<sup>61</sup> Respondents' Writ, Al-Bassiouni et al. v. Prime Minister of Israel, *supra* note 23, at 5.

petitioned the Supreme Court for an injunction.<sup>62</sup> The Court refused to grant such an injunction and subsequently refused to declare such policies *ipso facto* illegal; basing its decision on the government's assurances that it would not permit electricity and fuel reductions to cause a humanitarian crisis in the Gaza Strip.<sup>63</sup>

Commenting on whether Israel exercised effective control over the Strip after 2005, the Court noted that:

Since September 2005, Israel no longer has effective control over the events in the Gaza Strip. The military government that had applied to that area was annulled in a government decision, and Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to look after the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, pursuant to the entirety of the Law of Belligerent Occupation in International law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip. In the circumstances that have been created, the main duties of the State of Israel relating to the residents of the Gaza Strip are derived from the situation of armed conflict that exists between it and the Hamas organization controlling the Gaza Strip; these duties also stem from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip . . .<sup>64</sup>

Thus, the Court clearly determined that the current legal status of Gaza is one of non-occupation. When dealing with the question of whether the extent of Israel's control over the Strip was sufficient to consider Gaza "occupied," the Court did not restrict itself to examining the question of whether that control was "actual," but also examined whether the control was "potential."<sup>65</sup> The Court also noted the lack of Israel's capacity to exercise effective control, when it remarked: "Nor does Israel have effective capability, in its

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<sup>62</sup> See Fourth Geneva Convention Relating to the Protection of Civilian Persons in Time of War, art. 33(1), Aug. 12, 1949, 75 U.N.T.S. 287, 318-38 (stipulating that "no protected person may be punished for an offence he or she has not personally committed. Collective penalties...are prohibited"); see also Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2307 (stating that "no general penalty...shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.").

<sup>63</sup> HCJ 9132/07 Al-Bassiouni et al. v. Prime Minister of Israel [2008] (Isr.) (unreported).

<sup>64</sup> *Id.* at ¶ 12.

<sup>65</sup> *Id.*

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present status, to enforce order and manage civilian life in the Gaza Strip.”<sup>66</sup>

The Court’s conclusions from *Al-Bassiouni* were later reasserted in a case addressing the legality of the arrest of unlawful combatants.<sup>67</sup> There, the Court stated that Israel did not exercise actual control over the Strip, nor could it exercise such control in order for post-disengagement Gaza to be considered an “occupied” area.<sup>68</sup>

#### IV. GAZA’S LEGAL STATUS: DECLARATION AND CONSEQUENCES OF “NON-OCCUPATION” STATUS

Undoubtedly, the Court’s conclusion that Gaza is no longer occupied is correct.<sup>69</sup> As the court noted, most legal scholarship indicates that an occupation ends with the departure of foreign troops.<sup>70</sup> In cases where the occupied area is not part of an independent state, occupation ends when the local population exercises self-determination after the departure of the foreign army.<sup>71</sup> In Gaza, both conditions have been met following Israeli disengagement: (1) there is no Israeli army presence in the Strip, and (2) Palestinians enjoy self-determination in administering their daily affairs.<sup>72</sup> It is true that Israel has undertaken on ground military

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<sup>66</sup> Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel 6-7* (Feb. 25, 2009) (unpublished manuscript on file with the author)

<sup>67</sup> HCJ 6659/06 Anonymous et al. v. State of Israel, ¶ 11[2008] (Isr.) (unreported).

<sup>68</sup> *Id.* at ¶ 11.

<sup>69</sup> *Contra* Carey James, *Mere Words: The “Enemy Entity” Designation of the Gaza Strip*, 32 HASTINGS INT’L. & COMP. L. REV. 643, 665-67 (2009).

<sup>70</sup> ADAM ROBERTS, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *THE END OF OCCUPATION IN IRAQ 2* (2004), *citing* 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (Lauterpacht ed., 8th ed. 1955), <http://www.ihlresearch.org/iraq/pdfs/briefing3461.Pdf>.

<sup>71</sup> *Id.* (stating that “the essential feature of the ending of an occupation is often, though not always, an act of self-determination involving the inhabitants of the occupied territory”). *See* Caplen, *supra* note 4, at 711 (referring to post-disengagement Gaza as a “nebulous type of Palestinian sovereignty” and a “de facto autonomous entity”).

<sup>72</sup> Palestinian effective exercise of self-determination is evinced by the fact that they administer their own daily affairs, and by the independently held Palestinian elections of 2007, which led to the rise of Hamas to power. *Contra* James, *supra* note 69, at 652-53 (claiming that the Israeli disengagement was inconsistent with the right of self-determination of the Palestinians, because of the unilateral character of the disengagement and because the Gaza Strip is only one part of the larger Palestinian territory). Yet, the author does not elaborate on the reason why the Israeli disengagement could not be perceived as a step in the direction of the practical implementation of the self-

and air operations in Gaza after 2005 as measure of self-defense.<sup>73</sup> These military operations testify to the exertion of a certain level of control over the Strip.<sup>74</sup> However, it is questionable whether such control, apart from leading to undeniably dire humanitarian consequences, reaches the level of being “effective.”<sup>75</sup>

Moreover, control of a territory’s aerial and naval space, factors cited as attesting to the Strip’s continuing occupation status,<sup>76</sup> do not lead *ipso facto* to the designation of an area as “occupied.” The establishment of no-fly zones above Iraq after the First Gulf War, in order for Kurds in the North and Shi’a Muslims in the South to be protected from the Saddam regime, did not lead to claims that Iraq was occupied. Instead, arguments made against the imposition of no-fly zones were based on the violation of Iraq’s sovereignty.<sup>77</sup> Yet, these no flying zones remained in force until 2003, when the Second Gulf War started and Saddam’s regime was toppled. Their continued imposition was justified on the grounds that there is a right to intervene to prevent a humanitarian catastrophe under international law.<sup>78</sup> The imposition of limitations on the aerial space of a sovereign state like Iraq was accepted by the international community on humanitarian grounds. Analogous should be an acceptance of limitations on the aerial space of a non-sovereign entity for security reasons related to the prevention of possible attacks by air.

