

## [The Gaza Strip: Status under international humanitarian law](#)

Israel claims that its occupation of the Gaza Strip ended when it unilaterally withdrew its ground forces and settlers in 2005.<sup>1</sup> However, the issues of Israel's continued control of and the international legal status of the Gaza Strip and the ensuing obligations upon the relevant authorities remain a matter of international law and fact. The purpose of this note is to briefly outline the legal and factual standing of the Gaza Strip from the perspective of international humanitarian law (IHL).

It should be noted that, while the end of Operation Protective Edge may result in some changes in the closure regime imposed on the Gaza Strip, it is too early to definitively assess the nature or longevity of any such measures, or their possible bearing on the status of Gaza under IHL.

development of Gaza and its infrastructure;

## Occupation under IHL

As outlined by the Hague Regulations, a territory is considered occupied when it is placed under the effective control of a hostile army.<sup>2</sup> As such, the legal test relevant to assessing whether Israel occupies the Gaza Strip depends on the level of authority Israel has over the territory. This test is a factual one and is heavily dependent on the specific situation at hand. The ability to exercise authority as an indicator of occupation is a position that has been reiterated by the ICRC and other legal scholars.<sup>3</sup>

## The facts

- Israel maintains exclusive control of Gaza's airspace and territorial waters, including movement and access of people, goods and natural resources through military force;

- Israel controls Gaza's access to electricity, fuel, and water and sewage treatment, all of which should be considered essential to the enjoyment of civil life. In addition, Israel controls Gaza's access to telecommunications services as well as controlling the import of materials necessary for the

- Israel controls all land borders, with the limited exception of the Rafah crossing, which it effectively closed in an understanding between Israel and Egypt;

- Since 1967, Israel has maintained the population registry in the occupied Palestinian territory, thereby determining who is entitled to residency status. Palestinian passports are only granted to those who are present on the registry. By virtue of the fact that Palestinian passports are required to enter and exit through Rafah, Israel maintains a significant degree of indirect control over Palestinian entry and exit through the Egyptian crossing;<sup>4</sup>

- Israel continues to collect, on behalf of the Palestinian Authority, customs and VAT for goods entering the Gaza Strip;

- Israel controls the development and use of land in the so-called "buffer zone", which constitutes 17% of the Gaza Strip and 35% of its agricultural land;

- Since its physical withdrawal in 2005, Israel has carried out regular incursions into the Gaza Strip, and particularly into the “buffer zone”.

- Hamas, the de-facto authority in the Gaza Strip, retains control over the police force, the judicial process, aspects of public schooling and several other areas of daily life.

The above factors, taken together lead to the conclusion that Israel exerts effective control over the territory. Israel has not completely relinquished governing authority back to the local authorities. Since local authorities cannot exercise sovereign powers as a result of the withdrawal, it is concluded that Israel’s occupation of the Gaza Strip has not ended as a result of the partial withdrawal of its military forces.

An occupying power cannot simply absolve itself of its legal responsibility simply by “pulling out” or relinquishing some level of control while continuing to exercise an overwhelming degree of control that affects virtually every aspect of daily civilian life. This is a position that was recently articulated by Professor Michael Bothe, a preeminent IHL expert:

It should be taken into account that the withdrawal was not as complete as it should have been in order to terminate Israel’s position as an occupying power. Israel continues to control access to Gaza from land (except for a relatively short border line with Egypt [...]), from the sea and from the air. Israel, thus, remained in full control of the lifelines of the Gaza Strip. It is submitted that this is at least equivalent to a de facto control which, according to Art. 42 of the Hague Regulations, is constitutive for an occupation.<sup>5</sup>

### [The international community](#)

In recent years the following international organisations and regional bodies have reiterated their position that the Gaza Strip is still considered occupied according to IHL:

- The United Nations in 2012: “[U]nder resolutions adopted by both the Security Council and the General Assembly on the Middle East peace process, the Gaza Strip continues to be regarded as part of the Occupied Palestinian Territory. The United Nations will accordingly continue to refer to the Gaza Strip as part of the

Occupied Palestinian Territory until such time as either the General Assembly or the Security Council take a different view.”<sup>6</sup>

· The International Committee of the Red Cross in 2012: “Perhaps the most protracted and entrenched humanitarian situation in the region is the continued alienation of the Palestinian population living under occupation in the West Bank and the Gaza Strip.”<sup>7</sup>

· The European Union: “Gaza forms an integral part of the occupied Palestinian territory, as stipulated in the Oslo Agreements and UNSC Resolution 1860.”<sup>8</sup>

### The obligations of the Occupying Power

There are certain obligations that Israel as the occupying power cannot pragmatically be expected to undertake, such as that of ensuring law and order and the functioning of the education system in Gaza.<sup>9</sup> However, this should in no way be interpreted as undermining the occupied classification of the Gaza Strip.

Israel has a duty to ensure the welfare of the occupied population, to the

extent possible. This duty may not extend to the daily maintenance of law and order, but it certainly extends to other overarching aspects of civil welfare, particularly those which are under Israel’s direct or effective control, such as supply of electricity, water, sewage and sanitation infrastructure, as well as the general economic and social development needs of the Gaza Strip. It also extends to the provision of materials necessary to the reconstruction of the Strip.

Furthermore, Israel must not take any measure which undermines guarantees set out by both IHL and international human rights law in Gaza, such as the right to medical treatment, basic needs, access to education and movement between the West Bank and Gaza. Beyond the debate about the occupation of the Gaza Strip, Israel, as the Occupying Power, must also respect their obligation to facilitate the delivery of humanitarian assistance.

With regard to the conduct of hostilities, Israel must at all times respect the rules and obligations imposed on warring parties, particularly the core principles of

distinction, proportionality and precaution.

In conclusion:

· The Gaza Strip remains under belligerent occupation as Israel continues to retain effective control over significant aspects of civil life in the Gaza Strip on a daily basis as well as directly exercising certain elements of governing control over the territory and the people of the Gaza Strip.

· For as long as Israel maintains effective control over the Gaza Strip, it must fully comply with its obligations under IHL and IHRL, as the occupying power. This includes providing for the welfare of the occupied Palestinian population therein.

-Ends-

## End notes

1 Cabinet Resolution Regarding the Disengagement Plan, Government of Israel, as published by the Prime Minister's office, June 6, 2004, Article 6. "The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip." It is worth noting that the Israeli authorities also reject the position that the West Bank is occupied.

2 Article 42, Hague Regulations. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupations extend only to the territory where such authority has been established and can be exercised."

3 'Determining the beginning and end of occupation under international humanitarian law', International Review of the Red Cross (Spring 2012); See also Yutaka Arai-Takahashi, *The Law of Occupation* (2009) p16.

4 For more information see 'Rafah Crossing: Who holds the keys?', Gisha (March 2009).

5 Professor Michael Bothe, 'Cutting off electricity and water supply for Gaza

Strip', (July 2014). Available at <http://www.diakonia.se/en/IHL/News-List/cutting-off-electricity-and-water-supply-for-gs/>

6 Martin Nesirky, Spokesperson for the UN Secretary-General, Jan 19, 2012. See also, for example, Security Council Resolution 1860.

7 'Challenges to international humanitarian law: Israel's occupation policy.' International Review of the Red Cross (Winter 2012).

8 EU Heads of Mission Report on Gaza, 2013.

9 It should be noted that Israel's actions do have a significant impact on the functioning of the education system in the Gaza Strip. Twenty-six Government schools were destroyed during the latest round of hostilities and the school year was delayed by three weeks. See [www.gisha.org](http://www.gisha.org) for additional information.