

IS GAZA OCCUPIED?: REDEFINING THE STATUS OF GAZA UNDER INTERNATIONAL LAW

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INTRODUCTION	916
I. A BRIEF POLITICAL AND TERRITORIAL HISTORY OF GAZA	919
II. INTERNATIONAL LAW RELATIVE TO THE RELATIONSHIP OF ISRAEL AND GAZA.....	923
A. SOURCES OF OCCUPATION LAW AND “EFFECTIVE CONTROL”	923
B. LEGALITY OF THE AGREEMENTS BETWEEN ISRAEL AND THE PALESTINIANS	926
III. OCCUPATION OF GAZA AND THE ARGUMENTS FOR “EFFECTIVE CONTROL”	931
IV. DISMANTLING THE ARGUMENTS FOR EFFECTIVE CONTROL	935
A. AUTHORITY OVER GAZA’S TERRITORIAL WATERS AND AIRSPACE	935
1. Territorial Waters	936
2. Airspace	937
B. THE BORDER BETWEEN ISRAEL AND GAZA	940
1. Borders and International Law	940
2. The Crossings	942
C. GAZA’S INFRASTRUCTURE	947
1. Electricity, Fuel, and Telecommunications	947
2. Water Supply and Sewage Removal	950

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D. TAXATION AND POPULATION REGISTRY IN GAZA	952
1. Taxation	952
2. Population Registry	954
E. ISRAEL'S SECURITY CONSIDERATIONS AND RIGHT TO RE- ENTER GAZA	956
F. ISRAEL'S "ABILITY" TO EXERCISE POWER OVER GAZA	958
V. CHANGING THE STATUS OF GAZA	961
A. AN END TO OCCUPATION AND A NEW BEGINNING	962
B. THE TRANSITION OF GAZA FROM OCCUPIED TO <i>SUI</i> <i>GENERIS</i> TERRITORY	963
CONCLUSION	965

INTRODUCTION

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

On September 12, 2005, the last Israeli soldier left the Gaza Strip and there has been no official Israeli military or civilian presence in the territory since then. Nonetheless, the United Nations has been reluctant to accept that Gaza is no longer occupied, with a spokesman for U.N. Secretary General Ban Ki-Moon declaring in January 2009 that "the U.N. defines Gaza, the West Bank, and East

1. This article uses the names 'Gaza' and 'Gaza Strip' interchangeably.

2. See Israel Ministry of Foreign Aff., *The Disengagement Plan - General Outline*, Apr. 18, 2004, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> [hereinafter *The Disengagement Plan*] (expressing concerns over the lack of a reliable Palestinian partner as the basis for unilateral disengagement).

Jerusalem as occupied Palestinian territory. No, that definition hasn't changed."³

This article explores the definition of "occupied territory" under international law and contends that the term "occupied territory" no longer applies to Gaza after Israel's disengagement. Although the United Nations still maintains that Gaza is occupied, under both the literal and interpreted applications of the definition of occupation—characterized by what is termed "effective control"—Gaza is not occupied territory pursuant to the standards set forth in international law and doctrine.

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

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

The existence of an Israeli presence in Gaza has been used by Palestinians living in the territory to justify attacks against Israel. As a consequence of the attacks that have emanated from Gaza, Israel withdrew from the territory in order to end its legal obligations as an occupier of Gaza. Gaza's status as a "*sui generis* territory" will eliminate the existence of the occupation of Gaza as a justification for attacks that are initiated against Israel. It will also consequently provide greater legitimacy for Israel's acts of self-defense against hostile terrorist networks that use Gaza as a base for their operations.

3. Benny Avni, *The O Word: Is Gaza Occupied Territory?*, N.Y. SUN, Feb. 11, 2008, <http://www.nysun.com/foreign/o-word-is-gaza-occupied-territory/71079/> (last visited June 20, 2010).

It is therefore imperative that the official legal status of Gaza be changed. The analysis in this article will combine a practical and a legal approach that will strengthen the political argument in support of that change, while recognizing the legal implications and identifying the need for a political solution.

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

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

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

Part IV systematically dismantles each of the assertions regarding “effective control” from the previous Part. By combining legal analysis and interpretation with an examination of the facts, the

subparts assess the arguments relating to each assertion and explain why they fail the “effective control” test outlined in Part III.

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

This article concludes with a recommendation that Gaza should have a new intermediate legal status—“*sui generis* territory”—as a positive step towards relieving Israel of the obligations of an occupier while moving the Palestinian people in the direction of complete autonomy, which will lay the groundwork for the establishment of a Palestinian state that will exist peacefully beside Israel.

I. A BRIEF POLITICAL AND TERRITORIAL HISTORY OF GAZA

The Gaza Strip, a coastal territory along the Mediterranean Sea bordered by Israel and Egypt, is internationally recognized as part of the Palestinian Territories.⁴ The first historic mention of Gaza is in the Hebrew Bible: “The . . . Canaanite territory extended from Sidon as far as Gerar, near Gaza”⁵ Gaza is mentioned again around the fifteenth century B.C., in connection with Samson whose story is inextricably linked with Gaza.⁶ Samson was delivered into bondage in Gaza by Delilah, and he died toppling the Temple of the god Dagon as revenge on the Philistines for gouging out his eyes.⁷ Gaza was mentioned again in the story of the prophet Amos, who

4. See MARTIN GILBERT, *ISRAEL: A HISTORY* 491-92 (William Morrow 1998) (1936) (noting that the Camp David Accords suggested an independence plan for the Gaza Strip and the West Bank, further confirming acceptance of a Palestinian identity).

5. *Genesis* 10:19.

6. *Judges* 16:25-30.

7. *Id.*

condemned the people of Gaza for trading in slaves and told its people that they had sinned and that God would bring fire upon the city walls.⁸

In the eleventh and twelfth centuries the Crusaders contested and sometimes controlled Gaza.⁹ In 1517 the Ottoman Empire conquered the territory,¹⁰ but Ottoman rule over Gaza was interrupted in 1799 when the Middle East was temporarily conquered by Napoleon's invading armies.¹¹ After the turn of the century, Mohammed Ali, known as the founder of modern Egypt, expanded his power to territories beyond Egypt including Sudan and Syria.¹² This event is significant because it marks the beginning of modern Egypt's influence over Gaza. Later recaptured by the Ottoman Empire, the Ottomans permanently lost Palestine to the British during World War I in the Third Battle of Gaza in 1917.¹³ After the war, Gaza became part of the British Mandate of Palestine in 1922 under the authority of the League of Nations.¹⁴ The territory remained under British mandatory control until the dissolution of the Mandate of Palestine in May of 1948.¹⁵

8. See Amos 1:6; see also THE JEWISH PUBLICATION SOCIETY, TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT 16, 405-07, 1015-16 (1985).

9. See NORMAN DAVIES, EUROPE: A HISTORY 358 (1996) (briefing the Crusaders seven major attempts to recover the Holy Land between 1096 and 1291).

10. See ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 86 (1991) (elaborating on the success of the Ottoman Empire and its absorption of Syria, Egypt, and Western Arabia).

11. See *id.* at 265 (noting this interruption of the Ottoman control by the French armies as marking a new era regarding military power).

12. See *id.* at 273 (describing how Ali rallied the support of the townspeople and imposed a new ruling group).

13. See *id.* at 318 (specifying that after the end of World War I, the British Balfour Declaration and Treaty of Versailles subjected the Ottoman controlled territories of Iraq and Palestine to British Mandate).

14. See GILBERT, *supra* note 4, at 42 (remarking that the Paris Peace Conference both granted the Palestine Mandate to Britain and "accept[ed] the promise of the Balfour Declaration to 'facilitate' the establishment of Jewish National Home there").

15. See *id.* at 186 (detailing Israel's inaugural ceremony, the signing of the Israeli Declaration of Independence, and the exit of the British troops and administration).

On the eve of Israel's independence in November 1947, the United Nations issued a Partition Plan for Palestine¹⁶ which recommended dividing the remaining territories of the Mandate of Palestine into two states, one Jewish and one Arab, with Gaza becoming part of the Arab state.¹⁷ The Jewish authorities in Palestine accepted the U.N.'s plan, while Arab representatives in Palestine, as well as the Arab states, rejected it. After Israel declared its independence in May 1948, the Egyptian army invaded the area from the south, thus commencing Israel's War of Independence. That event was followed by invasions from the other neighboring Arab countries of Jordan, Syria and Lebanon.¹⁸

The territory of the Gaza Strip as it is now known was the product of the subsequent 1949 Armistice Agreement between Egypt and Israel.¹⁹ The Agreement established that the border of the Gaza Strip

16. See G.A. Res. 181 (II), § A, U.N. Doc. A/RES/181 (Nov. 29, 1947).

17. See *id.* § B, pt. I(A) (detailing the termination of the Mandate, the gradual withdrawal of armed forces, and the creation of two independent states in the territory). Article 10 of the U.N. Charter, however, only allows the General Assembly to discuss any matter within the ambit of the U.N. terms of reference and to make recommendations, but not binding decisions. Only the Security Council can make binding decisions. U.N. Charter art. 10.

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

Id.

18. See generally GILBERT, *supra* note 4, at 186-208 (providing a historical account of the events leading up to and occurring during the Israeli War of Independence).

19. The 1949 Armistice Agreements are a set of agreements negotiated bilaterally between Israel and its neighbors—Egypt, Lebanon, Jordan, and Syria—that ended the official hostilities of the 1948 Arab-Israeli War (1947-1949) and established respective demarcation lines. These armistice agreements have not been superseded by an authentic peace treaty, with the exception of the treaty between Israel and Egypt. See General Armistice Agreement, Isr.-Egypt, Feb. 24, 1949, arts. II, V, VI, 42 U.N.T.S. 251 [hereinafter Isr.-Egypt Armistice]; General Armistice Agreement, Isr.-Leb., Mar. 23, 1949, arts. I-V, 42 U.N.T.S. 287; Israel-Jordan Armistice Agreement, Isr.-Jordan, Apr. 3, 1949, arts. I, IV-V, 42 U.N.T.S. 303; General Armistice Agreement, Isr.-Syria, July 20, 1949, arts. I, III, V, 42 U.N.T.S. 327. Pursuant to these agreements, the Security Council on August 11, 1949 issued a Resolution that, *inter alia*, “noted with satisfaction the several Armistice Agreements” and found “that the Armistice Agreements constitute[d] an important step toward the establishment of permanent peace in Palestine and

was “dictated exclusively by military considerations” and was “valid only for the period of the Armistice” without “establish[ing], . . . recogniz[ing], . . . strengthen[ing], . . . weaken[ing] or nullify[ing], in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine.”²⁰ Egypt imposed a military government on Gaza in the 1950s and 1960s,²¹ but never purported to annex it. In June 1967, as a consequence of the Six-Day War, Israel gained control of Gaza, and the Israeli military—the Israel Defense Forces (“IDF”)—remained the authority in Gaza until 1994.²² On September 13, 1993, Israel and the PLO signed the 1993 Declaration of Principles on Interim Self-Government Arrangements (“Oslo Accords”)²³ leading to the transfer of governmental authority to a newly established Palestinian Authority the next year. After the signing, most of Gaza, with the exception of the Israeli settlement blocs and military areas, came under Palestinian control.²⁴

As a consequence of the Second Intifada which erupted in September 2000 and wreaked havoc on Israel for several years with rocket attacks and suicide bombings from Gaza (as well as the West Bank) at the direction of Fatah, Hamas and Islamic Jihad, the Israeli government voted in February 2005 to unilaterally disengage from

consider[ed] that these agreements supersede the truce provided for in Security Council resolutions 50 (1948) of 29 May and 54 (1948) of 15 July 1948.” G.A. Res. 73, ¶ 2, U.N. Doc. S/RES/73 (Aug. 11, 1949).

