

JUSTIFYING RESTRICTIONS ON RECONSTRUCTING GAZA: MILITARY NECESSITY AND HUMANITARIAN ASSISTANCE

*Sari Bashi**

This article analyses the relationship between the scope of security needs that are cited as justification for restricting humanitarian assistance in situations of occupation and the scope of the occupant's obligation to facilitate and/or proactively provide humanitarian relief. It argues that, compared with a non-occupant, an occupying power may consider broader security goals as reasons to restrict humanitarian assistance, but that doing so imposes a greater responsibility on the occupying power to provide alternatives to the humanitarian assistance being restricted. In addition, as a normative matter, as increasingly long-term security goals are included in the 'military necessity' cited as a reason for restricting humanitarian assistance, the ambit of what is included in humanitarian assistance should be expanded to include the economic development and investment in infrastructure needed to provide for humanitarian needs in the long term. This kind of regime would enhance the self-regulation of warring powers by requiring those with the ability to engage in long-term security planning to use that ability also to provide for the long-term humanitarian needs of the civilian population. The article examines restrictions on humanitarian assistance in Gaza as an example of how this normative arrangement might work in practice.

Keywords: Gaza, Israel, military necessity, humanitarian intervention, occupation

1. INTRODUCTION

Changes in the way in which warfare is conducted bring about a host of challenges to international humanitarian law (IHL), including its provisions requiring parties to a conflict to facilitate humanitarian assistance. As in the case of most IHL obligations, the provisions that require a party to facilitate humanitarian assistance are subject to limitations of military necessity: humanitarian action may be restricted or conditions placed upon it if so required by the military or security needs of the party in question. Yet, the scope of those security needs is far from clear, especially in conflicts that are not between standing armies seeking to gain territorial advantage, but rather involve non-state actors, where the goals and scope of the battle are not well defined.¹

In this article I analyse the guidelines used to evaluate the lawfulness of restrictions or conditions placed on the provision of humanitarian assistance to civilians during an armed conflict and belligerent occupation. I focus on the kinds of security goal that may justify the restriction or

* Co-founder of Gisha – Legal Center for Freedom of Movement; Israel and Palestine Country Director at Human Rights Watch. sari.bashi@gmail.com. The views expressed in this article are the author's personal views only. The author thanks Eliav Liebllich, Eitan Diamond and David Kretzmer for their guidance in researching this article.

¹ See, eg, Peter Maurer, 'Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond' (2014) 47 *Israel Law Review* 175, 177; Eliav Liebllich and Eyal Benvenisti, 'The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems are Unlawful', *Global Trust Working Paper Series*, October 2014, 18–20, <http://globaltrust.tau.ac.il/wp-content/uploads/2014/11/Eliav-and-Eyal-Autonomous-Weapons-Systems-WPS-10-141.pdf>.

refusal of humanitarian assistance and the implications that resorting to them may have on a party's obligations towards the civilians who would benefit from such activity.

First, I analyse the concept of military necessity, exploring the nature and extent of security considerations that may be taken into account in restricting or setting conditions on humanitarian action. I draw a rough distinction between two primary and overlapping kinds of protected military need: (i) military necessity in the framework of the laws of armed conflict, and (ii) security needs in the framework of belligerent occupation. I suggest that in the case of belligerent occupation, there is, or should be, a proportional relationship between the scope and nature of the security needs claimed by the party seeking to restrict humanitarian action and, conversely, the obligations that such party has to facilitate or even undertake humanitarian relief. This kind of proportional relationship emerges from a comparison of the way in which the law of occupation and the law of hostilities, respectively, treat obligations to undertake and/or to facilitate humanitarian assistance.

Second, I explore the kind of activity that is or should be protected as humanitarian assistance in situations of occupation. Here, too, I explore a proportional relationship. I suggest that as the scope of the security needs cited as justification for restricting humanitarian action becomes broader and more forward looking, so too should the ambit of actions that are protected by IHL as humanitarian in nature, including development and other activities that increase the capacity of the civilian population to provide for its needs.

I use the procedures and rules governing relief schemes for residents of the Gaza Strip as an area of focus, evaluating the nature and scope of security needs cited by Israel as justification for restricting or setting conditions on humanitarian assistance, and analysing them under the relevant (and overlapping) IHL provisions governing humanitarian assistance in situations of armed conflict and belligerent occupation. I also apply my tentative conclusions on what should be considered humanitarian assistance to the activity that international organisations seek to undertake in Gaza, to assess the extent to which it may be protected under IHL. I ask whether – in the context of occupation and perhaps other situations of long-term control, and as a future direction for IHL – an obligation to facilitate development can or should be read into the relevant IHL provisions governing the obligation to facilitate humanitarian relief.

In addressing humanitarian assistance, I include two types of obligation: (i) the obligation of parties to a conflict and/or an occupying power to permit and facilitate the provision of humanitarian assistance by others, and (ii) proactive activities that an occupying power is required to undertake in order to ensure the provision of adequate supplies to the civilian population.

In considering the proportionality issue, I consider the calculations on each side of the 'scale': military necessity (which is addressed in the next section) and the importance of the humanitarian assistance in meeting the needs of the civilian population protected by IHL. This latter item can also be thought of as the harm that the civilian population would suffer if such assistance were delayed, hampered, reduced or denied.

The outline of this article is as follows. Section 2 introduces the provisions that protect humanitarian assistance in situations of armed conflict and occupation together with their limitations. It then analyses the security rationales that may justify restricting or setting conditions on

humanitarian assistance in each context. It suggests, in the case of occupation, a proportional relationship between the breadth of the security justifications cited for restricting humanitarian assistance and, paradoxically, the obligation to facilitate or undertake such activity. Section 3 applies this emerging theoretical framework to Israeli restrictions and conditions on humanitarian assistance in Gaza, focusing on restrictions on construction, reconstruction and repair projects. Section 4 briefly analyses the scope of what may be considered humanitarian assistance protected by IHL. The article concludes by suggesting some practical implications of this analysis.

2. THE OBLIGATION TO FACILITATE HUMANITARIAN ACTION AND ITS LIMITATION

In this section I survey the source of the obligation to facilitate humanitarian assistance, noting differences in the scope of the obligation imposed on occupying powers as opposed to parties to an armed conflict who are not occupants, and the type of military requirement that may justify placing restrictions or conditions on humanitarian assistance.

We can identify two types of obligation to facilitate humanitarian assistance: those applicable specifically to occupied territories and those applicable generally to parties engaging in international armed conflict.² In the first instance, an occupying power owes a robust duty not just to facilitate humanitarian assistance provided by others but also to proactively provide for the needs of the civilian population. The source of this duty predates the post-Second World War humanitarian revolution³ and can be found in Article 43 of the Hague Regulations, which requires an occupying power to restore ‘public order’, or rather public life, by stepping into the shoes of the ousted sovereign and providing the services it would have provided.⁴ This broad authority to restore normal life includes meeting the humanitarian needs of the civilian population. The later codifications in the Fourth Geneva Convention⁵ and Additional Protocol I⁶ elaborate the proactive obligations of an occupying power, and include obligations to facilitate the proper working of educational⁷ and medical⁸ institutions and to supply food, medicine, clothing, shelter and other items ‘essential to the survival of the civilian population’.⁹

² I will not address here the differences that may apply in cases of non-international armed conflict but rather note that most of the provisions discussed in this article would apply to both situations: see, eg, Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 239, 260–63.

