



One Year after the 'Disengagement': Gaza still Occupied and under Attack

[Disengagement] supplies the amount of formaldehyde that is necessary so there will not be a political process with the Palestinians...Effectively, this whole package called the Palestinian state, with all that it entails, has been removed indefinitely from our agenda.¹

Dov Weissglas, Chief of Staff to Ariel Sharon

The Disengagement Plan and Israel's Status as Occupying Power

On 6 June 2004, the Israeli government approved a "Disengagement Plan," which provided for the complete unilateral withdrawal of Israeli settlers and ground troops from the Gaza Strip, as well as a limited unilateral withdrawal from a small part of the northern West Bank. In the Gaza Strip, the plan was implemented from 15 August 2005, when Israel began removing settlers, until 12 September 2005, when the last troops withdrew.

Prior to the unilateral withdrawal, there were approximately 8,500 Israeli settlers in the Gaza Strip constituting just two per cent of the total settler population in the Occupied Palestinian Territories (constituting the Gaza Strip, West Bank and East Jerusalem). In the time taken to implement the plan, the number of new settlers arriving in other parts of the Occupied Palestinian Territories exceeded the number of settlers evacuated under the plan.

A key goal of the unilateral withdrawal was to remove the "basis for claiming that the Gaza Strip is occupied territory" and thus "dispel claims regarding Israel's responsibility for the Palestinians in the Gaza Strip."² If the unilateral withdrawal had brought an end to Israel's occupation of the Gaza Strip, Israel's status as an Occupying Power and its attendant duties and responsibilities under international humanitarian law would also have ended. However, the text of the plan itself, the form of Israel's withdrawal and its subsequent practice make clear that the Gaza Strip remains under Israeli occupation.

Article 42 of the Hague Regulations of 1907 provides that,

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

The test of occupation is "effective control," which exists if the military forces of the adversary could, "at any time they desired assume physical control of any part of the country."³ This test has been reiterated by various courts, including the International Criminal Tribunal for the former Yugoslavia, which ruled that one of the guidelines for determining occupation was whether "the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt."⁴

By stating that "Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip,"⁵ Israel's plan showed the intention to maintain effective control. Furthermore, Israel's provision for a military presence on the border between

¹ Haaretz, "Top PM aide: Gaza plan aims to freeze the peace process," 6 October 2004.

² Overall concept of the Disengagement Plan, Article 1(vi) and Article 2(i)(3).

³ *Hostages* case, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume VIII, 1949, at p. 56.

⁴ *Prosecutor v Naletilic and Martinovic*, in the Trial Chamber of the ICTY, Case No.IT-98-34-T, para. 217.

⁵ Overall concept of the Disengagement Plan, Article 3(i)(1).

Gaza and Egypt for an indeterminate length of time,⁶ and subsequent control of this area have ensured that military control of the entire Gaza Strip could be maintained. In a 24-hour period beginning 12 days after the complete withdrawal of ground forces, the Israeli Air Force carried out nine attacks in the Gaza Strip, killing two persons, injuring 24, and damaging 17 houses and a school, clearly making the authority of the occupying power felt.⁷ Both air and artillery shelling increased throughout the year after the withdrawal. According to statistics provided by Palestinian human rights organisation Al Mezan, these attacks resulted in the deaths of more than 150 Palestinians, and injured at least 320 between September 2005 and June 2006.⁸

The large scale military incursions begun on 28 June 2006, ostensibly in response to a cross-border attack by armed Palestinians involving the capture of an Israeli Corporal, and to home-made rocket fire from the Gaza Strip, illustrated Israel's ability to assume physical control of any part of the area at any time it desired. Israeli ground troops easily moved into and have remained in parts of Gaza. Air strikes and artillery shelling have been unremitting. Border closures have increased; the Rafah Crossing, at the border between the Gaza Strip and Egypt, was closed completely for 54 days, and partially for 5 days, from 25 June to 23 August 2006.⁹