20. Isr.-Egypt Armistice, *supra* note 19, art. IV.3.

21. GILBERT, *supra* note 4, at 329-31.

22. See Israeli Ministry of Foreign Aff., *Israel's Disengagement Plan: Renewing the Peace Process*, Apr. 20, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan+Renewing+the+Peace+Process+Apr+2005.htm> [hereinafter *Israel's Disengagement Plan*] (explaining that the Six Day War also resulted in Israel's control over the West Bank).

23. See Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self Government Arrangements, pmbl., Sept. 13, 1993, 32 I.L.M. 1525, 1527 [hereinafter *Oslo Accords*] (recognizing the need to end conflict and create peaceful coexistence).

24. In September 1995, Israel and the PLO signed a second peace agreement, known as Oslo II, which extended the Palestinian Authority to most West Bank towns. The agreement also established an elected 88-member Palestinian National Council, which held its inaugural session in Gaza in March 1996. Israel-Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, With Selected Annexes, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter *Oslo II*].

the territory.²⁵ The Disengagement Plan stipulated that all Israeli settlements in Gaza and the Israeli-Palestinian Erez Industrial Zone should be dismantled, military bases be removed, and all 9,000 Israeli settlers be relocated from Gaza.²⁶

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

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

A. SOURCES OF OCCUPATION LAW AND “EFFECTIVE CONTROL”

The laws of occupation are derived from two primary sources: the regulations annexed to the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land (“Hague Regulations”)²⁷ and the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”).²⁸

The Hague Regulations codified the rules of customary international law on armed conflict and addressed international occupation law in Section III entitled, “Military Authority over the

25. See *Israel’s Disengagement Plan*, *supra* note 22 (noting that the disengagement plan could lead to renewed peace talks). It must be noted that disengagement is not a unilateral attempt to change Gaza’s formal legal status, an act that is prohibited by the various agreements between Israel and the Palestinian Authority. See *infra* Part V.

26. See *id.* (outlining the key provisions and timeline of the unilateral disengagement plan).

27. See Hague Convention (II) with Respect to the Law and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, July 29, 1899, arts. 23, 42-43, 187 Consol. T.S. 429 (banning the use of certain types of modern technology in war); Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277 [hereinafter Hague Regulations] (expanding upon the 1899 Convention).

28. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 2-3, 6, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (asserting the Convention’s application to occupying powers and delineating the restrictions on the exertion of their control).

Territory of the Hostile State.”²⁹ The laws address what would happen after hostilities end and an occupation begins. They also deal with various aspects of occupation from its commencement to the responsibilities of the occupier, as well as limitations on the occupier’s behavior.

The Hague Conventions and the annexed Hague Regulations were drafted in a time when wars were primarily fought by soldiers in a combat zone. That dynamic changed during the two World Wars because new tactics were used that directly affected civilian populations.³⁰ In addressing the changes on the battlefield, the Fourth Geneva Convention was written to supplement the Hague Regulations by filling in the areas in which the Hague Regulations fell short with respect to civilians.³¹ The Fourth Geneva Convention included provisions regulating the behavior of states towards civilian populations during wartime, and further delineated states’ obligations to civilians in the event of an occupation.³² Some of the obligations in occupied territories outlined in the Fourth Geneva Convention include:

29. Hague Regulations, *supra* note 27, § 3.

30. See Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?*, 189 MIL. L. REV. 51, 55-57 (2006) (discussing the Convention drafters’ intent to create provisions aimed at preventing the suffering of civilian populations affected by war); ALLEN GERSON, *ISRAEL, THE WEST BANK, AND INTERNATIONAL LAW* 5 (1978) (remarking that occupants often desire to reform the occupied territory). Occupants are restricted in the nature of the changes that they wish to make in that “[i]t is widely acknowledged that the occupant must not institute in the occupied territory far-reaching constitutional modifications.” Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 113 (1978).

31. Fourth Geneva Convention, *supra* note 28, art. 154.

In the relations between the Powers who are bound by The Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July, 1899, or that of 18 October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Id.

Additionally, Section II of the Hague Regulations relates to “Hostilities” and Section III relates to “Military Authority over the Territory of the Hostile State.” Hague Regulations, *supra* note 27, §§ II-III.

32. See Fourth Geneva Convention, *supra* note 28, arts. 55-57.

- Protecting children and providing facilities for their care and education, as well as taking any necessary measures to help identify children, to assist orphaned children, and to provide preferential treatment to “children under than fifteen years, expectant mothers, and mothers of children under seven years”;³³
- Providing food and medical care and ensuring sufficient hygiene and public health standards;³⁴
- Allowing humanitarian aid shipments such as food, clothing and medical supplies for the benefit of the population and facilitating the accessibility of such shipments;³⁵ and
- Prohibiting destruction of any property unless “absolutely necessary” to the military operation.³⁶

Notwithstanding these obligations, the Fourth Geneva Convention makes little mention of the geographic reach of the responsibilities of an occupying force. The Hague Regulations vaguely address the issue of scope by stating that occupation exists only in areas where authority is “established” and “can be exercised.”³⁷

Beyond these two sources, international law provides little guidance as to what constitutes an occupation. However, the term “effective control” is consistently applied in the case law and state practice to assess the exercise of authority in a territory and, therefore, the existence of an occupation. In the context of international occupation law, “effective control” is a term of art with no definite source, but it has developed as the standard that combines the conditions for occupation outlined in the Hague Regulations and the Fourth Geneva Convention. Article 42 of the Hague Regulations states that “territory is considered occupied when it is actually placed under the authority of the hostile army” and that “[t]he occupation extends only to the territory where such authority has been

33. *Id.* art. 50.

34. *Id.* arts. 55-56.

35. *Id.* art. 59 (specifying that aid from “either . . . States or . . . impartial humanitarian organizations” would be acceptable).

36. *Id.* art. 53.

37. See Hague Regulations, *supra* note 27, art. 42.

established and can be exercised.”³⁸ Article 6 of the Fourth Geneva Convention merely describes the legal duties of an occupier as existing only to the extent that the state in power “exercises the functions of government in such [occupied] territory.”³⁹

To expand upon those requirements, the case of *United States v. List* (“*Hostages Case*”)⁴⁰ before the United States Military Tribunal at Nuremberg after World War II provides legal precedent for a more comprehensive interpretation. The tribunal held that the established government of the territory must be fully replaced by the occupier in order for occupation to obtain:

[A]n occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.⁴¹

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

B. LEGALITY OF THE AGREEMENTS BETWEEN ISRAEL AND THE PALESTINIANS

The purpose of the 1907 Hague Convention was to establish agreements to reduce suffering caused by future wars and to codify the rules of warfare in the event that a war could not be prevented;

38. *Id.* art. 42.

39. Fourth Geneva Convention, *supra* note 28, art. 6.

40. *United States v. List (Hostages Case)*, U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. 6-10, at 55-56 (William S. Hein 1997) (1948) [hereinafter *Hostages Case*].

41. *Id.*; see also Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L. HUM. L. 1, 11 (2006) [hereinafter Shany, *Faraway, So Close*] (summarizing the three stages of occupation implied by the Hague Regulations and the Geneva Convention).

the intention was to maintain state sovereignty even after defeat.⁴² Despite defeat, the losing state retained sovereignty and the right to return to a peaceful state and the *status quo ante* unless the conquering state annexed the territory.⁴³ While Gaza's status quo ante was that of administered territory and not statehood, in this context the notion can be taken to mean a return to a peaceful condition characterized by the establishment of self-government in some form. Recognizing the importance of these principles and that the ultimate objective of an occupation is to enable the territory that is occupied to eventually self-govern and live peacefully with its neighbors, Israel entered into several bilateral agreements with the PLO to facilitate a transfer of power to the Palestinian Authority.⁴⁴

According to Article 47 of the Fourth Geneva Convention, protected persons may not be deprived "of the benefits of the . . . Convention by any . . . agreement concluded between the authorities of the occupied territories and the Occupying Power."⁴⁵ In light of this provision, some contend that the Israel's bilateral agreements with the PLO amount only to self-administration agreements between the occupier and the local authorities in the occupied territories. Such contentions are easily dispelled by the preamble to the Oslo Accords, which states:

42. See Lancaster, *supra* note 30, at 53 (adding that "the convention was a product of its times, where states fought mainly limited wars with minimal impact on civilian populations").

43. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 11 (1993) (highlighting the difficulties of the restoration process in times of occupation, and remarking that that process is often the source of many of those difficulties).

44. See, e.g., Oslo Accords, *supra* note 23 (encompassing one such bilateral agreement between Israel and the PLO). The agreements mentioned throughout this piece have been included as they pertain to Gaza. Another agreement, the Hebron Protocol, was not included as it makes no mention of Gaza and is not relevant to the subject matter of this paper. Israel Ministry of Foreign Aff., *Protocol Concerning the Redeployment in Hebron*, Jan. 17, 1997, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Protocol+Concerning+the+Redeployment+in+Hebron.htm> [hereinafter *Hebron Protocol*].

45. Fourth Geneva Convention, *supra* note 28, art. 47; see also Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISR. L. REV.* 68, 73-74 (2006) (identifying a "binary normative configuration" in the application of certain fields of international law in which international law will apply only where preceded by a certain set of factual circumstances, and remarking that the law of occupation is one such field of law).

The Government of the State of Israel and the PLO team . . . representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.⁴⁶

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

The Oslo Accords laid the groundwork for Israel's transfer of control over parts of the West Bank and Gaza to the newly created Palestinian Authority, which would be responsible for administering the territory under its own rule. The Oslo Accords also provided for the future negotiation of an interim agreement to settle many of the details of responsibility and transfer of powers that were not covered therein.⁴⁷ The Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area of 1994 ("Gaza-Jericho Agreement") was concluded as a follow-up to the Oslo Accords and provided many of the particulars relating to the responsibilities of Israel and the Palestinian Authority.⁴⁸

The Gaza-Jericho Agreement was eventually superseded by Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo II").⁴⁹ Oslo II was concluded in 1995 and provided the details for the establishment of the Palestinian Council, including its structure, its powers, its responsibilities, and the transfer of

46. Oslo Accords, *supra* note 23, intro.

47. *Id.* art. 7.

48. See Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, May, 1994, 33 I.L.M. 622, 626-28 [hereinafter Gaza-Jericho Agreement] (establishing provisions for the withdrawal of Israeli military forces and the transfer of authority to the Palestinian Authority).

49. See Oslo II, *supra* note 24, pmb. (asserting expressly that the previous three agreements, including the Gaza-Jericho Agreement, would "be superseded by this Agreement").

authority to the Council.⁵⁰ Among other items, Oslo II also contained provisions relating to redeployment of Israeli military forces and security arrangements for Israel.⁵¹

Two later agreements, the Wye River Memorandum of 1998 (“Wye River Memo”)⁵² and the Sharm el-Sheikh Memorandum of 1999 (“Sharm el-Sheikh Memo”),⁵³ were concluded with the purpose of implementing Oslo II. The Sharm el-Sheikh Memo was also intended to implement all the other “prior agreements” between Israel and the Palestinians since the signing of the Oslo Accords in September 1993.⁵⁴

The strength of the arguments to be made in this article depends upon the assumption that these agreements are legally binding under international law. Because the PLO is not the government of a sovereign state, questions have been raised as to whether the agreements are binding since they were not “concluded between States” as required by the Vienna Convention on the Law of Treaties (“VCLT”).⁵⁵ However, the absence of statehood of one or both parties to an agreement does not entirely diminish either party’s responsibilities under international law. The VCLT states: “The fact that the present Convention does not apply to international agreements concluded between *States and other subjects of international law* or between such other subjects of international law . . . shall not affect . . . [t]he legal force of such agreements.”⁵⁶ An agreement between Israel and the Palestinians may not be

50. Oslo II, *supra* note 24, arts. 1-12, 31.

51. *Id.* arts. 10-14.