³ *ibid* 245.

⁴ 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 (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461 (Hague Regulations), art 43. See also Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993) 9–12, and Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 91–94.

⁵ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention or GC IV).

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I).

⁷ GC IV (n 5) art 50.

⁸ *ibid* art 56.

⁹ *ibid* art 55; AP I (n 6) art 69, which enlarges the list of supplies enumerated in GC IV to all supplies essential for the survival of the civilian population.

If the civilian population is inadequately supplied, the occupying power must also agree to and facilitate humanitarian relief schemes, including allowing free passage of consignments.¹⁰ These obligations are qualified: they are to be undertaken subject to the means available to the occupying power.¹¹ A second qualification would be the security requirements of the occupying power, which the occupant is authorised under Article 43 of the Hague Regulations to protect and which can also be read into the ‘means’ qualification as part of the general architecture of the law of occupation. There are no bright lines to determine when each obligation applies – the obligation to permit or facilitate, and the obligation to proactively undertake humanitarian relief. Presumably, if the first, positive obligation, which is an obligation of means, is not met fully, at the very least the occupier must facilitate the initiatives of others.

The second type of provision applies generally to international armed conflict and is limited to facilitating, rather than undertaking, humanitarian action. The Fourth Geneva Convention and Additional Protocol I require all parties, including those not taking part in the hostilities, to facilitate humanitarian relief.¹² Article 23 of the Fourth Geneva Convention requires facilitation of humanitarian supplies and enumerates three concerns that may allow a party to refuse the passage of supplies essential for civilians: (i) diversion of supplies; (ii) ineffective control of supplies; and (iii) that a definite advantage may accrue to the enemy’s military efforts or economy by substituting the consignments for goods that would otherwise be provided or produced by the enemy. Additional Protocol I modifies these provisions, specifying that parties to the conflict and any high contracting party may specify the technical arrangements, including search, under which passage is permitted and may not delay or divert such passage ‘except in cases of urgent necessity in the interest of the civilian population concerned’.¹³ As a corollary, parties are required to assist relief personnel in carrying out their mission, subject to practicability and ‘imperative military necessity’.¹⁴ The discretion of non-occupying parties to a conflict to restrict humanitarian assistance is strictly limited.

Here we may observe the contrast between the highly specific conditions under which a non-occupant may restrict humanitarian assistance and the more general provisions that apply to an occupant.

The broad scope of an occupying power’s authority to restore safety and protect security needs gives it discretion in entertaining requests to facilitate humanitarian action where such action is seen to conflict with its security needs. In other words, in light of the trustee relationship

¹⁰ GC IV (n 5) art 59.

¹¹ The obligation to restore public order, as outlined in art 43 Hague Regulations (n 4), is to be fulfilled by the occupant taking ‘all the measures in his power’ and ‘as far as possible’. That qualification is repeated, in varying forms, in GC IV, arts 55, 56 and 59, and in AP I, art 69.

¹² GC IV (n 5) art 23; AP I (n 6) art 70.

¹³ AP I (n 6) art 70, which applies in situations other than those of occupation, and incorporates by reference the broader definition of ‘supplies’ in art 69. According to its commentary, art 70 essentially replaces the justifications for thwarting humanitarian action outlined in GC IV, art 23 with the more general requirement of ‘urgent necessity’: International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols I and II of 8 June 1977* (Martinus Nijhoff 1987) 815–30 (ICRC Commentary).

¹⁴ AP I (n 6) art 71.

between the occupant and the civilian population spanning the entirety of public life inside the occupied territory, and in contrast to the general provisions regarding armed conflict,¹⁵ the legal doctrine does not explicitly delineate the nature of the security goals that may justify limiting offers of humanitarian relief. The primary limitation on an occupying power's ability to refuse humanitarian aid is not the scope of the security needs it may consider but rather its overarching obligation to ensure that the civilian population is adequately supplied¹⁶ and that normal life is restored as much as possible.¹⁷ Perhaps a range of security needs could potentially justify restricting humanitarian action, but if the occupier chooses to invoke them, it would then need to undertake such action itself as far as possible.

On the other hand, the legal provisions governing parties to a conflict who are not occupants do not allow refusal to facilitate humanitarian action for general reasons of military necessity, but rather narrowly circumscribe those reasons. Certainly, a party may prescribe the technical arrangements for the passage of aid and, for situations in which Article 70 of Additional Protocol I applies, delay or refusal is permissible only in cases of urgent necessity and when doing so furthers the interests of the civilian population. This last requirement is echoed in the provision requiring a party to the conflict to facilitate the activities of relief personnel, subject to cases of 'imperative military necessity'. Out of concern for civilians, in circumstances in which parties to the conflict do not owe special duties to civilians under the law of occupation, their ability to refuse or delay humanitarian action is limited.

Until now I have outlined the provisions governing humanitarian assistance and its limitation in situations of occupation and armed conflict not involving occupation. In the remainder of this section, I look more closely at the kind of military necessity that may justify the restriction of humanitarian action and explore a more generally applicable principle regarding the relationship between the breadth of the security needs claimed as reason to restrict humanitarian assistance and, conversely, the obligation to facilitate humanitarian action.

The principle of military necessity, although codified first in the context of the American Civil War¹⁸ and later in the St Petersburg Declaration of 1868,¹⁹ remains elusive to define. It has been most widely addressed in the context of active warfare, as commanders and jurists seek to parse out what may be considered legitimate military targets and what kinds of protection should be accorded to civilians and civilian objects. The Lieber Code of the American Civil War era defined acts of military necessity as 'those measures which are indispensable for securing the

¹⁵ GC IV (n 5) art 23, which applies in situations of both occupation and non-occupation, and AP I, art 70, which explicitly applies except in occupied territory.

¹⁶ GC IV (n 5) art 59.

¹⁷ Hague Regulations (n 4) art 43.

¹⁸ Francis Lieber, 'Instructions for the Government Armies of the US in the Field', promulgated as General Orders No 100 by President Lincoln, 24 April 1863, art 14, reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (3rd edn, Martinus Nijhoff 2004) (Lieber Code).

¹⁹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes in Weight, 1868, 138 CTS (St Petersburg Declaration).

ends of the war'.²⁰ Five years later and a continent away, the St Petersburg Declaration, joined by 19 states, stated that 'the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy'.²¹ The definition of military objects – what may be targeted – was entrenched in conventional and customary law in Additional Protocol I as follows:²²

Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The Dictionary of the International Law of Armed Conflict defines military necessity simply as 'doing what is necessary to achieve war aims'.²³

At the crux of the principle is the question of objectives. The doctrine, developed to determine which kinds of attack are lawful, seems to offer few guidelines for evaluating military necessity in the context of occupation, where active combat may have subsided but military necessity is invoked to justify restrictions on civilian life and humanitarian assistance. Even assuming that a belligerent occupation is maintained to achieve military – as opposed to political – ends, the military goals involved in maintaining control over a civilian population are very different from the goals contemplated by the body of law that regulates targeting during active hostilities.

