Israel Law Review **51**(2) 2018, pp 193–234. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2018.
doi:10.1017/S0021223718000110

Living in a Legal Vacuum: The Case of Israel's Legal Position and Policy towards Gaza Residents

Michal Luft[*]

The legal status of the Gaza Strip following the 2005 Israeli 'Disengagement', as well as the applicability of the laws of belligerent occupation with regard to this territory, have sparked, and continue to generate, a lively academic debate, involving states, organisations and legal scholars. Nevertheless, this debate has seldom included an examination of the de facto policy exercised by Israel vis-à-vis Gaza residents themselves.

This article seeks to fill the gap by providing a thorough examination of Israel's legal position towards the residents of Gaza, and a critical analysis of its policy and practice with regard to their movement as well as the movement of goods. This review, based on dozens of policy papers, regulations and procedures, as well as numerous judgments handed down by Israeli courts, reveals that Israel maintains a deliberately deficient and ambiguous legal position with regard to the status of Gaza residents. Under this position, the residents are merely 'foreign residents' who have no particular rights in relation to Israel. I argue that this position establishes a major legal vacuum in the protection afforded to Gaza residents and is therefore incompatible with both the reality of Israel's continuous control over Gaza as well as the objects and norms of international humanitarian law.

Keywords: Gaza, occupation, Israel, international law

1. Introduction

The Gaza Strip ('Gaza') made legal headlines in the aftermath of Israel's 2005 withdrawal (referred to as 'the Disengagement'). In international legal discourse, various opinions ensued regarding Gaza's new legal status, such as whether it is still occupied by Israel, and which law applies, if any, to relations between Israel and Gaza. Despite the emergence of a great corpus of legal scholarship, one still struggles to find literature that examines Israel's actual perception of Gaza residents and the day-to-day legal policy it has established in relation to them. As a result, the academic debate on the status of the territory has been of limited influence in establishing a better understanding of what is required in order to advance the protection of the residents' rights.[1]

[*] Former Attorney with Gisha – Legal Center for Freedom of Movement; holds an LLM from the College of Management (Emil Zola Chair for Human Rights) and an LLB and BA in Law and International Relations from the Hebrew University of Jerusalem. Michalluft@gmail.com. I am grateful for the comments of Professor Orna Ben-Naftali, Professor David Kretzmer, Professor Guy Harpaz and Advocate Shlomo Kaplan on previous versions of this article, as well as to the *Israel Law Review* editors and the anonymous referees for their comments. The views expressed in this article are solely my own and do not necessarily reflect the positions of Gisha.

[1] Aeyal Gross, 'Rethinking Occupation: The Functional Approach', *Opinio Juris*, 23 April 2012, http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach. A good example of a 'practical' discussion is Sari Bashi, 'In Reluctant Defense of the Law of Occupation', *Opinio Juris*, 24 April 2012, http://opiniojuris.org/2012/04/24/in-reluctant-defense-of-the-law-of-occupation.

This article seeks to fill the void by conducting a comprehensive examination of Israel's actual position vis-à-vis Gaza residents, both in terms of the nature of control that Israel seeks to exercise over their lives and in terms of the actual legal regime that has been applied to them. This examination is carried out through a review of dozens of policy papers, procedures, regulations and state responses to petitions submitted to Israeli courts. The rulings of the Israeli courts are also examined, as they are important to establish whether the government's position has been sanctioned.

In reviewing the de facto practice and judgments concerning Gaza, it becomes evident that Israel's legal position with regard to the status of Gaza following the 'Disengagement' – according to which Gaza is no longer occupied and Israel is therefore not bound by the laws of occupation or international human rights law (IHRL) – has led to the formulation of an extremely narrow understanding of the status and rights of Gaza residents themselves in their ongoing relations with Israel. These residents, it has been asserted time and again, are merely 'foreign residents' who enjoy no particular rights, and who may be subject to policy changes without any explanation or prior warning.

Although Israel has repeatedly acknowledged that it is bound by 'humanitarian obligations' towards Gaza residents, it has provided an extremely narrow and indistinct interpretation of this term, while failing to take into account the evolving needs of the residents as well as their ongoing dependence on Israel. The High Court of Justice (HCJ) and administrative courts of Israel have embraced this position wholeheartedly. Accordingly, the vast majority of petitions concerning Gaza-related issues have been rejected.

I argue that this position is flawed for a number of reasons. First, it is inconsistent with the reality of Israel's ongoing control over major aspects of life in Gaza. Not only has Israel neglected to release Gaza from its control, it has even actively sought to maintain its control while attempting to release itself from legal responsibility. As a result of this continuous control, Israel has, on occasion, even demanded that Gaza residents conduct themselves in a manner that is contradictory to their own interests, thus essentially treating them as residents subject to Israel's complete authority. In one case, when asked to explain how this is compatible with its so-called 'foreign residents' paradigm, Israel sought to rebrand Gaza residents as 'special residents' who are subject to 'special' arrangements established by the state.

Second, this position is inconsistent with Israel's current practice regarding movement in and out of Gaza. This practice is, in fact, more lenient than its formal policy and rhetoric whereby permits are granted only under 'exceptional humanitarian circumstances'. In this sense, Israel has created a deliberate gap between the one-dimensional legal regime it has established and the elaborate policy it implements in practice. The ambiguous nature of Israel's legal position and the arbitrariness with which its policies are implemented are intended to obscure and nullify, to the greatest extent possible, Israel's international duties and responsibilities towards Gaza residents, while at the same time maintaining (again, to the greatest extent possible) Israel's actual control over Gaza and its interests therein.

It will also be argued that the position according to which Gaza residents are mere 'foreign residents' in their dealings with Israel contradicts international humanitarian law (IHL) and its

fundamental objective of protecting civilians under foreign rule or occupation. Surprisingly, this position falls short even of the low threshold established by the HCJ in *Al-Bassiouni*. In that case, the Court deduced Israel's legal obligations from the extent of its control over border crossings with Gaza and the dependence of Gaza residents on Israel.[2] Despite this, these circumstances have not been taken into account by Israel in establishing its policies.

The aforementioned position creates an intolerable legal gap, if not a de facto legal vacuum in the protection afforded to Gaza residents.[3] This position essentially renders such residents devoid of any entitlements vis-à-vis Israel, despite the latter's extensive and ongoing control over many aspects of their lives (and particularly their ability to travel outside Gaza and receive goods and services necessary for their livelihood). Gaza residents are not entitled to make any demands towards Israel, including the demand to be treated in a reasonable, fair and consistent manner. The courts, having adopted the government's position, have become almost completely inattentive to the pleas of Gaza residents, given the 'broad discretion' of the government in these cases.

I argue that a far more appropriate legal position is one that derives Israel's legal responsibility from factual reality (that is, a reality of continuous, albeit partial, control over foreign territory), thus granting Gaza residents rights (and imposing on Israel corresponding duties) that derive from all relevant branches of applicable international law. These branches of law include primarily the law of occupation and IHRL, which contain several provisions relevant to the relationship between Israel and Gaza. An improved legal position such as this must lead to a change in the current governmental policy regarding movement of persons, in order to provide greater protection for the rights of Gaza residents.

The structure of this article is as follows. Section 2 provides an overview of the international legal debate concerning Gaza's legal status following the 'Disengagement'. Section 3 reviews the government's legal position with regard to the status of Gaza residents, as well as the policy on movement of persons that was articulated based on this position. In particular, the section focuses on key rulings by Israeli courts, which have articulated and sanctioned this position. Section 4 provides a critical analysis of Israel's position and policy, grounded on four distinct arguments. The section concludes with an assessment of the implication of Israel's position on the protection of the rights of Gaza residents. Section 5 summarises and concludes.

2. THE DEBATE REGARDING GAZA'S LEGAL STATUS

The nature of the debate on the legal status of Gaza, first begun in 2005, has remained essentially the same to date. Scholars, states and international organisations engage in a lively debate over whether Gaza remains occupied and whether Israel continues to exercise effective control over

[2] All references to Israeli case law in this article are in Hebrew unless stated otherwise. HCJ 9132/07 *Gaber Al-Bassiouni v The Prime Minister* (unpublished, 30 January 2008), http://elyon1.Court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf (in English).

[3] It is important to note that this lacuna cannot usually be bridged by other actors – such as the Palestinian Authority, Hamas or Egypt – as Israel exercises exclusive authority on many aspects of life in Gaza.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

this territory, in accordance with the established definition of occupation in international law.[4] Although this debate has certainly contributed to the legal scholarship on the application and interpretation of certain IHL provisions,[5] it has consistently failed to include any specific analysis of, or even reference to, the day-to-day lives of Gaza residents and their legal relations with Israel. Accordingly, the debate remains largely theoretical in nature, as will be further evidenced below.

Israel's position with regard to this debate is clearly situated on the far end of the present range of opinions. According to the Israeli government, following the 2005 'Disengagement' the military occupation of the Gaza Strip came to an end, as there were no longer any 'boots on the ground' and Israel no longer exercised effective control in the region.[6] Thus, the law of occupation in its entirety ceased to apply.[7] Israel has further maintained that as it lacks the capacity to exercise governmental authority in Gaza, it cannot fulfil the legal obligations imposed on an occupying power under the law of occupation.[8] Therefore, Israel contends, it has *no legal obligations* towards the residents of Gaza,[9] with the exception of those stemming from the laws of armed conflict (LoAC), which continue to apply as a result of its ongoing conflict with Hamas.[10]

Indeed, one of the proclaimed objectives of the 'Disengagement' was to 'dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip'.[11] It is therefore hardly

[4] The definition of an 'occupied territory' is articulated in the 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, art 42 (Hague Regulations).

[5] See, eg, Yuval Shany, 'Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 *Israel Law Review* 68; Tristan Ferraro, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory', International Committee of the Red Cross (ICRC) Report, March 2012, 26–33, http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf.

[6] The Turkel Commission, 'The Public Commission to Examine the Maritime Incident of 31 May 2010', Part I, January 2011, 50–53, http://www.turkel-committee.gov.il/files/wordocs//8707200211english.pdf.

[7] Israel Ministry of Foreign Affairs, 'The 2014 Gaza Conflict: Factual and Legal Aspects', 14 June 2015, paras 45 and 374, http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf; Israel Military Advocate General (MAG), 'The Legal Framework for the IDF's Activity in the Gaza Strip', http://www.law.idf.il/935-4489-he/Patzar.aspx.

[8] Israel Ministry of Foreign Affairs, ibid para 45 and fns therein.

[9] In addition to the law of occupation, Israel also rejects the application of IHRL to the situation, as it generally opposes the extraterritorial application of human rights conventions to the Palestinian territories (and in Gaza all the more so): Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 *Israel Law Review* 17. Interestingly, though, in HCJ 9329/10 *A v Minister of Defense* (unpublished, 14 April 2011), http://elyon1.Court.gov.il/files/10/290/093/t10/10093290.t10.pdf (Case of *A*), State Response (unpublished, 17 January 2011), para 79, Israel denied the application of IHRL based on the principle of *lex specialis* with the LoAC rather than based on issues of extraterritoriality.

[10] This body of law compels Israel to ensure the passage of basic humanitarian goods to Gaza: Israel Ministry of Foreign Affairs (n 7) para 374; HCJ 5841/06 *Association for Civil Rights in Israel and Others v Minister of Defense* (unpublished, 13 March 2007) (*ACRI*), http://elyon1.Court.gov.il/files/06/410/058/N05/06058410.n05.pdf; State Response (unpublished, 13 July 2006), paras 58–62, http://gisha.org/UserFiles/File/LegalDocuments/Fuel_Petition06/StateResponse_13.7.2006.pdf; HCJ 9132/07 *Gaber Al-Bassiouni v The Prime Minister*, Preliminary Response by the State (unpublished, 2 November 2007), http://gisha.org/UserFiles/File/LegalDocuments/fueloct07/state_ response_2_11_07.pdf.

[11] Israel Ministry of Foreign Affairs, 'The Cabinet Resolution regarding the Disengagement Plan', 6 June 2004, https://goo.gl/TzBD6x. In the original plan, dated April 2004, it was stated explicitly that 'as a result [of the withdrawal], there will be no basis for claiming that the Gaza Strip is an occupied territory': Israel Ministry of Foreign

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

surprising that shortly after its unilateral withdrawal, the Israeli government introduced legislative amendments designed to emphasise that Gaza was no longer under Israeli control: it rebranded the borders with Gaza as 'international crossing points'[12] and declared that control over the territory had passed to the Palestinian Council.[13] Following Gaza's takeover by Hamas in 2007, Israel further declared Gaza a 'hostile territory'[14] and, in 2014, designated it 'enemy territory', albeit solely for the purpose of exempting itself from liability for tort claims brought by Gazans.[15]

Israel's High Court of Justice ultimately accepted the above Israeli position regarding the legal status of Gaza, although after some hesitation. In judgments given in 2006 and 2007 the Court deliberately sidestepped the issue,[16] noting that it was still premature to decide on the matter.[17] In other cases the justices stated that it was best to adopt a practical approach rather than to delve into the 'heavy-weight' issue of Gaza's legal status.[18]

Affairs, 'The Disengagement Plan – General Outline', 18 April 2004, https://goo.gl/5FLQzc. For a critical analysis of the plan, see Sara Roy, 'Praying with Their Eyes Closed: Reflections on the Disengagement from Gaza' (2005) 34(4) *Journal of Palestine Studies* 64, 65, 67, 71–72.

[12] The Entrance to Israel Order (Border Stations) (Amendment), KT 6425, 2005 (Israel). However, because of the unclear status of the Gaza Strip, Israel has decided that the entry into Israel of Gaza residents will remain on the basis of permits rather than passports and visas: Entrance to Israel Order (Exemption to Gaza Residents) (Provisional Order), 2005 (Israel). This provisional order was extended each year until 2013, when it became a permanent order: Entrance to Israel Order (Exemption to Gaza Residents) (Provisional Order) (Amendment), 2013 (Israel).

[13] The 30th Israeli Government, Res No 4235, 'The End of Israeli Presence in the Gaza Strip and "Philadelphi" Route', 11 September 2005, http://www.pmo.gov.il/Secretary/GovDecisions/2005/Pages/des4235.aspx; Israel Defense Forces, 'Proclamation regarding the End of Military Regime', 12 September 2005, http://www.hamoked.org.il/items/7931.pdf (in Hebrew).

[14] Israel, Security Cabinet Decision No B/34, 19 September 2007 (unpublished); Israel Ministry of Foreign Affairs, 'Security Cabinet Declares Gaza Hostile Territory', 19 September 2007, http://www.hamoked.org/files/2013/114320_eng.pdf. This designation has no legal meaning under Israeli domestic law. Nevertheless, Israel has used it to justify sanctions imposed on Gaza residents relating to the entry of goods as well as movement of people. For a critical analysis of the declaration and its meaning, see Carey James, 'Mere Words: The Enemy Entity Designation of the Gaza Strip' (2009) 32 *Hastings International and Comparative Law Review* 643; Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15 *Journal of Conflict & Security Law* 211, 240–41.

[15] The 33rd Israeli Government, The Torts Order (State Liability) (Declaration on Enemy Territory – Gaza Strip), 2014 (Israel). Interestingly, a similar amendment from 2005, which exempted Israel from any liability over action that occurred in Gaza after the 'Disengagement', was struck down as unconstitutional: HCJ 8276/05 *Adalah – Legal Centre for Arab Minority Rights in Israel and Others v Minister of Defense and Others* 2006 PD 62(1) 1 [2006], http://elyon1.Court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf (in English).

[16] *Adalah*, ibid, Judgment of President Barak, para 36. Two days later, the Court referred to Gaza as part of the 'area' in which the law of occupation still applies, but this determination was insignificant as the judgment focused on the application of the LoAC: HCJ 769/02 *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others* ILDC 597 (IL 2006) [2006] (*Extra-Judicial Killings*), Judgment of President Barak, paras 16–20, http://elyon1.Court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (in English).

[17] *ACRI* (n 10) para 6. HCJ 11120/05 *Osama Hamdan and Others v Commander of the Southern Command and Others* (unpublished, 7 August 2007) (*Osama Hamdan*), para 13, http://elyon1.Court.gov.il/files/05/200/111/T22/05111200.t22.pdf (in which it was stated: 'We believe a "full" legal determination on the legal situation of Israel vis-à-vis Gaza would, for the time being, be a mistake, due to the fluidity of the situation'). See also HCJ 9522/07 *Physicians for Human Rights v IDF Commander in Gaza* (unpublished, 28 November 2007), para 4(1), http://elyon1.Court.gov.il/files/07/220/095/T06/07095220.t06.pdf.