52. Israel-Palestine Liberation Organization: Wye River Memorandum (Interim Agreement), Oct. 23, 1998, 37 I.L.M. 1251, 1251 [hereinafter Wye River Memo].

53. Israel-Palestine Liberation Organization: The Sharm el-Sheikh Memorandum, Sept 4, 1999, 38 I.L.M. 1465, 1465 [hereinafter Sharm el-Sheikh Memo].

54. *See id.* (prefacing the memo by stating that nothing contained therein would undermine any prior agreements between Israel and Palestine).

55. *See* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (“[T]reaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

56. *Id.* art. 3 (emphasis added).

permitted the formal title of a treaty under the VCLT, but the agreements have the potential to be enforced nonetheless.⁵⁷

It has also been contended that the Oslo Accords and its subsequent agreements are no longer relevant due to failure of implementation. However, just as the VCLT applies to any international treaty between states parties, failure of implementation does not automatically nullify an agreement between a state and another subject of international law and does not lessen its weight. Remedies for breach of the agreements are also covered by Article 3 of the VCLT.⁵⁸ The failure to implement the agreements allows the aggrieved party to invoke the same remedies for breach as under the VCLT: “terminating the treaty or suspending its operation in whole or in part.”⁵⁹ While the right of termination is available to both Israel and the Palestinians, neither party has exercised that right.

That the agreements between Israel and the Palestinian Authority are perceived as binding is also evidenced by the fact that the U.N. Security Council, reflecting the sentiments of the international community, has urged the parties on several occasions to implement their terms.⁶⁰ The Security Council issued a resolution in 1994 to encourage the “implementation of the declaration of principles . . . without delay,”⁶¹ and in 1996 the Security Council “urg[ed] the

57. See generally GEOFFREY R. WATSON, *THE OSLO ACCORDS: THE INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 57-74* (2000) (delineating the arguments regarding the enforceability of the Oslo Accords as treaties, such as the fact that the original version of the VCLT referenced agreements encompassing non-state parties, and remarking that the “nomenclature adopted by the parties . . . or the press” (“agreement” as opposed to “treaty”) is not dispositive).

58. Vienna Convention on the Law of Treaties, *supra* note 55, art 3. Article 3 of the VCLT is entitled “International agreements not within the scope of the present Convention,” and states:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law . . . shall not affect . . . the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.

Id.

59. *Id.* art. 60(1).

60. John Quigley, *The Israel-PLO Interim Agreements: Are they Treaties?*, 30 CORNELL INT'L L.J. 717, 738 (1997).

61. *Id.* (quoting S.C. Res. 904, U.N. SCOR, 49th Sess., 3351st mtg., U.N. Doc. S/RES/904 (1994), *reprinted in* 33 I.L.M. 548 (1994)).

parties to fulfill their obligations, including the agreements they reached.”⁶² And as recently as June 26, 2009, the Quartet on the Middle East—four entities involved in mediating the peace process: United States, Russia, the European Union, and the United Nations—called upon Israel and the Palestinians to implement their obligations.⁶³ All of these efforts indicate that the United Nations sees the agreements as binding in that the agreements have created responsibilities for both parties that need to be enforced.⁶⁴

The ability to execute the agreements between Israel and the Palestinians remains a challenge, but the provisions that both parties continue to uphold, particularly the ones that are pertinent to the arguments here, still apply. The agreements may not prove to serve as a direct path to peace for Israel and statehood for the Palestinian people, but the contracts that they created and the rights that they granted to the parties endure, insofar as both parties act in good faith.⁶⁵

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

The international law of occupation as applied to the situation in the Palestinian Territories has often been questioned. Under Israel’s interpretation, the occupation provisions of the Hague Regulations and the Fourth Geneva Convention refer only to territories of “High Contracting Parties,” i.e., states parties to the treaties. Indeed, the international law of occupation has traditionally been understood to only apply to the relationships between sovereign states.⁶⁶ Prior to Israel’s entry into the Gaza Strip in 1967, however, Gaza was not the

62. *Id.* (quoting S.C. Res. 1073, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1073 (1996)).

63. See U.S. Dept. of State, Bureau of Public Aff., Office of the Spokesman, *Quartet Statement from the June 26, 2009 Meeting in Trieste*, available at <http://www.state.gov/r/pa/prs/ps/2009/06a/125433.htm> (affirming the Quartet’s “determination to actively and vigorously seek a comprehensive resolution of the Arab-Israeli conflict”).

64. See Quigley, *supra* note 60, at 738 (referencing a letter from the European Union to the PLO which also supports the conclusion that the parties have obligations under the agreements).

65. See *infra* Part IV.

66. See Fourth Geneva Convention, *supra* note 28, art. 2 (applying the Convention specifically to “High Contracting Parties”).

sovereign territory of any state party to the treaties. Turkey had renounced sovereignty in 1923; Britain never acquired sovereignty but instead ruled the territory under a League of Nations Mandate; and Egypt never claimed to have acquired sovereignty after its capture of the territory in 1948. Thus, Gaza has no permanent sovereign status and “belongs” to no one. Accordingly, and due to a general lack of clarity as to what exactly constitutes “effective control,” there has been some understandable ambivalence among the Israeli government, political community, and public as to whether Israel has occupied Gaza.

Notwithstanding this ambivalence, the international community, spearheaded by the United Nations, has repeatedly declared the West Bank and Gaza to be occupied, and Israel has de facto conceded that point. From 1967 until 2005, Israel imposed a military administration on Gaza (and continues to do so in parts of the West Bank) and required itself, by means of military orders, to grant civilians the humanitarian protections outlined in the international law of occupied territories. In cases before the Israeli Supreme Court, the Israeli government has consistently agreed to concede, *arguendo*, the question of occupation, and has had the Court rule on the assumption that the West Bank (and, until 2005, Gaza) is governed by the international law of occupation. This concession is so deeply rooted in Israeli legal practice that in the 2002 Israeli Supreme Court case of *Ajuri v. the Commander of IDF Forces in the West Bank*, Justice Aharon Barak, President of Israel’s Supreme Court, blandly asserted in his decision that “Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power.”⁶⁷

Israel understood that occupation could not continue indefinitely and that the situation as it was functioning posed an ongoing security challenge for the Israeli military and a constant danger to the Israeli civilian population. Israel thus withdrew from Gaza in September 2005, with the intent that the Palestinian leadership would have complete authority in the territory and that Israel would no longer

67. HCJ 7015/02 *Ajuri v. The Commander of IDF Forces in the West Bank and Gaza* [2002] 1, 2; see also HCJ 2056/04 *Beit Sourik Village Council v. Israel* [2004] 1, 2 (noting that Israel had been belligerently occupying the West Bank since 1967).

have any obligations as an occupier.⁶⁸ Some argue that the occupation of Gaza continues in spite of Israel's disengagement from the territory because Israel has retained "effective control" over Gaza.⁶⁹ However, since the disengagement from Gaza, Israel has maintained that it no longer has authority in Gaza, thus ending the occupation of the territory.⁷⁰

Israel's detractors assert that "effective control" persists because Israel:

- patrols Gaza's territorial waters and maintains exclusive control in the air space over Gaza;⁷¹
- controls the entire Israeli border with Gaza including the Erez, and Karni border crossings;⁷²
- is said to "control" Egypt's border with Gaza, including the Rafah border crossing;⁷³
- supplies Gaza with electricity, fuel, telecommunications services, water, and sewage removal and is said to "control" the administration of these services in Gaza.⁷⁴

68. See Israeli Office of the Prime Minister, *The Cabinet Resolution Regarding the Disengagement Plan*, June 6, 2004, available at http://www.awesome seminars.com/docs/the_plan.pdf ("The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.").

69. See John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in Palestinian Territories Occupied Since 1967*, ¶ 6, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007) (maintaining that Gaza is effectively occupied because Israel controls the airspace over Gaza, the territorial waters next to it, the adjacent land crossing points of Rafah and Karni, and the external borders).

70. See HCJ 9132/07 *Ahmad v. The Prime Minister of Israel* [2008] 1, ¶ 12 ("Israeli soldiers are not present in [Gaza] on a permanent basis and do not direct what occurs there").

71. News Release, Hum. Rts. Watch, *Israel/Egypt: Choking Gaza Harms Civilians* (Feb. 18, 2009), <http://www.hrw.org/en/news/2009/02/18/israelegypt-choking-gaza-harms-civilians> (last visited June 20, 2010) [hereinafter *Israel/Egypt: Choking Gaza Harms Civilians*].

72. See *id.* (conceding that Israel does not have full control over the Rafah crossing between Gaza and Egypt); see also Dugard, *supra* note 69, ¶¶ 15-16 (discussing Israel's control of the six crossings in Gaza).

73. See Dugard, *supra* note 69, ¶¶ 15-16 (pointing out that since June 25, 2006, Israel has contributed to significant closures of the Rafah crossing).

74. *Israel/Egypt: Choking Gaza Harms Civilians*, *supra* note 71.

- maintains a population registry of Gazans and collects, on behalf of the Palestinian Authority, taxes on goods bound for Gaza passing through Israeli ports and is, therefore, said to “control” Gaza’s tax system and population registry;⁷⁵
- has identified security considerations and reserved for itself the right to re-enter Gaza for broadly self-defined “self-defense”;⁷⁶ and
- has the “ability” to exercise power over Gaza.⁷⁷

Arguably, it will be more likely that Israel will be viewed as having ended the occupation if it has fewer restrictions on Gaza than it does at present.⁷⁸ However, the mere existence of restrictions on a territory does not necessarily indicate an occupation, and so it is important to be clear about what an exercise of “effective control” requires. Having influence over, responsibility for, restrictions on, or command of certain activities or resources is not an automatic indication of the level of “effective control” that is necessary to invoke the laws of occupation. This distinction is often obfuscated by the various international organizations and the media, who consistently misapply the term “effective control” in the context of an occupation and continue to disseminate information that supports incorrect and perhaps even misleading conclusions.

This article proposes a three-part test for assessing the existence of “effective control” over a territory. The test, which is derived from the standards set forth in the Hague Regulations, the Fourth Geneva Convention, and the *Hostages* case, analyzes whether:

75. See B’TSELEM, *The Gaza Strip: The Scope of Israeli Control in the Gaza Strip*, http://www.btselem.org/english/Gaza_Strip/Gaza_Status.asp (last visited June 20, 2010) (explaining that authority for the administration of the population registry was formally transferred to the Palestinian Authority under the second Oslo Agreement, but that in practice Israel still exercises significant control over the registry).

76. See *infra* Part IV.E.

77. See *infra* Part IV.F.

78. See Reut Inst., *End of Occupation*, Nov. 8, 2004, <http://reut-institute.org/en/Publication.aspx?PublicationId=375> (last visited June 20, 2010) (asserting that even if the world does eventually view Israel as no longer being an occupier of Gaza, there are still other challenges Israel will face under international law in relation to its actions in Gaza).

1. the territory is “actually placed under the authority of the hostile army[,]” and the “authority has been established and can be exercised”;⁷⁹
2. the state in power “exercises the functions of government in such territory”;⁸⁰ and
3. the authority of the occupier is “to the exclusion of the established government.”⁸¹

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

IV. DISMANTLING THE ARGUMENTS FOR EFFECTIVE CONTROL

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

A. AUTHORITY OVER GAZA’S TERRITORIAL WATERS AND AIRSPACE

Israel’s authority in the sea and air is not an exercise of “effective control” for two reasons. First, control over adjacent waters and air space does not constitute “effective control” over Gazan land. Second, Israel’s control is neither complete nor hostile. Israel also

79. Hague Regulations, *supra* note 27, art. 42.

80. Fourth Geneva Convention, *supra* note 28, art. 6.

81. *Hostages Case*, *supra* note 40, at 55; *see also* Shany, *Faraway, So Close*, *supra* note 41, at 12-13 (explaining that the 2005 case of *Democratic Republic of Congo v. Uganda* rejected the using the potential for control as an indicator of effective control by applying a more restrictive reading of Article 42 of the Hague Regulations).

does not exercise total control over the sea because it has allowed Gazan authorities and civilians access to several nautical miles off Gaza's coast. The control that Israel exercises is based on negotiated agreements between Israel and the PLO which grant Israel exclusive rights to the airspace over Gaza as well as significant control over adjacent waters.