Both sides of the proportionality inquiry change when we consider the military necessity not of carrying out an attack that puts civilians at risk, but rather the military necessity of restricting humanitarian assistance in an occupied territory. In the former case, military necessity is evaluated by parameters such as how direct and concrete a military advantage would accrue, weighed against the likelihood and severity of civilian death and/or injury or destruction of civilian property.²⁴ In the latter case of occupation, especially where active combat operations have ceased, commanders might weigh the necessity of preventing military supplies from reaching armed groups against the needs of the civilian population and its ability to carry out normal public life, for which the occupier is responsible. Indeed, it is difficult to separate what may be military aims and what may be political aims, especially if one adopts the view that war itself is a political instrument.²⁵

A further complication arises from changes in modern warfare, away from standing armies facing each other and towards combat activities which involve both state and non-state actors fighting wars of attrition. Under a conventional model of warfare, necessity has been understood

²⁰ Lieber Code (n 18) art 14.

²¹ St Petersburg Declaration (n 19) Preamble, para 3.

²² AP I (n 6) art 52(2).

²³ Pietro Verri, *Dictionary of the International Law of Armed Conflict* (ICRC 1992) 75.

²⁴ AP I (n 6) art 51(5)(b).

²⁵ Carl von Clausewitz, *On War* (1832) 594–601. See also the interesting discussion in Burrus M Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 *American Journal of International Law* 213, 219–24.

to be that which is required to achieve the ‘complete or partial submission of the enemy’²⁶ or ‘to bring about the successful conclusion of a military operation’.²⁷ It is difficult to apply these conventional definitions in cases in which the ‘military operation’ is low level and has been ongoing for decades, or the ‘enemy’ consists of armed groups rather than a state that may surrender.

The increasing trend towards viewing occupation as ‘transformative’ – seeking political and domestic changes in the territory, presumably to alter the conditions which allowed a military threat to emerge – further muddies the definition of military necessity.²⁸ For example, if the primary military threat to an occupier emanates from an armed group which also provides social services – as is true of the Hezbollah group in Lebanon or the Hamas group in the Palestinian territory – an occupying power may argue that allowing aid to enter areas controlled by such a group and enhance its provision of social services would increase political support for the group and thus a threat to the occupier’s security interests. The ‘necessity’ that is being fulfilled is related to long-term control of a foreign territory, and its potential meaning could be quite broad.

I suggest that, in situations of occupation, there should be a proportional relationship between the broad scope of the security objectives claimed as reasons for limiting or placing conditions on humanitarian assistance and the scope of the obligation owed by an occupying power to facilitate and undertake humanitarian relief. This relationship appears to be built into the architecture of the law of occupation – an occupant claiming broad powers under Article 43 of the Hague Regulations to take restrictive measures for reasons of security would presumably owe robust obligations, also under Article 43, to restore public life, including at a minimum meeting the humanitarian needs of civilians. We might imagine that as an occupation lasts longer, and the scope of the security needs cited as reasons to restrict humanitarian action expands, the occupant’s obligations towards the civilian population would deepen, paradoxically limiting its ability to restrict humanitarian assistance in the name of security or, if it does so restrict, requiring it to provide alternatives.²⁹

The scope of the security needs claimed might provide guidance in determining the balance between an occupier’s obligation to undertake humanitarian action and its obligation merely to facilitate it. An occupier pursuing long-term security goals – and restricting humanitarian action in order to achieve them – implicitly gives a broad interpretation to the powers outlined in Article 43 of the Hague Regulations in restoring public order and safety. A robust interpretation of that provision would apply not just to the power and obligation to protect security but also to

²⁶ United Kingdom Joint Doctrine and Concepts Centre, ‘The Joint Service Manual of the Law of Armed Conflict’, Joint Service Publication 383, 2004, para 2.2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

²⁷ North Atlantic Treaty Organization, NATO Standardization Agency, ‘NATO Glossary of Terms and Definitions’, AAP-6(2008), at 2-M-6, <https://fas.org/irp/doddir/other/nato2008.pdf>.

²⁸ Gabriella Blum, ‘The Fog of Victory’ (2013) 24 *European Journal of International Law* 391, 391–94. See also Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 *American Journal of International Law* 580.

²⁹ On the relationship between the duration of the occupation and the extent of the obligations owed to the civilian population, see Adam Roberts, ‘Prolonged Military Occupation: The Israeli Occupied Territories since 1967’ (1990) 84 *American Journal of International Law* 44.

the power and obligation to provide for normal civilian life, including meeting humanitarian needs. This is consistent with the Israeli Supreme Court's determination, based on legal scholarship, that the responsibility to restore public life, in accordance with Article 43, becomes broader in the context of a long-term occupation in which an occupant has the ability to engage in long-term planning and the needs of the civilian population become more complex.³⁰ Indeed, an occupant engaging in long-term military planning signals that it has the capacity and control needed to engage in other kinds of long-term planning such as that needed to meet humanitarian needs.

Such an interpretation of an occupant's duties is consistent with the trend towards the 'humanization of humanitarian law'.³¹ It reflects heightened concern for the civilian population but leaves the occupying power with broad discretion to determine how to meet civilian needs while still taking steps that are militarily necessary. It serves as a check on the decisions made by an occupying power in balancing its security needs with the humanitarian needs of civilians, and especially claims about the feasibility of meeting humanitarian needs.³²

While the duty to provide for the civilian population's humanitarian needs is firmly grounded in IHL and pre-dates the entrenchment of human rights norms into the responsibilities that an occupying power has towards the civilian population,³³ human rights law may provide an independent source of the obligation for the occupying power not just to facilitate but also to undertake humanitarian assistance.³⁴ There is some overlap between an occupying power's IHL duties to facilitate and undertake humanitarian relief and its obligations, for example, to protect and fulfil the right to health³⁵ or the rights of children.³⁶ Such human rights obligations may also provide

³⁰ HCJ 69/81 *Abu Ita v West Bank Commander* 1981 PD 37(2) 197, para 24(c); HCJ 393/82 *Jamiat Askan Elmaalmon v West Bank Commander* 1982 PD 37(4) 785, para 22. See also Roberts, *ibid*.

³¹ Meron (n 2).

³² Eyal Benvenisti notes that, because of the inherent tension between the interests of the occupant and the local population, observers should apply 'healthy suspicion' to an occupying power's motives in its dealings with civilians: Eyal Benvenisti, 'Occupation and Territorial Administration', *Global Trust Working Paper Series*, November 2015, 22, <http://globaltrust.tau.ac.il/wp-content/uploads/2015/08/Occupation-and-territorial-administration-WPS-11-20151.pdf>.

³³ On the application of human rights law in occupied territories, see generally European Court of Human Rights (ECtHR), *Loizidou v Turkey*, App no 15318/89, 18 December 1996; ECtHR, *Behrami v France, Saramati v France, Germany and Norway*, Apps nos 71412/01 and 78166/01, 2 May 2007; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, paras 106–13; *Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgment [2005] ICJ Rep 168, 216. The Israeli Supreme Court has expressed willingness to presume that international human rights law applies to the actions of a military commander in a territory held under belligerent occupation and/or during armed conflict: HCJ 10356/02 *Haas v IDF West Bank Commander* (unpublished, 4 March 2004); HCJ 1890/03 *Bethlehem Municipality v State of Israel* (unpublished, 3 February 2005); HCJ 3969/06 *Head of Deir Samit Village Council al-Harub v IDF West Bank Commander* (unpublished, 22 October 2009); HCJ 769/02 *Public Committee Against Torture in Israel v Government of Israel* 2006 PD 57(6) 285.