In addition to maintaining military control, Israel retained substantial administrative authority in Gaza. Israel closes and opens Gaza's borders at will, thereby controlling the entry and exit of all people, goods and services to and from Gaza. In the year since the unilateral withdrawal, this has resulted in the loss of 100 tons of agricultural produce in January alone,¹⁰ and losses to the Palestinian economy of \$500,000 per day in March.¹¹ Finally, Israel retains control of the civil population registry, meaning that the Palestinian Authority cannot issue identity cards for Palestinians until their applications are approved by an Israeli official and has no power to grant citizenship.¹²

Gaza and its inhabitants are undoubtedly under effective Israeli control; control which Israel continued to exert since the unilateral withdrawal. Because Israel remains the Occupying Power in Gaza, the legal framework governing its actions, which includes international humanitarian and human rights law, has also remained in force.

Israel's Excessive Use of Force: Destruction of Property, Extrajudicial Executions, and Civilian Casualties

Israeli forces damaged and destroyed dozens of houses in Gaza from 12 September 2005 to 22 August 2006, as well as educational institutions, charitable associations, government ministries, and infrastructure such as bridges and roads. The attacks were particularly severe in the first three months after the unilateral withdrawal, and during Operation 'Summer Rains,'¹³ but have persisted throughout the year as part of an ongoing campaign. Immediately after the unilateral withdrawal, from 12 to 30 September 2005, shelling damaged or destroyed approximately 20 houses, a school, a vocational training centre, a cultural centre, two workshops used for

⁶ Overall concept of the Disengagement Plan, Article 6.

⁷ PCHR, *Press Release 112/2005*, 25 September 2005, all press releases available at <http://www.pchrgaza.org>; and Al Mezan, *Press Release 65/2005*, 25 September 2005, all press releases available at http://www.mezan.org/site_en/index.php.

⁸ Office for the Coordination of Humanitarian Affairs OPT (OCHA), *Weekly Briefing Notes* for the period September 2005 to June 2006. All OCHA documents available at <http://www.humanitarianinfo.org/opt/>.

⁹ PCHR, *Press Release 92/2006*, 23 August 2006.

¹⁰ OCHA, *Gaza Strip Situation Report*, 31 January 2006, p. 1.

¹¹ OCHA, *Gaza Strip Situation Report*, 19 March 2006, p. 1.

¹² Haaretz, "Gaza after the pullout: Israeli control over the population registry means continued control over Gaza Strip," 26 September 2005.

¹³ Figures collated from OCHA, *Weekly Briefing Notes* and *Humanitarian Updates*, for the period 12 September 2005 to 22 August 2006.

manufacturing agricultural machinery, and the PNA Ministry of Social Affairs.¹⁴ Attacks since 28 June 2006 have damaged or destroyed approximately 76 homes,¹⁵ the main bridges connecting North and South Gaza,¹⁶ two educational institutions,¹⁷ three government ministries,¹⁸ and Gaza's main power plant,¹⁹ the latter of which resulted in severely restricted power supply to hospitals and civilians, and affected the operation of water pumps.²⁰

Israel's policy of assassinating wanted Palestinians continued in Gaza following the unilateral withdrawal. The policy was reaffirmed by then-Israeli Prime Minister Ariel Sharon and Military Chief of Staff, Dan Halutz, at a meeting on 8 November 2005.²¹ According to statistics from Al Mezan, 47 targeted assassinations²² took place from 12 September 2005 to 10 September 2006, usually in the form of air strikes on a moving vehicle. Such attacks killed and wounded a total of 25 bystanders; for instance, an attack on 27 October 2005 killed seven Palestinians, including three children, and injured 19 more.²³