1. Territorial Waters

By way of background, the range of territorial sea—the belt of water immediately adjacent to the coast of a nation—was at one point determined by range of vision, and was later amended to three nautical miles based on the range of cannon fire. The United Nations Convention on the Law of the Sea (“UNCLOS”) ultimately determined the range of the territorial sea to not exceed twelve nautical miles.⁸²

Article 1(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone⁸³ lays out the general rule of international law, stating: “The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.”⁸⁴ In other words, only a state has sovereign authority over its territorial sea by definition.

Despite Gaza's lack of sovereignty, Article XVII(2)(a) of Oslo II granted the Palestinian Authority control over Gaza's territorial waters.⁸⁵ It can be argued that, in light of the sovereignty principle as it pertains to the law of the sea, access to territorial waters is inherent in statehood and the parties could not assign control over the territorial sea to Gaza. In recognizing that granting control was an allowance and not an automatic right for Gaza, the agreements also allowed the Israelis to override that control in the event of a threat to Israeli security.

82. See United Nations Conference on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (reserving the Convention's power to determine the “baselines” from which the range should be measured).

83. Convention on the Territorial Sea and the Contiguous Zone, art. 1(1), Apr. 29, 1958, 516 U.N.T.S. 205.

84. *Id.*

85. See Oslo II, *supra* note 24, art. XVII(2)(a) (“Territorial jurisdiction includes land, subsoil and territorial waters . . .”).

Article V(3)(a) of the Gaza-Jericho Agreement gave Israel the authority over “external security”⁸⁶ of the territories, which extends to the territorial waters off Gaza’s shore. Oslo II elaborated upon that notion by giving Israel the exclusive responsibility to protect itself from the air and sea. Specifically, Chapter 2, Article XII(1) of Oslo II states: “Israel shall . . . carry the responsibility for defense against external threats . . . from the sea and from the air . . . and will have all the powers to take the steps necessary to meet this responsibility.”⁸⁷

Although Gaza does not have an automatic right of access to its adjacent waters according to the Geneva Convention on the Territorial Sea and the Contiguous Zone, Israel has granted the Palestinians in Gaza access to the waters for fishing and other ecological purposes. Before 2000, the Palestinians had access to the full twelve nautical miles of territorial waters in accordance with UNCLOS, but after the start of the Second Intifada in 2000, access was reduced to six nautical miles and then three in January 2009 because of Israel’s continued external security concerns about the smuggling of weapons and ammunition into the Gaza Strip by sea.⁸⁸

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

2. Airspace

Similar to the argument regarding the territorial waters, Gaza is not entitled as of right to the airspace above it because Gaza is not a

86. Gaza-Jericho Agreement, *supra* note 48, art. V(3)(a).

87. Oslo II, *supra* note 24, art. XII(1).

88. See *Israel-Opt: Gaza Fishing Industry Reeling*, IRIN, Mar. 12, 2009, <http://www.irinnews.org/report.aspx?ReportId=83422> (last visited June 20, 2010) (quoting an Israeli military source as saying that Israel had initially completely closed off access to the coast in order “to prevent the smuggling of weapons and ammunition into the Gaza Strip by sea,” but later widened access to three miles).

state. The 1944 Convention on International Civil Aviation (“Chicago Convention”) articulates the principle of sovereignty stating “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”⁸⁹ Notwithstanding the sovereignty principle, and because Gaza covers a very small geographic area, Article XII of the Gaza-Jericho Agreement outlined the agreed terms by which the Palestinian Authority would, indeed, be able to operate air traffic out of the Gaza Airport while taking into account Israel’s security and air safety concerns.⁹⁰ But, as seen in the previous section on territorial waters, Oslo II also gave Israel exclusive responsibility to defend itself from air in order to guard its external security.⁹¹ Moreover, Chapter 3, Article XVII(5) of Oslo II allows Israel the authority over the airspace in accordance with the other provisions of Oslo II, stating that “[t]he exercise of authority with regard to the electromagnetic sphere and air space shall be in accordance with the provisions of this Agreement.”⁹²

Looking at other factual scenarios, many countries have restrictions on their access to airspace based on mutual agreements which would not be a form of occupation. For instance, as a result of security arrangements created by the 1979 Treaty of Peace between Israel and Egypt,⁹³ Egypt’s aerial sovereignty in Sinai is limited.⁹⁴ In addition, to prevent air collisions, many small European states must coordinate their air traffic with their larger neighbors to prevent mid-

89. Convention of International Civil Aviation art. 1, Dec. 7, 1944, *available at* <http://www.icao.int/icaonet/dcs/7300.html> [hereinafter Chicago Convention]. The Convention excludes “state aircraft,” which include “military, customs and police services” aircraft, from its purview. *Id.* art. 3. It also restricts the ability of foreign state aircraft from flying through other states’ airspace “without authorization by special agreement.” *Id.*

90. *See* Gaza-Jericho Agreement, *supra* note 48, art. XII.

91. Oslo II, *supra* note 24, art. XII(1).

92. *See* Oslo II, *supra* note 24, art. XVII(5).

93. *See* Isr.-Egypt Peace Treaty, Annex I, art. III, Mar. 26, 1979, *available at* <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Egypt%20Peace%20Treaty> (dividing the relevant airspace into different zones); *see also id.* Annex I, app., art. VII (defining the limits of “[a]erial surveillance activities during the withdrawal”).

94. *See* Dore Gold, *Legal Acrobatics: The Palestinian Claim that Gaza is Still “Occupied” Even After Israel Withdraws*, 5 JERUSALEM ISSUE BRIEF 1 (2005) *available at* <http://www.jcpa.org/brief/brief005-3.htm> (pointing out that no one would argue that such limitations on Egyptian sovereignty amount to occupation).

air collisions and therefore do not have the exclusive right to control their airspace. The cooperation between states in both of those scenarios does not pose a threat to state sovereignty or governmental authority.⁹⁵

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

A few examples clearly illustrate this point. First, during the Cuban Missile Crisis in 1962, in order to prevent Cuba from importing nuclear-tipped ballistic missiles from the USSR, the United States imposed a “quarantine” around Cuba using naval and air units. The United States argued that this was not an act of war, while the communist countries protested that a blockade was in fact an act of war. No country argued that by imposing a quarantine America had somehow occupied Cuba. Though the United States did have enough control to ultimately encourage Cuba and the USSR to change their policies, it did not have nearly enough control to displace the Cuban government.⁹⁶

Second, during the 1990s, the United States and the United Kingdom maintained an unauthorized “no-fly-zone” over Iraq to ensure the Iraqi air force maintained limited access to various parts of the country, without approval from the U.N. Security Council.⁹⁷ They also imposed a sanctions regime that was enforced with naval

95. *Id.*

96. *See, e.g.,* Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT’L L. 546, 553-56 (1963) (examining the argument that the American quarantine of Cuba was a “‘peaceful method’ for settling a dispute,” rather than a threat to the integrity of that state, because it complied with international regulations). While Wright notes that the United States’ actions arguably constituted a “threat or use of force,” he does not characterize the Quarantine as having effectuated U.S. control of Cuba. *Id.*

97. *See* JEAN ALLAIN, INTERNATIONAL LAW IN THE MIDDLE EAST 160-61 (Ashgate 2004) (1965) (using the existence of the no-fly-zone to illustrate that the conflict between the United States and Iraq did not fully end at the cessation of the Gulf War in 1991).

power.⁹⁸ It has never been argued that the United Kingdom and the United States had occupied Saddam Hussein's Iraq in the 1990's.

Third, NATO's victory over Serbia during the Clinton Administration was celebrated as the first war won almost entirely from the air. However, this measure of control was not "effective." It was enough destruction to convince the Serbian government to reverse its policies toward the Albanians residing in its territory, but it was not enough control to supplant the Serbian government and directly impose Western policies on the Serbian people.⁹⁹

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

B. THE BORDER BETWEEN ISRAEL AND GAZA

1. Borders and International Law

The international law of borders is grounded in customary international law which dictates that a country has complete control over closing its borders to non-citizens. Nothing in international law requires a sovereign state to open its borders to the territories around it.¹⁰⁰ However, customary international law does draw a distinction

98. See James Goldrick, *Maritime sanctions Enforcement against Iraq, 1990-2003*, in *NAVAL BLOCKADES AND SEAPOWER: STRATEGIES AND COUNTER-STRATEGIES, 1805-2005*, at 201, 201-02 (Bruce A. Elleman & S.C.M. Paine eds., 2006) (remarking that the conflict constituted "one of the longest blockade operations in history").

99. See Andrew L. Stigler, *A Clear Victory for Air Power: NATO's Empty Threat to Invade Kosovo*, *INT'L SECURITY*, Winter 2002/03, at 124, 125 (suggesting that it was NATO's air prowess that facilitated its victory).

100. See JUSTUS REID WEINER & AVI BELL, *INTERNATIONAL LAW AND THE FIGHTING IN GAZA* 16 (2008) (articulating the customary international law that allows a State to close its borders to non-citizens); see also *Ekiu v. United States*,

between the general rules of borders and the duties of a state toward an individual at the border.¹⁰¹ The international law governing border closure on the interstate level is generally accepted by the International Court of Justice (“ICJ”), but the law regulating border closure affecting individuals is still highly contentious and is regulated by several treaties and practices establishing the rights of individuals under international law.¹⁰²

Customary international law relating to borders evolved after World War II. The Universal Declaration of Human Rights (“UDHR”) was drafted in response to the atrocities committed during World War II in order to acknowledge the existence of basic human rights, including the right to move freely. Although not a treaty, the UDHR has been incorporated into international law as part of international custom. Article 13(1) of the UDHR provides that “[e]veryone has the right to freedom of movement and residence within the borders of each state.”¹⁰³ The UDHR also declares that “[e]veryone has the right to leave any country, including his own, and to return to his country.”¹⁰⁴ Freedom of movement is posited as existing within the borders of a state and encompasses the right to leave and return to one’s own country, but that right is not mirrored in a corresponding right of entry into another country. One state cannot send individuals across its border without permission from the neighboring state to receive them.¹⁰⁵ The fact that an independent state still has the authority to close its borders at any time, with or without cause, is reflected in human rights law by the failure of the

142 U.S. 651, 659 (1892) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

101. See THE MOVEMENT OF PERSONS ACROSS BORDERS 2 (Louis Sohn & Thomas Buergenthal eds., Am. Soc’y Int’l L. 1992) (noting that individuals have rights that may supersede the general rules regulating sovereign borders).

102. See *id.* at 4 (citing various international agreements which deal with the issue of individuals crossing, or attempting to cross, the border from one country to another).

103. See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 13(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

104. *Id.* art. 13(2).