³⁴ For example, the Committee on Economic, Social and Cultural Rights (CESCR) recommended that Israel ensure the availability of trauma care for people in Gaza, especially children, an obligation that could overlap with the duties outlined in GC IV (n 5) art 50: UN Economic and Social Council, 'Concluding Observations of the CESCR', 2 December 2011, UN Doc E/C.12/ISR/CO/3, para 32.

³⁵ International Covenant on Economic, Social and Cultural Rights (entered into force 2 January 1976) 993 UNTS (ICESCR), art 12.

³⁶ UN Convention on the Rights of the Child, 'Concluding Observations on the Second to Fourth Periodic Reports of Israel', 14 June 2013, UN Doc CRC/C/ISR/CO/2-4, para 5.

guidance in deciding whether an occupying power must actually undertake or merely facilitate humanitarian assistance.

There is a parallel between an occupant's obligations both to facilitate and to undertake humanitarian assistance and the obligations on states to respect and fulfil human rights.³⁷ Just as a state has a responsibility to respect human rights and to refrain from interfering with their enjoyment, so an occupying power, whose consent is required in order for others to undertake humanitarian relief schemes, has an obligation, subject to qualifications, to refrain from interfering with the humanitarian assistance provided by third parties. Just as a state has a responsibility to take proactive measures to facilitate the enjoyment of human rights, so an occupying power has a responsibility to take proactive steps to provide humanitarian assistance where needed. Conversely, the extent of the security objectives pursued by an occupant can provide information about its capacity to fulfil human rights in the occupied territory.

In contrast, a party to a conflict in situations other than occupation has no proactive obligation to provide for the needs of the civilian population; however, it is also much more limited in its ability to delay or refuse humanitarian relief schemes proposed by others, as noted in the discussion of 'urgent necessity' above.

Of course, I do not intend to blur the lines between legitimate and non-legitimate conditions on humanitarian action, or encourage occupants to compensate for non-legitimate restrictions on humanitarian action rather than refrain from imposing them in the first place.³⁸ One critique of the argument outlined above is that it undermines a bright-line rule that limits restrictions on humanitarian assistance or could even authorise an occupying power to restrict humanitarian assistance that a non-occupying party to the conflict would be required to permit. Certainly, an occupying power could not impose more restrictions than would be permissible for a non-occupying party to the conflict. In that sense, the obligations outlined in Article 23 of the Fourth Geneva Convention and Articles 70 and 71 of Additional Protocol I should, at the very least, serve as a minimum standard by which any restriction imposed by an occupant could be compared. We might ask whether the restriction contemplated by an occupying power would result in a lower level of humanitarian assistance than would be permitted by a non-occupant exercising its (limited)

³⁷ States also have a duty to protect against human rights violations from private actors.

³⁸ Indeed, where 'deterrence' is viewed as a military necessity, civilians are at risk because of the danger of withholding humanitarian aid to pressurise political actors or armed groups. There is a brief description by a senior Israeli military official of how civilian suffering could be used as a tool for deterring military and political actors in the context of Israel's conflict with the armed Lebanese group, Hezbollah. The former head of Israel's National Security Council has argued for the 'necessity' of making civilians in Lebanon suffer, in order to pressurise the Lebanese government to rein in Hezbollah and thus prevent a further round of violence: 'There is one way to prevent the Third Lebanon War and win it if it does break out (and thereby prevent the Fourth Lebanon War): to make it clear to Lebanon's allies and through them to the Lebanese government and people that the next war will be between Israel and Lebanon and not between Israel and Hezbollah. Such a war will lead to the elimination of the Lebanese military, the destruction of the national infrastructure, and intense suffering among the population. There will be no recurrence of the situation where Beirut residents (not including the Dahiya quarter) go to the beach and cafes while Haifa residents sit in bomb shelters. Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hezbollah's behavior more than anything else': Giora Eiland, 'The Third Lebanon War: Target Lebanon' 11(2) *INSS Strategic Assessment*, November 2008.

prerogative to impose restrictions for reasons of urgent military necessity.³⁹ Where an occupying power seeks to restrict humanitarian assistance below the ‘floor’ level established for parties to the conflict, such restrictions would be *prima facie* unlawful. Where restricting humanitarian assistance is found to be within the bounds of legitimacy for an occupying power, however, I suggest that a second inquiry should take place: What measures might the occupant be required to take to compensate for the interference with humanitarian relief? Such a two-step inquiry would comport with the goals of IHL – to permit an occupying power to pursue military goals but to require it to protect civilians from the effects of the conflict, to the extent possible.

In short, where an occupying power legitimately claims necessity as justification for restricting humanitarian action, the less immediate the security need it pursues, the more a price might be exacted for pursuing it, in the form of an obligation to provide alternatives to the delayed or thwarted humanitarian action.

3. LIMITATIONS ON HUMANITARIAN ACTION IN GAZA

In this section, I describe some of the procedures governing humanitarian action in Gaza, focusing especially on restrictions on the entry of construction materials, an issue that became prominent in the wake of the devastation arising out of the 2014 military operation. I hone in on the security needs cited by Israel in setting conditions on humanitarian action and analyse them in light of the discussion outlined above.

There are, of course, limitations in applying the general argument in this article to any one case study. Indeed, while all situations of occupation are unique, the Israeli relationship with Gaza is particularly complicated and controversial, as explained below. The following section is intended to be illustrative, a demonstration of how this argument might work in practice, and not an exhaustive application of the argument.

First, I offer a brief note on context. Israel conquered Gaza, the West Bank and other territories in 1967 and maintained a permanent military ground presence in Gaza until September 2005. At that time, Israel claimed that its removal of a permanent ground presence and civilian settlements ended the occupation and that it was no longer bound by the law of occupation in its interactions with Gaza’s civilian population.⁴⁰ I take the position that Israel continues to owe obligations under the law of occupation to the residents of Gaza and that the application of such obligations should reflect a functional approach; in areas in which Israel continues to exercise control (for example, over the movement of persons and goods) it continues to owe obligations,

³⁹ Subject to the qualifications outlined in GC IV (n 5) art 23 and AP I (n 6) arts 70–71: see discussion at text to nn 12–14.

