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Israel's Legal Obligations to Gaza After the Pullout. By Nicholas Stephanopoulos.

The weeks leading up to September 12, 2005 were among the most dramatic in the history of the Israeli-Palestinian conflict. After thirty-eight years of occupation, thousands of Israeli settlers vacated the Gaza Strip, some of them forcibly. Israel also withdrew all troops from Gaza, prompting a "carnival of celebration" among the Palestinians who now would be responsible for governing the territory.¹

But while Israel is no longer responsible for the day-to-day administration of Gaza, it retains a good deal of control over the territory. The flow of people and goods into and out of Gaza is supervised by Israel, even along the Gaza-Egypt border.² Israel also controls the airspace above the territory, patrols Gaza's coastline, bans the building of an airport or seaport, collects customs for the territory, and maintains a population registry for all of Gaza's residents.³ Most intrusively, the Israeli military creates sonic booms in the skies above Gaza, fires artillery at targets in northern Gaza, and carries out targeted assassinations throughout the territory.⁴

This set of facts—with no Israeli soldiers on Gaza soil but other means of control remaining in place—generates an interesting and important legal question: What exactly are Israel's obligations to Gaza in the wake of the withdrawal of all Israeli settlers and troops? Israel has argued that thanks to its pullout, it is no longer the occupying power in Gaza and thus has no legal duties whatsoever.⁵ This Recent Development contends, to the contrary, that Israel still occupies Gaza for two reasons: first, because it retains effective control over the territory, and second, because agreements between Israel and the Palestinian Authority (PA) prohibit unilateral changes to the legal status of Gaza and the West Bank. Moreover, even if Gaza is no longer considered to be occupied, Israel continues to bear legal obligations to the territory under both international law and the Israel-PA accords.

The international law of occupation is set out in the 1907 Hague Convention on the Laws of War (Hague Convention) and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War

1. Steven Erlanger, *Gazans Revel as They Sift Through Ex-Settlements*, N.Y. TIMES, Sept. 13, 2005, at A1.

2. See The Disengagement Plan—General Outline, <http://www.shanghi.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> (Apr. 18, 2004).

3. See *id.*

4. See, e.g., Greg Myre, *Israelis' Airstrikes Hit Gaza After Hamas Fires Rockets*, N.Y. TIMES, Sept. 25, 2005, at § 1, 8.

5. See Ariel Sharon, Address to United Nations General Assembly (Sept. 15, 2005), available at <http://www.mfa.gov.il/MFA/Peace+Process/Key+Speeches/PM+Sharon+addresses+the+UN+General+Assembly+15-Sep-2005.htm> (referring to "[t]he end of Israeli control over and responsibility for the Gaza Strip"); Greg Myre, *As Israelis Pull Out, the Question Lingers: Who'll Control Gaza?*, N.Y. TIMES, Sept. 11, 2005, at § 1, 8 (quoting Daniel Taub, deputy legal adviser in Israel's Foreign Ministry) ("The dismantling of the Israeli military government brings to an end Israeli authority over the area and transfers its responsibility to the Palestinians.").

By "legal duties" I am referring only to the customary responsibilities of a government for the territory that it administers. Even after the withdrawal, Israel does not argue that it is immune from *all* legal actions initiated by Palestinians (e.g. tort or contract claims).

(Fourth Geneva Convention).⁶ According to the Hague Convention, “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army,” and “[t]he occupation extends only to the territory where such authority has been established and can be exercised.”⁷ According to the Fourth Geneva Convention, occupation is linked “to the extent that [a] Power exercises the functions of government in [the allegedly occupied] territory.”⁸ If a territory is found to be occupied, then a host of responsibilities accrue to the occupying power, for instance, running schools, providing food and medical supplies,⁹ and “ensur[ing], as far as possible, public order and safety.”¹⁰