105. See WEINER & BELL, *supra* note 100, at 16 (noting that a sovereign nation has the right to close its borders to non-citizens).

so-called right to “freedom of movement” to emerge as an enforceable right *between* states. However, the UDHR offers exceptions to the rule for asylum seekers¹⁰⁶ and the U.N. Convention Relating to the Status of Refugees offers exceptions regarding refugees.¹⁰⁷

2. *The Crossings*

There are three primary crossing points from Gaza into Israel: Karni, Erez, and Rafah. In addition to those crossings, there are three secondary crossings: Sufa in the south, which is now closed but was open to Palestinians who were working on Israeli farms and was also used for cargo; Nahal Oz, which is used as a fuel terminal; and Kerem Shalom in the south-east, which is used for the transfer of cargo.¹⁰⁸ Following Israel’s disengagement from Gaza in 2005, Israel and the Palestinian Authority reached an agreement on border crossings to and from Gaza. The agreement details are contained in two documents. The first document is the Agreement on Movement and Access (“AMA”), which allows the Palestinians and Egypt to control the Rafah crossing and allows for increased traffic through the Erez and Karni crossings, which are managed by Israel.¹⁰⁹ The second document is the Agreed Principles for Rafah Crossing

106. See UDHR, *supra* note 103, art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution”).

107. See Convention Relating to the Status of Refugees art. 33(1), Apr. 22, 1954, 189 U.N.T.S. 150 (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

108. See Israel Ministry of Foreign Aff., *Humanitarian Assistance to Gaza During the Period of Calm (June 19-Dec. 18, 2008)*, Dec. 26, 2008, available at http://www.mfa.gov.il/MFA/Government/Communiques/2008/Humanitarian_assistance+_to_Gaza_since_June_19_calm_understanding_18_Nov_2008.htm [hereinafter *Humanitarian Assistance to Gaza*] (detailing specific instances of transfers of humanitarian assistance through the various passages).

109. See Israel Ministry of Foreign Aff., *Agreed Documents on Movement and Access from and to Gaza*, Nov. 15, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm> [hereinafter *Agreed Documents on Movement*] (stating the parties’ intention that the agreement will “promote peaceful economic development and improve the humanitarian situation on the ground”).

(“APRC”), which elaborates on the general provisions of the AMA.¹¹⁰

The Karni crossing is located in the northeastern end of the Gaza Strip and is used as a cargo terminal for imports and exports. Karni is managed by the Israel Airports Authority. The crossing was opened in 1996, but after the Hamas takeover of Gaza in June 2007, Israel has mostly closed the crossing due to concerns about security breaches. Having previously been used for the passage of most forms of cargo, the crossing is now only used as a station for transporting wheat and animal feed through a conveyor belt.¹¹¹

The Erez crossing—the only pedestrian crossing from Gaza into Israel—is located at the northern end of the Gaza Strip and is managed by the IDF. During the comparatively calm years of the 1990s before the eruption of the Second Intifada, tens of thousands of Palestinians entered Israel every day through the Erez crossing, but after the Second Intifada began in 2000, Israel tightened security at the borders and presently only allows 5,000 Palestinians into Israel daily.¹¹²

Recognizing that security risks arise from both successful and attempted attacks on the crossing points, and despite accusations of “collective punishment” of the Palestinian people because of the closures,¹¹³ Israel has gone to great lengths to ensure that the population of Gaza receives necessary supplies and has access to necessary medical treatment. For instance, due to concerns about an outbreak of foot-and-mouth disease, 125,000 vaccines had been supplied to Gaza through the Karni crossing in the three months in the first half of 2009. However, on June 8, 2009, a plan to attack the Karni crossing using horses laden with explosives was foiled, and the IDF subsequently closed the crossing. Because the Karni crossing

110. *Id.*

111. *Humanitarian Assistance to Gaza*, *supra* note 108.

112. See Greg Myre, *Gaza Crossings: Choked Passages to Frustration*, N.Y. TIMES, Mar. 4, 2006, at A1 (observing that the ability to cross the border into Israel is important to Palestinian’s seeking to earn better salaries by working jobs in Israel).

113. See Isabel Kershner, *Israeli Airstrike in Gaza Kills 2 Hamas Members*, N.Y. TIMES, Jan. 20, 2008, at A14 (reporting that John Dugard, the Special Rapporteur to the Human Rights Council on the situation of human rights in occupied Palestinian territory, viewed Israel’s actions as such collective punishment).

closure disrupted the shipment of 30,000 more vaccines for foot-and-mouth disease into Gaza, the IDF redirected the shipment to the Erez crossing.¹¹⁴

The Rafah crossing in the south is the sole major crossing point into Egypt from Gaza and is currently controlled by Egypt and the Hamas-led government of the Palestinian Authority. Israel has not exercised any direct control over the Rafah crossing since September 2005.¹¹⁵

The AMA specifies that the Rafah crossing shall be operated by “the Palestinian Authority on its side, and Egypt on its side.”¹¹⁶ Commenting on the AMA and Palestinian control over Rafah, Palestinian chief negotiator Saeb Erakat confirmed that “[t]his is the first time in history we[, the Palestinians,] will run an international passage by ourselves, and it’s the first time Israel does not have a veto over our ability to do so.”¹¹⁷

The APRC stipulated that there also be a role for a third party to monitor the Rafah crossing.¹¹⁸ On November 25, 2005, the Council of the European Union agreed that the EU should undertake the third party role proposed in the APRC and therefore established the EU Border Assistance Mission at Rafah (“EUBAM”) to monitor the operations of the Rafah crossing.¹¹⁹ Because of security considerations, EUBAM was based out of Ashkelon, Israel, rather than Gaza, and became operational on November 30, 2005.¹²⁰

114. See Yaakov Lappin, *After Foiled Gaza Attack, IDF Says Hamas Risking Another Gaza Offensive*, JERUSALEM POST, June 9, 2009, available at <http://www.jpost.com/Home/Article.aspx?id=144771> (detailing the attempted armed assault at Karni and the consequences resulting from the security breach).

115. See B’TSELEM, *supra* note 75 (characterizing Israel’s role with regard to the Rafah crossing as merely “supervisory”).

116. *Agreed Documents on Movement*, *supra* note 109.

117. Robin Wright & Scott Wilson, *Rice Negotiates Deal to Open Gaza Crossings; Secretary Pushes Late into Night to Win Israeli-Palestinian Accord*, WASH. POST, Nov. 16, 2005, at A12.

118. See *Agreed Documents on Movement*, *supra* note 109 (specifying that one of the prerequisites to Rafah opening was the presence of the third party on site).

119. See Press Release, Council of the European Union, EU Border Assistance Mission for the Rafah Crossing Point (Nov. 25, 2005), available at http://www.europa-eu-un.org/articles/en/article_5366_en.htm (articulating that one aim of EUBAM is to foster confidence between the Palestinian Authority and Israeli Government).

120. EUBAM, FAQs: Why Is EUBAM Based in Israel?, <http://www.eubam->

After the disengagement from Gaza and the development of the AMA and APRC, relative optimism took hold in Israel, but was later stanching by three major regional events. First, Hamas, a globally recognized terrorist organization,¹²¹ won Palestinian parliamentary elections in January 2006, which indicated that the prospect for a real partnership towards peace would be much more difficult to achieve.¹²² Second, Hamas attacked Israel on June 25, 2006 and kidnapped Israeli Corporal Gilad Shalit. Due to the security breach following the attack, Israel closed its borders to Gaza. Finally, there was a Hamas-orchestrated explosion at the Rafah crossing on July 14, 2006. Israel was not in control of the Rafah crossing and was therefore powerless to stop the breach.¹²³

Egypt has largely kept the Rafah crossing closed since Hamas took control of Gaza in June 2007 because of “concerns of a spillover of Hamas-style militancy into Egypt.”¹²⁴ At that time, EUBAM also temporarily ceased operations¹²⁵ because of “security concerns and the fact that the EU, like Israel and the US, has a policy not to permit direct contact with Hamas officials until it renounces terror, recognizes Israel’s sovereignty as an existing state, and honors past Palestinian agreements reached with Israel.”¹²⁶ The Rafah crossing

rafah.eu/node/2311 (last visited June 21, 2010).

121. See Adam Entous, *Hamas takeover in Gaza would short-circuit U.S. plans*, REUTERS, June 13, 2007, <http://www.reuters.com/article/idUSL136399920070613> (last visited June 20, 2010) (pointing out that the United States, European Union, and Israel all consider Hamas to be a terrorist organization).

122. See *Hamas Wins Majority in Palestinian Government*, ONLINE NEWSHOUR, Jan. 26, 2006, http://www.pbs.org/newshour/updates/hamas_01-26-06.html (last visited TBD) (classifying Hamas’ parliamentary victory as a landslide).

123. See *Palestinians breach Gaza border*, BBC NEWS, July 14, 2006, http://news.bbc.co.uk/2/hi/middle_east/5181520.stm (last visited June 20, 2010) (explaining that eventually Palestinian forces gained control of the area).

124. *Gazans Pour Into Egypt After Militants Blast Hole in Border*, TIMES ONLINE, Jan. 23, 2008, http://www.timesonline.co.uk/tol/news/world/middle_east/article3236517.ece (last visited June 20, 2010) [hereinafter *Gazans Pour into Egypt*].

125. See Press Release, EUBAM, Temporary Suspension of Operations (June 6, 2007), available at <http://www.eubam-rafah.eu/node/399> (noting that, despite the temporary suspension of operations, EUBAM still recognizes the value of having an open border and functioning Rafah crossing).

126. Calev Ben-David, *Analyze This: Waiting for the Call to Return to Rafah*, JERUSALEM POST, Apr. 21, 2008, available at http://www.consilium.europa.eu/uedocs/cmsUpload/080421_JerusalemPost_Analyze_this-waiting_for_the_call_to_return_to_Rafah.pdf.

was last opened with the presence of the EUBAM on June 9, 2007. Since then, the mission has remained on standby, ready to re-engage while awaiting a political solution.¹²⁷

While border control is, in fact, a function of government, Israel is exercising its own rights with respect to its own borders and not displacing Gaza's government, thus undermining both the second and third parts of the "effective control" test. In monitoring and periodically closing its borders, Israel is acting within its rights under international law, and the exceptions for refugees and asylum-seekers do not generally apply to the Palestinians in Gaza. In addition, the terms of the Gaza-Jericho Agreement and Oslo II grant Israel absolute authority over "external security" matters which would apply to Gaza's borders as well the airspace and territorial waters.¹²⁸ This, once again, undercuts the "hostility" requirement of the first part of the "effective control" test.

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

127. See Press Release, Council of the European Union, *supra* note 119 (explaining that EUBAM has a stand-by force that will be able to fully redeploy if the Rafah crossing is reopened).

128. See *supra* Part IV.A (articulating why Israel's authority over the sea and air surrounding Gaza does not amount to an exercise of "effective control").

C. GAZA'S INFRASTRUCTURE

1. *Electricity, Fuel, and Telecommunications*

A large share of electricity in Gaza is produced internally, and supplied by a single power plant operated by the Palestine Electric Company ("PEC"). The PEC is a very profitable enterprise, having earned \$4.4 million in 2007 and \$6.3 million in 2008.¹²⁹ Fuel for the plant is imported through Israel.¹³⁰ Different sources claim different percentages of electricity produced within Gaza, with estimates ranging from 25% to 50%. Pursuant to a part of the Gaza-Jericho Agreement preserved by the Oslo II agreement¹³¹ the remainder is supplied by the Israeli Electric Company ("IEC").¹³² In addition, the Agreement stipulates that the supply of fuel or gas will take into account Israeli standards of safety and security.¹³³ With regard to

129. See Adam Entous, *War Ravaged Gaza Power Company Pays Shareholders*, REUTERS, Apr. 23, 2009, <http://www.reuters.com/article/idUSLE319399> (last visited June 20, 2010) ("Profits are largely distributed in tax-free dividends.").

130. See Heather Sharp, *Guide: Gaza Under Blockade*, BBC NEWS, June 15, 2009, available at http://news.bbc.co.uk/2/hi/middle_east/7545636.stm (last visited June 20, 2010).

131. See Oslo II, *supra* note 24, Annex III, art. 10 (affirming that the Israeli Electric Company ("IEC") will have unfettered "access to the electricity grid" in Gaza).

132. See Martin Patience, *Gaza's Infrastructure Suffers*, BBC NEWS, June 29, 2006, http://news.bbc.co.uk/2/hi/middle_east/5130510.stm (last visited June 20, 2010) (noting that the sole power plant in Gaza produces approximately half of Gaza's electricity); see also Gaza-Jericho Agreement, *supra* note 48, Annex II, art. II(B)(24)(b).