⁴⁰ HCJ 10265/05 *Physicians for Human Rights v Israel Defense Minister*, State’s Submission (unpublished, 11 July 2006) (challenging the practice of creating sonic booms over the skies of Gaza); HCJ 769/02 *Public Committee Against Torture in Israel v Government of Israel*, State’s Submission (5 December 2005), para 5 (challenging the practice of targeted assassinations); HCJ 11120/05 *Hamdan v Southern Military Commander and related cases* (unpublished, 7 August 2007), State’s Response (19 January 2006) (brought by ten occupational therapy students, Gaza Community Mental Health Program, Bituna, Our Home for Community Development, and Gisha, challenging the ban on Gaza students studying in the West Bank), <http://www.gisha.org>.

especially to allow normal life for civilians, to the extent possible.⁴¹ The Israeli Supreme Court takes something of a middle ground, holding that the law of occupation no longer applies but that Israel owes enhanced obligations to Gaza residents, stemming from, inter alia, its control over Gaza's crossings and the dependence created on Israel during the decades of direct rule.⁴² The debate over this question continues to be lively.⁴³

At present, Israel controls the flow of goods entering and leaving Gaza and exercises substantial control over the movement of people. It does not allow passage via air or sea. The Rafah Crossing between Gaza and Egypt is closed for goods and mostly closed for passengers, opening for a few days every month or two for humanitarian purposes.⁴⁴ Gaza's major donors and international organisations rely on permission from Israel to undertake humanitarian action in Gaza, because Israel controls the movement of persons and goods.

As a general matter, Israel currently coordinates the entry of civilian goods, except for construction materials, without undue delay, via the Kerem Shalom crossing. It also permits foreign representatives of some international organisations to enter and leave Gaza, subject to conditions,⁴⁵ and allows limited access for Palestinian workers of international organisations.⁴⁶

⁴¹ Sari Bashi and Tamar Feldman, 'Scale of Control: Continued Israeli Responsibility in Gaza', Gisha, November 2011, http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf; see also Sari Bashi and Kenneth Mann, 'Israeli Responsibilities in Gaza after the Disengagement' (2010) 14 *Hamishpat* 25 (in Hebrew); Sari Bashi and Kenneth Mann, 'Disengaged Occupiers: The Legal Status of Occupiers', Gisha, January 2007, http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf.

⁴² HCJ 9132/07 *Al Bassiouni v Defense Minister* (unpublished, 30 January 2008), para 12, http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

⁴³ For arguments that the law of occupation applies, see Dinstein (n 4) 277–80; Johan D van der Vyver, 'Legal Ramifications of the War in Gaza' (2009) 21 *Florida Journal of International Law* 403, 411; Ian Scobbie, 'An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination' (2006) 11 *Yearbook of Islamic and Middle Eastern Law* 3, 30–31. The ICRC, which considers Gaza to be part of the occupied Palestinian territory, has adopted the functional approach to applying the law of occupation in situations such as that existing in Gaza: ICRC, 'International Humanitarian Law and the Challenge of Contemporary Armed Conflicts', Inner Report 32IC/15/11, October 2015, 12, <https://www.justsecurity.org/wp-content/uploads/2015/11/2015-ICRC-Report-IHL-and-Challenges-of-Armed-Conflicts.pdf>. See also an article by the ICRC legal division's thematic expert on the law of occupation: Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133. For arguments that the law of occupation does not apply, but human rights law applies, see Yuval Shany, 'The Law Applicable to Non-Occupied Gaza', Israeli Democracy Institute, 27 February 2009. For arguments that Gaza is a unique case to which the laws of combat apply, see Elizabeth Samson, 'Is Gaza Occupied? Redefining the Legal Status of Gaza', Begin-Sadat Center for Strategic Studies, Bar-Ilan University, January 2010, <http://www.biu.ac.il/Besa/MSPS83.pdf>. This last argument reflects the position of the Israeli government.

⁴⁴ For data and comparative data, see 'Movement of People via Rafah Crossing', Gisha, <http://gisha.org/graph/2399>.

⁴⁵ Organisations must obtain recognition by the Israeli Ministry of Welfare. They may then request access for foreign personnel, subject to a security check and a five-business-day waiting period: Israeli Coordinator for Government Activities in the Territories, 'Procedure for the Passage of Foreigners into the Gaza Strip via Erez Crossing', September 2013 (in Hebrew), http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/foreign_nationals/54.pdf.

⁴⁶ Subject to recognition by the Israeli Ministry of Welfare, security checks and numerical quotas: Israeli Coordinator for Government Activities in the Territories, 'COGAT Order: Status of Permissions for Palestinians to Enter Israel, Travel Abroad and Cross between the Gaza Strip and Judea and Samaria',

In accordance with its position that the law of occupation does not apply to its actions towards Gaza, the Israeli government sees its obligations to facilitate humanitarian access governed by the laws of combat as opposed to the law of occupation, primarily Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I, both of which it considers to be customary international law.⁴⁷

A succession of Israeli governments have stated that the limitations it imposes on movement to and from Gaza stem from three primary reasons: (i) its security needs;⁴⁸ (ii) what it calls the 'separation policy', which, in addition to having security objectives, also seeks to achieve unspecified 'political rationales';⁴⁹ and (iii) the absence of a legal obligation to permit movement, beyond a humanitarian minimum as outlined, Israel says, under the law of hostilities.⁵⁰ At various points in time, it raises the level of movement beyond what it considers to be a humanitarian minimum, saying that it does so voluntarily, as a policy matter and in the absence of an obligation to do so.⁵¹

For the purposes of this article, I wish to focus on two aspects of humanitarian assistance in Gaza: first, construction and reconstruction, specifically the conditions placed on the entry of construction materials; and, second, the ban on students travelling from Gaza to the West Bank.

Until June 2007, construction materials were treated as ordinary civilian materials and their entry into Gaza was permitted, subject to search and to Israeli decisions regarding the opening and operation of the commercial crossings into Gaza. Until 2005, a limited amount of construction materials also entered Gaza, under Israeli supervision, via the Rafah Crossing on the Egyptian border.⁵²

In June 2007, following the Hamas takeover of Gaza, Israel began to restrict the entry of civilian goods into Gaza, including construction materials, allowing only limited foodstuffs and other basic goods. In June 2010, in the wake of an incident in which Israeli commandos intercepted a ship bound for Gaza and killed ten Turkish nationals, most of those restrictions were cancelled, but Israel continued to block the entry of steel, gravel and cement, allowing limited exceptions for international organisations subject to a procedure that, in the first half of 2014, restricted the entry of construction materials to fewer than 500 truckloads per month, less than 10 per cent of

November 2015, 12–13 (in Hebrew), <http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50.pdf>.

⁴⁷ HCJ 9132/07 *Al Bassiouni v Defense Minister*, State Response (2 November 2007), para 44, http://www.gisha.org/UserFiles/File/Legal%20Documents/_fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf.

⁴⁸ HCJ 11120/05 *Hamdan v Southern Military Commander and related cases*, State Affidavit (20 March 2007), paras 47–52, http://www.gisha.org/UserFiles/File/state_response_20_3_2007.pdf.

⁴⁹ Gisha, 'What is the Separation Policy?', June 2012, <http://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>. See also Sari Bashi and Eitan Diamond, 'Separating Land, Separating People: Legal Analysis of Access Restrictions between Gaza and the West Bank', Gisha, June 2015.

⁵⁰ *Al Bassiouni* (n 42) para 49.

⁵¹ See, eg, HCJ 2486/14 *Masri v Defense Minister* (unpublished, 7 April 2014), State Response (6 April 2014), paras 18–23, http://gisha.org/UserFiles/File/LegalDocuments/2486-14/masri_state_response-he.pdf. The Israeli Justice Ministry explains that for policy reasons, it permits certain categories of people to travel between Gaza and the West Bank for reasons that exceed basic humanitarian needs, but argues that it has no legal obligation to do so.