Based on Al Mezan statistics, 362 Palestinians in Gaza died as a result of Israeli military attacks in the year following the unilateral withdrawal: 151 from 12 September 2005 to 27 June 2006, and 211 in Operation 'Summer Rains' between 28 June and 10 September 2006. The majority of casualties were civilian. The number of attacks escalated over the course of the year. Between 12 September and 31 December 2005, 544 artillery shells were fired into Gaza, and there were 124 air strikes.²⁴ Between January and April 2006, more than 3,600 artillery shells and 63 air strikes were launched.²⁵ Most recently, in June alone, there were 1,376 shells fired and 122 air strikes, as well as an explosion on Beit Lahiya beach which a Human Rights Watch investigation attributed to Israel; these recent attacks resulted in the deaths of thirty-six people, including 12 children, and injured 110.²⁶

Legal Analysis

As the Gaza Strip is occupied territory, the civilian population constitute protected persons under Article 4 of the Fourth Geneva Convention. According to Article 27 of the Fourth Geneva Convention, Israel is obligated to treat protected persons humanely at all times, and to protect them against all acts and threats of violence. Moreover, conventional and customary international humanitarian law requires that parties to a conflict distinguish at all times between civilians and combatants, and between civilian objects and military objectives. Only military objectives and combatants may be targeted.²⁷

Civilian objects lose their protection against attack only for as long as they are being used for military purposes and make an effective contribution to military action. In cases of doubt, civilian

¹⁴ Al Mezan, *Press Release 65/2005*, 25 September 2005; Al Mezan, *Press Release 66/2005*, 26 September 2005; PCHR, *Press Release 113/2005*, 26 September 2005; PCHR, *Press Release 115/2005*, 27 September 2005.

¹⁵ Figures collated from OCHA, *Weekly Briefing Notes*, for the period 28 June to 15 August 2006.

¹⁶ PCHR, *Press Release 55/2006*, 28 June 2006.

¹⁷ PCHR, *Press Release 61/2006*, 4 July 2006; PCHR, *Press Release 62/2006*, 5 July 2006.

¹⁸ PCHR, *Press Release 62/2006*, 5 July 2006; PCHR, *Press Release 69/2006*, 15 July 2006; PCHR, *Press Release 71/2006*, 17 July 2006.

¹⁹ *Supra*, note 16.

²⁰ Haaretz, "IAF strikes south Gaza in bid to press militants to free soldier," 29 June 2006.

²¹ PCHR, *Press Release 135/2005*, 9 November 2005.

²² A targeted assassination is the intentional taking of a wanted person's life as the result of a policy decision, with political motivation and by surprise attack.

²³ PCHR, *Press Release 134/2005*, 30 October 2005.

²⁴ Figures compiled from OCHA, *Humanitarian Update*, for period from September to December 2005.

²⁵ OCHA, *Humanitarian Update*, January 2006, p. 1; OCHA, *The Humanitarian Monitor - occupied Palestinian territory*, May 2006, p. 2.

²⁶ OCHA, *The Humanitarian Monitor - occupied Palestinian territory*, June 2006 pp. 3 and 7.

²⁷ Henckaerts and Doswald-Beck, *ICRC Customary International Humanitarian Law*, Cambridge University Press, 2005, Rule 1, p. 3, and Rule 7, p. 25.

objects must not be attacked.²⁸ Further, Article 53 of the Fourth Geneva Convention prohibits “any destruction by the Occupying Power of real or personal property...except where such destruction is rendered absolutely necessary by military operations.” Even when a clear military objective has been identified, the civilian cost of an attack must not be excessive in relation to the “concrete and direct military advantage anticipated.”²⁹

Israeli attacks in the Gaza Strip routinely fail to comply with these rules. They frequently target civilian structures not contributing to military action at the time of the strike, and where there is no apparent “concrete and direct military advantage” to be anticipated. Attacks are frequently carried out in densely populated areas, often resulting in high numbers of civilian casualties.