[18] HCJ 5429/07 *Physicians for Human Rights and Others v Minister of Defense and Others* (unpublished, 28 June 2007), para 2, http://elyon1.Court.gov.il/files/07/290/054/T04/07054290.t04.pdf; *Osama Hamdan*, ibid.

Only in 2008 did the Court adopt its current and well-known position that the occupation of Gaza had ended, and that the law of occupation no longer applied to Gaza.[19] In the famous *Al-Bassiouni case* (2008), then President Beinisch ruled:[20]

> Since September 2005 Israel no longer has effective control over what happens in the Gaza Strip … Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the Laws of Belligerent Occupation [in its entirety[21]] … Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.

Notwithstanding this ruling, according to which Israel no longer occupied Gaza, the Court ruled that Israel maintains 'humanitarian duties' with regard to Gaza residents – that is, duties to ensure and provide their 'basic humanitarian needs'.[22] Such duties, the Court held, derived from the state of armed conflict between Israel and Hamas; the degree of control Israel exercises over its borders with Gaza and the near-complete dependence that Gaza residents have developed on the supply of goods from Israel during the many years of Israeli control over the area.[23]

The Court held in *Al-Bassiouni* that Israel is under an obligation to continue the supply of electricity and fuels to Gaza so as not to harm the provision of humanitarian needs of the population.[24] Despite this, in subsequent rulings the Court neglected to articulate exactly what such 'humanitarian duties' entail, what their legal source in international law might be, and whether

[19] *Al-Bassiouni* (n 2) para 12; CrimA 6659/06 *A and Others v The State of Israel*, 2008 PD 62(4) 329, para 11, http://elyon1.Court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (in English). This position was repeated in many later cases, including, inter alia, HCJ 5268/08 *Rami Anbar and Others v Commander of the Southern Command and Others* (unpublished, 9 December 2009), para 6, http://elyon1.Court.gov.il/files/08/680/052/v05/08052680.v05.pdf; HCJ 9594/03 *B'tselem and Others v Military Advocate General* (unpublished, 21 August 2011), para 13, http://elyon1.Court.gov.il/files/03/940/095/n22/03095940.n22.pdf.

[20] *Al-Bassiouni* (n 2) para 12.

[21] The words 'in its entirety', which appear in the original version of the judgment published in Hebrew, were for whatever reason omitted from the English translation published by the Israeli Courts Administration.

[22] *Al-Bassiouni* (n 2) para 11 ('The respondents are required to discharge their obligations under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide for the essential humanitarian needs of the civilian population'); see also paras 12–15. This ruling corresponded with Israel's own position, presented to the Court: see references in paras 3, 4, 6, 14, 15, 19, 21 and 22 of the judgment.

[23] ibid para 12. Certain legal scholars have criticised the Court's laconic reasoning with regard to the legal basis of these humanitarian duties, which, in that case, related to a duty to *provide* Gaza with fuel and electricity: see, eg, Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel' (2009) 42 *Israel Law Review* 101; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 279; Darcy and Reynolds (n 14) 229–32. For an additional analysis and reference to this judgment see Israeli Experts' Opinion, 'Israel's Duty to Supply Gaza with Water and Electricity During Operation "Protective Edge"', *Haoketz*, 20 July 2014, http://goo.gl/5pFCrX (in Hebrew).

[24] *Al-Bassiouni* (n 2) paras 21–22. The Court, however, did approve a 5 per cent cut in the supply of electricity, and some cuts in the supply of fuels.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

their scope varies in times of war and peace.[25] The Israeli government has also not elaborated on the substance of these humanitarian duties.[26]

The position held by the Israeli government and the HCJ is supported by certain international judgments[27] and legal scholars. Such jurists contend that in order for a state to effectively control foreign territory, it must have a military presence there and must exercise governmental authority in relation to its local residents.[28] According to this view, these conditions are prerequisites for the application of the law of occupation, in general, as well as specifically in Gaza.[29] Since Israel has no continuous military presence in the area, and since it does not exercise full governmental authority (particularly in view of the Hamas regime), Israel should not be regarded as an occupying power.[30]

If the Gaza Strip is no longer occupied by Israel, does this mean that no law applies in the relations between Israel and the residents of Gaza? Indeed, some argue precisely this: that, in effect, no law applies. According to this view, since 2005 Gaza has been and is, legally and factually, a 'special case', *sui generis*, which does not conform to any known international legal

[25] The Court simply referred to 'certain duties' or the 'humanitarian' duties Israel owed to Gaza residents, without elaborating: see, eg, CrimA *A* (n 19); *Anbar* (n 19); HCJ 201/09 *Physicians for Human Rights and Others v The Prime Minister of Israel and Others* 2009 PD 63(1) 521 (*PHR Cast Lead*), para 14 (President Beinisch), http://elyon1.Court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf (in English); AdminA 4620/11 *Omima Kishawi and Others v Minister of Interior and Others* (unpublished, 7 August 2012), para 6 (Justice Fogelman), http://elyon1.Court.gov.il/files/11/200/046/m14/11046200.m14.pdf; HCJ 2088/10 *Hamoked Center for the Defense of the Individual and Others v Commander of the West Bank Area and Others* (unpublished, 24 May 2012), paras 15 and 19, http://elyon1.Court.gov.il/files/10/880/020/n21/10020880.n21.pdf.

[26] eg, Case of *A*, State Response (n 9) 63 ('the entire Law of Belligerent Occupation … is no longer relevant and instead *other duties* emerge, which stem from alternative sources … *it is not, then, the continuous application of the same duties in a different normative cover, but rather these are different duties, both qualitatively and quantitatively*') (emphasis in original).

[27] eg, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, para 173; ECtHR, *Banković and Others v Belgium and Others*, App no 52207/99, 12 December 2001, paras 71, 80–82; ECtHR, *Chiragov and Others v Armenia*, App no 13216/05, Judgment (Merits), 16 June 2015, para 96; ECtHR, *Sargsyan v Azerbaijan*, App no 40167/06, Judgment (Merits), 16 June 2015, para 94; Marko Milanovic, 'European Court Decides that Israel Is Not Occupying Gaza', *EJIL: Talk!*, 17 June 2015, http://www.ejiltalk.org/european-Court-decides-that-israel-is-not-occupying-gaza.

[28] Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 211–12; Shany (n 23); Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 *Yearbook of International Humanitarian Law* 369; Adam Roberts, 'The Termination of Military Occupations', in Ferraro (n 5) Appendix 2, 41–49; Ruth Lapidoth, 'Unity Does Not Require Uniformity', *Bitterlemons.org*, 22 August 2005, http//www.bitterlemons.org/previous/bl220805ed30.html#isr2; Nicholas Rostow, 'Gaza, Iraq, Lebanon: Three Occupations under International Law' (2007) 37 *Israel Yearbook on Human Rights* 205, 217–19; Pnina Sharvit-Baruch, 'Is the Gaza Strip Still Occupied by Israel?', *Opinio Juris*, 25 April 2012, http://opiniojuris.org/2012/04/25/is-the-gaza-strip-still-occupied-by-israel; Solon Solomon, 'Occupied or Not: The Question of Gaza's Legal Status after the Israeli Disengagement' (2011) 19 *Cardozo Journal of International and Comparative Law* 59, 70, 76; Abraham Bell, 'International Law and Gaza: The Assault on Israel's Right to Self-Defense' (2008) 7 *Jerusalem Issue Brief* 29.

[29] Shany (n 5); Ferraro (n 5).

[30] Shany (n 23); Shany (n 28); Abraham Bell and Dov Shefi, 'The Mythical Post-2005 Israeli Occupation of the Gaza Strip' (2010) 16(2) *Israel Affairs* 268; Elizabeth Samson, 'Is Gaza Occupied? Redefining the Status of Gaza under International Law' (2010) 25 *American University International Law Review* 915, 935–54; Elizabeth Samson, 'Israel, Gaza, and the End of "Effective Control"', *Opinio Juris*, 26 April 2012, http://opiniojuris.org/2012/04/26/israel-gaza-and-the-end-of-effective-control.

classification or definition.[31] In accordance with such view, Israel is not subject to any positive obligations in its relations with Gaza residents. The view that Gaza is a *sui generis* case has been endorsed by the Israeli government and the HCJ.[32] Nonetheless, both have acknowledged that Israel has certain 'humanitarian duties' vis-à-vis Gaza residents.

Some scholars have suggested alternative legal norms which might impose obligations on Israel in this unique situation, including IHRL,[33] siege law,[34] post-occupation law[35] or general legal principles derived from natural law (such as humanism, equity and good neighbour relations).[36] However, even proponents of these views acknowledge that there is much doubt as to the practical applicability of these doctrines in the Gaza context as well as to their strong foundation in international law.[37]

At the other end of the spectrum are scholars[38] and organisations[39] which contend that the Gaza Strip remains occupied even in the aftermath of the Israeli 'Disengagement'. This group points to

[31] Solomon (n 28) 60, 81–82, 84; Samson (2010) (n 30) 917, 963–67; Ariel Zemach, 'What are the Legal Duties of Israel towards the Gaza Population' (2009) 12 *Mishpat Umimshal* [*Law and Government*] 83 (in Hebrew) (contending that Israel has no duties towards Gaza stemming from primary rules of international law but rather only duties stemming from secondary rules of state responsibility for wrongful acts).

[32] Israel Ministry of Foreign Affairs, 'The Operation in Gaza, 27 December 2008–18 January 2009: Factual and Legal Aspects', July 2009, para 30, https://goo.gl/PFulnj ('[t]he Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel, as a matter of policy, applies to its military operations in Gaza the rules of armed conflict'). See also *Osama Hamdan* (n 17); Case of *A* (n 9) para 20.

[33] Shany (n 23) 110–14; Shany (n 28) 383.

[34] Shany (n 23) 106–07; Darcy and Reynolds (n 14) 237–39. Israel declares that it upholds the international rules of a maritime blockade, which is a kind of siege: The Turkel Commission (n 6) 56–63.

[35] Benjamin Rubin, 'Disengagement from the Gaza Strip and Post-Occupation Duties' (2010) 42 *Israel Law Review* 528. For more on post-occupation law in general see Yaël Ronen, 'Post-Occupation Law' in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 428.

[36] Solomon (n 28) 60, 84–88; Shany (n 23) 115.

[37] Darcy and Reynolds (n 14) 232, 243; Solomon (n 28) 80–81.

[38] Dinstein (n 23) 277–80; Darcy and Reynolds (n 14) 235; James (n 14); 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; Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133; Peter Maurer, 'Challenges to International Humanitarian Law: Israel's Occupation Policy' (2012) 94 *International Review of the Red Cross* 1503; Peter Maurer, 'Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond' (2014) 47 *Israel Law Review* 175; Sari Bashi and Kenneth Mann, 'Control and Responsibility: The Legal Status of the Gaza Strip after the "Disengagement"' (2011) 14 *Hamishpat* 35 (in Hebrew); Nicholas Stephanopoulos, 'Israel's Legal Obligations to Gaza after the Pullout' (2006) 31 *Yale Journal of International Law* 524; Mustafa Mari, 'The Israeli Disengagement from the Gaza Strip: An End of the Occupation?' (2005) 8 *Yearbook of International Humanitarian Law* 356; Valentina Azarova, 'Disingenuous "Disengagement": Israel's Occupation of the Gaza Strip and the Protective Function of the Law of Belligerent Occupation', *Opinio Juris*, 24 April 2012, https://goo.gl/J4OQeS.

[39] Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009), UN Doc A/HRC/12/48, paras 276–80; Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance (27 September 2010), UN Doc A/HRC/15/21, paras 63–64; Human Rights Council, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1 (24 June 2015), UN Doc A/HRC/29/CPR.4, paras 26–30. This view is also shared by the Office of the Prosecutor, International Criminal Court (ICC): ICC, 'Situation on Registered Vessels of the Comoros, Greece

the fact that Israel continues to exercise extensive control over Gaza's borders, aerial and marine spaces, supply of infrastructure and goods, its population registry, and similar. They further point to Israel's assertion that it maintains the right to enter Gaza by force at any time. Thus, according to this view, Gaza should continue to be regarded as part of the Occupied Palestinian Territory.[40]

This view is based on a broad interpretation of the effective control test, which asserts that *potential state control* of a certain territory, even in the absence of the continuous presence of military forces in such a territory, may suffice to regard it as occupied.[41] This broad interpretation, which finds support in certain international judgments,[42] derives from what its proponents consider the primary purpose of the law of occupation – namely, to protect civilians who find themselves under foreign rule.[43]

Still, such a position does not necessarily obviate the question of what particular duties apply in this situation. Even assuming that Gaza remains occupied by Israel, many will nonetheless acknowledge that Israel does not control each and every aspect of the lives of its inhabitants and thus cannot be held responsible for the implementation of each and every provision of the law of occupation.[44]

For these reasons, and in an effort to prevent abuse of power by the controlling state,[45]Aeyal Gross has developed the 'functional approach to occupation'. In line with this approach, 'duties [under the law of occupation] follow from the exercise of control, regardless of whether the

and Cambodia: Article 53(1) Report', 6 November 2014, para 24–29. See also ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 32nd International Conference of the Red Cross and Red Crescent, 31 October 2015, 11–12; Human Rights Watch, 'Israel/Occupied Palestinian Territories (OPT) – Events of 2005', http://www.hrw.org/world-report/2006/country-chapters/israel/palestine; Amnesty International, 'Israel/Gaza Conflict: Questions & Answers', 25 July 2014, https://www.amnesty.org/en/latest/news/2014/07/israelgaza-conflict-questions-and-answers/; B'tselem, 'Background on the Gaza Strip', 11 November 2017, http://www.btselem.org/hebrew/gaza_strip (in Hebrew); Gisha – Legal Center for Freedom of Movement (Gisha), 'Disengaged Occupiers: The Legal Status of Gaza', January 2007, http://gisha.org/publication/1649.

[40] UNSC Res 1860 (8 January 2009), UN Doc S/RES/1860; UNGA Res 63/96 (18 December 2008), UN Doc A/RES/63/96 (2008); UNGA Res 64/92 (10 December 2009), UN Doc A/Res/64/92.

[41] Human Rights Council (2015) (n 39) 26–27; Ferraro (n 38) 158; Dinstein (n 23) 279; Bashi and Mann (n 38) 55–57.

[42] For example, US Military Tribunal at Nuremberg, *United States v List and Others*, Judgment, 7, 19 February 1948, 38, 55–56; ECtHR, *Loizidou v Turkey*, App no 15318/89, Judgment, 18 December 1996, para 56; ICTY, *Prosecutor v Naletilic and Martinovic*, Judgment, IT-98-34-T, Trial Chamber, 31 March 2003, [214]–[217]; ECtHR, *Ilaşcu and Others v Moldova and Russia*, App no 48787/99, Judgment, 8 July 2004, paras 314–19, 392. Interestingly, the HCJ has also supported this approach: HCJ 102/82 *Tzemel v Minister of Defense* 1983 PD 37(3) 365, 373.

[43] Bashi and Mann (n 38) 52, 56; Darcy and Reynolds (n 14) 243; Shany also argues that preferring the 'de facto control' test for the application of the law of occupation might lead occupying states to minimise their presence in the territory in order to refrain from fulfilling their duties toward the population, thus creating 'legal black holes', leaving civilians bereft of governmental protection: Shany (n 28) 376–78.

[44] These provisions include, for example, the Hague Regulations (n 4) art 43, and 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), art 67: Dinstein (n 23) 279–80; Bashi and Mann (n 38) 37; Aeyal Gross, 'The Binary Approach to Occupation: A Double Bind?', *Opinio Juris*, 26 April 2012, http://opiniojuris.org/2012/04/26/the-binary-approach-to-occupation-a-double-bind.

[45] Such an abuse of power would create a legal gap in the protection of civilians: Darcy and Reynolds (n 14) 243; Gross (n 1); Bashi (n 1); Azarova (n 38).