⁵² Noga Kadman, 'Rafah Crossing: Who Holds the Keys', Gisha, March 2009, 26, http://www.gisha.org/userfiles/File/publications/Rafah_Report_Eng.pdf.

demand.⁵³ Together with the closure of tunnels under the Gaza–Egypt border – which, until mid-2013, had supplied most of Gaza’s need for building materials – the Israeli restrictions led to shortages of building materials, halting of construction projects, and a spike in unemployment to 45 per cent in the second quarter of 2014, compared with 28 per cent in the comparable quarter in 2013.⁵⁴

At the time of writing this article, the construction materials policy is in a state of flux. In the wake of the destruction of homes, schools, hospitals and infrastructure as a result of the 2014 military operation,⁵⁵ Israel has started to implement a procedure which increases the amount of construction materials allowed into Gaza relative to the policy in effect immediately prior to the operation, using a mechanism for approvals and supervision mediated by the United Nations. The main elements of that mechanism involve a process in which projects are submitted for approval and require extensive monitoring and reporting by the international organisations undertaking them, with some ability also to sell materials to the private sector via suppliers approved by Israel and working under international supervision.

Israel has stated that it restricts the entry of construction materials out of concern that they will be used by militants to fortify tunnels,⁵⁶ and part of the existing approval process appears to address that concern by requiring the endorsement of an international organisation and holding that organisation accountable, through detailed monitoring, to demonstrate that the building materials are used for the purpose for which they were requested. However, at least under the procedures published thus far, additional objectives are being pursued in the process of approving or rejecting requests to bring construction materials into Gaza.⁵⁷ An additional criterion for allowing construction materials into Gaza for internationally funded projects has been the location of the planned school, clinic or other building. Among the eight different departments within the Defence Ministry, the Israeli army and Foreign Ministry who must approve the entry of construction materials, both the Southern Command and the military planning department must approve the location of a specific project, presumably to evaluate whether it would get in the way of future combat plans.⁵⁸ The Israeli government has in some cases refused to allow construction materials into Gaza for international projects the location of which was seen to interfere with such plans.

⁵³ For monthly graphs of construction materials entering Gaza, see Gisha, ‘Entrance of Construction Materials’, <http://gisha.org/graph/2395>.

⁵⁴ Gisha, ‘Unemployment in Gaza Highest Since 2009’, 25 May 2014, <http://gisha.org/updates/2901>.

⁵⁵ Shelter Cluster, ‘Gaza Response Update’, 11 October 2014, <http://reliefweb.int/sites/reliefweb.int/files/resources/Shelter%20Cluster%20Update%2011Oct2014.pdf>.

⁵⁶ See, eg, Rami Shani, ‘Yaalon on Stopping Cement Transfers into Gaza: The Population Will Pay the Price’, *Walla!*, 3 November 2013 (in Hebrew), <http://news.walla.co.il/item/2691174>.

⁵⁷ One of the military procedures cites, as one of the goals of expediting small-scale construction projects, ‘legitimization for Israel via implementation of the policy’: Coordinator of Government Activities in the Territories, ‘Procedure for Implementation of Internationally Funded Projects in the Gaza Strip’, App C, 26 October 2011, 4(a), unofficial English translation available at <http://www.gisha.org/UserFiles/File/freedomofinformation/Translations/AppendixC-ProjectProcedures-Oct2011.pdf> (Construction Materials Procedure).

⁵⁸ *ibid.*, Table, 6, fn 1 of s 7(d) notes that projects that change the topography of the territory require approval from the planning and operations departments, respectively, of the Israeli military, while repairs that do not change the landscape do not require such approval.

For example, in 2010, Israel refused to allow construction materials into Gaza for the construction of a school until the United Nations Relief and Works Agency (UNRWA) agreed to change the location of the school, which Israel claimed was near a military training site.⁵⁹ Additional criteria for reviewing requests to transfer construction materials include the identity of the donor funding the project and whether the project is tied to the Hamas movement or government.⁶⁰ Approval is granted only for projects undertaken by international organisations recognised by Israel.⁶¹

Here I would like to pause to evaluate the kind of security objective that appears to be promoted in the conditions that Israel sets on the entry of construction materials. The first objective – to prevent construction materials from being used by militants to fortify tunnels – would seem to be within the ambit of security objectives that an occupying power may pursue or even, according to the Israeli government’s position, would be legitimate for a non-occupying party to the conflict seeking to prevent diversion of humanitarian aid to the war effort. As a side note, I would argue that while blocking tunnels fills a valid military necessity, the means used to do so – restricting construction materials – fails the proportionality test.⁶² Some of the other criteria for approving the entry of construction materials, however, seem to be aimed at broader, forward-looking and, in some cases, politically tinged objectives, as outlined below.

Consider, for example, the demand to change the location of a school or housing project as a condition of allowing the transfer of materials for its construction. Presumably, as part of its authority under Article 43 of the Hague Regulations, an occupying power might restrict construction in certain areas even to pursue forward-looking security objectives – for example, to prevent the construction of buildings that would block the view of its observation towers, or would concentrate civilians or civilian objects in areas that it foresees the possibility of bombing in the future. Such restriction should be matched, however, by a positive obligation to ensure that the construction takes place, whether by undertaking it directly in a different location, funding it, or in other ways ensuring that the needs of the civilian population are met. On the other hand, for a non-occupying party to the conflict it is difficult to justify such forward-looking security needs as ‘urgent’ or ‘imperative’ military necessity, especially when the restrictions are being imposed in the context of an approval process lasting for months, or even years, during most of which no active combat is taking place.

⁵⁹ Yaakov Katz, ‘Exclusive: “No” to UNRWA School “Near Hamas Base”’, *The Jerusalem Post*, 22 October 2010, <http://www.jpost.com/Israel/Article.aspx?id=192368>. The procedure for requesting approval for a school lasts for months or even years; during that time the Israeli military did not attack the area that it said was a military training site, which indicates that its considerations were forward looking.

⁶⁰ Construction Materials Procedure (n 57) s 5(2). It is not clear to what extent the limitation of not wanting to facilitate construction projects sponsored by the Hamas government is based on political reasons, and to what extent the limitation is based on concerns that the construction materials would be used for military purposes.

⁶¹ Construction Materials Procedure (n 57) s 5(1).

⁶² Given the extremely limited effectiveness of the restrictions in actually preventing the fortification of tunnels, on the one hand, and the substantial harm to civilians and civilian infrastructure on the other, the restrictions are a disproportionately harmful means of achieving what would otherwise be a legitimate security goal. For more information see Gisha, ‘Frequently Asked Questions about Construction Materials’, October 2014, <http://gisha.org/publication/3610>.

As another example consider restrictions on experts from Gaza travelling to the West Bank for training and cooperation on building projects. The restrictions are part of Israel's 'separation policy', which is described as having both security and political rationales.⁶³ The security rationales include a desire to prevent 'the ability to transfer information and materials to hostile entities and abuse of ties between residents of the two areas'.⁶⁴ There has been little elaboration of the political objectives, although they would not constitute valid reasons to restrict humanitarian assistance. The security objectives, however, appear to be broad and go beyond what is considered urgent military necessity.