In *Bankovi et al. v. Belgium*, the European Court of Human Rights refrained from applying the European Convention of Hu-

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determination principle as far as the residents of the Gaza Strip are concerned, without being extended to all the Palestinians; something which Israel never argued. *See id.*

<sup>73</sup> The Disengagement Plan states that, “Israel reserves its fundamental right of self defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.” *Disengagement Plan, supra* note 20, at Addendum B.

<sup>74</sup> James, *supra* note 69, at 652-53.

<sup>75</sup> David Luban, *Was the Gaza Campaign Legal?*, A.B.A. NAT’L SEC. L. REP., Jan.—Feb. 2009, at 3 (noting that the fact that during Operation Cast Lead in 2009, the Israeli forces had to fight their way in is a clear indication that Gaza is not under Israeli occupation). *See contra* GISHA, *THE LEGAL STATUS OF GAZA, supra* note 29; James, *supra* note 69, at 651-53 (arguing that Israel’s control of Gaza’s air space, naval space, border crossings, and the fact that the Israeli army, in exercise of its right of self defense, can enter the Strip whenever it chooses to do so, constitutes occupation of the Strip).

<sup>76</sup> James, *supra* note 69, at 654-55.

<sup>77</sup> *No Fly Zones: The Legal Position*, BBC NEWS, Feb. 19, 2001, available at [http://news.bbc.co.uk/2/hi/middle\\_east/1175950.stm](http://news.bbc.co.uk/2/hi/middle_east/1175950.stm).

<sup>78</sup> *Id.*

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man Rights extraterritorially.<sup>79</sup> The Court refused to accept the argument of the petitioners, victims of the N.A.T.O. bombardment of the television station in Belgrade, that N.A.T.O. member states had violated their rights. Similarly, the fact that Israel controls the crossings into the Strip and closes them according to its will does not mean *ipso facto* that Gaza is occupied, since every state has the right to close its borders as a matter of policy.

Despite the previous arguments, a conclusion that classified post-2005 Gaza as being a non-occupied territory, without going further, would fail to meet the legal and factual reality. Gaza is not independent<sup>80</sup> and depends on decisions that have to be taken by Israeli officials on major issues, not only on a bilateral level, affecting the relationship between the Strip and Israel, but also on issues regarding the interaction of the Strip with the outside world.

Legally, the designation of “non-occupation status” for the Gaza Strip, without addressing other concerns, would lead to the emergence of a *lacuna*. This is the case, since international humanitarian norms apply in cases of occupation.<sup>81</sup> As far as human rights norms are concerned, under the *lex specialis* relationship between human rights law and international humanitarian provisions,<sup>82</sup> it is logical to assume that any relevant human rights would

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<sup>79</sup> Bankovi et al. v. Belgium, 41 Eur. Ct. H.R. 517, 526 (2001).

<sup>80</sup> See the First Circuit Court of Appeals remarks that even under the interim agreement in 1994, when Israel transferred some authority to the Palestinian Authority, the Palestinian Authority, comprising the territories of the West Bank and Gaza, did not turn to an independent state :

[T]he interim agreement expressly denied the Palestinian Authority the right to conduct foreign relations; left Israel with an undiminished ability to defend and control the territorial borders . . . retained Israeli control over the territorial airspace . . . It is therefore, transparently clear that the Palestinian Authority has not yet exercised sufficient governmental control over Palestine . . . We recognize that the status of the Palestinian territories is in many ways *sui generis*. Here, however, the defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time.

Ungar v. Palestine Liberation Organization, 402 F.3d 274, 291 (1st Cir. 2005). See also Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued In Israeli Civilian Courts for Damages Caused by its Involvement in Terror Acts During the Second Intifada*, ARMY LAW, Jul. 2008, at 3 (presenting arguments in line with the conclusions of the First Circuit Court of Appeals).

<sup>81</sup> Luban, *supra* note 75 (asserting that the question of whether Gaza is occupied or not matters, because if it is still under Israeli occupation, Israel must abide by the Fourth Geneva Convention).

<sup>82</sup> The classical source of this *lex specialis* relationship of international humanitarian law to human rights law is the pronouncement of the International Court of Justice in the

only be applied under the framework of the laws of armed conflict. However, even if human rights were applied as a separate field,<sup>83</sup> they would apply in cases where subjects are under a state's jurisdictional control, which in the context of occupation is interpreted as being under a state's effective control.<sup>84</sup> The problem with Ga-

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Nuclear Weapons Advisory Opinion that, "in principle the right not to be arbitrarily deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18 (July 8).