Pending the establishment by the Palestinian Authority of an alternative system for the Gaza Strip it shall temporarily buy electric power from the Israel Electric Company (IEC), and to that end shall enter into a commercial agreement with the IEC. This Agreement shall relate to the settling of debts; to IEC property; and to the maintenance of lines to Palestinian customers.

Id.; cf. *EU Confirms Halt to Gaza Fuel Aid*, BBC NEWS, Aug. 20, 2007, http://news.bbc.co.uk/2/hi/middle_east/6954120.stm (last visited June 20, 2010) (reporting that the plant produces "at least 25%" of electricity); Tani Goldstein, *We're Supplying Electricity to Gaza Under Qassam Fire*, YNET NEWS, Jan. 21, 2008, <http://www.ynet.co.il/english/articles/0,7340,L-3496729,00.html> (last visited June 20, 2010, 2010) (explaining that the Israel Electric Corporation supplies 70% and the Gaza plant supplies 30%).

133. See *id.* Annex II, art. II(B)(36)(e) ("Transfer of gas or fuel products through or to Israel and the West Bank shall be in accordance with Israeli standards concerning safety, security and environmental protection, and in accordance with

telecommunications services, the Oslo II agreement also provides for its supply based on a contract between the Palestinian Authority and a private Israeli company:

Pending the establishment of an independent Palestinian telephone network, the Palestinian side shall enter into a commercial agreement with Bezeq - The Israel Telecommunications Corp. Ltd. (herein, "Bezeq"), regarding supply of certain services in the West Bank and the Gaza Strip.¹³⁴

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

In the past Israel has cut off or restricted electricity to Gaza which also affected telecommunications and the fuel supply needed for backup generators when power is lost. This occurred most recently during the conflict with Gaza in the winter of 2008-2009, with the electrical supply later being restored to pre-conflict levels. In addressing its security concerns, Israel has also limited fuel supply in retaliation for unlawful rocket attacks by armed groups which caused a lot of destruction in Israeli territory, most notably in 2007 after Hamas took power.¹³⁵ In light of Israel's ability to place these limitations on Gaza, Israel's detractors argue that the restrictions are an indication of "effective control."¹³⁶ However, Israel is not the only country that has placed restrictions on energy for political reasons, and doing so has not been deemed to be an exercise of "effective control," as evidenced by the examples that follow.

Russia reduced the supply of gas to Ukraine in the winter of 2009 because of an escalation in a gas price dispute. As a result, gas

the arrangements regarding entry into Israel.").

134. Oslo II, *supra* note 24, Annex III, art. 36(D)(1).

135. See Sharp, *supra* note 130 (enumerating the limitations imposed by Israel after Hamas seized control in 2007, including eliminating nearly all fuel imports and drastically reducing the amount of fuel to operate the Palestinian power plant that provides electricity for parts of Gaza).

136. See News Release, Hum. Rts. Watch, Israel: Disengagement Will Not End Gaza Occupation (Oct. 28, 2004), available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation> (last visited June 20, 2010) [hereinafter Israel: Disengagement Will Not End Gaza Occupation] (explaining that the absence of Israeli troops inside Gaza does not mean that Israel is not exercising control over the territory).

supplies that are channeled to Europe via Ukraine were completely shut down, which prompted the European Union to call for an immediate solution. Europe imports forty percent of its fuel from Russia; therefore Russia's conflict with the Ukraine caused a serious energy crisis because the reduction affected the supply of natural gas to the Czech Republic, Turkey, Poland, Hungary, Romania, and Bulgaria.¹³⁷ Russia's reluctance to immediately resolve the dispute was argued to be a politically motivated move to send a message "to Europe that Ukraine should not be integrated into the Euro-Atlantic zone, but remain within the Russian sphere of influence."¹³⁸

Past actions of the Organization of the Petroleum Exporting Countries ("OPEC") provide another example. In 1973, the Arab members restricted the world's oil supply to protest Western support for Israel during the Yom Kippur War.¹³⁹ During that time, after failed negotiations with the world's major oil companies, OPEC's Arab members used their control over the world price-setting mechanism to quadruple the world's oil prices.¹⁴⁰

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

The supply of electricity to Gaza is pursuant to a private contractual relationship that was created by the Gaza-Jericho Agreement and preserved by Oslo II which, once again, removes the

137. See generally David Jolly & Andrew E. Kramer, *Ukraine says Russia Halts all Gas to Europe*, N.Y. TIMES, Jan. 7, 2009, available at <http://www.nytimes.com/2009/01/07/world/europe/07iht-08gazprom.19150762.html> (discussing the effects of Russia's reduction in the supply of gas to Ukraine).

138. Ariel Cohen & Owen Graham, *European Security and Russia's Natural Gas Supply Disruption*, Heritage Found., JAN. 8, 2009, available at <http://www.heritage.org/research/russiaandeurasia/wm2194.cfm>.

139. Deborah Halber, *Seventies Oil Crisis was a "Perfect Storm" for U.S.*, MITNEWS, Mar. 23, 2007, <http://web.mit.edu/newsoffice/2007/jacobs.html> (last visited June 20, 2010).

140. See *id.* (noting that Americans were not ready to deal with the energy shortage that ensued).

element of hostility from the interaction between Israel and the Palestinians as required by the first part of the “effective control” test. The terms of the supply contract were not imposed by one party over the other; they were achieved through a series of contractual negotiations. Furthermore, supplying electricity to Gaza is not an attempt on Israel’s part to exercise a “function of government” in Gaza. On the contrary, the Palestinian Authority is exercising its own governmental authority by negotiating and contracting for the supply of resources on behalf of its population. This indicates a failure of the third part of the “effective control” test: the Palestinian Authority has not been “excluded” from power over its territory, but rather it has been empowered to act on behalf of the people of Gaza.

2. *Water Supply and Sewage Removal*

In 2004, prior to Israel’s disengagement from Gaza, Human Rights Watch released a statement asserting that regardless of Israel’s withdrawal, Israel would still maintain control over many key aspects of Gaza including Gaza’s water supply and sewage networks.¹⁴¹ This statement is patently incorrect, and as of the introduction of the Gaza-Jericho Agreement in 1994 and Oslo II which preserved that Agreement’s terms, and until the present day, the supply of part of Gaza’s water is based on a contractual relationship with an Israeli company. Sewage removal has always been and remains the responsibility of the Palestinian Authority.¹⁴² The Gaza-Jericho Agreement states that “[t]he Palestinian Authority shall pay Mekoroth for the cost of water supplied from Israel and for the real expenses incurred in supplying water to the Palestinian Authority,”¹⁴³ and that “[a]ll relations between the Palestinian Authority and Mekoroth shall be dealt with in a commercial agreement.”¹⁴⁴

The Palestinian Authority buys some of its water from Mekoroth—Israel’s water authority—and Gaza also has its own internal wells. Sewage removal in Gaza is handled internally and is

141. Israel: Disengagement Will Not End Gaza Occupation, *supra* note 136.

142. Oslo II, *supra* note 24, Annex III, art. 40(25); Gaza-Jericho Agreement, *supra* note 48, Annex II, art. II(B)(31).

143. Gaza-Jericho Agreement, *supra* note 48, Annex II, art. II(B)(31)(e).

144. *Id.* Annex II, art. II(B)(31)(f).

not managed by any Israeli entity.¹⁴⁵ The Gaza-Jericho Agreement provides that “[a]ll water and sewage (hereinafter referred to as ‘water’) systems and resources in the Gaza Strip and the Jericho Area shall be operated, managed and developed (including drilling) by the Palestinian Authority, in a manner that shall prevent any harm to the water resources.”¹⁴⁶ It also states “[t]he Palestinian Authority shall take the appropriate measures to prevent the uncontrolled discharge in the Gaza Strip and the Jericho Area of sewage and effluence to water sources including underground and surface water and rivers, and to promote the proper treatment of sanitary and industrial waste water.”¹⁴⁷

However, under the Gaza-Jericho Agreement, one exception to total Palestinian control placed the management of water and sewage in the Israeli settlements and military installations in Gaza under the authority of Israel through Mekoroth.¹⁴⁸ Israel’s removal of the settlements and installations in 2005, therefore, completely cancelled any relationship Israel had with Gaza with respect to water supply and sewage removal. Gaza’s internal wells and sewage treatment facilities are dependent on electricity and/or imported fuel, thus linking the water supply to the energy supply.¹⁴⁹ Although water supply and sewage treatment can be affected by limitations on energy supply, that does not indicate control over those functions.¹⁵⁰ In light of this, the “effective control” test fails in its entirety because the Palestinian Authority—not the Israeli government—has complete control over this matter and not the Israeli government.

145. *Id.* Annex II, art. II(B)(31)(a).

146. *Id.* Annex II, art. II(B)(31)(a).

147. *Id.* Annex II, art. II(B)(35)(c).

148. *See id.* Annex II, art. II(B)(31)(b) (“As an exception to subparagraph a., the existing water systems supplying water to the Settlements and the Military Installation Area, and the water systems and resources inside them continue to be operated and managed by Mekoroth Water Co.”).

149. *See* Maher Najjar, *Fire and Water in Gaza*, WASH. POST, Nov. 27, 2009, at A17 (“Power is needed to run treatment plants, pump water to homes and pump sewage away from populated areas.”); *see also* *Mekorot Restructuring Plan Gets the Go-Ahead*, GLOBAL WATER INTELL., Apr. 2002, available at <http://www.globalwaterintel.com/archive/3/4/general/mekorot-restructuring-plan-gets-the-go-ahead.html> (noting that a Mekorot subsidiary supplies water to Gaza).

150. *See supra* Part IV.C.1 (arguing that whatever involvement Israel has with respect to Gaza’s power supply does not rise to the level of effective control).

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

D. TAXATION AND POPULATION REGISTRY IN GAZA

1. Taxation

Article VI(2) of the Oslo Accords provides that “authority will be transferred to the Palestinians on the . . . sphere[] . . . [of] direct taxation.”¹⁵¹ In addition, Articles V and VI of the Gaza-Jericho Agreement expanded upon the Oslo Accords and outlined the responsibilities of the Israelis and Palestinians with respect to direct and indirect taxation. For the most part, Israel and the Palestinian Authority each determine, regulate, levy and collect their own taxes,¹⁵² “including income tax on individuals and corporations, property taxes, municipal taxes and fees.”¹⁵³

The Israeli government only collects taxes from those Palestinians who work inside Israel,¹⁵⁴ just as many states collect taxes from foreign workers who are employed within their territories. For instance, in the United States, foreign workers are required to pay U.S. taxes. There are exemptions that foreign agricultural workers and non-resident aliens have for Social Security and Medicare, but income taxes still apply, though the foreign workers may be taxed at graduated rates.¹⁵⁵

Of the taxes that Israel collects from Palestinians employed in the state, Israel transfers nearly all the income taxes that are collected

151. Oslo Accords, *supra* note 23, art. VI(2).

152. Gaza-Jericho Agreement, *supra* note 48, Annex IV, arts. V-VI.

153. *Id.* Annex IV, art. V(1).

154. *See id.* Annex IV, art. V(4) (outlining where the income tax revenue from Palestinians working in Israel will go).

155. *See* U.S. Internal Revenue Service [IRS], *Foreign Agricultural Workers: Withholding Tax Requirements*, Nov. 19, 2009, available at <http://www.irs.gov/businesses/businesses/small/international/article/0,,id=96422,00.html> (laying out the tax filing requirements for H-2A agricultural workers).

from Gaza residents back to the Palestinian Authority. Annex V, Article V(4) of Oslo II states:

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

- a. 75% of the income taxes collected from Palestinians from the West Bank and the Gaza Strip employed in Israel.
- b. The full amount of income taxes collected from Palestinians from the West Bank and the Gaza Strip employed in the Settlements.¹⁵⁶

Both the Israeli and the Palestinian tax administrations levy and collect value added taxes (“VAT”) and purchase taxes on local production. But Oslo II indicates the Israeli VAT rate to be 17% and the Palestinian VAT rate was 15% to 16%.¹⁵⁷ The provisions on both income tax and VAT are clearly favorable to the Palestinian Authority.