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

situation is conceptualized as falling into the category of occupation or sovereignty'.[46] In the context of Gaza, the implementation of this approach would mean that Israel's legal responsibility should be defined according to the scope and nature of the power that it exercises in practice.[47] Therefore, as Israel still controls (to this day) the movement of persons as well as the passage and supply of goods to and from Gaza, it must comply with those provisions of the law of occupation that relate to the freedom of movement of persons and the passage of goods to the population.[48]

The functional approach, which calls for a modular rather than a binary application of the law of occupation, has recently been adopted by major legal actors in the international community, such as the Human Rights Council and the ICRC,[49] as well as scholars.[50] Even in *Al-Bassiouni*, in which the Court rejected the claim that Israel continues to occupy Gaza, one can find some resonance to this approach in the Court's statement that Israel has a legal obligation to *supply* humanitarian goods to Gaza residents based on the *extent of control* it maintains on Gaza's borders.[51]

Interestingly, the academic debate on Gaza's legal status shows no sign of abating even today, more than ten years after the 'Disengagement'. In this thriving debate, it seems that Gaza is employed mostly as a case study, in what is primarily a theoretical discussion concerning the proper interpretation of the term 'effective control' and the limits of the law of occupation. Unfortunately, this debate rarely, if ever, extends to a more practical analysis of Israel's day-to-day legal policy towards Gaza residents, and the manner in which the HCJ has responded to such policy. Such analysis, as will be carried out in the following section, can potentially lead to a more relevant debate on the status of the Gaza Strip and the international norms that should apply in the relations between Israel and Gaza residents. Such a debate is crucial for the enhancement of the protections afforded to these residents.

3. ISRAEL'S LEGAL POLICY TOWARDS GAZA RESIDENTS AND ITS EVALUATION BY THE COURTS

Israel's narrow view with regard to Gaza's legal status – according to which Gaza is no longer occupied, and Israel is obligated only by the LoAC – has resulted in a similarly narrow view with

[46] Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 130, 132–35; Gross (n 1).
[47] Gross (2017) ibid 213–15. See also Gisha, 'Scale of Control: Israel's Continued Responsibility in the Gaza Strip', November 2011, http://gisha.org/publication/1660.
[48] Gross, ibid 224.
[49] Human Rights Council (2015) (n 39) 31; Maurer (2014) (n 38) 179; ICRC (2015) (n 39) 12; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC 2016), paras 305–13.
[50] Dinstein (n 23) 279–80; Ferraro (n 38); Bashi and Mann (n 38) 37–38, 50–52, 56, 60; Bashi (n 1); Eitan Diamond, 'Outside the Range of Considerations: Rights, Duties and Principles Not Taken into Account in the Decision to Prevent a Gazan Runner from Participating in the Palestine Marathon: Case Review of HCJ 2486/14 Nader Masri v. the Minister of Defense' (2014) 28 *Hamishpat Online: Human Rights – An Online Law Review* 6 (in Hebrew).
[51] *Al-Bassiouni* (n 2) 12; see also Gross (n 46) 219.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

regard to the status of Gaza residents themselves in their relations with Israel. According to this view, Gaza residents are mere 'foreign residents', and in fact even 'foreign residents of a hostile or enemy territory'.[52] They have no 'acquired' right to enter Israel, even for the purpose of reaching the West Bank[53] or travelling abroad, and they have no acquired right to receive goods (which must pass through Israeli territory). It is argued that just like every other foreign national, and in accordance with the sovereignty principle in international law, Israel has full discretion whether to allow a Gaza resident to enter through its borders.[54] Accordingly, the Israeli government has emphasised that every permit it decides to grant is given *ex gratia*, as a mere gesture of goodwill, privilege or policy-decision, which bears no legal significance.[55]

Nonetheless, the Israeli government has declared that it would allow Gaza residents to enter its territory under 'exceptional humanitarian cases',[56] and ensure the passage of goods that are essential for the 'basic humanitarian needs' of Gaza's population.[57] Israel maintains that these policy decisions are the product of its discretion and are not legally binding.[58] As will be demonstrated below, Israeli courts, primarily the HCJ and the administrative courts,[59] have accepted the government's position in its entirety and have repeatedly stated that, as a general rule, they will refrain from interfering with Israel's policy with respect to Gaza.[60]

---

[52] eg, *Rami Anbar and Others v Commander of the Southern Command and Others*, State Response (unpublished, 23 October 2008), paras 31–41, http://www.hamoked.org.il/items/110491.pdf (in Hebrew); *Kishawi* (n 25) para 8 (Justice Fogelman, citing the government's position).

[53] *Osama Hamdan* (n 17) State Response (unpublished, 20 March 2007) para 43, http://www.gisha.org/UserFiles/File/state_response_20_3_2007.pdf (in Hebrew). See also HCJ 6475/07 *Rajda Abu-Laban and Others v Commander of the Southern Command and Others* (unpublished, 31 July 2007), http://elyon1.Court.gov.il/files/07/750/064/M04/07064750.m04.pdf; HCJ 4906/10 *Fatma Sharif v Minister of Defense* (unpublished, 7 July 2010), http://elyon1.Court.gov.il/files/10/060/049/c02/10049060.c02.pdf; HCJ 495/12 *Azza Azat and Others v Minister of Defense and Others* (unpublished, 24 September 2012), http://elyon1.Court.gov.il/files/12/950/004/t09/12004950.t09.pdf; Reply Affidavit by the State (unpublished, 13 August 2012), paras 7–8, 21–31, 63, http://gisha.org/UserFiles/File/LegalDocuments/affidavite/affidavit.pdf (in Hebrew). For a critical analysis of Israel's arguments in this case, see Sari Bashi, 'Justifying Restrictions on Reconstructing Gaza: Military Necessity and Humanitarian Assistance' (2016) 49 *Israel Law Review* 149, 163–64.

[54] eg, HCJ 2277/06 *Hamoked Center for the Defense of the Individual and Others v The State of Israel and Others*, Complementing Response by the State (unpublished, 20 August 2006), para 20, http://www.hamoked.org.il/items/8224.pdf (in Hebrew); HCJ 2748/12 *Rafik Maslam and Others v Commander of the West Bank Area and Others* (unpublished, 16 April 2012), http://elyon1.Court.gov.il/files/12/480/027/s04/12027480.s04.pdf.

[55] HCJ 1742/14 *Abir Hamdan and Others v Commander of the West Bank Area and Others* (unpublished, 17 March 2014), http://elyon1.Court.gov.il/files/14/420/017/h02/14017420.h02.pdf; State Response (unpublished, 16 March 2014), para 4; HCJ 4496/07 *Wesam Madhun and Others v Commander of the Southern Command and Others* (unpublished, 4 June 2007), http://elyon1.Court.gov.il/files/07/960/044/N04/07044960.n04.pdf; *PHR* 9522/07 (n 17) 3–4.

[56] *Abir Hamdan*, *State Response*, ibid 5–8.

[57] See text at n 10.

[58] See, eg, HCJ 5651/17 *Thaer Taia v Minister of Defense*, Preliminary Response of the State (unpublished, 18 July 2017), paras 5, 27, 31, 37, http://gisha.org/UserFiles/File/LegalDocuments/5651-17/response.pdf.

[59] These courts were authorised to discuss petitions filed against decisions of the Military Commander with regard to entry permits to Israel: Administrative Courts Law, 2000 (Israel), First Addendum, s 12.

[60] *Azat* (n 53) para 13 (Justice Rubinstein), paras 2–3 (Justice Zilbertal); *Hamoked* (n 25) 17–20; HCJ 1583/10 *Fadia Abu-Hamida and Others v Commander of the West Bank Area and Others* (unpublished, 25 March 2010), http://elyon1.Court.gov.il/files/10/830/015/p02/10015830.p02.pdf.

3.1. The Normative Framework and Policy Outline

Before describing in depth the Israeli government's legal position towards Gaza residents and the manner in which the Israeli courts have responded to it, a brief outline of the domestic norms governing Israel's relations with Gaza is warranted. Following the 'Disengagement' and the formal conclusion of the Israeli military regime in Gaza, the military orders in place until that time were annulled and the legal framework applied to Gaza residents was demilitarised.[61] To date, Israel's policy towards Gaza residents is established in a few primary laws enacted by the Israeli legislature (the Knesset),[62] Government Security Cabinet decisions[63] and dozens, if not hundreds, of procedures and protocols drafted by the Coordinator of Government Activities in the Territories (COGAT).[64] Only in recent years have these procedures been made public and translated into Arabic.[65]

With regard to the movement of people to and from Gaza, the Citizenship and Entry into Israel (Temporary Provision) Law (2003) is of greatest significance. This Law prohibits the entry of all Palestinians from the West Bank and Gaza into Israel,[66] but maintains that a

[61] That is, as opposed to the West Bank, no military orders were from that moment on applicable in the Gaza Strip: *A* (n 19) 37; HCJ 4487/08 *Physicians for Human Rights and Others v Commander of the Southern Command and Others* 2008 PD 63(1) 149 (*PHR* 4487/08), para 6.

[62] Citizenship and Entry into Israel Law (Temporary Provision), 2003; Internment of Unlawful Combatants Law, 2002; Criminal Procedure Law (Detainee Suspected of a Security Offence) (Temporary Provision), 2006 (which authorises the administrative internment and prosecution of Gaza residents (*A* (n 19)). According to Darcy and Reynolds (n 14) 236, the enactment of these rules, immediately after the 'Disengagement', was designed to maintain Israel's direct control over matters of law in Gaza; Defense Export Control Law, 2007; and Defense Export Control Order (Controlled Dual-Use Equipment to the Palestinian Civil Jurisdiction Areas), 2008 (which regulate the entry into Gaza of goods which are considered to have 'dual use'); Amendment and Extension of the Emergency Regulations Law (Judea and Samaria – Criminal Jurisdiction and Legal Assistance), 2007; Emergency Regulations Order (Judea and Samaria and Gaza Region – Criminal Jurisdiction and Legal Assistance) (Palestinian Council Areas – Legal Assistance in Civil Matters), 1999.

[63] Israel Security Cabinet Res no B/34, 19 September 2007 (unpublished); Security Cabinet Res no B/44, 20 June 2010 (unpublished); Security Cabinet Res (No unknown), 11 June 2017 (unpublished).

[64] COGAT, working under the auspices of the Israeli Ministry of Defense and in itself a branch of the Israeli army, is the body in charge of civil contact with Palestinians living in the West Bank and the Gaza Strip as well as Israel's policy towards them. To this end COGAT has published many procedures and protocols, the key of which are 'Policy for the Movement of People between the State of Israel and the Gaza Strip', 2011 (Policy Paper), http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/entering_and_exiting_gaza/03.pdf (in Hebrew), and 'Permission Status for the Entry of Palestinians to Israel, Their Passage between the West Bank and the Gaza Strip and Their Exit Abroad', updated on a monthly basis and last viewed on 22 January 2018, https://goo.gl/HjbGXe (in Hebrew). For a list of all of the procedures, see the COGAT website at http://www.cogat.mod.gov.il/en/Pages/default.aspx and Gisha website at http://gisha.org/legal/procedures-and-protocols.

[65] Only after Gisha filed two Freedom of Information petitions against COGAT did the latter start to publish in an orderly fashion dozens of procedures and protocols and later translated most of them into Arabic: AdmC (TA) 51147-05-14 *Gisha v COGAT and Others*, 10 May 2016, http://gisha.org/UserFiles/File/LegalDocuments/foiucogat/judment.pdf. See Natasha Roth, 'How Israel's Military Gov't Keeps Palestinians in the Dark', *972 Magazine*, 14 January 2016, https://goo.gl/9wHTsI.

[66] Citizenship and Entry into Israel Law (n 62). Despite the 'Disengagement', the Law still refers to the 'Area' as including both the West Bank and the Gaza Strip (s 1). See also *PHR* 4487/08 (n 61); HCJ 4047/13 *Najma Hadri and Others v The Prime Minister and Others* (unpublished, 14 June 2015), http://elyon1.Court.gov.il/files/13/470/040/c17/13040470.c17.pdf.

Palestinian resident may be granted an entry permit for the purpose of medical treatment, employment and 'other temporary purposes'.[67]

On the basis of this Law, a policy paper was published, which included a list of all circumstances in which the entry of Gaza residents into Israel would be permitted, either for a temporary stay in Israel or for passage to the West Bank and travel abroad.[68] To date, these circumstances include not only entry for necessary medical treatment, family visits, weddings and funerals, but also for the receipt of consular services, prayers, children's recreational activities, visits to prisoners, work meetings and sports events. In addition, businesspeople receive special long-term permits.[69]

It should be noted that, as opposed to movement to Israel and abroad, Israel has established a particularly restrictive policy with regard to the movement of Gaza residents to the West Bank, known as 'the separation policy'. Allegedly based on 'security and political considerations',[70] this policy essentially prohibits the movement of Gazans to the West Bank except in extraordinary and extreme circumstances.[71] In addition, Israel conditions and restricts the entry into Gaza of foreigners, such as journalists, workers of international organisations, professional experts and diplomats.[72] In theory, such persons can enter Gaza through the Rafah crossing controlled by Egypt; however, in recent years this crossing has remained closed most of the time.[73]

Israel's policy with regard to the movement of goods[74] is articulated only in COGAT procedures and in several Security Cabinet resolutions.[75] This policy has fluctuated dramatically

[67] Citizenship and Entry into Israel Law (n 62) s 3(b).
[68] These permits are, of course, subject to many conditions and limitations: COGAT, Policy Paper (n 64).
[69] For the updated list see COGAT, Permission Status (n 64).
[70] *Azat*, Reply Affidavit by the State (n 53) para 38; *Azat* (n 53) para 4 (Justice Zilbertal).
[71] Gisha, 'Separating Land, Separating People', June 2015, http://gisha.org/publication/4379. These situations do not even include, according to Israel's policy, unification between spouses or between a parent and a child: COGAT, 'Procedure for the Treatment of Settlement Requests by Gaza Residents in the Judea and Samaria Area', July 2013, https://goo.gl/VjufFX (in Hebrew) (Settlement Procedure); *Abir Hamdan* (n 55); Jack Khoury, 'Trapped in Gaza: The Faces behind the Blockade of the Gaza Strip', *Ha'aretz*, 9 June 2015, https://www.haaretz.com/.premium-the-faces-behind-the-blockade-of-gaza-1.5370116. It should be noted that Israel can control movement between the two Palestinian areas since entry to the West Bank can be carried out solely through its territory. In addition, Israel still administers the Palestinian population registry and thus can decide who will be allowed to change his or her residential address to the West Bank: Alon Margalit and Sarah Hibbin, 'Unlawful Presence of Protected Persons in Occupied Territory? An Analysis of Israel's Permit Regime and Expulsions from the West Bank under the Law of Occupations' (2010) 13 *Yearbook of International Humanitarian Law* 245.
[72] COGAT, 'Procedure for the Coordination of Foreigners' Entry to the Gaza Strip', June 2015, https://goo.gl/vjZRSP (in Hebrew); HCJ 9910/08 *Association of Foreign Reporters in Israel v Commander of Southern Command* (unpublished, 2 January 2009), http://elyon1.Court.gov.il/files/08/100/099/n06/08099100.n06.pdf; Bashi (n 53) 160; Human Rights Watch, 'Unwilling or Unable: Israeli Restrictions on Travel to and from Gaza for Human Rights Workers', April 2017, http://www.hrw.org/report/2017/04/02/unwilling-or-unable/israeli-restrictions-access-and-gaza-human-rights-workers.
[73] Formally, Israel has no control over the Rafah crossing, and its opening is dependent on a mutual decision by Egypt and Hamas. Gaza residents who wish to leave Gaza through Rafah must register in advance. To date, the list of persons asking to cross through Rafah exceeds 30,000: Gisha, 'Rafah Crossing Has Been Closed for Five Months; Longest period in the Last Decade', 8 August 2017, http://gisha.org/updates/8077.
[74] Israel is the only outlet through which Gaza can receive the supply of goods of any kind as, to date, the Kerem-Shalom crossing is the only merchandise crossing between Gaza and the rest of the world.
[75] See text at n 63. Israel's control over the supply of any item and commodity to Gaza is articulated in the Gaza-Jericho Agreement: Economic Protocol, 29 April 1994, Annex IV, https://goo.gl/hzJuw9 (which is seemingly still in force, notwithstanding the 'Disengagement').