<sup>83</sup> MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 16, 239, 250, n.34, n.133 (1959); Morris Greenspan, *The Protection of Human Rights in Times of Warfare*, 1 *ISR. Y. B. HUM. RTS.* 228, 228 (1971); G.I.A. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 *ISR. Y. B. HUM. RTS.* 191, 191 (1971); Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y. B. HUM. RTS.* 104, 116 (1978); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 *AM. J. INT'L L.* 1, 1-2, 26-28 (2004); Roy Schondorf, *Extra-State Conflicts: Is There A Need For A New Legal Regime?*, 37 *N.Y. U. J. INT'L L. & POL.* 60 (2004); Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239 (2000); Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 *INT'L REV. RED CROSS* 94 (1993). *Contra* Michael Dennis, *Agora: ICJ Advisory Opinion On the Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 *AM. J. INT'L L.* 119 (2005). *See also* the assertion of Adam Roberts that "the relation between human rights law and the laws of war is not just a simple confrontation between the *lex generalis* of human rights and the *lex specialis* of the laws of war." Adam Roberts, *Transformative Military Occupation*, 100 *AM. J. INT'L L.* 580, 594 (2006). *See also* Human Rights Committee, General Comment No. 29: States of Emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001). For examples of the jurisprudence of the International Court of Justice referring to the separate applicability of human rights law, see *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, 2004 I.C.J. 136,178 (July 9).

<sup>84</sup> Article 2 of the International Covenant on Civil and Political Rights ("ICCPR") requires that state parties respect and protect the Covenant rights of all persons who are on their territory or under their jurisdiction. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16), UN Doc. A/6316 (1966), 999 U.N.T.S. 171. The Human Rights Committee has interpreted this to mean that states must ensure the protection of Covenant rights of all persons within the power or effective control of a particular state. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 10 (2004). While Gaza may not be under effective Israeli control, it has been argued that Gaza residents fall within the power of Israel and as such, the ICCPR applies to them. This argument rests on two premises: (1) the existence of some level of Israeli control of the Strip, and (2) the universality of the application of a major human rights instrument. Yet, an application of human rights provisions not adjusted to the particularities of the laws of war, (as would be the case with regards the Israeli occupation of the Strip), would lead to a reality where Israel's legal position in the Strip would be worse after the disengagement than when it was the occupying power. Such a solution, which discourages the occupying power from leaving the occupied region, cannot

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za is that it is neither occupied nor under effective Israeli control. As such, its residents are presumably unable to invoke international humanitarian law provisions.<sup>85</sup> Such a *lacuna* cannot be condoned, either on a legal basis or on a factual one.

Some jurists have tried to address the question of the aforementioned *lacuna* by resorting to already existing concepts in international law. Thus, it has been argued that the restrictions imposed on post-disengagement Gaza by Israel can best be characterized, from a legal standpoint, as a siege.<sup>86</sup> Yet, a *mutatis mutandis* application of the legal notion of "siege" in the case of Israeli policy in Gaza is not proper. Under international humanitarian law, a siege is connected with a military objective and a territory's surrender.<sup>87</sup> In contrast, Israeli measures are meant to ex-

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be condoned since it would be contrary to the basic doctrine of occupation law that occupation should not be sustained for a long time, and must end as quickly as possible. Compare Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 10 (2004) (stating that the ICCPR is deemed to only apply to persons within the power of a state), and Jeffrey Dunoff, Steven Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem Oriented Approach* 452 (2006) (arguing for the application of the ICCPR in post-disengagement Gaza). Under occupation status human rights law applies in tandem with international humanitarian law, as well as the needs not only of the local population but also of the occupying army. See Eyal Benvenisti, *The International Law of Occupation* 189 (1993) (stating that, "in the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community."). The Israeli Supreme Court has taken an approach which balances Palestinian rights and the rights of the Israelis residing in the occupied territories by resorting to international humanitarian law and the concept of "military necessity," (which the latter incorporates), when dealing with issues which concern the "territories." See *Ayoub v. Minister of Defense* 33(2) PD 113, ¶¶ 391-92 [1978] (Isr.); *HCI 2056/04 Beit Sourik Village Council v. Israel* 58(5) PD 807 [2004] (Isr.). See also *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, 2005 I.C.J. 26, ¶ 172-73 (Dec. 19).

<sup>85</sup> But see the opinions of those who hold that Gaza is still under Israeli occupation, and as such, international humanitarian law applies in its totality. James, *supra* note 40, at 655; Amnesty International, *Palestinian Authority*, Amnesty International Report 2007 (2007), <http://www.amnesty.org/en/region/palestinian-authority/report-2007>.

<sup>86</sup> Shany, *supra* note 66, at 8.

<sup>87</sup> James Fry, *Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law*, 44 COLUM. J. TRANSNAT'L L. 453, 512 (2006); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 136, 137 (2004); U.S. DEPT. OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* 20 (1956). The same is true as far as "blockade" is concerned. A blockade is the equivalent of a "siege" at sea. Under the laws of war, a blockade is the right of a belligerent to block off all or part of the enemy's coast with the use of warships, for the purpose of cutting off all maritime commerce between its

ert pressure on Hamas, not to lead to the surrender of Gaza or its re-occupation by the Israeli army. Moreover, Gaza cannot be deemed under a “siege” for legal purposes because the laws pertaining to siege require that civilians be able to leave the besieged area.<sup>88</sup> In the case of the Gaza Strip, very few residents have been allowed to leave, and only with Israeli authorization.

