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**The Law Applicable to Non-Occupied Gaza**

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*Introduction*

On 30 January 2008, the Israeli Supreme Court rendered its decision in *Gabber v. Prime Minister* – a case dealing with a challenge to the legality of cuts in the supply of electricity and fuel into Gaza. These cuts, together with trade and travel restrictions, were decided upon by the government's security cabinet in September 2007 as a reaction to the rise of Hamas and the escalation of rocket and mortar attacks from Gaza strip to adjacent Israeli towns and villages – thus, as a form of an economic sanction. Although the cabinet decision required a legal examination of the humanitarian consequences of the aforementioned and clarified that they are not designed to generate a humanitarian crisis in Gaza, Palestinians and Israeli NGOs have argued that the decision is likely to result in dire humanitarian consequence, and submitted a petition to the Supreme Court challenging the lawfulness of the new governmental policy.

A key preliminary question which the Court had to decide, before addressing the merits of the case, goes to the status of Gaza – whether it is occupied or not. Of course, if Gaza is occupied sanctions of the kind approved by the Israeli cabinet would probably constitute a form of collective punishment and conflict with some of the occupier's obligation towards the protected population (e.g., the duty to maintain public services, the duty under the ICESCR to provide adequate standards of living, etc.). On the other hand, if Gaza is not occupied than the much looser legal framework governing economic sanctions between warring parties, would apply. Hence, the Court – which has tried in previous cases to avoid classifying the situation in Gaza – had finally to rule on the applicable legal framework.

Para. 12 of the judgment contains the Courts conclusions on the status of Gaza and the ensuing obligations of Israel:

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"[S]ince September 2005, Israel no longer has effective control over the events in the Gaza strip. The military government that had applied to that area was annulled in a government decision, and Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to look after the welfare of the residents of the strip or to maintain public order within the Gaza Strip pursuant to the entirety of the Law of Belligerent Occupation in International Law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip. In the circumstances which have been created, the main duties of the State of Israel relating to the residents of the Gaza Strip are derived from the situation of armed conflict that exists between it and the Hamas organization controlling the Gaza Strip; these duties also stem from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip, as well as from the relations which has been created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the area, as a result of which the Gaza Strip has now become almost completely dependent upon supply of electricity by Israel."

*Is Gaza still occupied?*

Let us examine the various parts of the analysis offered by Court one at a time. The first conclusion that the Court offers directly relates to the question whether Gaza is still occupied and it appears that the Court's position on the question is unequivocal: since the occupation regime was formally abrogated and since no Israeli troops are present in Gaza, Israel no longer has actual effective control over the territory. Of course, we know that a military tribunal in Nuremberg (*List* case) has held that even if a military power does not exercise actual control over foreign territory, the area in question may still be deemed occupied: In that that specific case it was established that since "Germans could at any time they desired assume physical control of any part of the [Greece and Yugoslavia]" – the area was still subject to the laws of occupation. In fact, this very *potential* control standard was upheld by Israel's Supreme Court in the *Tsemel* case (1983) with regard to Israel's control over South

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Lebanon. Still, in *Gabber* the Court held that even this looser standard of control was not met in Gaza – "Israel [does not have] effective *capability*, in its present status, to enforce order and manage civilian life in the Gaza Strip".

I don't want to dwell too much upon this point – as it is not the focus of my present presentation – but I think that the Court's conclusion on this point is sensible: The situation in Gaza, where an organized government (the Hamas) openly exercises power and authority – is very different from the guerilla warfare situation discussed in *List*. Moreover, the Court was right, in mind, in linking effective control to ability to perform obligations – in other words, to construe article 42 of the Hague Regulations, which sets the conditions for the beginning and end of occupation, in light of article 43 which defines the main obligations of an occupier – to restore and maintain public order and life in the occupied territory. When viewed from this perspective, it is difficult, I think, to sustain the argument that the IDF can – in the words of sec. 356 of the 1956 US Field Manual 27-10 (which codifies the standard introduced in the *List* case) - send detachments of troops to make its authority felt within the occupied district within a reasonable time. Israel can certainly send troops into Gaza at any time (or into Lebanon, for that matter) – but in order to enforce law and order and manage basic public services, it has to *reoccupy* Gaza as it had done with respect to the West Bank in 2002. This reoccupation is likely to be a long and costly process, which will fail to meet the temporal reasonableness standard introduced in *List* and FM 27-10.