In addition to international humanitarian law, Israel's actions in Gaza are also subject to human rights law. In particular, the attacks on houses carried out throughout the year violate Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), which states, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”

Targeted assassinations likewise violate the fundamental principle of the protection of civilians enshrined in international humanitarian law. Civilians remain protected persons as long as they are not taking a direct part in hostilities; they may only be legitimately targeted, injured, or killed during the period of their participation. However, once direct participation has ended they may no longer be made the object of attack, but may be arrested for having participated in the fighting. In parallel, Article 6 ICCPR protects the fundamental right to life, establishing that “No one shall be arbitrarily deprived of his life.” Article 14 of the same Covenant further guarantees the right to due process of law for persons suspected of having committed crimes. Israel's policy of targeted assassinations is in clear violation of these fundamental norms.

Freedom of movement

On 15 November 2005, Israel and the Palestinian Authority reached an agreement on movement and access in and out of the Gaza Strip, contained in two documents: the Agreement on Movement and Access, and Agreed Principles for Rafah Crossing. Despite these agreements, external freedom of movement has been severely restricted. According to statistics from Al Mezan, in the year since 12 September 2005, Karni Crossing, used for the transit of goods, was closed completely for a total of 175 days and partially for a further 169 days. Rafah Crossing has been closed completely for 121 of the 365 days since the end of the unilateral withdrawal.

Since the beginning of Operation ‘Summer Rains,’ there has been a comprehensive land, sea and air closure of the Gaza Strip. This involves the closure of the Rafah Crossing, prevention of fishermen going out to sea, and constant aerial surveillance. Transfers of humanitarian supplies and access for humanitarian workers have been restricted. Almost all other cross-border movement has been suspended.

The Rafah Crossing has remained closed since 25 June 2006. On 11 July 2006, there were 578 people trapped at the crossing waiting to enter the Gaza Strip, including 17 United Nations Relief and Works Agency beneficiaries who required critical medication.³⁰ These events mirror the period from 7 to 11 September 2005, when Israeli authorities closed Rafah Crossing, and made no exceptions for medical patients seeking essential treatment unavailable in the Gaza Strip.³¹

Since April 2006, border closures have caused severe humanitarian shortages and precipitated a humanitarian crisis in the Gaza Strip. There were shortages of antibiotics, and medicines for

²⁸ *Ibid.*, Rule 10, pp. 34-35.

²⁹ *Ibid.*, Rule 14, p. 46.

³⁰ OCHA, *Gaza Strip Situation Report*, 12 July 2006, p. 2.

³¹ PCHR, *IOF continue to control Palestinian Suffering at Rafah International Crossing Point*, 11 September 2005.

cancer and blood disease patients, forcing hospitals and medical centres to decrease the amount of medicines prescribed.³² Restrictions on the importation of food, and on the operation of fishing vessels off the coast of the Gaza Strip, have considerably diminished food stocks available in the region. The closure of Karni Crossing from 21 February to 9 March 2006 led to markets in the Gaza Strip running out of commodities such as dairy products and fruit.³³

Education and the right to work have also been seriously affected by restrictions on movement. Students have been prevented both from going to school, and from returning home.³⁴ Erez Crossing, used by workers to reach their jobs in Israel, was closed from 12 March to 11 July 2006,³⁵ further restricting access to the few who obtain work permits under strict conditions.³⁶ There has also been a restriction on fishing off the Gaza Strip falling short of the Bertini Commitment.³⁷

Legal analysis

Freedom of movement is enshrined in Article 12 ICCPR, which states that, "Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence." This is qualified by Article 12(3) ICCPR which states that restrictions may be permitted where they are "necessary to protect national security...and are consistent with the other rights recognized in the present Convention." However, as the Human Rights Committee notes in its General Comment on the implementation of Article 12, movement restrictions must be the exception and not the rule, and must not be implemented in a discriminatory, disproportionate, or unnecessary way, as Israel has done.

States Parties must respect the right to the enjoyment of the highest attainable standard of physical and mental health under Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Restricting access to medical services involves regression from this right and requires a full justification. In its General Comment 3, the Committee on Economic, Social and Cultural Rights (CESCR) noted that,

A state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.