A similar observation can be made about a decision by the Israeli Defence Ministry to prevent students from Gaza from travelling to their occupational therapy study programme in Bethlehem University in the West Bank. Ten students from Gaza received scholarships to attend the only Palestinian occupational therapy degree course, which is located in the West Bank. The context was a severe shortage of occupational therapists in Gaza – with only one certified therapist working – and a high percentage of people with disabilities in need of therapy. The Israeli Defence Ministry refused to allow the students to travel, citing a total ban on students from Gaza studying in the West Bank, which had been in place since 2000. The security objectives cited as reasons for the prohibition include the concern that a student who innocently wished to study at a West Bank university might, at some future date, decide to use violence against the State of Israel or its citizens, and that students belonged to a 'risk profile' of people who were particularly likely to be radicalised.⁶⁵ Although it was acknowledged that the students were seeking to learn a badly needed humanitarian skill, the Israeli Supreme Court upheld the refusal.⁶⁶

Here, too, the security arguments invoked as justification for restricting humanitarian activity are quite broad, including the long-term concern that a student with no ill intentions now might in the future choose to engage in activity that would endanger the security of the occupying power. In pursuing such broad and forward-looking security objectives, an occupying power indicates that it has the capacity and control needed to engage in long-term planning and should be required to apply that capacity to meeting the humanitarian needs of the civilian population. In the case of the occupational therapy students, given the civilian population's need for the expertise that the students sought to acquire, it would mean taking proactive steps to ensure that the occupied territory is adequately supplied with professionals trained in occupational therapy, whether by facilitating alternative educational programmes, providing funding, or taking other steps to ensure that humanitarian needs are met.

I highlight two points here. First, in the case of construction materials, if we take seriously the Israeli government's position that the law of occupation does not apply, it would be difficult to justify restricting the entry of humanitarian relief in order to pursue objectives that stray from the requirements of 'urgent necessity'. That is not to say that a contextual approach to evaluating

⁶³ Gisha (n 49).

⁶⁴ *ibid* 7.

⁶⁵ *Hamdan State Affidavit* (n 48).

⁶⁶ *Hamdan* (n 40).

security objectives is *prima facie* inappropriate – the security needs that might justify placing conditions on a year-long project to build houses might be broader than those that could justify delaying a convoy bringing food and water to civilians urgently in need of supplies, if only because ‘without delay’ has a different meaning in those two situations. However, the extent of the objectives pursued appears to deviate from those covered by ‘urgent necessity’ as contemplated in Article 23 of the Fourth Geneva Convention and Articles 70 and 71 of Additional Protocol I, applicable to situations of armed conflict that do not include occupation.

Second, if one takes the position, as I do, that the law of occupation does apply to Israel’s actions towards Gaza, pursuing at least some of these broader and forward-looking objectives may be justifiable, but it should be matched by a commensurately more robust obligation on Israel to undertake such humanitarian action itself. It would seem that the broader the interpretation of Article 43 ‘public order and safety’ for the purposes of security justifications to restrict humanitarian action, the more robust the obligation should be to ensure that humanitarian action takes place through other means. The literature and case law on the duties of an occupier in a long-term occupation support this approach.⁶⁷ So a refusal to allow building materials to enter for the construction of a school, because the planned location interferes with plans for a future military operation, may activate with greater vigour the obligation that Israel has not just to facilitate humanitarian assistance but rather to undertake it itself – perhaps to pay for the school’s construction in an alternative location or facilitate school administrators to access training programmes in Israel, the West Bank or abroad.

The broader point is that a party to a conflict that is pursuing long-term planning goals in regulating the entry of civilian supplies and the population demographics is also creating a special relationship with the civilian population in question, one that carries with it not just control but also commensurate responsibility. A power so involved in shaping life in a foreign territory essentially engages in a trustee relationship, whether it is the kind of trusteeship that exists between an occupying power and the civilian population or a trusteeship based on a robust interpretation of a warring party’s obligations to facilitate humanitarian action.

4. DEFINING HUMANITARIAN ASSISTANCE

In this section I briefly address what might be considered humanitarian assistance protected by international humanitarian law. As noted above, international law has developed to expand the scope of humanitarian assistance protected, from a closed list of supplies to civilians to the broader category of items necessary for survival, including clothing, shelter, food and medicine. On this reading, then, would an item like construction materials be considered humanitarian supplies the passage of which must be facilitated? Would it depend on the intended use of the materials (such as construction of a water well, a hospital, a school or a housing unit)? Would it depend on whether the housing unit is intended for displaced persons whose homes have been destroyed

⁶⁷ Roberts (n 29); *Abu Ita* (n 30).

by fighting or a young middle-class couple seeking to move out of their parents' home? On whether the school is a government or United Nations school? What about students seeking to learn a paramedical profession so that they can provide care to those who need it?

International organisations have taken a broad view of humanitarian assistance, consistent with the principles of Additional Protocol I and borne of experience with entrenched conflicts in which long-term responses to crises require linking humanitarian assistance to rehabilitation.⁶⁸ It is also increasingly accepted that an occupying power should not only be bound by the requirements of IHL but also by its obligations under international human rights law, including the obligation to allow for economic, social and cultural development, subject to the limitations of military necessity.⁶⁹

On the other hand, the Israeli government has taken the position, with approval from the Israeli Supreme Court, that its obligations under a conduct of hostilities model in Gaza are limited to allowing for the provision of 'essential humanitarian supplies', but not beyond that,⁷⁰ and indeed for three years it has restricted the entry of goods into Gaza by quantity and type, including creating mathematical formulae to determine how much food would be allowed into Gaza and classifying food items as permitted humanitarian items or banned luxury goods.⁷¹

I suggest here, too, a proportional relationship between the scope of security arrangements claimed and the scope of the action that is considered protected humanitarian assistance. Again, the broad scope of the security objectives claimed is indicative of the context as well as the long-term nature of the relationship between the party restricting aid and the civilian population affected. Pursuing a long-term security objective – such as regulating zoning and building or seeking to prevent the development of a tunnel network that by its nature takes time to build – indicates a relationship between a party to the conflict and the civilian population which projects into the future. It indicates long-term planning to meet security needs and should be accompanied by long-term planning to address civilian needs. Such planning would include not just tents or temporary shelter, for example, but also the development and maintenance of permanent structures, whether they are schools, homes or water systems. A party to the conflict that foresees lengthy engagement should also facilitate the civilian population's ability to prepare

⁶⁸ ICRC, 'Assistance Policy', 29 April 2004, Introduction, https://www.icrc.org/eng/assets/files/other/irrc_855_policy_ang.pdf. See also ICRC Commentary (n 13) paras 2779–80 (on AP I, art 69, noting that the extent of the obligation of the occupying power to ensure supplies depends on the local conditions and can include providing housing, fuel and other goods).

⁶⁹ ICESCR (n 35) art 13. For a discussion of the parallel application of human rights law and IHL, see Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 *Israel Law Review* 17. For the most recent comments of the Human Rights Committee, see Convention on the Rights of the Child: Concluding Observations (n 36) para 5. In para 12 the Committee called on Israel to ensure that any restrictions on freedom of movement of people and goods be consistent with Israel's obligations under the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

⁷⁰ *Al Bassiouni* (n 42) paras 11–18.