So, if the Court is right – and I think it is right – Gaza is no longer occupied, but placed under a situation analogous to a situation of siege (since Israel controls most of the entry and exit point to and from Gaza by land, air and sea). Note that this conclusion is supported by the language of the aforementioned sec. 356, which stipulates that: "The mere existence of a fort or defended area within the occupied district, provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective ": so the existence of a non-occupied fort or area under siege within a larger area controlled by the foreign military does not necessarily negate the existence of a state of occupation over the

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*remainder* of the area (in our case, the West Bank). It seems difficult to maintain, however, that the mere placing of a hostile area under siege – from the air, sea and land – suffices to regard this as occupied land. The untypical sequence of events in Gaza – the transformation from a situation of occupation to one of siege does not undermine the distinction between the two: The same reasons that would support the conclusion that a pre-occupation siege does not qualify as occupation also support the conclusion that post- occupation siege does not qualify as occupation.

*The duty to provide services in an armed conflict situation*

But, the significance of *Gabber* may prove to be at a different level altogether. The more interesting element in the decision relates to the implications of the Court's nuanced conclusion regarding the legal effects of the end of occupation. This is because, according to the Court, Israel continues to hold certain obligations to the residents of Gaza – which derive from three distinct sources – and I am careful, here, not to claim that these are *legal* sources: the laws of war, control over boundaries and the historical dependency of Gaza in Israel.

**First**, the Court alludes to obligations derived from the armed conflict situation between Israel and Hamas. This is hardly controversial as clearly there are international legal norms relevant to an armed conflict involving a situation of siege – e.g., the duty to allow passage of humanitarian relief supplies, the prohibition against targeting civilian objects and employing methods designed to bring about the starvation of the local population. But the issue discussed in the *Gabber* case – provision of electricity and fuel by Israel to Gaza – presents a unique challenge: in the case, Israel is not being requested merely to facilitate passage of basic supplies to Gaza, but rather to supply them itself. In the terms of the First Additional Protocol, Israel is required to actively provide basic needs – in accordance with article 69 that regulates the obligations of occupying forces - and not simply refrain from excessively interfering with the provision of such supplies in accordance with article 70, which governs situation of non-occupation (and even this more modest scope of obligations may be subject to certain limitations, which reflect military necessity and proportionality). So, in order to reach the conclusion that it had reached

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on Israel's obligation to continue and provide some electricity and fuel to Gaza, the Court had to rely on additional reasons, which could support the Judges' intuition or sense of justice, which must have made it difficult for them to release Israel from all of her positive obligations vis-à-vis Gaza.

*Human rights law and the obligation to provide basic needs*

The **second** basis offered by the Court for imposing on Israel some obligations vis-à-vis Gaza is the fact that Israel controls the border crossings into Gaza. The theory or legal doctrine underlying the reference to this fact remains not expounded. To the extent that it merely seeks to reiterate the point that international law contains some legal standards that govern situations of siege (which control over border crossings facilitate) than the reference to border crossings is not very controversial or illuminating. Of course, the legal provisions relating to the passage of relief consignments are directly relevant to parties that have the material ability to block the passage of relief consignments - that is, parties that control points of entry into the area under siege. But in the context of the facts of the case, which deals with supply of electricity and fuel by Israel (i.e., provision of services, not relief consignments), and in light of the third basis invoked by the Court – the long duration of the relations of dependency between Israel and the territory of Gaza, it appears that the reference to Israel's control over the border crossings was meant to serve a different purpose for the Court. Arguably, this reference was meant to underscore the scope of Gaza's dependency on Israel's actions – or in other words, emphasize the power (not control) Israel still has over Gaza.

The fact that decisions taken by Israel have dramatic implications on life in Gaza – that is, on individuals living in an area situated beyond Israel's effective control, raises, in my mind, the question of whether a state should be required to refrain from adopting measures that entail cross-border harm. We know that in some areas of law the answer is clearly yes: For example, under environmental law a state cannot create a cross-border environmental nuisance (Principle 2 of the Rio Declaration on Environment and Development provides that all States have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the

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environment of other States or of areas beyond the limits of national jurisdiction"). Arguably, the inter-connectedness of environmental problems, which underlies the 'no harm rule' finds an analogy in the interconnectedness of Gaza and Israel; clearly, closing the border crossings for the passage of essential goods or cutting off the electricity supply to Gaza is an act, which causes no smaller cross-border harm than an air pollution nuisance.