The status of Gaza after the Israeli withdrawal is open to some debate under the Hague Convention’s definition of occupation. On the one hand, the lack of Israeli ground troops in Gaza suggests that the territory is no longer “under the authority of the hostile army.” More persuasively, however, Israel’s continuing military incursions and control of Gaza’s borders indicate that Israel is still exerting authority over the territory. Boots on the ground are often a reasonable proxy for authority over a territory, but nothing in the Hague Convention makes them a prerequisite for a finding of occupation.¹¹ The legal relationship under the Fourth Geneva Convention is clearer still. Israel continues to carry out several core functions of government in Gaza—for example, managing internal and external security, regulating the flow of people and goods, collecting customs, etc.—and is to that extent still an occupying power. Israel may have *fewer* obligations to Gaza now that its troops and settlers have withdrawn, but it will not be completely free of responsibilities until it allows the PA to exercise full control over the territory.¹²

Putting aside international law for the moment, there is a second reason why Gaza must still be regarded as occupied territory even after the Israeli pullout: the repeated pledges of both Israel and the PA not to alter unilaterally the legal status of Gaza or the West Bank. Several interim agreements

6. The Hague Convention is generally considered to have become customary international law. Israel is a signatory to the Fourth Geneva Convention, but there is some controversy over whether the treaty applies to the Israeli-Palestinian conflict. Israel claims that it does not, but the majority view is that it does. See David John Ball, *Toss the Travaux: Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment*, 79 N.Y.U. L. REV. 990, 1009 (2004).

7. Annex to The Hague Convention on the Laws of War: Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention].

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

9. See Fourth Geneva Convention, *supra* note 8, arts. 47-78.

10. Hague Convention, *supra* note 7, art. 43.

11. The Nuremberg Tribunal after World War II notably took this position as well. See *United States v. Wilhelm*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 1230, 1243 (holding that Greece and Yugoslavia were occupied even though “the partisans were able to control sections of these countries at various times” because “it is established that the Germans could at any time they desired assume physical control of any part of the country”).

12. Occupation is thus a binary concept under the Hague Convention, but a more multifaceted one under the Fourth Geneva Convention. Under the Hague Convention, a territory either is or is not occupied, while under the Fourth Convention, degrees of occupation exist depending on the extent to which the occupying power exercises functions of government.

between Israel and the PA contain the following language or a close variant: "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."¹³ Before Israel's withdrawal, there was little dispute that Gaza was occupied; a 2004 International Court of Justice advisory opinion even stated that Gaza and the West Bank "were occupied by Israel in 1967 during the armed conflict between Israel and Jordan," and that "[s]ubsequent events in these territories . . . have done nothing to alter the situation."¹⁴ Now that Israel has pulled out of Gaza, the territory must still be considered to be occupied or else Israel will have effected the unilateral change in status prohibited by the Israel-PA interim agreements. The Palestinians, of course, have not consented to any alteration of Gaza's legal status, and oppose any modifications to the status quo to which both sides have not agreed.

Israel might respond that the term "status" in the interim agreements does not refer to whether a territory is occupied under international humanitarian law, but rather only to whether a territory is formally under Israeli or Palestinian sovereignty. Alternatively, Israel might claim that the interim agreements sought only to ban *self-serving* unilateral shifts in status, i.e., the annexation of land by Israel or a declaration of independence by the PA. Both of these arguments are belied by the plain text of the agreements. On its face, "status" includes within its scope whether a territory is occupied, and does not hint at any asymmetry whereby certain changes in status would be acceptable but others would not be. Moreover, turning to the drafting history of the agreements, there is no evidence that Israel and the PA wished to exclude international humanitarian law from the definition of "status," or to establish an asymmetric policy on status change. As the weaker of the two parties, the PA in particular might have been expected to oppose any such asymmetry, in order to prevent precisely the situation that is now unfolding in Gaza—the unilateral imposition of terms by Israel.

Therefore, under both international law and the Israel-PA interim agreements, Gaza remains occupied territory in the wake of the Israeli withdrawal. But even if Gaza is not considered to be occupied, Israel continues to bear obligations to the territory pursuant to the same legal documents that support Gaza's post-pullout occupied status. First, the Fourth Geneva Convention imposes duties not only on occupying powers, but also on treaty signatories whenever they are involved in armed conflict. Article 2 states that "the present Convention shall apply to all cases of . . . armed conflict which may arise between two or more of the High Contracting Parties," and that even if "one of the Powers in conflict may not be a party to

13. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. 31, Sept. 28, 1995, 37 I.L.M. 557, 568 [hereinafter Interim Agreement]; see also Wye River Memorandum, Isr.-P.L.O., art. 5, Oct. 23, 1998, 37 I.L.M. 1251, 1255 ("[N]either 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."); Sharm El-Sheikh Memorandum, Isr.-P.L.O., art. 8, Sept. 4, 1999, 38 I.L.M. 1465, 1468 (same).