Israel also collects import tariffs on Gaza-bound goods that originate from beyond either Israel or the Palestinian territories. It is important to note that Israel only collects taxes in situations emanating from economic activity within Israel, such as goods being transshipped through Israel and Palestinian employment in Israel. Israel does not collect any taxes relating to business activity or incomes in Gaza proper.¹⁵⁸

Although it is indeed true that levying and collecting taxes is a function of government, the only taxes that Israel collects on behalf of the Palestinian Authority are the income taxes on Palestinian employees within Israel, a common and well-accepted international practice. As apparent from Oslo II, Israel and the Palestinian Authority have responsibility for taxation in their respective areas, which undermines the “hostility” requirement of the first part of the “effective control” test. Moreover, Israel’s actions in that regard do not supplant the powers of the Palestinian Authority to collect their own taxes as required by the third part of the test. Therefore, the

156. Oslo II, *supra* note 24, Annex V, art. V(4).

157. *Id.* Annex V, art. VI(3).

158. *See id.* Annex V, art. V(1) (explaining that Israel and the Palestinian territories will have control over directly taxing individuals and corporations in their respective territories).

argument that Israel's collection of some taxes does not demonstrate the level of "effective control" required for an occupation under international law.

2. Population Registry

Article VI(1)(d) of the Gaza-Jericho Agreement, entitled "Powers and Responsibilities of the Palestinian Authority," grants the Palestinian Authority the "power to keep and administer registers and records of the population, and issue certificates, licenses and documents."¹⁵⁹ Oslo II preserved the terms of the Gaza-Jericho Agreement in Article 28 of Annex III, Appendix 1:

Powers and responsibilities in the sphere of population registry and documentation in the West Bank and the Gaza Strip will be transferred from the military government and its Civil Administration to the Palestinian side.

The Palestinian side shall maintain and administer a population registry and issue certificates and documents of all types, in accordance with and subject to the provisions of this Agreement. To this end, the Palestinian side shall receive from Israel the population registry for the residents of the West Bank and the Gaza Strip in addition to files and records concerning them¹⁶⁰

The assertion that Israel controls the population registry of the Palestinian Authority is thus incorrect. Article X(3)(f) of the Agreement entitled "Control and Management of the Passages," underscores the fallacy of this assertion; it states:¹⁶¹

In the Palestinian Wing, each side will have the authority to deny the entry of persons who are not residents of the Gaza Strip and West Bank. For the purpose of this Agreement, "residents of the Gaza Strip and West Bank" means persons who, on the date of entry into force of this Agreement, are registered as residents of these areas in the population registry maintained by the military government of the Gaza Strip and West Bank, as well as persons who have

159. Gaza-Jericho Agreement, *supra* note 48, art. VI(1)(d).

160. Oslo II, *supra* note 24, Annex III, App. 1, art. 28(1)-(2).

161. Gaza-Jericho Agreement, *supra* note 48, Annex I, art. X(3)(f).

subsequently obtained permanent residency in these areas with the approval of Israel, as set out in this Agreement.¹⁶²

Furthermore, Article II(27)(a) of Annex II of the Gaza-Jericho Agreement relating to the “Population Registry and Documentation” requires that the Palestinian Authority “receive the existing population registry in the Gaza Strip and the Jericho Area, as well as files pertaining to the residents of these areas.”¹⁶³

The Gaza-Jericho Agreement does allow Israel some involvement with monitoring the population registry and identification cards of the Palestinian Authority, but it does not control either of those functions. For example, when the Palestinians update their registry, Israel is supposed to be notified, “[i]n order to ensure efficient passage procedures” between Gaza and the Jericho Area.¹⁶⁴ Israel also has legitimate security concerns that would require the establishment of a uniform system of identification so that it may have knowledge of who will be entering Israeli territory. The Gaza-Jericho Agreement lays out this stipulation by requiring that “[p]ossession of [an] identity card and, whenever necessary, of an Israeli entrance permit, shall be required for entry into Israel by residents of the Gaza Strip and the Jericho Area.”¹⁶⁵ Israel’s actions are reasonable security measures because Palestinians must cross through Israel to go from Gaza to the West Bank.

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

162. *Id.* (emphasis added).

163. *Id.* Annex II, art. II(27)(a).

164. *Id.* Annex II, art. II(27)(e).

165. *Id.* Annex II, art. II(27)(c).

E. ISRAEL'S SECURITY CONSIDERATIONS AND RIGHT TO RE-ENTER GAZA

Israel's right to safeguard its national security is derived from the inherent right to self-defense, which in turn is enshrined in Article 51 of the U.N. Charter.¹⁶⁶ The right of states to self-defense also extends to claims against non-state actors because Article 51 does not make a distinction between armed attacks by state actors and non-state actors.¹⁶⁷ Furthermore, after the terrorist attacks of September 11, 2001, the U.N. Security Council passed a resolution recognizing the inherent right of individual or collective self-defense in accordance with the U.N. Charter and encouraged states to combat "threats to international peace and security caused by terrorist acts."¹⁶⁸

The proposition that Israel's general right to self-defense is an indication of "effective control" is contrary to the position of the U.N. Charter and the U.N. Security Council. That right was recognized by and reflected in the agreements between Israel and the Palestinian Authority in the several clauses granting Israel authority in the areas of external security.¹⁶⁹ The assertion that Israel has given itself overriding security considerations demonstrates a lack of appreciation for the dire threat that Israel faces from attacks that emanate from Gaza, and runs counter to the mutual understanding regarding Israel's security concerns that form the backbone of each of the agreements between Israel and the Palestinians.

Some argue that reserving the right to re-enter is also an indication that Israel still retains "effective control" over Gaza. However,

166. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ."); *see also* 1949 Y.B. INT'L L. COMM'N 178, art. 12 ("Every State has the right of individual or collective self-defence against armed attack."); R.P. DHOKALIA, *THE CODIFICATION OF PUBLIC INTERNATIONAL LAW* 272 (1970) (explaining that the right to self-defense was one of four rights of states included in the International Law Commission's Draft Declaration on Rights and Duties of States).

167. *See generally* William V. O'Brien, *Reprisals, Deterrence, and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421 (1990) (discussing how the theory of self-defense applies when defending against terrorist attacks, and how that theory has evolved since 1953).

168. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

169. *See, e.g.,* Gaza-Jericho Agreement, *supra* note 48, art. V(3)(a) ("Israel has authority over . . . external security . . .").

reserving the right to re-enter a territory because of security considerations is a common reservation made by a withdrawing occupying power. Indeed, when the Allied forces left West Germany after signing the General Treaty ending the occupation of the territory in 1955, they included a clause in the treaty that also reserved certain emergency rights in case of public disorder in Germany. These rights were only suspended in 1968 after the Bundestag approved the German Emergency Laws.¹⁷⁰

It must also be remembered that the goal of an occupation is to ultimately return the occupied territory to a peaceful situation after the end of a military conflict, and if threats continue to emanate from within that territory, re-entry can be deemed to be for the purpose of maintaining security or preventing chaos and not for the reassertion of occupation as seen in the above case. Israel indicated that the intention behind disengagement was for there to be “no basis for claiming that the Gaza Strip is occupied territory.”¹⁷¹ The notion that the reservation of the right of re-entry was for Israel to maintain its occupational hold on Gaza contradicts the disengagement plan’s stated premise.

While requiring a belief that the need to stop chaos from ensuing would necessitate “effective control,”¹⁷² emergency rights or reserving the right to re-enter, are not, in and of themselves, tantamount to a continued exercise of “effective control” and occupation. The contentions regarding security and re-entry fail the third part of the “effective control” test, which requires that the occupier actually exclude the government in power from exercising its authority. This concept will be developed further in the next part.

170. Bernard Blumenau, *Sixty Years of the Federal Republic of Germany*, PAPIERS D’ACTUALITÉ/CURRENT AFF. PERSP., May 2009, available at <http://www.fondation-pierredubois.ch/Papiers-d-actualite/sixty-years-of-the-federal-republic-of-germany.html>; see also EURO. COMM’N FOR DEMOCRACY THROUGH LAW [VENICE COMM’N], HUMAN RIGHTS AND THE FUNCTIONING OF DEMOCRATIC INSTITUTIONS IN EMERGENCY SITUATIONS 39 (Council of Eur. 1997) (explaining that these laws consisted of “seventeen emergency amendments to the Basic Law”).

171. *The Disengagement Plan*, *supra* note 2.

172. See VENICE COMM’N, *supra* note 170, at 37 (“In today’s Europe, making provision for states of emergency is considered a necessity for democracy itself.”)

F. ISRAEL'S "ABILITY" TO EXERCISE POWER OVER GAZA

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

Those who assert the position that the simple ability to control amounts to occupation often cite the case of *The Prosecutor v. Mladen Naletilic and Vinko Martinovic* before the International Criminal Tribunal for the Former Yugoslavia ("ICTY").¹⁷³ Paragraph 217 of the decision held that the establishment of authority can be determined by an occupying power having "a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt."¹⁷⁴ However, in referring to this clause, it is often removed from the immediate surrounding context in the ICTY's official publication of the case. In addition to the above citation, the court also gave the following requirements in the very same section:

- the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
- the enemy's forces have surrendered, been defeated or withdrawn. . . . ;
-
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.¹⁷⁵

173. *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, ¶ 217 (Mar. 31, 2003).

174. *Id.* ¶ 217; *see also* U.S. DEPT. OF THE ARMY, *THE LAW OF LAND WARFARE* 139 (1956) ("It follows from the definition that belligerent occupation must be both actual and effective, that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority.").

175. *Naletilic*, Case No. IT-98-34-T, ¶ 217.

Taken in the aggregate, the “capacity to send troops within a reasonable time” and the above terms may be combined to suggest the existence of “effective control,” but each clause cannot individually be considered to make that determination. This is further reinforced by paragraph 218 which states that “[th]e law of occupation only applies to those areas *actually controlled* by the occupying power and ceases to apply where the occupying power no longer exercises an *actual authority* over the occupied area.”¹⁷⁶

The International Court of Justice (“ICJ”) reaffirmed that position in the 2005 case of *Democratic Republic of Congo v. Uganda*.¹⁷⁷ The ICJ held:

In order to reach a conclusion as to whether a State . . . is an “occupying Power” . . . the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.¹⁷⁸

Stressing the necessity of actual authority as opposed to potential authority, the court’s decision supports the assertion that Israel’s “ability” to exercise power over Gaza fails both the second part of the “effective control” test which requires that the authority has been established and can be exercised, and the third part of the test which requires substitution of the existing government by the authority of the occupier.

The ability to exercise power, by itself, does not give rise to “effective control.” For the sake of argument, although it is theoretically possible for South Africa to swiftly send its military into Lesotho, or for the United States to exert military influence over Canada or Mexico, or for larger European countries like France or Germany to overtake smaller ones like Luxembourg, Belgium or the Netherlands, the mere ability to do so is not necessarily indicative of

176. *Id.* ¶ 218 (emphasis added).

177. *Armed Activities on the Territory of Congo (Congo v. Uganda)*, 116 I.C.J. 2005 (Dec. 19).

178. *Id.* ¶ 173.

“effective control.” However, it would be doubtful that if Lesotho were posing the same security threats to South Africa that Gaza is posing to Israel, or if Canada were militarily hostile to the United States, or if small European countries were arming to challenge larger ones, the stronger states would allow those threats to become real dangers. While the potential to use force to control the territories may be present, only the actual use of force to exclude the governments of the other states can amount to an occupation. The same principle would apply to Israel’s ability to use force against Gaza.