#### V. GAZA’S LEGAL STATUS: A LEGAL HYBRID

Discussion of the question of Gaza’s legal status after Israeli disengagement is usually confined to a dichotomist model of occupation versus non-occupation. Yet, the case of Gaza poses a challenge to the classical legal dichotomy of occupation versus non-occupation. Even before Israel’s complete withdrawal from the Strip, Israeli legal experts contemplated an “in-between;” *sui generis* legal status of the Strip post-disengagement, situated in a grey area of the law of occupation.<sup>89</sup>

In one sense, the question of Gaza’s legal status can be seen as just another facet of the grey areas that abound in contemporary international humanitarian law<sup>90</sup> and pertain to other issues relating to the Israeli-Palestinian conflict; such as the question of whether the Palestinian Authority is a state,<sup>91</sup> and whether the

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enemy and the rest of the world. For use of the term “blockade” by international actors see *New European Foreign Minister Criticizes Israel*, WORLD JEWISH CONGRESS NEWS (Dec. 18, 2009), <http://www.worldjewishcongress.org/en/main/shownews/id/8740>. See Christopher Greenwood, *Blockade as Act of War*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 48, 48-49 (Roy Gutman et al. eds., 2007), for a legal analysis of the notion of a “blockade.”

<sup>88</sup> Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 148, 148-49 (Astrid J.M. Delissen & Gerald J. Tanja eds., 1991).

<sup>89</sup> Aluf Benn, *Israel Proposes “In Between” Status for Gaza*, HAARETZ (Nov. 14, 2004), <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=501154>. See also an acknowledgment of the *sui generis* current legal status of the Strip in a position reiterated in an official document issued by the Israeli Ministry of Foreign Affairs, stating that “. . . the Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstance . . . .” in *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 23.

<sup>90</sup> Ewen Allison & Robert Goldman, *Gray Areas in International Humanitarian Law*, in CRIMES OF WAR; WHAT THE PUBLIC SHOULD KNOW 158, 158 (Roy Gutman et al. eds., 2007).

<sup>91</sup> The issue erupted in a very prominent way when the Palestinian Authority filed a declaration with the International Criminal Court, accepting jurisdiction under article 12(3) of the ICC Statute—which stipulates that such a declaration is only reserved for states. For more information about this and a discussion the issues surrounding Palestinian statehood see Curtis Doebbler, *International law and Palestinian Independence: A View from*

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character of the conflict is international or non-international.<sup>92</sup> Interestingly, scholars have rejected a monolithic conception of the legal framework surrounding "occupation status" and have commented on the existence of "various degrees of occupation."<sup>93</sup>

The multi-layer nature of the Israeli occupation in post-disengagement Gaza has also been acknowledged by the Palestinian side which, relying on Article 6 of the Fourth Geneva Convention, has noted that "the absence of a permanent Israeli presence and illegal settlers will mark a significant change in Gaza's 37 year history of belligerent Israeli occupation."<sup>94</sup> According to the Palestinian stance on the issue, despite Israel's status as an occupying power in post-disengagement Gaza, Israel is only bound by those aspects of the Geneva Convention within the ambit of its exercise of authority.<sup>95</sup>

Gaza's hybrid legal nature is further evinced by several factors. On one hand, the Gaza Strip cannot exercise effective con-

*Palestine*, THE JURIST FORUM (Nov. 27, 2009), <http://jurist.law.pitt.edu/forumy/2009/11/international-law-and-palestinian.php>;

Memorandum by John Quigley to the Office of the Prosecutor of the International Criminal Court (March 23, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281879/JohnQuigleyiccmemoPNADeclaration2.pdf>; MICHAEL KEARNEY & STIJN DENAYER, AL-HAQ POSITION PAPER ON ISSUES ARISING FROM THE PALESTINIAN AUTHORITY'S SUBMISSION OF A DECLARATION TO THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT UNDER ARTICLE 12(3) OF THE ROME STATUTE (2009), available at <http://ssrn.com/abstract=1523722>, Yael Ronen, *ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non State Entities*, 8 J. INT'L CRIM. JUST. 3, 11-16 (2010); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT'L CRIM. JUST. 329, 333 (2010); Letter from David Davenport et al., Hoover Institution, Stanford University, to His Excellency, Luis Moreno-Ocampo, Prosecutor, International Criminal Court, concerning the Palestinian Declaration and ICC Jurisdiction at 1, (Nov. 19, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281873/PaldeClandiCcJurisd.pdf>; Robert Weston Ash, *Is Palestine a "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to The International Criminal Court: The Statehood Issue,"* 36 RUTGERS L. REC. 186 (2009), <http://www.lawrecord.com/files/36-Rutgers-L-Rec-186.pdf>; Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73 (2010).

<sup>92</sup> There is a disagreement in the international community and scholarship as to whether the conflict between Israel and the Palestinians is an international or a non-international conflict. For varying opinions on this issue see David Kretzmer, *The Advisory Opinion: The Light Treatment of International Law*, 99 AM. J. INT'L L. 88, 95 n.54 (2005).

<sup>93</sup> Geoffrey Aronson, *Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip*, 34 J. PALESTINE STUDIES 49, 54 (2005).

<sup>94</sup> PLO NEGOTIATION AFFAIRS DEPARTMENT, *supra* note 25.