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

over the past decade. Following the Hamas takeover of Gaza in June 2007 Israel's Security Cabinet decided to restrict to a minimum the supply of goods that Gaza residents would be allowed to receive. This declared 'economic warfare'[76] related not only to goods that might pose a security threat to Israel but also to goods of a civilian and even a humanitarian nature. In accordance with this policy, Israel calculated the amount of calories required by each Gaza resident for survival and prohibited the entry of goods that could lead to exceeding this threshold.[77]

Following harsh international criticism, which culminated in the Marmara Flotilla to Gaza in May 2010, Israel retreated from this policy. Since then, every type of commodity has been allowed into Gaza, albeit subject to coordination with the Israeli authorities.[78] The only items the entry of which remains restricted are those that are termed by Israel 'dual-use items'.[79] Despite this seemingly expansive approach, the list of 'dual-use items' is extremely long and obscure, and includes items essential for the economy and welfare of the population, such as construction materials, communication equipment, wood planks, x-ray machines and castor oil.[80] Gaza residents who mistakenly fail to submit a request for a special permit to allow the entry of such goods risk their confiscation at the border crossing as well as the annulment of the residents' merchant permits.[81] They even run the risk of criminal prosecution in Israel.[82]

Israel regulates not only the goods that enter Gaza but also the products that may be exported from Gaza to markets in the West Bank and abroad. In fact, between 2007 and 2014 Israel prohibited altogether the export of goods from Gaza to the West Bank,[83] and allowed only a handful of trucks loaded with crops to leave for Europe. Following the military operation 'Protective Edge' in the summer of 2014, Israel reinstated the sale of goods from Gaza to the West Bank.[84] Despite this, Israeli procedures still go so far as to limit the kind of vegetables and fruits that may be exported and the number of produce trucks that may exit from Gaza each week.[85]

[76] *Al-Bassiouni,* Preliminary Response by the State (n 10) 23–38.
[77] AdminA 3300/11 *Gisha v The State of Israel* (unpublished, 5 September 2012), http://elyon1.court.gov.il/files/11/000/033/e12/11033000.e12.pdf. See also Aeyal Gross and Tamar Feldman, 'We Didn't Want to Hear the Word 'Calories': Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure' (2015) 33 *Berkeley Journal of International Law* 379.
[78] COGAT, 'Procedure for the Coordination of the Entrance of Goods into the Gaza Strip', June 2015, http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/merchandise/20.pdf (in Hebrew).
[79] This phrase accounts for items that may have a military use alongside their ordinary civilian use. Obviously, the entry of military equipment per se is utterly forbidden. According to Defense Export Control Law (n 62) s 20, every 'dual-use' item must receive a special permit from COGAT before it may enter Gaza.
[80] For the full list see the Defense Export Control Order (n 62). For a critical review of the list, see Gisha, 'Dark-Gray Lists', January 2016, http://gisha.org/UserFiles/File/publications/Dark_Gray_Lists/Dark_Gray_Lists-en.pdf.
[81] See, eg, HCJ 4356/16 and 7061/16 *Maslah and Others v Minister of Defense* (unpublished, 23 April 2017), http://elyon1.court.gov.il/files/16/560/043/b12/16043560.b12.pdf.
[82] Defense Export Control Law (n 62) s 32(a)(4).
[83] Gisha, 'A Costly Divide: Economic Repercussions of Separating Gaza and the West Bank', February 2015, http://gisha.org/UserFiles/File/publications/a_costly_divide/a_costly_divide_en-web.pdf.
[84] Gisha, 'For the First Time since the Closure: A Truckload of Cucumbers Left Gaza For Sale in the West Bank', November 2014, http://gisha.org/updates/3671.
[85] COGAT, 'Response to a Freedom of Information Act Application', January 2015, http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/merchandise/64.pdf (in Hebrew).

3.2. JUDGMENTS OF ISRAELI COURTS ON GAZA-RELATED ISSUES

Over the last decade, dozens, if not hundreds, of Gaza-related petitions have been brought before Israeli courts, primarily the HCJ and the administrative courts. In the vast majority of these cases, the courts have accepted the government's position with regard to the legal status of both Gaza and its residents, and have therefore approved the movement policy which had been formulated on the basis of these positions. A careful examination of the key rulings by the courts on these issues reveals the following recurring themes.

First and foremost, the courts have accepted the idea that Gaza residents are 'foreign residents' like any other foreigner, and thus do not have any particular right to enter Israel.[86] In *Anbar* (2009) the HCJ considered the government policy that entirely prohibited visits by Gaza residents to prisons in Israel where their relatives were incarcerated.[87] The Court stated:[88]

> We accept the State's argument that these provisions cannot negate the power of a sovereign state to prevent foreigners, especially foreigners who are part of a hostile entity's population, from entering its territory, even if this entry is intended for visiting incarcerated relatives.

In *Kishawi* (2012) the HCJ considered the government's policy of denying entry for Muslims to Israel for prayers in Jerusalem, while at the same time allowing entry for Christians for the same purpose.[89] Here, too, the Court ruled:[90]

> The starting point for the discussion is that, as accepted in the case of any sovereign state, foreigners do not have a vested right to enter the territory of the State of Israel … as often ruled, this rule is true also with respect to entry permit requests made by Gaza residents.

[86] *A* (n 19); HCJ 1912/08 *Physicians for Human Rights and Others v Commander of the Southern Command and Others* (unpublished, 16 April 2008) (*PHR Medical Treatment*), paras 7–8, http://elyon1.Court.gov.il/files/08/120/019/r05/08019120.r05.pdf; *Kishawi* (n 25) 5, 8; *Azat* (n 53) paras 17 and 22 (Justice Rubinstein), para 2 (Justice Naor), para 3 (Justice Zilbertal).

[87] This policy was in force from 2007 to 2012, when – despite the ruling in *Anbar* (n 19) – visits from Gaza were allowed for the first time in years. Visits were prohibited once again in 2014 and again renewed following operation 'Protective Edge', in October 2014. Recently, however, in June 2017 Israel decided once again to stop visits by prisoners' families from Gaza: Yaniv Kubovich and Jack Khoury, 'Israel Halts Family Visits for Hamas Prisoners from Gaza', *Ha'aretz*, 30 June 2017, https://www.haaretz.com/israel-news/israel-halts-family-visits-for-hamas-prisoners-from-gaza-1.5490551.

[88] *Anbar* (n 19) 8.

[89] This policy was implemented from 2007 to October 2014, when – despite the ruling in *Kishawi* (n 25) and following operation 'Protective Edge' – Israel decided to allow, for the first time, prayers for Gazan Muslims in Jerusalem. However, in December 2016, Israel once again prevented the entry of Muslims for prayers without clearly or publicly explaining why: Gisha, 'Friday Prayers at al-Aqsa Mosque Cancelled for Gaza Residents', 11 December 2016, http://gisha.org/updates/5682.

[90] *Kishawi* (n 25) 5.

Similarly, in *Azat* (2012) the HCJ voiced approval of the government's policy to prohibit the passage of students from Gaza to universities in the West Bank.[91] In its judgment the Court compared the relationship between Gaza residents and Israel with the relationship between Canadian residents and the United States. It ruled that 'these [Gaza residents] are residents of a foreign entity, and the petitioners will not dispute that a Canadian resident is not entitled to "regular" civil rights in the USA, unless both countries have agreed otherwise'.[92]

Second, and following the notion that Gaza residents are 'foreign residents', the courts have accepted the view that the government has broad discretion in deciding which residents will be granted the privilege of entering or passing through Israel.[93] The courts have further stated that, as a rule, they will not interfere with either the government's particular decisions or general policy with regard to movement to and from Gaza.[94] They have explicitly stated that this policy is legitimate, even if it is based on political as well as security reasons.[95]

Third, following the notion that Gaza residents have no acquired right to enter Israel, the courts have approved of the government's blatant discrimination between groups within the Gazan population. As mentioned, in *Kishawi* the HCJ legitimised the government's decision to allow Christians to enter Israel for prayers while denying Muslims entry for the same purpose. The government argued that such differentiation was lawful as Gaza residents are foreign residents, not to mention 'residents of an enemy state',[96] and thus it could maintain whatever kind of policy it wishes in their respect. It added that Christians are allowed into Israel in light of 'foreign and security considerations', and because they are an oppressed minority in Gaza.[97] The Court ruled:[98]

> Even if we are to assume in favor of the petitioners and, for the sake of discussion, that there is a duty to treat foreigners equally upon deciding on their entrance to Israel (this is a mere assumption; we are not decisive on this matter), we are not convinced that a breach of equality has been proven … this policy derives from foreign policy and security considerations … given these considerations and in light of the broad discretion bestowed on the respondents … there is no cause to intervene in the policy.

[91] This policy has been in force since 2000: Gisha, 'Student Travel between Gaza and the West Bank 101', September 2012, http://www.gisha.org/UserFiles/File/publications/students/students-2012-eng.pdf.
[92] *Azat* (n 53) para 17 (Justice Rubinstein).
[93] *PHR Medical Treatment* (n 86) 8 ('The [military] authority is the state's "gatekeeper", and therefore its power is vast, granting it a broad discretion when reaching a decision regarding giving a permit'); *Kishawi* (n 25) 5–6; *Azat* (n 53); HCJ 9657/07 *Sabah Garboa and Others v Commander of the West Bank Area and Others* (unpublished, 24 July 2008), http://elyon1.Court.gov.il/files/07/570/096/s09/07096570.s09.pdf; AdminC (BS) 462/09 *Issam Hamdan v Minister of Interior* (unpublished, 21 January 2010), paras 4–5, http://gisha.org/UserFiles/File/HiddenMessages/PsakDin210110.pdf.
[94] *Azat* (n 53) para 13 (Justice Rubinstein), paras 2–3 (Justice Zilbertal); *Hamoked* (n 25) 17–20; *Abu-Hamida* (n 60).
[95] *Azat* (n 53) para 17 (Justice Rubinstein), para 3 (Justice Zilbertal).
[96] *Kishawi* (n 25) 8. The reference of Gaza residents as foreign nationals living in an 'enemy state' can be found also in *PHR Medical Treatment* (n 86) 7.
[97] *Kishawi* (n 25) para 4 (Justice Fogelman).
[98] ibid para 8.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

Similarly, in *Azat* the government contended that it may generally deny the passage of students from the Gaza Strip to the West Bank, while issuing permits for some of them, in accordance with its foreign policy interests.[99] It added that since academic studies did not constitute a 'humanitarian need', it was unnecessary to examine the existence of a specific security threat posed by any of the students.[100] The majority of the Court accepted this line of argument. Although Justice Naor acknowledged that it was difficult to counter discrimination arguments when discussing people of similar backgrounds such as students, she ruled that '[t]he State is entitled to allow the entrance of persons in order to fulfill the goals it wishes to advance at any particular moment, for one reason or another, though it is not required to do so'.[101]

In *Masri* (2014) the Court approved the government's policy which allowed football players from Gaza to exit for league games in the West Bank, but other athletes such as marathon runners were prevented from leaving.[102] In this case the government did not even trouble itself to demonstrate how specific characteristics or considerations might have led to the decision to allow the movement of football players exclusively. It made do with referring to its long-established legal position whereby Gaza residents are foreign residents who have no legal right to enter Israel. Once again the Court countenanced this position and the case was dismissed on the ground that '[t]he Minister of Defense has apparently acted within the scope of his discretion, according to the policy paper, and, as is well known, the scope of intervention in such discretion is extremely limited'.[103]

Fourth, the courts have repeatedly accepted the government's definition of 'humanitarian exceptions' in which the state would allow the passage of Gaza residents to Israel, the West Bank or abroad. Although no clear and public interpretation was proposed by the government, this phrase has gradually become known to include only urgent medical treatment, visiting first-degree family members who are terminally ill, and attending weddings and funerals of first-degree family members.[104]

In various petitions the courts have deemed this 'humanitarian' policy to be lawful[105] and have refused to broaden the scope of the 'humanitarian' exceptions. For example, the HCJ has ruled that travel to the West Bank for the purpose of family unification between a husband

[99] These students applied to a US State Department programme: *Azat*, Reply Affidavit by the State (n 53) para 58.
[100] ibid para 61. This indicates that the state's decision was not based on security reasons but rather on policy considerations and can thus be regarded as arbitrary. Only following the petition did the state argue that two of the five petitioners were individually prevented based on security reasons (but that was inconsequential in light of the general policy).
[101] *Azat* (n 53) para 4 (Justice Naor).
[102] HCJ 2486/14 *Nader Masri v Minister of Defense and Others* (unpublished, 7 April 2014), http://elyon1.Court.gov.il/files/14/860/024/a02/14024860.a02.pdf; State Response (unpublished, 6 April 2014), http://gisha.org/UserFiles/File/LegalDocuments/2486-14/masri_state_response-he.pdf.
[103] *Masri*, ibid 4.
[104] Even then, if a resident is defined as a security risk, his entry will be denied: *PHR Medical Treatment* (n 86) (in which the entry of a terminally ill cancer patient was denied because he allegedly presented a security risk).
[105] For a non-exhaustive review see *Kishawi* (n 25).

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

and a wife or a parent and a child do not constitute 'justified humanitarian reasons'.[106] In addition, visiting family members who are seriously but not terminally ill,[107] as well as visiting family members who are incarcerated in Israel,[108] are not of a 'humanitarian' nature. Similar rulings have been given, as mentioned above, with regard to academic studies[109] and prayers in holy places in Israel and the West Bank.[110]

Even when discussing leaving Gaza for medical treatment – a matter clearly considered 'humanitarian' by the government itself – the state has sought to differentiate between forms of treatment that 'save lives' and those that simply 'improve the quality of life', such as surgery to save a person's legs or eyes.[111] In *Physicians for Human Rights* (2007) the HCJ intimated that it could not understand this distinction, but ultimately decided to dismiss the petition. In obiter dicta it added that 'we assume that the respondents' approach will be humane, so that very severe cases, where the "point of life" will change utterly in the absence of treatment, will be taken into consideration'.[112]

With regard to the movement of goods, the courts have been far less specific in determining what kind of goods are considered necessary to fulfil a 'basic humanitarian need' (in terms of their nature, quantity, and the like).[113] However, the courts have declared that the government has a duty to ensure the entry of electricity,[114] fuels and money[115] (salaries to Palestinian Authority employees) into Gaza, holding that these items are considered 'humanitarian'. Beyond this, the courts have referred plainly to the government's duty to ensure the 'basic

[106] *Hamoked* (n 25) (this case confirmed the Settlement Procedure (n 71)). See also Hamoked and B'tselem, 'So Near and Yet So Far: Implications of Israeli-Imposed Seclusion of Gaza Strip on Palestinians' Right to Family Life', January 2014, https://goo.gl/d8UNkA. In *Abir Hamdan* the state refused to let a bride move to the West Bank in order to marry, arguing that she had no right to choose her place of marriage and that she could not create a new humanitarian ground: *Abir Hamdan*, State Response (n 55) 29, 34 and 38. See also HCJ 1892/10 *Naser Abu-Sardane and Others v Commander of the West Bank Area* (unpublished, 11 August 2010), http://elyon1.court.gov.il/files/10/920/018/h05/10018920.h05.pdf. Israel did not even allow a bride to exit Gaza in order to marry abroad: Edo Konrad, 'Israel Preventing Gaza Woman from Attending Her Own Wedding', *972 Magazine*, 20 November 2015, https://goo.gl/JYTfgN. In addition, the movement of Gaza residents to Israel for the purpose of family reunification has been entirely forbidden since 2008: *Hadri* (n 66).

[107] *Garboa* (n 93); *Abu-Hamida* (n 60); HCJ 5829/09 *Tahrir Mansur and Others v Commander of the West Bank Area* (unpublished, 30 July 2009), http://elyon1.court.gov.il/files/09/290/058/s02/09058290.s02.pdf.

[108] *Anbar* (n 19) 7.

[109] *Osama Hamdan* (n 17) 17; *Azat* (n 53) paras 17–18 (Justice Rubinstein), para 2 (Justice Naor), para 2 (Justice Zilbertal); *Sharif* (n 53) 2.

[110] *Kishawi* (n 25) 7.

[111] This distinction was first introduced in June 2007, when the Erez crossing was mostly closed for security reasons and the state therefore decided to grant permits only for the most critical patients: *PHR* 5429/07 (n 18) Updating Announcement of the State (unpublished, 24 June 2007) paras 4–6, http://gisha.org/UserFiles/File/LegalDocuments/stateresponde5429-0724[2].5.07.pdf. However, this distinction remained in force for many years, notwithstanding the relatively regular activity of the crossing.