Article 55 of the Fourth Geneva Convention states that an Occupying Power must ensure food and medical supplies to the population, including bringing them in, if necessary. Article 59 of the Fourth Geneva Convention requires the Occupying Power to agree to relief schemes and facilitate them by all means at its disposal. By restricting the entry of such goods into the Gaza Strip, Israel has been acting contrary to its duties and therefore in breach of the Fourth Geneva Convention. Under Article 11(2)(a) ICESCR, States Parties are specifically required to take measures to improve methods of food distribution. Israel has not taken any such measures, and the situation has worsened.

The ICCPR's General Comment on the right to education, as recognised in Article 13 ICESCR, states that, for the right to be properly enjoyed, there must be access to education within "safe physical reach." This is not presently the case for many people within the Gaza Strip. Under

³² PCHR, *Press Release 32/2006*, 6 April 2006.

³³ PCHR, *Press Release 25/2006*, 9 March 2006; Al Mezan, *Press Release 23/2006*, 6 March 2006.

³⁴ Al Mezan, *Press Release 58/2005*, 4 September 2005.

³⁵ United Nations, *Seventeenth Report on the Implementation of the Agreement on Movement and Access (28 June to 11 July 2006)*, 18 July 2006, p. 1.

³⁶ OCHA, *The Gaza Strip: Access Report*, April 2006.

³⁷ Specific commitments given by the Government of Israel to Ms Caroline Bertini in August 2002 in her capacity as Personal Humanitarian Envoy of the UN Secretary-General, see OCHA, *Gaza Strip Situation Report*, 31 January 2006, see map on p.3.

Article 6(1) ICESCR, States Parties must safeguard the right of people to gain a living through freely chosen and accepted work. Restrictions on movement and fishing restrict the enjoyment of this right.

Reprisals and collective punishment

Israeli General Yoav Galant, Southern District Commander, described the purpose of Operation 'Summer Rains' as follows,

The IDF is ready for a long operation involving raids. Within a month or two, the Palestinians will count hundreds of dead terrorists, damaged infrastructures and destroyed offices. When they make the overall calculation, I assume that they will think twice before their next attack or abduction attempt.³⁸

The clear intention is to punish all Palestinians in the Gaza Strip for an operation and rocket attacks carried out by a small number of armed Palestinians.

Article 33 of the Fourth Geneva Convention prohibits reprisals and collective punishment of protected persons for an offence they have not personally committed. Movement restrictions, property destruction and military attacks, including sonic booms, have affected Palestinians indiscriminately. They amount to penalising the entire population for the acts of individuals.

Conclusion

Under international law, an Occupying Power has specific responsibilities towards the civilian population of the territory it occupies. Israel's withdrawal attempted to "dispel the claims regarding Israel's responsibility for the Palestinians within the Gaza Strip."³⁹ However, the events of the year since its implementation have shown that Israel's occupation remains, as do its attendant legal responsibilities and obligations. Israel has breached its obligations under international humanitarian and human rights law through military operations in response to specific incidents, but also as part of a systematic campaign. The policies and acts outlined above have included collective punishment and done much to worsen the situation for the Palestinian people.

Statements and unilateral plans which seek to negate Israel's responsibility will not be effective unless they bring about an effective end to the occupation, and allow the Palestinian people meaningful self-determination. Until that time, Israel must comply with relevant treaty and customary international law, particularly with regard to the protection of the occupied civilian population. Common Article 1 to the Geneva Conventions places the High Contracting Parties under an obligation to ensure that Israel respects the Geneva Conventions, and their failure to do so is a clear breach. Respect for international law is a fundamental prerequisite to a durable solution to the conflict. By remaining the Occupying Power, Israel still has substantial obligations which must be enforced.

³⁸ Arutz Sheva, "Two Dozen Weekend Kassams; Four Hurt on Sunday," 9 July 2006.

³⁹ Overall concept of the Disengagement Plan, Article 1(vi).