<sup>95</sup> *Id.*

trol over its coastal area. On the other hand, Gaza's authority over its borders and its management of its external and commercial affairs are qualities which speak to its independent nature.<sup>96</sup>

The hybrid character of post-disengagement Gaza has implications both on a policy and on a legal level. On a policy level, it helps explain Israel's decision not to allow the passage of certain goods or persons into the Strip, trade of third countries with Gaza, as well as visits of third state nationals to Gaza.<sup>97</sup> The Israeli policy of obliging third states to be bound by the restrictions Israel has unilaterally imposed on the Strip<sup>98</sup> resembles the right of sovereign states to close frontiers with neighboring states as part of bilateral

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<sup>96</sup> In existing international legal theory and practice, such a scheme can be found in the legal construction of U.N. trusteeships, where a territory not deemed occupied, but also not independent, is administered by the United Nations. Examples of these are the cases of Timor Leste and Kosovo. See Simon Chesterman, *Unaccountable? The United Nations, Emergency Powers and the Rule of Law*, 42 VAND. J. TRANSNAT'L L. 1509 (2009). Resorting to the U.N. trusteeship model is, at first sight, not relevant to the case of Israel and the Gaza Strip. This is due to the fact that U.N. organs exercise authority over the trustee territory, and the argument in the present paper is that Israel does not exercise similar authority over the Gaza Strip. Accordingly, the trusteeship legal construction is not relevant per se in the case of Israel or in the context of Israeli obligations in the Gaza Strip. Instead, the trusteeship model was only presented to demonstrate that even conventional international law recognizes the possibility of an international legal entity having legal obligations towards a particular territory absent classification as an occupying power. See Daniel Haboucha, *What the ICJ Ruling on Kosovo Could Mean for Palestine*, LEGAL FRONTIERS: MCGILL'S BLOG ON INTERNATIONAL LAW (Feb. 12, 2010), <http://www.legalfrontiers.ca/2010/02/what-the-icj-ruling-on-kosovo-could-mean-for-palestine>, for an opinion and relevant responses to the question of whether there are similarities between the Palestinian situation and the case of Kosovo.

<sup>97</sup> For notable cases where such permission has been denied even to high-level foreign politicians such as the Belgian Minister for International Development, the Turkish Foreign Minister, the French Foreign Minister and the European Union's Foreign Minister see *Israel Denies Belgian Minister's Request to Visit Gaza*, JERUSALEM POST, Jan. 24, 2010, <http://www.jpost.com/Home/Article.aspx?id=166537>; Barak Ravid, *Israel to Turkey FM: If You Want to Visit Gaza, Don't Come Here*, HAARETZ, Sep. 8, 2009, available at <http://www.haaretz.com/news/israel-to-turkey-fm-if-you-want-to-visit-gaza-don-t-come-here-1.8241>; Barak Ravid, *Israel Refuses to Let French FM Visit Gaza*, HAARETZ, Oct. 20, 2009, available at <http://www.haaretz.com/hasen/spaces/1122381.html>. For cases where permission was granted see Barak Ravid, *Israel Agrees to Let UN Chief, UN Commissioner Enter Gaza*, HAARETZ, Mar. 8, 2010, available at <http://www.haaretz.com/news/israel-agrees-to-let-un-chief-eu-commissioner-enter-gaza-1.264345> [hereinafter *Israel Agrees to Let UN Chief, UN Commissioner Enter Gaza*].

<sup>98</sup> GISHA: LEGAL CENTER FOR FREEDOM OF MOVEMENT, GAZA CLOSURE DEFINED: COLLECTIVE PUNISHMENT, (2008), <http://gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>.

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sanctions.<sup>99</sup>

Nevertheless, Israeli policy in Gaza cannot be understood as the imposition of bilateral sanctions. Bilateral sanctions require the involvement of two sovereign states. While it is difficult to dispute that Israel is sovereign, the same cannot be said of the Strip. Gaza is an entity that had been formerly occupied by Israel and is still much dependent on its former occupier. However, the imposition of an Israeli policy which resembles bilateral sanctions does not render the Strip an occupied area either. Israel only exercises its control over its border with Gaza and goods and persons can still enter the Strip from Egypt.<sup>100</sup> Thus, Israeli control does rise to the level of facilitating or obstructing international intervention of any kind—something which would be indicative of an occupation, since such acts are reserved for an occupying power.<sup>101</sup>

The hybrid character of post-disengagement Gaza also has practical implications for the law applicable to the territory. As stated above, the non-application of international humanitarian

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<sup>99</sup> Sanctions have been compared to the imposition of fines and other punishments on members of a guild who do not meet certain agreed criteria. As such, they refer to situations where states do not meet obligations under international law. See Eiichi Fukatsu, *Coercion and the Theory of Sanctions in International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 1187, 1188 (Douglas M. Johnston & Ronald St. J. Macdonald eds., 1983); Todd A. Wynkoop, *The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 42 NAVAL L. REV. 91, 98 (1995). For examples of states closing borders in the framework of bilateral sanctions, reference the economic blockade of Armenia by Turkey and Azerbaijan, as well as the economic blockade of the former Yugoslav Republic of Macedonia by Greece. See Artak Dabaghyan & Mkhitar Gabrielyan, *Keeping Border Market Afloat: On Drivers and Constraints of Cross Border Cooperation in the South Caucasus*, CAUCUS RESEARCH RESOURCE CENTERS, [http://www.crrc.am/store/files/Article\\_on\\_border\\_market.pdf](http://www.crrc.am/store/files/Article_on_border_market.pdf); *Azerbaijani MP Offers Iran to Close Borders With Armenia*, NEWS.AZ, Feb. 12, 2010, <http://news.az/articles/8967>; *Deputy Foreign Minister: Closed Borders in 21<sup>st</sup> Century Are Unnatural*, PANORAMA.AM, Mar. 30, 2009, <http://www.panorama.am/en/politics/2009/03/30/agn/>; *Macedonia Embargo is Halted by Greece*, N.Y. TIMES, Oct. 16, 1995, available at <http://www.nytimes.com/1995/10/16/world/macedonia-embargo-is-halted-by-greece.html?pagewanted=1>.