[112] ibid para 6(5)(b). This phrase was later inserted into the policy papers as a criterion for receiving a permit: COGAT, Permission Status (n 64) s 2(a)(1), and COGAT, Policy Paper (n 64) s 7(a)(1).

[113] For a critical analysis of the 'minimum humanitarian' with regard to food supply to Gaza, see Gross and Feldman (n 77).

[114] *Al-Bassiouni* (n 2).

[115] HCJ 1169/09 *Legal Forum for the Land of Israel v The Prime Minister and Others* (unpublished, 15 June 2009), para 21, http://elyon1.Court.gov.il/files/09/690/011/r09/09011690.r09.pdf.

humanitarian needs' of Gaza residents and to the need to ensure the regular operation of the merchandise crossings.[116]

An illustrative example of such general reference to the government duties is *Legal Forum for Eretz Israel* (2009), in which the HCJ ruled:[117]

> This Court has repeated not once the Israeli government's duty to ensure the fulfillment of basic humanitarian needs of West Bank and Gaza residents. Even if the Gaza Strip is controlled today by the Hamas movement … there are residents living there who need essential services in order to maintain a quality and a standard of living which are reasonable and humane. Israel is required to lend a hand in order to enable fulfillment of essential needs of the local population, which without it will not be met.

Fifth, and commensurate with their decision to regard Gaza as a non-occupied territory and its residents as 'foreigners', the courts have rarely turned to international law to inform their rulings. In fact, the courts have refrained from reviewing Israeli policy pursuant to the law of occupation or IHRL, even if these norms were specifically invoked by the petitioners as relevant to the case.[118] The courts have reiterated that when dealing with Gaza-related issues, they prefer to leave the principled, legal questions aside and focus on finding 'practical and creative solutions' to the problem presented before them.[119]

For example, in *Abu-Daka* (2014) – which dealt with COGAT's procedure regarding the entry of Gaza residents to Israel for litigation procedures – the HCJ stated that 'although it is possible to tackle these issues on high grounds of constitutional dilemmas … such a course of action is entirely unwarranted'.[120] The Court warded off the petitioners' claims that the procedure was illegal, stating that 'there is no place to confront this issue with great constitutional lenses, but rather through practical lenses'.[121] This attitude led to a rejection of the petition, notwithstanding some obiter dicta concerning the desired way to implement the procedure in the future.

Rather than examining the *legality* of the government's movement policy under international legal standards, the courts have, at most, been willing to review the *appropriateness* of the

[116] This is true in peacetime as well as in time of war: *PHR Cast Lead* (n 25) paras 26–27 (President Beinisch); *ACRI* (n 10); HCJ 4258/08 *Gisha and Others v Minister of Defense* (unpublished, 5 June 2008), http://elyon1.court.gov.il/files/08/580/042/n04/08042580.n04.pdf.

[117] *Legal Forum* (n 115).

[118] In *Al-Bassiouni* (n 2) para 20, the Court stated: 'Our role is limited to judicial review of compliance with the provisions of Israeli and international law that bind the State of Israel, which, according to the declaration of the respondents, are being scrupulously observed by the state'. See also *PHR* 5429/07 (n 18); *Diamond* (n 50) 13–17.

[119] See, eg, *Osama Hamdan* (n 17). Unfortunately, the shying away from principled legal discussion is typical of the HCJ's mindset in recent years in deliberating on political or human rights issues. For a critical review of this trend see Michal Luft, 'Guys, Haven't You Exaggerated a Bit? Where Has the Judicial Review of the Israeli Courts over State Actions Gone?' (2014) 29 *Hamishpat Online: Human Rights – an Online Law Review* 25.

[120] HCJ 7042/12 *Maher Abu-Daka and Others v Minister of Interior and Others* (unpublished, 16 December 2014), para 10, http://elyon1.Court.gov.il/files/12/420/070/t10/12070420.t10.pdf.

[121] ibid para 19.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

general policy or the specific decision at hand, according to Israeli administrative legal standards.[122] In other words, they have been prepared only to examine whether the government has acted with reasonableness and proportionality, and according to procedural fairness.[123] Since the courts have consistently reiterated that the government holds broad administrative discretion on Gaza-related issues, this narrow judicial review has resulted in dismissing almost all petitions.[124]

Finally, two more interesting characteristics can be discerned in the Israeli courts' jurisprudence on Gaza-related issues. The first is that despite dismissing most of the petitions and refusing to intervene, the courts have repeatedly expressed their sympathy for the 'regrettable human situation' to which Gazans are subject.[125] Justice Rubinstein in *Azat* described the situation with regard to the movement of residents from Gaza as 'almost despairing', and Justice Naor, who elected to dismiss the petition, stated that she 'sadly agrees'. In another case, concerning the government refusal to allow Israeli citizens to visit their relatives in Gaza during holidays, Justice Naor again dismissed the petition, while stating:[126]

> The relatives of the petitioners are a short drive from here. Almost at arm's length. However, this short driving distance seems as far as a journey beyond the mountains of darkness. The pain is understandable and touching, but we are unable to assist the petitioners.

This alleged solidarity with Gaza residents, their pain and their sorrow, has yet to lead to a ruling in favour of petitioners and, in all appearances, has rarely caused the justices to sense that there is something wrong with the policy that is being challenged. The courts have, in this sense, acted as

[122] This is typical behaviour of the Court in both Gaza and West Bank-related petitions: David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002) 25–27, 69–70, 196 (arguing that the courts are more at ease with overturning a Military Commander's decision on the basis of Israeli administrative law than on the basis of international law, since the former is considered an internal rather than external constraint on the state). See also David Kretzmer 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94 *International Review of the Red Cross* 207, 228–32. However, given the broad discretion granted to the state and the fact that administrative law is made up of principles that are inherently vague, most decisions are not dismissed but rather legitimised: Orna Ben-Naftali, 'The Epistemology of the International Law Closet and the Spirit of the Law' in Daphna Hacker and Neta Ziv (eds), *Does Law Matter?* (Tel Aviv University 2010) 527, 539–40 (in Hebrew); Martti Koskenniemi, 'Occupied Zone – "A Zone of Reasonableness"?' (2008) 41 *Israel Law Review* 13.

[123] eg, *PHR Medical Treatment* (n 86) 7–12; *PHR* 9522/07 (n 17) 4; *Kishawi* (n 25) 5; *Hamoked* (n 25) 18.

[124] This estimate is based on a non-exhaustive review of many judgments on Gaza-related petitions over the past decade. To my knowledge, no empirical research in this field has been published to date. However, similar studies on the HCJ's scope of interference in petitions concerning West Bank issues and Gaza prior to 2005 reveal similar results: Kretzmer 2002 (n 122); Ronen Shamir, 'Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 *Law and Society Review* 781.

[125] *Osama Hamdan* (n 17) 1, 12 and 17; see also *PHR Medical Treatment* (n 86) 12; *Azat* (n 53) paras 1, 8 and 13 (Justice Rubinstein); *Hamoked* (n 25) 19; *Masri* (n 102) 4; HCJ 5649/12 *Fahima Hamdan and Others v Commander of Southern Command and Others* (unpublished, 16 August 2012), http://elyon1.Court.gov.il/files/12/490/056/c02/12056490.c02.pdf.

[126] *Fahima Hamdan*, ibid 4. As a matter of policy, Israel generally prohibits Israelis from visiting family relatives who live in the Gaza Strip, except in extreme cases. This practice was approved by the HCJ, despite its grave breaches of the citizens' constitutional right to family life: HCJ 7235/09 *Hamoked Center for the Defense of the Individual v Commander of the Southern Command* (unpublished, 16 September 2009), http://elyon1.court.gov.il/files/09/350/072/o03/09072350.o03.pdf.

though the government policy has no bearing on the desolate reality faced by Gaza residents, which is perceived as a natural result of life in Gaza.

The second, complementing, point is that while rejecting petitions, the courts have on occasion indicated that a change of the policy is warranted, be it in order to provide relief for Gaza residents or to confront problems that arose with specific provisions in the procedures. However, these statements have hardly ever changed the courts' final position that the policy in its present form is lawful, and that the petition should be dismissed.[127]

For example, while deliberating the ban on marathon runners from leaving Gaza, Justice Barak-Erez suggested that the policy was arbitrary and noted that 'it would be good if the respondents consider broadening this exception to other sports fields in the same vein'.[128] Similarly, when considering the procedure that almost entirely prohibits the 'settlement' of Gaza residents in the West Bank, the HCJ implied that the procedure was too narrow and even harmful. Despite this, the Court dismissed the case. President Beinisch stated: 'We assume that this policy will be examined from time to time … and to the extent that it will be possible to establish facilitating measures in these aspects, the respondents will act accordingly'.[129] In addition, the HCJ dismissed the petition in *Abu-Daka* despite its insinuations that the provisions of the relevant procedure were too narrow and almost impossible to comply with. At the conclusion of his judgment, Justice Rubinstein called on the state to remove, to the greatest extent possible, 'technical-procedural' barriers in the implementation of the procedure.[130]

Only in *Azat*, concerning the refusal to allow Gazans to study in the West Bank, was Justice Rubinstein of the view that the policy should be changed and even issued a decisive ruling in this vein. He held that the government was compelled to establish an 'exception committee' where individual requests to leave Gaza for study purposes could be examined.[131] Unfortunately, Justice Rubinstein was in the minority. The two other justices held that the policy was lawful. They reiterated the Court's conventional view – that Gaza residents are foreign residents; that the governmental policy is legitimate, even if based on political considerations of 'separation' between the two areas; and that academic studies are not a 'humanitarian' need. Thus, *Azat* joined hundreds of previous and future rulings in which the Israeli legal position towards Gaza residents was endorsed wholeheartedly.

4. A CRITICAL ANALYSIS OF ISRAEL'S LEGAL POSITION TOWARDS GAZA RESIDENTS

The position of the Israeli government, which has taken a steady hold in Israeli courts, is both misleading and legally erroneous. It is misleading for two main reasons. First, it stands in

[127] eg, *Hamoked* (n 25) 19–20; *Association of Foreign Reporters* (n 72); *Abu-Sardane* (n 106) 3 (in which, despite dismissing the petition, the HCJ called on the state to review its decision with regard to the specific petitioners).
[128] *Masri* (n 102) 4. For a critical review of this judgment see Diamond (n 50).
[129] *Hamoked* (n 25) 19–20.
[130] *Abu-Daka* (n 120) 20.
[131] *Azat* (n 53) paras 18–19 (Justice Rubinstein).

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

stark contrast to the reality of Israel's control over the daily lives of Gaza residents. This control, and the restrictive measures that Israel has applied towards Gaza residents pursuant to it, has even led Israel to refer on occasion to Gaza residents as 'special residents' rather than purely 'foreign', thus subjecting them to a 'special' legal arrangement, the content of which is unknown. Second, it contradicts Israel's practice regarding movement, which, to date, is far more lenient than strictly fulfilling 'basic humanitarian needs'. Israel deliberately maintains a narrow legal position de jure, while in practice allowing the entry of Gaza residents to Israel or the West Bank on many occasions.

In addition, Israel's position is legally flawed. It is incompatible with the provisions and objective of IHL, and it sets an even lower standard of protection than that established in *Al-Bassiouni*. Consequently, it creates a normative gap and a fundamental vacuum in the protection afforded to Gaza residents. The present section demonstrates these flaws.

4.1. ISRAEL'S POSITION CONTRADICTS THE REALITY OF CONTROL

Defining the residents of Gaza as 'foreigners', like any other foreign national, is irreconcilable with the fact that Israel maintains a high degree of control over their lives. Contrary to its relations with residents of other states or foreign entities, Israel maintains daily contact with Gaza residents. As mentioned above, Israel *completely controls* the movement of Gaza residents to the West Bank and abroad, given that the Rafah crossing (which is under Egyptian control) has, to date, almost always remained closed. Therefore, Gaza residents have no choice but to seek Israel's permission to pass through or enter its territory in order to fulfil any needs related to movement outside Gaza.

Israel also *completely controls* the entry of goods, of all kinds, to Gaza. To date, the Rafah crossing is not designed for the passage of goods and, therefore, every item required by Gaza residents for their livelihood arrives through Israel and must receive its prior approval. In addition, Gaza residents continue to depend on Israel for the supply of critical infrastructure: as of June 2017 Israel was selling to Gaza 70 per cent of its consumed electricity,[132] as well as close to 10 million cubic metres of water per year.[133] Israel also oversees all the fuel, gas, and construction materials that enter Gaza.[134] Accordingly, even if Gaza residents were to attempt to develop independent capacities for creating electricity, desalination plants and so forth, they would still require Israel's approval to bring into Gaza the required equipment, such as water pumps and solar panels.

[132] Until June 2017, Israel sold Gaza 120 megawatts through ten electricity lines: Gisha, 'Hand on the Switch', January 2017, 3–9, http://gisha.org/UserFiles/File/publications/infrastructure/Hand_on_the_Switch-EN.pdf. On 11 June 2017, Israel's Security Cabinet decided to cut 40 per cent of this amount, which means that Israel supplied Gaza with only 70 megawatts, seven from each line: Samuel Osborne, 'Israel Cuts Power Supply to Gaza Strip as Palestinian Authority pressures Hamas', *Independent* 13 June 2017, http://www.independent.co.uk/news/world/middle-east/israel-gaza-strip-power-cuts-palestinian-authority-hamas-settlements-a7787916.html.

[133] Jack Khouri, 'Israel to Double Amount of Water Supplied to Gaza', *Ha'aretz*, 4 March 2015, https://www.haaretz.com/israel-to-double-amount-of-water-supplied-to-gaza-1.5332185.

[134] For an analysis of Israel's control over construction projects in Gaza, see Bashi (n 53) 161–64.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

Israel continues to oversee the taxation system in Gaza and, despite the 'Disengagement', maintains control over the allocation of communication frequencies in the area.[135] In addition, and as mentioned, it determines the goods that Gazans may export to the West Bank, how many truckloads of crops may leave Gaza each week, and which 'foreigners' may enter Gaza. Israel further controls mail and money transfers to Gaza by thoroughly examining each and every transfer.[136] Moreover, Israel continues to apply a maritime blockade over Gaza and has established a 300-metre wide 'no-go' area within Gaza, along its border with Israel, enforced through the use of live ammunition.[137]

Indeed, as is evidenced, Israel's control over major aspects of life in Gaza did not end with the 'Disengagement', nor was this Israel's intention.[138] In fact, over the past decade, Israel's control over Gaza has increased. For example, in 2015 Israel greatly expanded the list of civilian goods that may not enter Gaza without special prior permit[139] and further tightened its supervision on the daily contacts between Gaza residents and Hamas authorities within the Gaza Strip.[140]

Recently, not only has Israel started to conduct security 'talks' with practically every Gaza resident who wishes to obtain an exit permit[141] (including minors, the elderly and the sick), it has even started to demand that every such resident provide his or her cell phone to the Israeli authorities in the course of such 'talks' so that they may search the phone for personal data.[142] Cooperation with these demands is non-negotiable. Those who arrive for 'talks' and disclose the required information can expect to receive the desired permit. Those who refuse to cooperate will certainly be denied their requests and will thus remain 'trapped' in Gaza, possibly for years.

---

[135] Gisha (n 132) 7, 17–19.

[136] COGAT, 'Procedure for the Coordination of Transfer of Cash between the Palestinian Authority Territories and Israel or Overseas', April 2015, http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/108.pdf (in Hebrew).

[137] Israeli military forces are stationed all along the land and maritime borders of Gaza and can thus shoot live ammunition on persons who cross beyond the authorised area. The incidents of March and April 2018, in which dozens of Gazans were shot dead during protests in Gaza in proximity to the border with Israel, illustrate this element of control: Isabel Kershner and Iyad Abuheweila, 'Israeli Military Kills 15 Palestinians in Confrontations on Gaza Border', *The New York Times*, 30 March, 2018, https://www.nytimes.com/2018/03/30/world/middleeast/gaza-israel-protest-clashes.html; 'Israeli Navy Shoots Gaza Fisherman Dead', *Al Jazeera*, 15 May 2017, http://www.aljazeera.com/news/2017/05/israeli-navy-shoots-gaza-fisherman-dead-170515191205958.html.