But what is the legal doctrine, which may serve as the basis the obligation to refrain from cross-border harm in the circumstances discussed in *Gabber* (which, after all, do not fall within the scope of environmental law)? I believe that one such possible doctrine may derive from international human rights law, which may apply under some circumstances extra-territorially. For example, a large number of ECHR and HRC decisions, in deportation and extradition cases such as *Soering* or *Ng*, have required states to refrain from taking acts whose direct consequences entails human rights violations outside their territory (such as torture); moreover, some of the *dicta* of the ECHR and HRC in cases like *Issa* or *Burgos* that address extra-territorial operations by state agents supports the proposition that states may not engage in conduct outside their territory which violates human rights, if the same conduct would have been impermissible within their own territory. These legal doctrines, while not directly applicable to the situation in Gaza, are indicative of the flexibility of human rights law and its potential extra-territorial reach.

The specific doctrine which may regulate situations like that of Gaza, may derive from the language used in HRC General Comment 31 (2004), which defines the scope of obligations of state parties to the ICCPR. According to this General Comment, the ICCPR applies to all individuals subject to "the *power* or effective control of that State Party, even if not situated within the territory of the State Party". The reference to a new legal standard – power – is arguably indicative of the view that individuals in areas outside the state's national boundaries which are not occupied– that is, not subject to effective control by the violating state, may also enjoy international protection, at least under in some circumstances. There is indeed a considerable body of precedent in HRC, ECHR and English jurisprudence, which supports the notion

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that individuals who find themselves under the physical control of state agents operating in foreign territory – e.g., under the custody of secret service agents or in a foreign detention facility – would continue to be protected under human rights law from rights violation by the state to whom these agents belong.

A case of even greater relevance to our discussion may be the decision of the ECHR in *Ilascu*, where it was held that Russia entails responsibly for human rights violations in Transnistria by reason of its "decisive influence" over the acts of the break away republic's authorities (such an influence was sustained by the availability of "Russian peacekeepers" on the ground in Transnistria and Russia's assistance to the Transnistrian government which constitute that regime's lifeline). In other words, Russian power – not effective control – was the basis for an obligation to secure the human rights of individuals present in Transnistria. So, even if Israel no longer has effective control over Gaza, the policy of siege and Israel's control over Gaza's lifeline – gasoline and electricity included – may place Gaza's residents, for some purposes, under Israel's power or decisive influence.<sup>1</sup>

So, one could argue that the existence of a *power* over individuals situated in a different country – which includes the ability to adopt measure that interfere with the enjoyment of human rights by individuals across the border – would bring such individuals under the jurisdiction of the power-exercising state. Hence, the latter should strive to conduct its cross-border exercises of power in a manner compatible with human rights law. Of course, the obligations under such a construction would normally be of a relative nature, and restricted in scope to the aspects closely related to the cross-border activity (e.g., when state A emits health-endangering gases to the territory of state B, the obligation would only appertain to the acts and omissions which facilitate the emission). In addition, cross-border obligations will typically be obligations of a negative nature that require the operating state to cease and desist from harming the interests of the individuals across the border (this is because

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<sup>1</sup> Of course, Israel can only dream to have the kind of influence over Hamas that Russia has over the Transnistrian authorities

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positive obligations normally presume greater degree of control over territory and stronger and ongoing links between the government and the governed).

One could, I believe, draw an interesting analogy in this context between the broad concept of jurisdiction I advocate here and the concept of "reasonable jurisdiction to prescribe" under section 403(2) of the Third U.S. Restatement for Foreign Relations. Section 403(2) addresses the power of U.S. law-makers to regulate extra-territorial conduct with cross-border impact and instructs the courts to consider, when reviewing such matters, the extent to which the regulated activity has "*substantial, direct and foreseeable effect* upon or in the territory". Arguably, the same interests which support regulation by the affected state of the foreign activities in question pursuant to national law, would also support, where the cross-border activities affect internationally protected human rights, the parallel regulation of such activities by international human rights law.

Significantly, under the proposed model, not every cross-border effect of state conduct on human rights would create a sufficient jurisdictional link that triggers the application of human rights law. To the contrary, such an outcome will only be appropriate with regard to forms of conduct which suggest a relationship of power. The control of the borders of Gaza, to which the Court in *Gabber* alludes, may constitute a kind of power. Hence, the lawfulness of Israeli measures, such as electricity cuts or an embargo on gasoline imports, which have *substantial, direct and foreseeable* effects on the population of Gaza, should, according to this view, be examined under human rights norms.