<sup>100</sup> *Israel Agrees to Let UN Chief, UN Commissioner Enter Gaza*, *supra* note 97. The fact that Egypt has pledged to Israel not to open its borders with Gaza until the European border monitors return something that would require Israeli consent does not serve as an argument proving effective Israeli control as far as the Egyptian border with Gaza is concerned since Egypt is a sovereign state and can alter its policy whenever it wishes to do so. See Sharm El-Sheik, *Egypt Will Keep Gaza Strip Border Closed: Israel*, THE ASSOCIATED PRESS, June 24, 2008, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080624/Egypt\\_olmert\\_080624?s\\_name=&no\\_ads=](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080624/Egypt_olmert_080624?s_name=&no_ads=).

<sup>101</sup> Aronson, *supra* note 93, at 57.

law or human rights law *in globo* does not mean that provisions of these two branches cannot apply *vis-à-vis* the civilian population of the Strip. As acknowledged by the Israeli Supreme Court, certain obligations of the former occupying power to the local population continue to be in force for humanistic reasons.<sup>102</sup> Yet, these obligations do not originate from any positivist field of international law.

While it has been argued that these obligations could be perceived as post-*bellum* obligations,<sup>103</sup> application of this legal construction to the case of post-disengagement Gaza poses some difficulties.<sup>104</sup> First, the case of Gaza is not one of a transformative occupation<sup>105</sup> where post-*bellum* obligations usually apply.<sup>106</sup> In a transformative occupation, an occupying power's post-*bellum* obligations are intended to foster public order and civil life during and immediately after the termination of an occupation and the transition to indigenous rule.<sup>107</sup> This was never Israel's intent in Gaza. Second, post-*bellum* obligations are typically seen as part of a process which gradually leads to independence.<sup>108</sup> In the case of Gaza, Israeli maintains its humanitarian obligations in the territory because of a factual and legal stagnation that occurred after the imposition of Israeli restrictions on the territory. Israel does not maintain its obligations as part of process leading to independence.

Accordingly, it can be argued that any post-disengagement Israeli obligations owed to the Gaza Strip do not stem from posi-

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<sup>102</sup> HCJ 9132/07 Al-Bassiouni et al. v. Prime Minister of Israel, ¶ 12 [2008] (Isr.) (unreported); HCJ 6659/06 Anonymous et al. v. State of Israel, ¶ 11[2008] (Isr.) (unreported).

<sup>103</sup> Rubin, *supra* note 27, at 24-25, 29, 31. The whole notion of post-*bellum* obligations is based on the conviction that a former occupying power has certain obligations after the end of occupation and throughout the transition period during which authority is transferred to the legitimate sovereign. See Roberts, *supra* note 83, at 619; Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom"*, 95 CALIF. L. REV. 2295, 2348 (2007).

<sup>104</sup> See, e.g., Shany, *supra* note 66, at 16 (doubting the existence of post-occupation duties as far as the Gaza Strip is concerned).

<sup>105</sup> "Transformative" occupation is an occupation whose stated purpose is to change failed states that have been under tyrannical rule. See Roberts, *supra* note 83, at 580.

<sup>106</sup> *Id.*

<sup>107</sup> Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, in VEROFFENTLICHUNGEN DES WALTHER-SHUCKING-INSTITUTS FÜR INTERNATIONALES RECHT AN DER UNIVERSITÄT KIEL 7 (Andreas Zimmermann & Thomas Giegerich eds., 2009).

<sup>108</sup> As Benjamin Rubin writes, "either the authority of the local sovereign has been restored, although it has not yet acquired the ability to function fully, or the population is struggling to find its political expression free from the presence of the occupant." See RUBIN, *supra* note 27, at 28-29.

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tive, but rather from natural law.<sup>109</sup> As a normative source, natural law has a character distinct from positive law.<sup>110</sup> Traditionally, courts resort to natural law in order to address positivist *lacuna* in international law cases.<sup>111</sup> However, although it has traditionally been incorporated into positivist texts,<sup>112</sup> natural law can also func-

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<sup>109</sup> Application of natural law in the case of Gaza is based on the normative assertion that all human beings are equal and have an inherent dignity. See Matthew Ritter, "Human Rights": Would You Recognize One If You Saw One? A Philosophical Hearing of International Rights Talk, 27 CAL. W. INT'L L.J. 265, 282-83 (1997); Robert George, *Natural Law*, 52 AM. J. JURIS. 55, 59 (2007). The fact that some rights are based on natural law is also evident by the fact that non-derogable rights include rights such as freedom from torture and slavery, and freedom of thought. See International Covenant on Civil and Political Rights (I.C.C.P.R.), G.A. Res. 2200 A (XXI), ¶ 4.3, U.N. GAOR, 21st Sess., 1496th Plen. Mtg., Supp. No. 16, U.N. Doc. A/6546 (Dec. 16, 1966).

<sup>110</sup> Alberto Piedra, NATURAL LAW: THE FOUNDATION OF AN ORDERLY ECONOMIC SYSTEM 41 (2004); Alejandro Vigo, *Kant's Conception of Natural Right*, in CONTEMPORARY PERSPECTIVES ON NATURAL LAW 136 (Ana Marta Gonzalez ed., 2008).