Furthermore, the exercise of ‘some’ power does not give rise to an occupation. The Hague Regulations are triggered when the invader’s functional control on the ground outruns the existing authority’s formal control over the territory. The provisions define an occupier as possessing actual control that is adverse to the territory’s official legal status.¹⁷⁹ The language of Article 43 of the Hague Regulations, which states that “[t]he authority of the legitimate power having in fact passed into the hands of the occupant,” indicates that the invader must have a monopoly or near-monopoly on the use of force, as well as the ability to govern the civilian population.¹⁸⁰

All other things being equal, Hamas, as the dominant political party of the Palestinian Authority and the governmental authority in Gaza since its takeover in June 2007, has a far greater “ability” to exercise control over Gaza than Israel does.¹⁸¹ Israel’s strike against Gaza in the winter of 2009 demonstrates that while Israel can cause damage to Hamas, that damage will not necessarily (and, in fact, did not) upend or displace Hamas’s administration, either militarily or politically.¹⁸² In addition, if there were ever an airtight case that Israel does not have any real ability to rule over Gaza, it would be evidenced by the fact that after Hamas won control over the Palestinian Authority and took command of Gaza in 2007, Hamas

179. Hague Regulations, *supra* note 27, arts. 42-43, 45.

180. *Id.* art. 43.

181. See Ethan Bronner, *Israel Speeds Withdrawal from Gaza*, N.Y. TIMES, Jan. 19, 2009, at A6 (observing that Hamas’s strength in and control over Gaza grew in the wake of Israel’s winter 2009 offensive in the territory).

182. See Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 18, 2009, at A1 (quoting a military official as saying that “Hamas is the dominant organization in Gaza”).

ejected the Fatah party from the Gaza Strip—an act that Israel did not support.¹⁸³

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

V. CHANGING THE STATUS OF GAZA

Since Israel no longer exercises “effective control” over Gaza and Gaza is no longer occupied, the obvious question is: “What is the status of Gaza?”

Oslo II, the Wye River Memo, and the Sharm el-Sheikh Memo prohibit both parties from declaring a unilateral change of status of the Palestinian Territories. Oslo II states in Article XXXI(7): “Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”¹⁸⁴ The Wye River and Sharm el-Sheikh Memoranda both state “Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”¹⁸⁵

Some scholars have taken this to indicate that Gaza must continue to be regarded as occupied despite Israeli withdrawal from the territory.¹⁸⁶ That assessment is incorrect. The texts of the memoranda simply mean that the Palestinian Authority cannot unilaterally declare statehood and Israel cannot unilaterally annex Gaza.¹⁸⁷ In the

183. See *How Hamas Took Over the Gaza Strip*, BBC NEWS, June 15, 2007, http://www.news.bbc.co.uk/2/hi/middle_east/6748621.stm (last visited Feb. 10, 2010) (detailing former Fatah strongholds of which Hamas was able to take control).

184. Oslo II, *supra* note 24, art. XXXI(7).

185. Wye River Memo, *supra* note 48, art. V; Sharm el-Sheikh Memo, *supra* note 53, art. V.

186. See Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT'L L. 524, 524 (2006) (arguing that “Israel still occupies Gaza for two reasons,” namely that it has “effective control,” and because various agreements “prohibit unilateral changes to the legal status of Gaza and the West Bank”).

187. See Israeli Ministry of Foreign Aff., *Israel, the Conflict and Peace*:

present situation, both Israel and the Palestinian Authority have pledged not to unilaterally change the final status of Gaza or the West Bank “pending the outcome of the *permanent* status negotiations.”¹⁸⁸ However, those terms do not indicate a preclusion of the possibility of altering Gaza’s *temporary* status.

The agreements between Israel and the PLO firmly establish that both parties “view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”¹⁸⁹ However, it may be argued that endowing the Palestinian Authority with absolute and uncontested control over part of its prospective territory allows it to demonstrate the ability to function as a sovereign government at peace with its neighbors, thereby assisting it in laying the groundwork for declaring statehood at the conclusion of permanent status negotiations.

A. AN END TO OCCUPATION AND A NEW BEGINNING

Article VI of the Fourth Geneva Convention describes an occupation as ending “one year after the general close of military operations” and when the “Occupying Power” no longer “exercises the functions of government in [the] territory.”¹⁹⁰ However, the Fourth Geneva Convention does not provide specific guidelines for how that determination is made.

There are four ways, in principle, that an occupation can end: loss of “effective control”; dissolution of the ousted sovereign (a practice that is no longer accepted as it is incongruent with the principle of self-determination); signing a peace agreement or armistice agreement with an ousted sovereign; or “transferring authority to an

Answers to Frequently Asked Questions (Nov. 5, 2003), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/11/Israel+the+Conflict+and+Peace+Answers+to+Frequen++2003.htm (last visited Feb. 10, 2010) (“The prohibition on unilateral measures was designed to ensure that neither side take steps that would change the legal status of [Gaza and the West Bank] (such as by annexation or a unilateral declaration of statehood), pending the outcome of permanent status negotiations.”).

188. Oslo II, *supra* note 24, art. XXXI(7) (emphasis added); *see also* Wye River Memo, *supra* note 52, art. V; Sharm el-Sheikh Memo, *supra* note 53, art. 10.

189. Oslo Accords, *supra* note 23, art. IV.

190. *Id.*

indigenous government endorsed by the occupied population through referendum and by international recognition.”¹⁹¹

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

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

B. THE TRANSITION OF GAZA FROM OCCUPIED TO *SUI GENERIS* TERRITORY

The status of Gaza has often been presented as an “either/or” scenario. *Either* Gaza is occupied by Israel *or* it is part of a state comprised of that territory and the West Bank. Statehood and occupation are not mutually exclusive, and there can be many alternatives to those choices and those that are presented above. Although determining the end of an occupation is not dependent upon a formal redefinition, this article recommends that, in the case of Gaza, there should be a temporary or intermediate status that

191. See Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, in VERÖFFENTLICHUNGEN DES WALTHER-SCHÜCKING-INSTITUTS FÜR INTERNATIONALES RECHT AN DER UNIVERSITÄT KIEL (Andreas Zimmermann & Thomas Giegerich eds., forthcoming 2009) (manuscript at 1), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps>.

reflects the absence of occupation after disengagement as well as the exercise of Palestinian governance in the territory while awaiting the finalization of permanent status negotiations. The status of Gaza should be redefined as a “*sui generis* territory” under the governmental control of the Palestinian Authority.

Sui generis, meaning “of its own kind or class, or unique” in its characteristics, is a term of art. In international law, a *sui generis* territory is one that is of its own unique character by virtue of the fact that there are no similar scenarios to which it can be compared.¹⁹²

Though every territorial situation has some *sui generis* attributes, several unprecedented territorial situations have specifically been described as *sui generis*, such as in Namibia,¹⁹³ Kosovo,¹⁹⁴ and the Russian territories of South Ossetia and Abkhazia,¹⁹⁵ though they have not had that title assigned to them as their official status. The only territory officially referred to by the term “*sui generis* collectivity” is New Caledonia, a French subdivision.¹⁹⁶ New Caledonia is one of the sixteen Non-Self-Governing territories listed in 2002 by the United Nations General Assembly that are not considered occupied, but also do not have autonomous status.¹⁹⁷

192. BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

193. CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION 103-04 (2008); see also U.N. Transition Assistance Group [UNTAG], *Nambia-Untag Background*, http://secint24.un.org/Depts/dpko/dpko/co_mission/untagFT.htm (last visited June 21, 2010).

194. James Hughes, London Sch. of Econ. & Polt. Sci [LSE], UNDP, *The Kosovo Precedent? Implications for Frozen Conflicts*, Mar. 23, 2007 <http://developmentandtransition.net/index.cfm?module=ActiveWeb&page=WebPage&DocumentID=637> (last visited Feb. 10, 2010).

195. Embassy of Greece, Wash., D.C., Russian Envoy: Ossetia, Abkhazia ‘*sui generis*’ Cases (Aug. 29, 2008), <http://www.greekembassy.org/embassy/Content/en/Article.aspx?office=1&folder=19&article=24156> (last visited June 21, 2010).

196. See LA CONSTITUTION art. 72 (1958) (Fr.) (defining various territorial communities); see also *Regions and Territories: New Caledonia*, BBC, http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/3921323.stm (last visited June 21, 2010) (providing background on New Caledonia).

197. See U.N., Non-Self-Governing Territories Listed by General Assembly in 2002, <http://www.un.org/depts/dpi/decolonization/trust3.htm> (last visited June 21, 2010) (listing the sixteen Non-Self-Governing Territories as: Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, Guam, New Caledonia, Pitcairn, and Tokelau).

It had long been the official position of the Israeli government, supported by Israeli court decisions, that the situation in the Palestinian Territories was *sui generis*¹⁹⁸ because it has never been the territory of a High Contracting Party¹⁹⁹ pursuant to Article 2(2) of the Fourth Geneva Convention.²⁰⁰ This notion was first presented to legitimize Israeli retention of at least part of the territories conquered after the Six-Day War by asserting that since the territory was not a state, it was not subject to the international law of occupation and therefore was not “occupied” but rather “disputed” or “administered.” Later Israeli Supreme Court decisions rejected this idea and, in fact, leaned in the direction of conceding that Israel’s relationship with the territories to be a belligerent occupancy.²⁰¹

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

CONCLUSION

Recognizing the need for a political solution to the Israeli and Palestinian conflict while also recognizing Israel’s security concerns, the Israeli government withdrew all military and civilian personnel

198. JOHN DUGARD, ENFORCEMENT OF HUMAN RIGHTS IN THE WEST BANK AND THE GAZA STRIP 464-65 (Emma Playfair ed., 1992); *see also*, LISA HAJJAR, COURTING CONFLICT 54 (Univ. of Cal. Press 2005) (1961) (“Israel was not ‘occupying’ but ‘administering’ these ‘disputed’ areas, whose legal status was *sui generis*.”).

199. *See* Quigley, *supra* note 60, at 728 (explaining that sovereignty over Gaza and the West Bank was not clearly established when Israel’s occupation began).

200. *See* Fourth Geneva Convention, *supra* note 28, art. 2 (“In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”)

201. *See supra* note 67 and accompanying text (citing the applicable case law from the Israeli Supreme Court).

from Gaza in September 2005 with the intent to end the occupation and move toward a resolution of the conflict. By applying the Hague Regulations, the Fourth Geneva Convention, and the precedent of the *Hostages Case* to the situation in Gaza (after Israel's disengagement), Gaza can no longer be considered occupied and under "effective control," since "effective control," as understood in the context of the laws of occupation, does not apply to the actions of Israel in relation to Gaza.²⁰²

Although Israel's loss of "effective control" over Gaza is legally sufficient to indicate that the occupation of the territory has ended, the international community has been reluctant to accept the change in status. While it is not legally necessary to obtain international recognition of Israel's position, it is politically important for the absence of occupation to be acknowledged by international legal experts so that Israel can no longer be held to the more stringent legal requirements of an occupier and to lend greater legitimacy to Israel's acts of self-defense.

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

Redefining Gaza's status from an "occupied territory" to a "*sui generis* territory" in order to reflect the absence of "effective control" would be an affirmative step towards statehood for the Palestinian people and would provide greater security for the people of Israel. The international community has generally taken a particular interest in resolving the Israel-Palestinian conflict. Acknowledging the shift in Gaza's legal status would be a positive political gesture that would demonstrate an appreciation for Israel's efforts to end its occupation

202. See *supra* Part IV (dismantling arguments that Israel has effective control over Gaza).

of Gaza and which may ultimately help provide a stabilizing force in the Middle East.