14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 78 (July 9) [hereinafter *Wall Advisory Opinion*]. Israel, it should be noted, sometimes argues that Gaza and the West Bank are not *occupied* but rather *disputed* territories.

the present Convention, the Powers who are parties thereto” shall “be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”¹⁵

Both of these clauses indicate that Israel’s relations with Gaza are still governed by the Fourth Geneva Convention. “Armed conflict” continues in Gaza in the form of Israeli military incursions and Palestinian rocket attacks and suicide bombings. It is true that the PA is not—and, as an entity other than a sovereign state, could not be—a “High Contracting Party” to the Convention, but the Gaza conflict arose as a result of the 1967 war between Israel and Egypt, both of which are signatories. In addition, the PA officially “accepts and applies” the Fourth Geneva Convention, meaning that the treaty is applicable even if one ignores Egypt’s role in the hostilities.¹⁶ The obligations specified in the Convention for belligerents (as distinct from occupying powers) are laid out in Articles 13-46, and include allowing the free passage of food and medicine, permitting civilians to leave the zone of conflict, and avoiding unnecessary physical suffering among civilians.

Israel also retains legal duties to Gaza, even if the territory is no longer occupied, under the Israel-PA interim agreements. In those agreements, Israel vowed, *inter alia*, to facilitate the “normal and smooth movement of people, vehicles, and goods . . . between the West Bank and Gaza Strip,”¹⁷ to exercise its powers “with due regard to internationally-accepted norms and principles of human rights and the rule of law,”¹⁸ and to cooperate with the PA in dealing with areas such as agriculture, commerce, education, and employment.¹⁹ Crucially, none of these obligations hinges on whether Gaza is occupied. The assumption of both Israel and the PA in drafting the agreements was that “the West Bank and the Gaza Strip [are] a single territorial unit, the integrity and status of which will be preserved during the interim period.”²⁰ The Israeli obligations denoted in the agreements will therefore remain in place until a permanent settlement regarding both Gaza and the West Bank is achieved. Nothing in the agreements’ texts suggests that the duties expire as soon as Israel withdraws its settlers and troops from a particular parcel of land.

To conclude, Israel has not yet succeeded in washing its hands of Gaza. Whether or not Gaza is regarded as occupied in the wake of the Israeli pullout, Israel continues to bear obligations to the territory under both international humanitarian law and the Israel-PA interim agreements.

Israelis may consider this situation to be a bit unfair. After all, the decision to withdraw from Gaza was a wrenching one for the country, and may have been expected to shift the legal landscape at least a little. But there is a common—and quite equitable—theme that underlies both the

15. Fourth Geneva Convention, *supra* note 8, art. 2.

16. See *Wall Advisory Opinion*, *supra* note 14, ¶ 91.

17. Interim Agreement, *supra* note 13, Annex I: Redeployment of Israeli Military Forces and Transfer of Responsibility art. 1.

18. Interim Agreement, *supra* note 13, art. 19.

19. Interim Agreement, *supra* note 13, Annex III: Protocol Governing Civil Affairs art. 1.

20. Interim Agreement, *supra* note 13, art. 11.

international law of occupation and the Israel-PA accords: the notion that no party should profit from unilateral changes to the status quo. Under the Hague Convention and the Fourth Geneva Convention, nations incur the obligations of occupation whenever they engage in warfare beyond their borders, and can only shed these obligations if they halt the conflict, terminate military control over the conquered territory, and stop carrying out the functions of government in that zone. Under the Israel-PA interim agreements, similarly, both sides agreed to treat Gaza and the West Bank as a unified entity, and to make changes to the territories' status only by mutual consent. Israel's position that it no longer owes anything to Gaza, then, squarely violates this principle of not rewarding those who unilaterally shift the status quo. Politically, the withdrawal may yet prove to be a masterstroke. Legally, however, it has changed nothing.