<sup>111</sup> Yet, it has to be mentioned that sometimes the gap-filling process can also constitute the introduction of new norms into a legal order. For example, the European Court of Justice utilized the notion of "the general principles of law" as part of European law in order to fill a gap and impose European-wide fundamental rights on national consistencies. The Court referred to the constitutionality of secondary Community legislation and established that such Community enacted rules could be imposed on the national consistencies. See Roza Pati, *Rights and their Limits: The Constitution for Europe in International and Comparative Legal Perspective* 23 BERKELEY J. INT'L L. 223, 262 (2005).

<sup>112</sup> See, e.g., Statute of the International Court of Justice art. 38, June 26, 1945, 3 Bevans 1179, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (incorporating the notion of equity in international law, which stems from natural law, as an alternative source of law); United Nations Convention on the Law of the Sea art. 293, Dec. 10, 1982, 1833 U.N.T.S. 397, [http://www.un.org/Depts/los/convention.../texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention.../texts/unclos/unclos_e.pdf) (stating that, inter alia, "Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree."). On the notion of equity incorporating the values of the system and its connection with natural law, see Malcolm Nathan Shaw, INTERNATIONAL LAW 99-100 (5th ed. 2003); Ruth Lapidoth, *Equity in International Law*, 22 ISR. L. REV. 161, 163 (1987). Another example of natural law being absolved by positivist norms is the case of customary law that has formed part of international treaties and conventions. Examples of such conventions constitute the Vienna Convention on the Law of Treaties and the Convention on the Prevention and Punishment of the Crime of Genocide. On this see Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1, at 188 (Dec. 11, 1946), available at <http://daccess-ods.un.org/TMP/2133580.74426651.html>; G.A. Res. 96 (I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/96(I) (Dec. 11, 1946) (stating that genocide contravened moral law and the spirit and aims of the United Nations, and that despite the United Nation's emphasis on a natural law approach to the issue, it would call upon the Economic and Social Council to undertake studies with a view to drawing up a convention on the crime of genocide). See 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 749-51 (Lauterpacht ed., 8th ed. 1955). See Patrick Thornberry, INTERNATIONAL LAW AND THE

tion independently from positive law.

The last few years have seen examples where recourse to natural law as a distinct legal branch has provided solutions in cases where positive arrangements were inadequate. For example, in *jus ad bellum* cases of humanitarian intervention, it has been argued that natural law gives states the right to intervene under certain conditions, even when prerequisite conditions stipulated by positive law and the U.N. Charter do not exist.<sup>113</sup>

Even in the absence of any positivist duty, natural law concerns and the notion of human dignity have led military commanders involved in military expeditions to consider soldiers' human rights as a legitimate *jus in bello* factor.<sup>114</sup>

In one law of the sea incident, the U.N. Security Council allowed states the right to operate in Somali territorial waters in order to eliminate the threat posed to commercial ships by pirates, nevertheless indicating that the United Nations Convention on the Law of the Sea ("UNCLOS") remained the framework governing the law of the sea and that Resolution 1851 did not form customary law.<sup>115</sup> Accordingly, Resolution 1851 should be understood as

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RIGHTS OF MINORITIES 92-93 (1991), for a list of state representatives making such statements during the drafting of the Genocide Convention. See *Barcelona Traction Case (Belg. v. Spain)*, I.C.J. Rep. 1970, 3, for an acknowledgement by the International Court of Justice that natural law is the source of the crime of genocide.

<sup>113</sup> These prerequisite conditions are a codified under Chapter VII of the U.N Charter and article 51 of the same instrument, concerning the right to self-defense. See A. P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J. L. & PUB. POL'Y 725 (2004).

<sup>114</sup> Thus, in the case of *Private Jason Smith*, the Court of Appeal of England and Wales affirmed the decision of the High Court of Justice which held that the right to life applied to British soldiers serving in battlefields outside the United Kingdom and, as such, the army should consider that particular right when making any decision about a particular soldier. In the case of *Private Smith*, the Court concluded that the army had violated its responsibilities by sending him to battle with defective equipment. *Sec'y of State for Def. v Smith, R.*, [2009] EWCA (Civ) 441, [2009] 4 All E.R. 985 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/441.html>.

Notwithstanding the absence of any positive provision in the laws of war, the lives of soldiers can be a legitimate parameter in a military commander's decision to execute or not a targeted killing. See Solon Solomon, *Targeted killings and the Soldiers' Right to Life*, 14 ILSA J. INT'L & COMP. L. 99 (2007).

<sup>115</sup> See S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008), <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N08/655/01/PDF/N0865501.pdf?OpenElement>.

U.N. Resolution 1851 calls on states to deploy naval vessels and military aircraft in order to combat the piracy at sea off Somalia's coast. *Id.* The Resolution specifies that it does not establish customary law and that it only applies in the case of Somalia and that it does not affect the rights, obligations, or responsibilities of member states under international law, including under

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an *ad hoc* attempt by the international community to resort to rules outside any positivist framework in order to reasonably provide a solution to the problem of piracy in the Gulf of Aden. Since reason is one of the main pillars of natural law,<sup>116</sup> the natural law character of the aforementioned approach is evident.