Of course, a little case called *Bankovic* stands in the way of this legal construction. As is well known, the ECHR unanimously decided in 2001 not to review the lawfulness of NATO air operations over Yugoslavia for lack of jurisdiction, adopting in the process a binary all-or-nothing approach towards the application of human rights law to cross-border operations. Only where the acting state is in a position to apply all of the provisions of the Convention would the jurisdictional provisions 'kick in'. I do not have the time to dwell upon this point, but I have written before on why I believe *Bankovic* represents bad law and a departure from previous (and probably also

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subsequent) ECHR case law (for example, the consular services cases and the *dicta* employed in *Issa*). Still, this is the law of the ECHR (and was, essentially, affirmed by the House of Lords in *Al Skeini*) and this greatly complicates our ability to rely on human rights law in order to require Israel to refrain from employing its powers over non-occupied Gaza in ways that are incompatible with human rights law.

*A moral obligation?*

If the views expressed in *Bankovic* will ultimately prevail, human rights law may suffer from the same rigidity and binary configuration that characterizes the law of occupation. Hence, we should examine the **third** justification offered by the Court – the history of the relations between Israel and Gaza – and assess whether it has the potential for normative innovation. According to the Supreme Court, the longtime dependency of occupied Gaza on Israel for basic supplies supports demanding Israel to continue and provide Gaza with supplies even after the occupation has ended.

Perhaps, the Court meant to insinuate here that Israel had failed throughout its long occupation of Gaza to facilitate the development of local capabilities for producing basic supplies, and that, under these circumstances Israel has a moral responsibility to make up for its omission, by continuing to supply the essential needs of Gaza. But how do these arguments, which are essentially corrective or transitional justice arguments, translate into a concrete legal obligation remains unclear.

One can think of several legal constructions, which could have perhaps been used by the Court, though their normative status and suitability to the facts at hand is questionable: First, if Israel as an occupier failed to meet its legal duty to administer the infrastructures in the occupied territory "in accordance with the rules of usufruct" (art. 55, Hague Regulations) - an obligation that may be analogous to some extent to the duty of a trustee to administer a trust – then a remedy for this shortcoming may be appropriate. As *restitutio in integrum* is impossible to attain and compensation may be inappropriate – the requirement that Israel should continue to provide basic supplies for an interim period (until independent capabilities or an alternative source for the supplies is identified) may serve as an appropriate form of satisfaction, which does not wipe away the consequences of the breach, but mitigate it.

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Second, considerations of equity (and maybe good neighborliness) – which may comprise part of the applicable general principles of law - may fill *lacunae* in existing law (see *North Sea Continental Shelf*). Such principles could justify continuing to hold Israel responsible for providing basic supplies to Gaza – if such an outcome appears to be just under the circumstances - even if no specific legal norm which prescribes this specific obligation can be identified. Perhaps the Martens Clause can also be utilized in order to reach a similar result – as far as it relates to the obligation to provide basic supplies in the context of an ongoing armed conflict in post-occupation areas.

Third, while it may be argued that Israel did not have a clear obligation under IHL to facilitate an autarkic economy in the Gaza Strip – human rights law may have required it to ascertain before leaving Gaza that conditions on the ground *after* the withdrawal would be compatible with human rights standards. This proposition is somewhat analogous to the *ratio decidendi* of the aforementioned deportation or extradition cases: A state would be held accountable for violations by other entities if it created, when it had jurisdiction over the individuals in question, conditions whose direct consequences would be human rights violations. Here too, reintroduction of the need to provide basic needs may serve as a just satisfaction for the aforementioned violations.

*Conclusion*

It seems that the Israel Supreme Court in *Gabber* felt that it would be unjust – and perhaps politically undesirable – if Israel were to be relieved from all, or almost all of its obligations vis-à-vis Gaza – as a result of the withdrawal from Gaza. Israel's perceived position of physical dominance over Gaza, coupled with the historical links of dependence, were probably central to the balancing formula applied by the Court – Israel would assume obligations that go beyond the requirements of IHL in situations of siege, but that fall short of the requirements applicable in situations of occupation – that is the 'basic humanitarian needs' standard (a standard that may also sit well with the laws of countermeasures that could have also served as a framework of analysis in the case at hand).

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The main weakness of the Court's decision is not found in the final outcome it prescribes – but in the underdeveloped legal analysis of the alternative grounds for imposing obligations on the State of Israel. This unnecessarily complicates attempts to grasp the full implications of the decision and to identify its precedential value. Still, at the end of the day, the judgment should be viewed as endorsement of the need to step outside IHL and to look for additional legal norms – which may reflect our moral sensibilities and contemporary needs in a more accurate manner than traditional IHL.