[138] Israel did not declare that with its withdrawal from Gaza it would relinquish its control over the area. On the contrary, continuous Israeli control is embedded in the 'Disengagement' Plan. Gross rightly argues that Israel sought to end the discussion about control, rather than to end the control itself: Gross (n 46) 205–26.

[139] Defense Export Control Order (n 62) (last amended on November 2015).

[140] eg, *Shber*, discussed below (n 162 and onwards).

[141] These security 'talks' are essentially investigations of Gaza residents who are being summoned to Erez crossing for this special purpose, or who happen to cross the border on that day. They are conducted by Israel Security Agency investigators: Jen Marlowe, 'In Gaza, Medical Permits Linked to Intelligence Gathering', *Al Jazeera America*, 19 November 2015, http://america.aljazeera.com/articles/2015/11/19/medical-permits-tied-to-intelligence-gathering.html; Amira Hass, 'Shabak has Increased Investigations of Traders and Businessman from Gaza to Gather Information', *Ha'aretz*, 29 January 2016, https://www.haaretz.co.il/news/politics/.premium-1.2834058 (in Hebrew).

[142] Jack Khoury, 'Israel Barring Palestinians from Entering for Medical Care over Cellphones, Witnesses Say', *Ha'aretz*, 23 February 2017, https://www.haaretz.com/middle-east-news/palestinians/israel-barring-palestinians-from-entering-for-medical-care-over-cellphones-witnesses-say-1.5440483.

In such a situation, of an extensive and prolonged control over many elements of life in Gaza, one cannot seriously maintain that Gaza residents are mere 'foreign residents' in their relations with Israel. Their dependence on Israel to provide their needs, and the massive supervision and influence that Israel maintains over their lives are far from the typical relationship between 'foreigners' and any particular country. Indeed, there is no other state or territorial entity over which Israel maintains so much control; Israel controls Gaza's internal affairs, the movement of its people and the movements of goods to and from it (except from the West Bank, of course). Absurdly, Israel's control over Gaza is, to a certain extent, stricter than the control it maintains over areas A and B of the West Bank, which are still largely considered, even by Israel, as occupied.[143]

Israel's control over Gaza is a matter of fact. It is impossible to dispute its existence or its accumulative effect. Even if one were to contend that all forms of control exercised by Israel result from the latter's security needs, this is hardly a relevant point, as the motivation of a given state's control cannot serve to absolve it from subsequent legal responsibility. In addition, even if it is argued that such control does not amount to 'effective control' and thus to belligerent occupation, it is still implausible to argue that Gaza residents are mere 'foreigners' in view of the comprehensive control that Israel exercises over their lives. Indeed, the many elements of the control described above are far more typical of relations between an occupying power and occupied residents than anything else.

The unbridgeable gap between Israel's minimalistic legal position towards Gaza residents and the reality of its extensive control over their lives has led to several absurd situations. In these situations, Israel has been confronted with the inherent tension between its desire to exercise restrictive measures on Gaza residents on the one hand, and its desire to conceive them as 'foreigners' on the other. Below I describe two examples of this.

4.1.1. THE CASE OF *A*

First, in *A* (2011) the HCJ deliberated on the government's decision to prevent a Gaza resident, who was present in Israel lawfully, from returning home. This decision was grounded allegedly in both Israel's security and the petitioner's safety.[144] The petitioner's arguments were quite straightforward: he claimed that the order banning his return home was issued ultra vires, as he was not an Israeli citizen but a person who had merely visited Israel lawfully and temporarily under a visiting permit.[145] He further claimed that as a 'protected person' living under Israeli

[143] The Oslo Accords determined that despite the transfer of certain responsibilities to the Palestinian Authority, the Israeli Military Commander would retain residual authority over the entire area: Israel Ministry of Foreign Affairs, Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, art VIII, https://goo.gl/LRPjof. For more details and a commentary on the legal status of the West Bank following the Oslo Accords, see Gross (n 46) 181–204.

[144] Case of *A*, State Response (n 9) 38.

[145] Case of *A* (n 9) Amended Petition (unpublished, 30 January 2011) paras 77–111.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

occupation, his freedom of movement should be protected,[146] and that according to applicable IHRL he had a right to return to his own country and family.[147]

Surprisingly, the government justified the restrictions on the petitioner's freedom of movement by claiming that he was not a 'regular' foreign national. In its response to the petition the government argued:[148]

> The relationship between the (Gaza strip) residents and Israel is not like the relations between nationals of a 'foreign state' and Israel. Gaza residents who enter Israel are not 'tourists', in the simple sense of this term … they enter Israel for purposes other than 'tourism' and the rules that should apply to them are different rules.

And:[149]

> These are not regular 'tourists', but rather a population with which [Israel's] contact is on a daily basis. In light of the *unique characteristics* which stand at the basis of the relations between the State of Israel and the Palestinian residents … *different arrangements* were established with regard to their entrance to Israel.

Indeed, in stark contrast to its consistent view and rhetoric proclaimed in other petitions, here the government claimed that Gaza residents were actually not foreign nationals, but rather people who had routine contact with the state. The government further contended that this fact warranted that Gazans be subject to different treatment with respect to their movement. According to the government, Gaza residents were 'people whose affinity to Israel is *totally different* and therefore it is essential that they may be held in Israel'.[150]

This assertion raises the following question. If the relationship between Gaza residents and Israel is so ordinary and their affinity with Israel so different compared with that of the everyday 'tourist', how is it possible to regard them continuously as strictly 'foreign' in other cases? Moreover, if they have a 'unique' status in the eyes of Israel, how can one justify the restrictive treatment to which they are subject, while contending that Israel's discretion is absolute? In other words, how is it that this admitted special linkage with Israel serves merely as grounds for expanding Israel's *authority* over Gaza residents, but not for increasing its *obligations* towards them?

Apart from defining Gaza residents as 'not regular tourists', the government made two interesting doctrinal assertions in this case. First, it reiterated its well-known position regarding the inapplicability of the law of occupation in the Gaza situation, emphasising that there is no de jure or de facto occupation.[151] Second, the government rejected the applicability of IHRL to

[146] ibid paras 182–205.
[147] ibid paras 206–23.
[148] Case of *A* (n 9) State Response to the Amended Petition (unpublished, 7 February 2011) para 36.
[149] ibid para 40 (emphasis added).
[150] ibid para 41 (emphasis added).
[151] Case of *A*, State Response (n 9) para 55.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

the present situation seeing as, in its view, the LoAC constitutes *lex specialis* and thus supersedes them.[152] It further claimed that since the petitioner was a national of a party to an armed conflict with Israel, 'the actions against *people of his kind*' are governed (exclusively) by the LoAC, even if such actions were carried out within Israel and had no linkage whatsoever with any ongoing military conflict.[153]

The HCJ accepted the government's arguments unquestionably, despite this being clearly contradictory to previous rulings concerning the status of Gaza residents. Although the Court had previously referred to the situation in the Gaza Strip as *sui generis*, 'unique' and 'complex',[154] this was the first time the Court defined the residents themselves as 'special' in their legal status vis-à-vis Israel.[155] Justice Rubinstein stated that:[156]

> [T]he residents of Judea, Samaria and Gaza are not, for the purpose of security issues, 'regular' tourists. Indeed … certainly Gaza residents may be considered foreign by Israel … but this is a '*sui generis*' kind of foreignness, a *special foreignness*, and therefore it is not identical to the foreignness of 'regular' tourists.

On the basis of this 'special foreignness' of Gaza residents, the Court ruled that the government had assumed an authority to prevent the petitioner from returning to his home in Gaza. However, the Court neglected to elaborate further on the substance of this newly concocted status for Gaza residents. What were its characteristics and scope? What were the government's subsequent legal obligations towards such 'special foreigners'? All of these important questions were apparently deemed unimportant by the Court.[157]

The overwhelming conclusion stemming from this case is that Gaza residents are subject to a severe normative gap when it comes to their status in relation to Israel: they are not 'protected persons' because the Israeli occupation is apparently over; they are not entitled to universal human rights since IHRL does not apply; and they do not even enjoy the basic rights emanating from being 'foreigners', as their right to return home is also restricted.

---

[152] ibid 79. Such a claim distorts and makes both erroneous and cynical use of the *lex specialis* doctrine, which is designed to promote IHRL purposes by applying its norms to the greatest extent possible, alongside the LoAC: Ben-Naftali and Shany (n 9) 56.

[153] Case of *A*, State Response (n 9) para 79 (emphasis added).

[154] *Osama Hamdan* (n 17) ('It is obvious that the law is not in the center of the circumstances, which are unique, *sui generis* in every sense of the word'); *Azat* (n 53) para 17 (Justice Rubinstein) ('The situation of Israel vis-à-vis the Palestinians … in Gaza is not "normal", and it has complexity and uniqueness'). See also Gross (n 46) 223.

[155] Interestingly, the HCJ in the past had opposed the granting of 'special status' to other groups of persons in light of the vague content of such statuses: see, eg, HCJ 282/88 *Mubarak Awad v The Prime Minister and Others* 1988 PD 42(2) 424, para 9 (where President Barak ruled that one should prefer interpretation to legislation which 'prevents the existence of legal "holes" and advances equality'). The Court repeated this statement in AdminA 5829/05 *Salah Dari and Others v Ministry of Interior* (unpublished, 20 September 2007), http://elyon1.Court.gov.il/files/05/290/058/Z19/05058290.z19.pdf.

[156] Case of *A* (n 9) para 20 (emphasis added).

[157] It should be noted that commensurate with the government's own arguments, the Court did not refer at all in this case to Israel's 'humanitarian duties' towards Gaza residents.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

If one is to take Israel's view seriously then, Gaza residents are 'special residents' who are subjected exclusively and personally to the LoAC.[158] These laws follow them at all times, even when they leave Gaza and even when they are residing within Israel lawfully. This application of the LoAC is completely one-sided in its nature: it neither affords Gaza residents any rights nor imposes on Israel any duties. Rather, this Israeli legal construction functions merely as a licence for Israel to impose on Gaza residents whatever restrictions it deems fit.

Interestingly, when the case was brought for an additional hearing, it seems that the Court attempted to mitigate the broad repercussions of the judgment. Justice Rivlin expressed doubts as to Justice Rubinstein's principle statement that Gaza residents fall into a 'special category'. He emphasised that the result in the case could have been reached without this reasoning, as evidenced by the fact that the two other justices had not referred to this point at all.[159]

4.1.2. THE *SHBER* CASE

The second example comes from the criminal field. For many years, and even following the 'Disengagement', Gaza residents who were engaged in terrorist activity or other security-related offences have been arrested and subsequently either prosecuted or administratively detained in Israel.[160] In recent years, however, Israel has toughened its prosecutorial policy and started to prosecute Gaza residents even for engaging in mere civil and economic contact with Hamas officials. This policy, a particular manifestation of which is described below, in my view discloses Israel's genuine position towards Gaza residents and reveals the magnitude of the control it seeks to establish over their lives.

In *Shber* (2015) Israel arrested and prosecuted a Gaza resident, the owner of an electricity shop in Gaza City, for selling electric cables to Hamas officials as part of his daily work. He was charged, inter alia, with 'providing services to an illegal association' – an offence punishable by as much as ten years' imprisonment.[161] At his remand hearing the state argued:[162]

> In between the lines one is led to understand that he claims that he had no choice but to sell to Hamas workers as well. The respondent will argue that the appellant had another choice, as he could have elected to waive the foreseeable profit and cease the importing of products which were suspected of being used by Hamas.

[158] Gross argues that in many aspects of Israel's policy (and rhetoric) towards Gaza, one can identify an attempt to shift from an 'occupation paradigm' to a 'belligerent paradigm': Gross (n 46) 235–47.
[159] Add.HCJ 2493/11 *A v Minister of Defense and Others* (unpublished, 18 May 2011), http://elyon1.Court.gov.il/files/11/930/024/04p/11024930.04p.pdf.
[160] As mentioned, Israel has retained the authority to arrest and detain Gaza residents following the 'Disengagement'. Such power is currently applied in a harsher manner than before the 'Disengagement': *A* (n 19).
[161] This was the penalty under the law that was in force at the time of the offence.
[162] Cited in Oth.CrimR 1780/15 *Abdelhakim Shber v The State of Israel* (unpublished, 23 March 2015), para 7, http://elyon1.Court.gov.il/files/15/800/017/w02/15017800.w02.pdf.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

It is apparent from this argument that, despite its rhetoric that Gaza residents are 'foreigners', the government nonetheless expects them to avoid making any contact (including of a civil/economic nature) with their local 'foreign' government. The state does not even distinguish between selling electric cables to Hamas as part of one's ordinary occupation and selling it munitions. Indeed, despite its declared estrangement from Gaza, the government demands that Gaza residents prefer its own interests over their own.

Justice Bitan of the Beer Sheva District Court apparently understood the problematic outcome of convicting Shber merely for selling regular products to Hamas, and so decided to partially acquit him, ruling that:[163]

> Hamas, its military and civil bodies including, is the sovereign that controls the Gaza Strip. It is the government. It is the army. It is the police. It is the municipalities. It is the health and education and welfare institutions, etc. And its institutions and various branches are quite important and meaningful clients for commerce and services in the Gaza Strip. Its exclusion and expulsion, in the internal economic context, by traders and businessmen of the Gaza Strip, is impossible … it is unacceptable to require the public to treat its own regime as an illegitimate body, and to criminalise economic contact with it.

Justice Bitan added that regardless of this, the extraterritorial application of Israeli penal law in this case was problematic. He emphasised that since Hamas was the apparent sovereign in Gaza, Israel should refrain from prosecuting Gazans for conduct that occurred entirely within the Gaza Strip when there was no clear proof that such action had been carried out specifically to harm Israel's security.[164]

The government decided to appeal against Shber's acquittal to the Supreme Court and defend its prosecutorial policy in relation to Gaza residents. It challenged Justice Bitan's statements and insisted on its right to prosecute Gazans for engaging in civilian contacts with the Hamas regime. To support its position it pointed to other cases, such as *Mashrahawi* (2016),[165] in which the District Court had found Gaza residents guilty of similar acts, such as selling electricity cables, light bulbs, telephone cables, agglomerates and diesel fuel to Hamas officials.

The very insistence by the state to prosecute Gaza residents in such situations demonstrates that Israel continues to perceive Gaza as a territory under its authority and its residents as subject to its supervision and command. It is difficult to reconcile Israel's strict demands of Gaza residents to serve Israel's own national interests with it labelling them 'foreign' residents. Indeed, if the residents of Gaza cannot maintain ordinary contact with the local authorities who are

[163] See CrimC (BS) 35009-01-15 *The State of Israel v Abdelhakim Shber* (unpublished, 6 September 2015), para 14.
[164] ibid para 16.
[165] CrimC (BS) 37117-02-15 *The State of Israel v Rihad Mashrahawi* (unpublished, 28 January 2016). This case was combined with *Shber* at the appellate level. For an additional conviction see CrimC (BS) 27227-02-15 *The State of Israel v Ahmad Tzaidi* (unpublished, 1 February 2016). For an additional acquittal see CrimC (BS) 27274-02-15 *The State of Israel v Awad Tzaidi* (unpublished, 27 May 2015).

responsible for their health, education, infrastructure and the like, without risk of prosecution by Israel, then this would suggest that Israel is conducting itself as the de facto sovereign of Gaza.

Moreover, the government insistence on appealing to the Supreme Court to try and reverse the District Court judgment in the *Shber* case indicates its complete lack of concern with publicly confirming this de facto control over Gaza. It further reflects its strong desire to maintain its control over Gaza residents with minimal interruption. The fact that such control blatantly contradicts its proclaimed position – that Gaza is no longer occupied and that its residents are mere 'foreigners'– does not strike the government as problematic.

The Supreme Court discussed both appeals together – the state's in *Shber* and the defendant's in *Mashrahawi* – as both raised similar legal questions regarding Israel's prosecutorial policy towards Gaza residents. Following a hearing in July 2016, during the course of which the Court expressed doubts concerning the state's broad prosecutorial policy,[166] Israel issued a new directive on the matter.[167] According to this directive, Israel would distinguish between different types of civilian contact with Hamas and, as a rule, will not prosecute Gaza residents for providing Hamas with services that are *de minimis* in their nature, value or availability.