⁷¹ Gisha, 'Food Consumption in the Gaza Strip – Red Lines', October 2012, <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>.

for that engagement, including the proper functioning of civilian institutions over time, requiring not just emergency aid but also the ability to engage in development.

In Gaza, I would argue that construction materials should be treated as humanitarian items the transfer of which is protected because of their crucial importance in meeting humanitarian needs such as shelter, housing, medical care and education. I would argue further that construction materials ordered by the private sector to undertake development and housing projects should also be protected, because economic development and a functioning private sector are necessary to provide for humanitarian needs in the long term. Similarly, allowing people to obtain the training they need to provide humanitarian services to the civilian population, such as occupational therapy, is also an essential part of meeting humanitarian needs.

Such a long-term view of the needs of the civilian population is commensurate with the long-term nature of the security objectives cited by Israel as justification for regulating the entry of construction materials. It would seem strange to interpret Article 43 to authorise an occupying power to make long-term investments in security while taking a narrow and short-term view of the parallel authority and responsibility to restore normal civilian life.

While a robust interpretation of the duty to facilitate development would flow from the obligation to restore normal civilian life, I suggest that, in some contexts, development assistance should come within the ambit of IHL protection for international relief schemes. For example, where the Dutch government donates a truck scanner to be used at the goods crossing between Israel and Gaza Crossing,⁷² it seems clear that the Israeli government should facilitate its use for transferring humanitarian items into Gaza. What about allowing the scanner to be used for goods to be marketed from Gaza to the West Bank? In 2013 the Israeli Defence Minister refused to allow the scanner to be used for such purpose, citing Israel's policy to separate Gaza from the West Bank and specifically a desire to prevent information from being transferred from Gaza to the West Bank, even though the scanner was approved for goods leaving Gaza via Israel for markets abroad.⁷³

⁷² Maj-Gen Eitan Dangot (Israeli Coordinator of Government Activities in the Territories) and Caspar Veldkamp (Dutch Ambassador to Israel), 'Joint Declaration', 26 February 2012, http://gisha.org/UserFiles/File/LegalDocuments/freedomofinformation_5_2014/agreement.pdf.

⁷³ Protocol of the 19th Israeli Parliament's 39th Assembly, 18 December 2013, Defence Minister Moshe Yaalon's Comments in Response to MK Michal Rozin's Parliamentary Inquiry, unofficial English translation available at http://www.gisha.org/userfiles/file/publications/sheilta_en.pdf. The Defence Minister explained that the scanner could be used for checking goods to be exported to Europe via Israeli ports but not to be sold in the West Bank:

Whether goods from Gaza can be shipped to Judea and Samaria is a different question. It has nothing to do with the scanner. It has to do with a security policy whereby, according to the recommendation of all security agencies, we should not allow merchandise to be transferred to [sic] the Gaza Strip and the West Bank for security reasons. And why?

Yes, the scanner is effective. If a person tries to hide or if someone tries to smuggle certain weapons, the scanner is supposed to detect that. But the scanner does not detect everything people want to smuggle from the Gaza Strip to Judea and Samaria; we are talking about a security situation from the Gaza Strip. There is a functional Hamas command center today. As an example, there are other actors at play there – Palestinian Islamic Jihad, Salafist organizations, global Jihad organizations, who would very much like to export terrorist activity to Judea and Samaria.

The Hamas command centre in Gaza has been trying for a long time to set up, establish and activate Hamas

In situations in which a party to the conflict pursues broad and long-term security objectives and cites them as reasons for setting conditions on humanitarian assistance, international organisations and donors should also be permitted to set broad and long-term goals in providing assistance, including not just objects essential for survival but also the economic and physical capacity and infrastructure necessary for civilians to provide those objects themselves over time. I would argue that Israel should facilitate use of the scanner for outgoing goods, so that in the long term civilians in Gaza will engage in the economic development necessary for self-sufficiency, which will allow them to provide for their own humanitarian needs.⁷⁴ While the obligation to allow economic development in Gaza has roots in human rights law⁷⁵ and in the obligation, under Article 43 of the Hague Convention, to restore public life, I suggest here, as a direction for future development of IHL, that the provisions requiring facilitation of humanitarian aid should apply also to facilitation of development, a long-term aspect of humanitarian aid that is the mirror image of the long-term security objectives being pursued.

5. CONCLUSION

I have looked at the architecture of the provisions on limiting or refusing humanitarian assistance and analysed the potential consequences of seeking to meet broad or forward-looking security objectives through restrictions on humanitarian assistance. I have proposed a symmetrical relationship between the breadth and forward-looking nature of security goals pursued and the breadth and forward-looking nature of obligations towards civilians harmed by restrictions on the delivery of humanitarian aid, including a robust interpretation of an occupying power's obligation to ensure adequate supplies to the civilian population. Over the long term, that obligation should take into account not just receipt of humanitarian assistance but also the development activity that could provide future sources of supplies and livelihoods.

The advantage of this approach is its potential to enhance the self-regulation of warring powers who are increasingly expanding the ambit of what they consider to be militarily necessary, including actions in response to asymmetric warfare. 'Military necessity' is a veritable black box not easily cracked open by international organisations seeking access or others trying to engage in humanitarian assistance. Where attempts by those seeking to undertake humanitarian assistance fail to overcome restrictions, recourse might be had by essentially exacting a price for restricting humanitarian relief, one that is consistent with the principles and purpose of IHL. The broader the scope of the military necessity claimed, the broader the obligation the foreign power may have to facilitate, or even provide, humanitarian relief, presumably through other

cells in Judea and Samaria and the reason they have had a hard time doing this has to do with their ability to communicate with Judea and Samaria. If we open this channel, that allows shipping merchandise, it will be possible to hide things in this merchandise that we don't want to reach the Judea and Samaria from Gaza and which the scanner can't detect.

⁷⁴ As background, see Barak Ravid, 'Israel Tells Holland? Security Trumps Prosperity When It Comes to Dutch Scanner', *Ha'aretz*, 3 December 2013, <http://www.haaretz.com/news/diplomacy-defense/premium-1.562465>.

⁷⁵ ICESCR (n 35) art 13.

channels and means. Such a price could ultimately reduce the instances of restrictions on humanitarian assistance by acting as a deterrent or, where such restrictions are justified by military necessity, mitigate their negative effects on the civilian population.

A symmetrical relationship between the scope of military necessity claimed and the scope of the obligation to facilitate or undertake humanitarian assistance also more accurately reflects the nature of the relationship that a warning party or occupying power is forging with the civilian population. Where engagement with the civilian population is intense – including tactics of ‘winning hearts and minds’, seeking to influence support for militant groups and deterring civilians from participating in hostilities – a foreign power is essentially investing in a long-term series of interactions and controls with the aim of enhancing security. On a normative level, where pursuing military needs reflects long-term planning and investment, so should ensuring the civilian population’s humanitarian needs. On a practical level, the ability to engage in long-term security planning implies the kind of control and resources needed to provide alternatives to the humanitarian initiatives that may be restricted.