Post-disengagement Gaza should be seen as a case where positive law cannot provide an adequate solution to the situation, due to its factual complexity. On the other hand, recourse to natural law provides a useful tool in navigating the territory's legal issues until its status is clarified, either through an Israeli re-occupation or the establishment of a Palestinian state. In scenarios where an occupying power retreats from a certain area, the occupying power has an obligation to consider the aftermath of the termination of its occupation.<sup>117</sup> Until the incoming power establishes control, plans for termination should include efforts to ensure public order and supply basic goods and services to the population, such as water, food, and medical supplies.<sup>118</sup> In such cases, natural law does not function alongside positive law after occupation ends, instead functioning autonomously because the laws of occupation no longer apply. Thus, any obligations a former occupying power assumes in the formerly occupied territory are based on natural law. This is demonstrated by a focus on the satisfaction of basic human needs.

In the case of post-disengagement Gaza, the Israeli position does not treat positivist legal duties as if they apply *a priori*. Instead Israel applies them *in concreto*, examining its policy in a particular situation and any possible violations of international humanitarian or human rights law that policy may entail.

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UNCLOS. *Id.* See also Press Release, Security Council, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight against Piracy Off Coast, Unanimously Adopting 1851, U.N. Press Release SC/9541(Dec. 16, 2008), <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>.

<sup>116</sup> Reason has been associated with natural law from the time of antiquity. The connection of these two notions can be found in the teachings of the Stoic philosophers of ancient Greece; the teachings of Cicero in ancient Rome; and the teachings of Thomas Aquinas during the Middle Ages. See BERYL HAROLD LEVY, *ANGLO-AMERICAN PHILOSOPHY OF LAW: AN INTRODUCTION TO ITS DEVELOPMENT AND OUTCOME* 4 (2001); CHARLES EDWARDS, *HUGO GROTIUS-THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT* HUGO 33 (1981), citing MARCUS TULLIUS CICERO, *DE RE REPUBLICA* [On the Commonwealth] book 3, ch. 22; THOMAS AQUINAS, *SUMMA THEOLOGICA* [Treatise on Law], Questions 90-97, 4 (Regnery Publishing, Inc. 2001).

<sup>117</sup> Benvenisti, *supra* note 107.

<sup>118</sup> *Id.*

The prevalent role of natural law in the case of post-disengagement Gaza is further evinced by a careful reading of the Israeli Supreme Court decision in the *Al-Bassiouni* case. In *Al-Bassiouni* the Court stated that after its disengagement from the Strip, Israel's sole obligation was to provide the civilian population of Gaza with the essential humanitarian resources<sup>119</sup> necessary to prevent a humanitarian disaster.<sup>120</sup> In addition, the Court declared that Israel must afford Gaza's civilian population its basic rights; rights which are inherent in the natural law based notion of human dignity,<sup>121</sup> and protection of which States consider a principle obligation.<sup>122</sup>

The *Al-Bassiouni* Court held that the post-disengagement Gaza Strip could not be considered occupied by Israel and that, as such, international humanitarian law did not apply. However, the Court also recognized that international humanitarian norms should be applied in Gaza, even absent Israel's status as an occupying power. The Court based this conclusion on the fact that an armed conflict continued to take place between Hamas and Israel, even after the latter's disengagement from the Strip.<sup>123</sup> Had such a conflict not existed, the justices may have looked for a positivist legal basis, such as human rights law, in order to provide the petitioners with some form of judicial redress. However, if they had done so, they would have looked to positivist legal doctrine as a way to inform their decision, not as a normative reference. Thus, positivist norms are applied *de lege lata* not *de lege ferenda*; that is, as a starting point and legal cloak to dress a natural law approach to Israeli obligations in the Gaza Strip.

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<sup>119</sup> HCJ 9132/07 *Al-Bassiouni et al. v. Prime Minister of Israel*, ¶ 11 [2008] (Isr.) (unreported).

<sup>120</sup> *Id.* at ¶ 2 (referring to the Israeli government's decision of September 19, 2007).

<sup>121</sup> Vigo, *supra* note 110.

<sup>122</sup> Comm. on Economic, Social and Cultural Rights, Comment on its 29th Sess., Nov. 11–29, 2002, U.N. Doc. E/C.12/2002/11, ¶¶ 37, 40 (Jan. 20, 2003); Comm. on Economic, Social and Cultural Rights, Comment on its 22nd Sess., Apr. 25–May 12, 2000, U.N. Doc. E/C.12/2000/4, ¶¶ 43, 44, 47 (Aug. 11, 2000); *see also* HCJ 9132/07 *Al-Bassiouni et al.* at ¶ 14 (during proceedings in front of the Israeli Supreme Court in *Al-Bassiouni*, the State of Israel stated that in cases of armed conflict, as was the case between the State of Israel and Hamas after the Israeli disengagement, international law requires Israel to ensure peace among the enemy civilian population and to respect the population's right to dignity and other basic rights).

<sup>123</sup> It is estimated that between 6,000 and 8,000 rockets have been launched into Israel since Hamas took over power in the Gaza Strip. *See* Luban, *supra* note 40, at 3.

## VI. CONCLUSION

This article explored Gaza's legal status after the Israeli disengagement. A certain set of rules, either of international humanitarian or human rights law, accompanies any choice of a legal framework. In light of this fact, such a framework acquires practical importance for the Strip's residents, who, as human beings, should always be at the epicenter of any legal arrangements.

This article argued that while post-disengagement Gaza should not be considered "occupied" by Israel, it is also not fully independent. As such, this article asserted that Israel has certain responsibilities in Gaza that stem from natural law and pertain to the satisfaction of the basic human needs of the local population.

A complex factual reality requires international law to transform its traditional dichotomist approach into a multi-faceted one. In this regard, the legal framework in post-disengagement Gaza could serve as a nightingale for the ever—developing field of international law.