In July 2017 the Court delivered its ruling on the case, in which it dismissed the state's appeal on Shber's acquittal, and accepted Mashrahawi's appeal on his conviction.[168] The Court ruled that in the unique and complex circumstances prevailing in Gaza, it is impossible to demand that Gaza residents abstain from contact with the Hamas regime. The Court stated:[169]

> The Gaza Strip is controlled by a government on behalf of Hamas. This entails that routine civil activities in the Gaza Strip may include contacts and engagements with Hamas, including commercial relations …We can assume that practically each and every one of the adult residents in the Gaza Strip will provide, during his lifetime, some kind of 'service' to the authorities in the Gaza Strip … merchants, taxi drivers, teachers, physicians – all might have daily contact with people who organically belong to Hamas … a norm which entails that the residents should abstain from engaging in relations with the authorities runs the risk of imposing on them a burden they will be unable to withstand.

The Court recalled that Gaza was not under Israeli sovereignty, and thus Israel should be cautious in applying its penal law to activities taking place there.[170] It added:[171]

> Despite the fact that IDF forces are no longer present in the Gaza Strip, Israel still maintains influence on some aspects of the activity conducted in that territory. This fact sometimes carries significance in

[166] CrimA 6434/16, 838/16 *The State of Israel v Abdelhakim Shber and Others* (unpublished, 4 July 2017), http://elyon1.court.gov.il/files/15/340/064/a23/15064340.a23.pdf (*Shber*); Protocol of the Hearing (unpublished, 6 July 2016).
[167] Israel, State's Attorney Directive No 2.30, 'Prosecution Policy of Gaza Residents for Providing Services or Supplying Needs to the Terror Organization Hamas', 5 February 2017, http://www.justice.gov.il/Units/StateAttorney/Guidelines/02.30.pdf.
[168] *Shber* (n 166) para 48.
[169] ibid para 68.
[170] ibid para 70.
[171] ibid para 67.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

> the sphere of international law … in other cases, such as in ours, it might carry significance at the domestic law level.

Based on these arguments as well as others, the Court dismissed the state's appeal and acquitted both residents of the offence of 'providing service to a terrorist organization'.[172]

To a certain extent, in this judgment the Supreme Court 'saved' the government from itself, by reminding it that if, as it claims vehemently, it was no longer occupying Gaza, then it could not sanction Gaza residents for maintaining contacts with the authority that, according to Israel's own claims, administers their lives on a daily basis. This judgment is a testament to both Israel's incessant efforts to maintain control over Gaza residents without bearing legal responsibility for it, and the Supreme Court's own efforts to uphold Israel's policy despite the obvious contradictions between policy and reality.

4.2. ISRAEL'S POSITION CONTRADICTS THE CURRENT DE FACTO MOVEMENT POLICY

Israel's rhetoric, whereby Gaza residents are 'foreign residents' whose entry into Israel should be allowed only in 'extreme humanitarian cases', has come to dominate Israel's policy papers and procedures. Accordingly, Israel has rejected many requests for movement in and out of Gaza, claiming that they were not sufficiently 'humanitarian'. Israeli courts have accepted this argument wholeheartedly and with little question. They have reiterated that the policy whereby movement is permitted only in humanitarian cases is legal and have refused to order that the state examine each request individually if it does not fit into one of the humanitarian categories.[173] In addition, they have almost never challenged the substance of what the state defines as 'humanitarian', even in cases where the justices intimated that they had doubts concerning the state's interpretation of this term.[174]

Nevertheless, in practice, in recent years the state has greatly expanded the criteria for movement of Gaza residents and, as of March 2018, allows their entrance to Israel even in cases that had previously been found by the courts not to be 'humanitarian'. These include academic studies in Israel and abroad;[175] visits to prisoners in Israel;[176] various sports events in the West Bank and abroad, and prayers in Jerusalem.[177] Israel has also recently introduced new criteria, such as consular interviews in Israel; conferences or events held by the Palestinian Authority in the West Bank; work meetings in the West Bank; children's recreational activities in Israel and professional training courses in the fields of agriculture and medicine.[178] On occasion Israel has

[172] ibid paras 94–95, 99.
[173] A good example is *Azat* (n 53) paras 3–4 (Justice Naor), paras 2–4 (Justice Zilbertal).
[174] *Abu-Daka* (n 120) para 18; *PHR* 5429/07 (n 18) para 6(5)(b).
[175] Studies in the West Bank are still prohibited: see text to n 91.
[176] See text to n 87.
[177] See text to n 89; COGAT, 'Procedure for the Exit of Palestinians Residents of the Gaza Strip to Prayers in Al-Aqsa Mosque on Fridays', February 2015, https://goo.gl/gFUwn2 (in Hebrew).
[178] See COGAT, Permission Status (n 64).

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

even been willing to examine and approve requests that did not fall into any established criteria at all.[179]

When confronted with this gap between the professed 'humanitarian only' policy and the far broader de facto practice, Israel has referred to its wide discretion to choose whatever policy it wishes vis-à-vis Gaza residents. It has argued that these additional criteria or permits, which have been provided as a mere privilege, do not change the crux of the policy, which is to minimise the movement of Gaza residents.[180]

The HCJ discussed this issue in *Azat*, in which the petitioners claimed that since Israel could and in practice did review individual requests for various causes, it could review such requests made by students. Justice Rubinstein, who five years earlier, in *Hamdan*, had approved the uniform ban on the exit of students, was convinced this time that the state's position was too rigid. He stated that in view of the apparent widening of the criteria, the state was required to begin reviewing individual student's requests. He noted:[181]

> This Court did not see fit, throughout the years, to judicially intervene in the respondents' policy with absolute decrees … however, not once have the Court's remarks as well as the dialogue it has conducted with the respondents, be this through oral deliberations or written recommendations appearing in its decisions, helped cause some change in one direction or another … Moreover, regardless of the Court … due to various considerations, some humanitarian, some political and some combined, the respondents have significantly expanded the leeway for entry into Israel.

He added:[182]

> The question is whether it is possible to determine, based on the policy of the respondents themselves, as was detailed, and due to the variety of existing possibilities, the need for an exception committee. I believe that, at the end of the day, the answer is positive. I emphasise: seeing as the respondents themselves, as is made clear in their statements, declare that all requests are examined and not merely humanitarian cases in the narrow sense, and since in the many categories there might be exceptions, it is appropriate within the framework of administrative law to establish an orderly exceptions committee.

To the best of my knowledge, to date Justice Rubinstein is the only Supreme Court justice to have pointed to the contradiction between Israel's narrow legal position on Gaza residents and its wide

[179] These cases included movement of Gaza residents who were workers with Israeli NGOs and undergraduate students: see AdminC (BS) 19657-08-13 *B'tselem – The Israeli Information Center and Others v Minister of Defense and Others* (unpublished, 28 January 2014), http://www.gisha.org/UserFiles/File/LegalDocuments/19657-08-13/verdict_complete.pdf. For a critical analysis of this practice see Bashi (n 53) 161.

[180] *Taia* (n 58) 5, 28, 31, 41–43; *B'tselem*, ibid, Complementing Response by the State (unpublished, 17 September 2013), paras 10–11, 16–19, 31–32, http://www.gisha.org/UserFiles/File/LegalDocuments/19657-08-13/state_answer_17.9.13.pdf; HCJ 5711/17 *Tzafia Raduan and Others v Minister of Defense*, Preliminary Response by the State (unpublished, 25 July 2017), paras 24, 28, 32–35, 38–39, http://gisha.org/UserFiles/File/LegalDocuments/5911-17/state.response.pdf.

[181] *Azat* (n 53) para 13 (Justice Rubinstein).

[182] ibid para 18.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

policy in practice, and to have formulated a judgment demanding changes in this policy.[183] Unfortunately, his opinion in *Azat* was in the minority. Justices Naor and Zilbertal maintained the conventional position and stated briefly that the list of criteria, humanitarian and others, is in itself an exception to the general policy, and that therefore Israel should not be obliged to broaden it any further.[184]

It is impossible to reconcile the definition of Gaza residents as mere foreign residents who may leave Gaza only in humanitarian cases, with the articulation of a permissive policy, according to which these residents can enter Israel for a myriad of reasons. Even if Israel views the expansion of the criteria as merely a manifestation of its sovereign prerogative or a gesture of goodwill, it cannot change the simple fact that there are no other foreign nationals who receive similar gestures from Israel. There are no other foreign residents who may enter Israel on the basis of such a lengthy list of criteria. Call it what you wish, this expansion is derived from Israel's understanding that Gaza residents have a unique and unavoidable connection with Israel and the West Bank, or, in other words, that they are not truly 'foreign'. Therefore, I contend that Israel has a particular duty to enable their movement to these territories and abroad.

How can the gap be explained between Israel's stated opinion with regard to the status of Gaza residents and its de facto ever expanding control over their lives, liberty and movement? Obviously Israel wishes to retain the greatest deal of control over Gaza, without having to pay the legal price attached to this control. In order to exercise its control effectively, and in order to be free to change its policies towards Gaza at will – according to its political, national and international interests – Israel must minimise as much as possible its legal obligations in relation to the residents of Gaza. Labelling such persons as 'foreigners' enables just this: it allows Israel to act freely towards Gaza while exempting itself from all meaningful legal liabilities.

4.3. Israel's Position is Incompatible with International Humanitarian Law

As described above, Israel's stated legal position regarding Gaza residents is that they do not enjoy the protection of either the law of occupation or IHRL. Israel further contends that following the 'Disengagement', it ceased 'effectively' to control Gaza and thus the only branch of international law which continues to apply to this territory is the LoAC, albeit a very narrow application thereof. It is my view that such a position is illegal under IHL, given the purposes and actual provisions of this legal framework.

One of the main goals of IHL, which is at the core of its customary principles and conventions, is to ensure the protection of civilians who do not participate in the hostilities or find

[183] During the discussion in *B'tselem* (n 179), Justice Netzer of the Beer Sheva District Court issued a decision stating: 'It is unreasonable in my view, that the same administrative authority that, on the one hand, claims that the entrance to Israel from the Gaza Strip can be approved only on humanitarian grounds, will approve requests which are undoubtedly not of humanitarian nature': see Protocol of the Hearing (unpublished, 15 August 2013) 4, http://www.gisha.org/UserFiles/File/LegalDocuments/19657-08-13/protocol.pdf. However, Justice Netzer later decided to dismiss the case.

[184] *Azat* (n 53) Justices Naor and Zilbertal.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

themselves under foreign rule.[185] IHL regards these situations, and specifically foreign occupation, as exceptional and extreme since they deviate from the ordinary state of affairs of sovereign states, living side by side in peace.[186] In these situations, the assumption is that the regular protection of the rights and interests of civilians is undermined, if not altogether denied. Therefore, states are obligated to respect and protect the civilians subject to their control.

In order to enhance the protection of civilians in times of armed conflict and foreign rule, and to prevent states from exempting themselves from the auspices of the law, the applicability of IHL (and IHRL) is broadly defined and based on factual parameters. For example, Article 42 of the Hague Regulations establishes a factual test of *control* for the existence of occupation[187] and, as mentioned, many legal sources suggest that even potential control may suffice.[188] Some suggest adopting a functional approach towards occupation, in order to ensure and enhance the protection of civilians in unique situations of partial foreign control.[189]

Similarly, in IHRL the common view is that human rights conventions apply not only within states' sovereign territories, but also wherever they exercise jurisdiction.[190] Here, too, a functional approach has been suggested in order to prevent states from abusing the law to escape legal accountability.[191]

Indeed, if states were to choose for themselves which provisions (or bodies of law) apply in each situation, the affected civilians would be likely to find themselves in a dire state of legal deficit, or even a legal vacuum, in the level of protection that should be afforded to them.[192] Such legal 'black holes' are particularly forbidden in IHL, as this body of law seeks to define exactly the rights and obligations in each situation, as well as the legal status of each person

[185] Benvenisti (n 28) 1; Orna Ben-Naftali and Yuval Shany, *International Law between War and Peace* (Ramot Publications, Tel Aviv University 2006) 115–20; *PHR Cast Lead* (n 25); HCJ 3451/02 *Mohammed Almadani and Others v Minister of Defense and Others* 2002 PD 56(3) 30, http://elyon1.Court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf (in English).

[186] Ben-Naftali (n 122) 538–39; Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551, 554, 606–08.

[187] Hague Regulations (n 4) art 42; Eyal Benvenisti, 'Water Conflicts during the Occupation of Iraq' (2003) 97 *American Journal of International Law* 860, 861.

[188] nn 41–44.

[189] nn 46–50.

[190] HRC, General Comment 31 – Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), UN Doc CCPR/C/21/Rev.1/Add.13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion [2004] ICJ Rep 136, [180]; ECtHR, *Al-Skeini and Others v United Kingdom*, App no 55721/07, Judgment, 7 July 2011.

[191] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) *Law and Ethics of Human Rights* 47; Noam Lubell, 'Human Rights in Military Occupations' (2012) 94 *International Review of the Red Cross* 317.

[192] ECtHR, *Cyprus v Turkey*, App no 25781/94, Judgment, 10 May 2001, para 78 (in which it was stated that finding Turkey irresponsible for human rights violations in Northern Cyprus 'would result in a regrettable vacuum in the system of human rights protection … by removing from individuals there the benefit of the Convention's fundamental safeguards'). See also Ben-Naftali and Shany (n 185) 24, 46, 80; Shany (n 28) 377; Israeli Experts' Opinion (n 23) 6; Ben-Naftali, Gross and Michaeli (n 186) 612; Scobbie (n 38) 30.

involved in an armed conflict.[193] For instance, according to the accepted interpretation of the LoAC, no person should be in an intermediate status between a 'combatant' and a 'civilian'.[194]

In view of the above, it is clear that Israel's position – according to which Gaza residents are foreign residents despite its continuous (factual) control over many aspects of their lives – is contrary to the purpose of international law. It is a precise manifestation of IHL's 'worst nightmare': a state which abuses IHL provisions to exempt itself from legal responsibility, while still maintaining control and exercising jurisdiction over civilians who are not its citizens.[195]

Israel's legal position towards the residents of Gaza creates an unacceptable legal vacuum, or at the very least a legal lacuna, with regard to the protection afforded to the rights of Gaza residents. This vacuum cannot be filled with the LoAC alone. This branch of law is naturally focused on the rights and interests of the belligerent parties, and the protection it affords to the civilians caught in between is narrow and limited in scope. For example, the LoAC merely obligates the belligerent parties to ensure the passage of humanitarian goods to civilians of the enemy.[196] Applying only these provisions in the context of Gaza would mean that Gaza residents are not entitled to receive, through Israeli territory, anything other than what is required for their physical survival. Such a conclusion is absolutely unthinkable in the present reality, in which Gaza is under a decade-long Israeli siege and is populated by more than two million people. Indeed, the LoAC was not designed for such prolonged and unique armed conflict and it is insufficient to ensure the residents' appropriate standard of living.

The LoAC might have had the potential to suffice were Israel to interpret its provisions widely and dynamically, in view of the unique characteristic of its conflict with Hamas, which is embedded with substantial control over Gaza. However, not only has Israel refused to provide such an interpretation, it has failed altogether in prescribing any vision with respect to how this branch of law should be applied in relation to Gaza residents in ordinary times (and not during the course of a military operation). As mentioned, Israel has stated only that it is obligated to ensure the 'basic humanitarian needs' of Gaza residents, without elaborating further on what this entails.

[193] Shany claims that despite the dichotomy that characterises IHL, this body of law still suffers from ambiguity and duality in its terms and provisions. Partly because many of its provisions were drafted a hundred years ago, it is contended there is a gap between the written legal reality and the factual reality. This gap may lead each belligerent party to choose the interpretation which best suits its interests, often at the expense of human rights: Shany (n 5) 73–75, 80–83; Ben-Naftali (n 122) 535, 537–42; Eitan Diamond, 'Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power' (2010) 43 *Israel Law Review* 414.

[194] Oscar Uhler and Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949, Vol IV* (ICRC 1950) 51. The question of the existence of a third category of 'illegal combatants' has risen in the context of targeted killings of terrorist group forces as well as their arrest in Guantánamo, for instance: see *Extra-Judicial Killings* (n 16) para 28 (President Barak); Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87 *International Review of the Red Cross* 39, 48–49; Johan Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1.

[195] Gross (n 1); Maurer (2014) (n 38) 177.

[196] Fourth Geneva Convention (n 44) art 23; 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, arts 54, 70.

Under these circumstances, I agree with the call to apply IHRL concurrently with the law of occupation, albeit in a functional manner, with regard to the Gazan situation, as Gaza residents cannot be protected solely by the provisions of the LoAC for such a lengthy period of time. The failure to apply central provisions and rights enshrined in IHRL and the law of occupation leads to a severe legal vacuum, or at least a legal lacuna, in their protection. This result is contrary to the most basic and fundamental principles of IHL.

4.4. THE ISRAELI GOVERNMENT'S POSITION IS INCONSISTENT WITH *AL-BASSIOUNI*

Last but not least, I point to the contradiction between the government's current legal position and practice towards Gaza residents and the opinion it expressed in *Al-Bassiouni*, which was accepted by the Court. Not only has the state failed to meet the already-low threshold established in this case, in recent years it has even openly disavowed the main assertion in *Al-Bassiouni* that Israel has *legal obligations* towards Gaza residents.

As one will recall, in *Al-Bassiouni* the HCJ ruled that although Israel was no longer occupant in Gaza and that the 'entirety' of the law of occupation no longer applied, Israel still bore obligations vis-à-vis Gaza, which stemmed from 'the state of armed conflict …, the degree of control exercised by the State of Israel over the border crossings …, the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule'.[197] This determination was based on the state's position, as presented to the Court, according to which Israel recognised its obligation to ensure the minimum humanitarian needs of Gaza residents.[198]

A ruling that Israel bears *legal and positive duties* towards Gaza residents naturally means that such residents have *legal rights* vis-à-vis Israel, rather than mere privileges or graces. Indeed, according to the well-known Hohfeld analysis, a legal duty is always matched with a legal right, as these concepts are correlative to one another.[199] Similarly, declaring that a person is granted a mere privilege means that he or she has no right.

However, in the years since *Al-Bassiouni* the government has gravitated away from the normative determination of the Court. First, it declared that Gaza residents were 'foreign' residents devoid of any rights.[200] This statement clearly contradicts the position whereby Israel has specific obligations towards these people. After all, why would Israel be responsible for providing the humanitarian needs of complete strangers? Obviously the HCJ's assertion, according to which Israel bore legal obligations towards Gaza, was based on the fact that Gaza residents were more than mere foreigners, but rather of a different legal status (in view of the Israeli control and their long-lasting dependence on Israel). Describing Gaza residents as 'foreigners' renders this assertion meaningless.

[197] *Al-Bassiouni* (n 2) 12.
[198] *Al-Bassiouni*, Preliminary Response by the State (n 10) 37–57, 73, 79.
[199] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919) 36–38.
[200] nn 52 and 53.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

Secondly, the state has adopted a very restrictive view as to the normative source of its 'humanitarian duties'. It has consistently argued that its obligations stem only from the LoAC, thus ignoring two other branches of law alluded to in *Al-Bassiouni* – the law of occupation ('the degree of control') and post-occupation law ('the dependence of Gaza residents'). As one will recall, in *A* the government made it clear that, in its view, the only law applicable to its relationship with Gaza residents was the LoAC.[201] As far as Israel is concerned, then, the fact that Gaza residents are dependent (and have been for many years and will be for years to come) on Israel for water, electricity, construction materials and movement of all kind, is completely irrelevant in establishing the extent or nature of the legal duties the state bears towards them. Rather, the only relevant parameter is the ongoing state of armed conflict with Hamas.

Thirdly, and as mentioned, the government has consistently refused to explain what exactly its humanitarian obligations entail. Time and again it has repeated the phrase 'humanitarian duties' or 'basic humanitarian needs', while failing to clarify what this actually means.[202] At a certain point, it had become clear that for the purpose of movement out of Gaza, the government considered a case to be of 'humanitarian need' only if it involved life-saving medical care, attending a funeral or a wedding of a first-degree relative, or a visit to a first-degree relative who is terminally ill. 'Regular' family visits, visits to prisoners, prayers in holy places and movement of NGO workers, for instance, were not considered humanitarian.

One could argue that these determinations do not necessarily contradict *Al-Bassiouni* as they have simply introduced content to the general term of 'humanitarian duties' that the Court had established. However, it is worth remembering that the Court in *Al-Bassiouni* ruled that Israel bore 'humanitarian duties' in light of, inter alia, its control over Gaza's borders and the dependence created during many years of occupation. Hence, the interpretation that should be given to these 'humanitarian duties' is far broader than the current interpretation and is more appreciative of the control, the dependency and the changing needs of Gaza residents over time.[203] A policy that sweepingly denies, without reviewing individual requests, the unification of families torn between Gaza and the West Bank or receipt of medical care that is not 'life-saving', renders the word 'humanitarian' meaningless.[204]

Certainly, international law never foresaw such a terrible interpretation of the word 'humanitarian' in a situation where civilians are subjected to extensive foreign control. As in other cases, it seems that Israel has promoted its policy, inter alia, through a distorted interpretation and an improper application of the provisions of international law.[205] In this regard, Israel's public

[201] Case of *A*, State Response (n 9) 79.
[202] nn 25 and 26.
[203] This idea was also raised by Bashi (n 53) 166–67.
[204] The outcome is what the scholar James has described as 'a host of faulty legal arguments in support of Israeli action, creating, along with previous Israeli policies and positions, a maze of manufactured misconceptions, contorted logic, and obscured legal relationship with Gaza': James (n 14) 663.
[205] Darcy and Reynolds (n 14) 242–43; Ben-Naftali (n 122) 537–42. See also the words of former head of the International Law Department of the IDF, Daniel Reisner: 'What we are doing today is a revision of International Law, and if you do something long enough, then the world will accept it. The entirety of international law is based on the premise that an act which is forbidden today will become allowed, if enough states will carry

declarations that it meets its 'humanitarian duties' towards Gaza residents and attends to their 'basic humanitarian needs' is designed to fend off international criticism and portray itself as a law-abiding state.[206] However, a closer look reveals that not only has the exact content and scope of these 'duties' never been fully disclosed by Israel, the case-by-case interpretation that Israel has sought to provide to the term 'humanitarian' is a travesty.[207]

To add insult to injury, a recent new trend has emerged whereby Israel completely rejects the notion that it has *any* legal obligations towards Gaza residents, including those of a 'humanitarian' nature. This, of course, stands in stark contrast to the *Al-Bassiouni* ruling. In a number of responses to petitions filed by Gaza residents in recent times, Israel has stated that it has *no legal obligation* whatsoever towards Gaza, and that even entry permits in 'humanitarian' cases are a mere privilege rather than fulfilment of a duty.[208] This was argued also with regard to the entry of goods into Gaza.[209] For example, when asked about its decision to ban the entry of timber into Gaza, Israel responded that it had no legal obligation to allow this product into Gaza,[210] despite its obvious indispensability for civilian life.

Surprisingly, the more permissive Israel is with regard to the movement of Gaza residents (in a variety of situations) and to import and export from Gaza, the fewer legal obligations it is willing to take upon itself. I believe that Israel has opted for this approach in order to thwart international expectations or demands that it match legal responsibilities with the (massive) control and (profound) relations it has with Gaza residents. In other words, Israel has taken a 'preemptive' measure by predetermining that any permit or approval it grants should not be construed as a fulfilment of a duty but rather as an expression of an elected policy.

To conclude this section, the HCJ in *Al-Bassiouni* referred to the 'humanitarian obligations' that Israel bore in light of the specific situation that existed in Gaza at the time. Unfortunately, this situation continues to exist, and to some degree has even been exacerbated. Israel continues

out such an act … international law advances through violation', in Uri Blau and Yotam Feldman, '"Cast Lead" Operation: This is how the Military Advocacy Enabled the IDF to Win', *Ha'aretz*, 23 January 2009, https://www.haaretz.co.il/misc/1.1528798.

[206] Ariella Azoulay and Adi Ophir, *This Regime Which Is Not One – Occupation and Democracy between the Sea and the River (1967–)* (Resling 2011) 299 (in Hebrew). See also Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (Verso 2012) 81 (who argues that Israel's conduct can be described as a process of transformation from physical 'occupation' to 'humanitarian management').

[207] For example, in one of its procedures Israel demands that Gaza residents who need to enter Israel for a court hearing must prove not only the existence of the hearing but also that there are 'exceptional humanitarian circumstances' to justify entrance: COGAT, 'Procedure for Examining Entry Requests of Palestinians Living in Gaza for the Purpose of Conducting Legal Procedures within Israel', May 2013, https://goo.gl/qgt6X (in Hebrew). See also n 106 with regard to the settlement procedure (n 71); *Abu-Daka* (n 120); Gross and Feldman (n 77).

[208] HCJ 4974/17 *Jamila Masri v Coordinator of Government Activities in the Territories and Others*, Preliminary Response by the State (unpublished, 27 June 2017), para 25, http://gisha.org/UserFiles/File/LegalDocuments/4974-17/StateResponse_27.6.17.pdf; *Taia* (n 58); *Raduan* (n 180) 5, 28 and 32.

[209] See, eg, HCJ 3644/17 *Mohammed Sharif v Coordinator of Government Activities in the Territories and Others* Preliminary Response by the State (unpublished, 14 June 2017), para 3, http://gisha.org/UserFiles/File/LegalDocuments/petition3.5.17/StateResponse_14.6.17.pdf.

[210] COGAT, 'Call to Cancel the Ban on the Entrance of Timber Planks and Related Materials into the Gaza Strip' (response to a letter by Gisha), 16 December 2015, art 3, http://gisha.org/UserFiles/File/LegalDocuments/wood/cogat_response_16.12.2015.pdf (in Hebrew).

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

to control the border crossings, Gaza residents are no less dependent on Israel for basic infrastructure and goods (but rather more so), and the bloody conflict with Hamas goes on. Therefore, it is impossible to ignore either the *legal* humanitarian obligations that Israel bears towards Gaza or to interpret them narrowly. On the contrary, Israel's obligations towards Gaza residents should be given an expansive interpretation.

4.5. THE RESULT: A LEGAL GAP AND AMBIGUITY IN THE PROTECTION OF THE RIGHTS OF GAZA RESIDENTS

Israel's narrow legal position, described and criticised above, had led to a significant normative gap, if not an absolute normative vacuum, in the protection afforded to the rights of the residents of Gaza. In Israel's view these residents have no acquired right to enter Israel or receive goods of any kind required for their livelihood, nor are they entitled to any explanation with regard to Israel's elected policy towards them. Israel's decision to grant a permit in one case or another is always an utter privilege, given to Gaza residents *ex gratia*, not as a duty. Thus, they have no right to question the decision or to expect a similar result in the future.[211]

Despite the fact that Israel has not formally declared Gaza residents to be outside the law, and has been careful (at least until recently) to couch its position in terms of the LoAC and 'humanitarian duties', in practice it has applied and interpreted the law in such a way that a legal black hole is created, thus leaving Gaza residents outside the protection of the law.[212] These people suffer from the absence of a clear international legal status and are subject to a myriad of ever-changing terminologies.[213] This result is commensurate with Israel's description of the situation in Gaza as a whole as *sui generis*.

Absurdly, the bodies of law which are absent from the scene – namely, the law of occupation and IHRL – are designed precisely to mitigate the inherent imbalance between the controlling power and the civilians subject to its control. In their absence, Israel acts as it sees fit: while it enjoys both the benefits of a de facto occupying power and a de jure foreign and uninvolved neighbouring state, Gaza residents correspondingly enjoy neither the rights of 'protected persons' nor the status of citizens living in a sovereign independent state of their own. Indeed, this was precisely the result foreseen (and intended) by Israel as far back as the 'Disengagement' Plan:[214] subjecting Gaza residents to a legal limbo, thus allowing Israel to avoid international accountability for its harmful actions and, at the same time, to continue to advance its interests in Gaza.[215]

---

[211] *Azat* (n 53) para 4 (Justice Naor); *Issam Hamdan* (n 93).

[212] For a similar critique of the (non) legal system in Guantánamo, see Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16(4) *European Journal of International* Law 613; Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press 2013) 69–108.

[213] Indeed, legal ambiguity contributes to the creation of anomalous legal statuses, which deplete the law of its substance and foil its purpose, as we have seen with regard to the concocted status of 'special resident'.

[214] Darcy and Reynolds (n 14) 242; James (n 14) 663; Roy (n 11).

[215] Gross claims that this legal ambiguity constitutes in and of itself a means of control over Gaza residents: Gross (n 1), Gross (n 46) 204–06, 241. Shany, too, contends that in its policy towards Gaza Israel wishes to avoid, to the

The legal smokescreen[216] that Israel has cast upon the residents of Gaza is, of course, neither rare nor novel in the regional legal context.[217] Israel applies a similar legal strategy with regard to the Palestinians residing in the West Bank.[218] For fifty years it has maintained an intentional and institutional policy of ambiguity with regard to the application to this territory of the law of occupation and the Fourth Geneva Convention,[219] applying its provisions selectively in accordance with its changing interests.[220] According to several scholars, legal ambiguity has in fact become the trademark of Israel's occupation and control over the Occupied Palestinian Territories – its main feature and, ironically, the only constant variable thereof.[221]

The legal vacuum to which Gaza residents are subject cannot be fulfilled by other actors. Of course, Hamas, the Palestinian Authority and Egypt are very much responsible for protecting the rights of these residents (each in accordance with the type and extent of control it exercises over their lives). Accordingly, if the Palestinian Authority is responsible for the payment of salaries to employees in Gaza, it is obliged not to cut these wages disproportionately and thus impair the workers' ability to earn a living. Similarly, if Hamas is responsible for maintaining order and security in the Gaza Strip as well as for providing education, health, sanitation and transportation services to the residents, it must provide these services on a constant, orderly and egalitarian

greatest extent possible, the duties of an occupying power on the one hand, while at the same time continuing to control important aspects of life in Gaza on the other: Shany (n 5) 82–83; Scobbie (n 38) 30.

[216] James (n 14) 661; see also Darcy and Reynolds (n 14) 231.

[217] As Darcy and Reynolds correctly note, this behaviour is 'indicative of a legal culture of evasion and manipulation, rather than compliance': Darcy and Reynolds (n 14) 243. See also Gross (n 46) 223 ('The "sui generization" of Gaza is thus part of the "sui generization" of this occupation in general—its portrayal as simultaneously occupation and not occupation in order to enable the "pick and choose" regime').

[218] Of course, the strategies are somewhat different since towards the West Bank Israel still wishes to retain an 'occupation façade': Kretzmer (2002) (n 122) 197; Ben-Naftali, Gross and Michaeli (n 186) 611.

[219] Kreztmer (2002) (n 122) 33–41, 71, 197; Menachem Hofnung, *Israel – Security of the State against the Rule of Law: 1948–1991* (Nevo 1991) 281, 285–87 (in Hebrew). See also Akevot – Institute for Israeli-Palestinian Conflict Research, 'The Comay-Meron Cable Reveals Reasons for Israeli Position on Applicability of 4th Geneva Convention', http://akevot.org.il/article/comay-meron-cable/#popup/826e55c55c24e5916d77268cbcf2f9f8 (in Hebrew). While formally rejecting the application of the Geneva Convention, Israel declared it would *voluntarily* apply its 'humanitarian' provisions: Yehuda Zvi Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279; Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262. This legal ambiguity exists also with regard to the application of IHRL in the West Bank: Kretzmer (2012) (n 122) 211.

[220] Israel argues that some provisions of the law of occupation should be given a 'dynamic interpretation' in light of the unique characteristics of the Israeli occupation – including the temporal element, the security situation, and the interdependency of the areas. The HCJ has accepted this interpretive approach and, in doing so, has legitimised some of the most harmful actions taken against the Palestinians. For a critical analysis of this practice, see Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law' (2010) 43 *Israel Law Review* 514; Kretzmer (2012) (n 122) 216–26; Orna Ben-Naftali, 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and other Legal Pathologies' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 130, 176–77. Kretzmer (2002) (n 122) 58–72, 91–93, 111, 135 and 197 (arguing that this ambiguity has provided Israel with a convenient means of control). See also David Kretzmer, 'The Laws of Belligerent Occupation as a Control System: Dressing the Dispossession in a Distinguished Cover' in Daniel Bar-Tal and Izhak Schnell (eds), *The Impact of Lasting Occupation: Lessons from Israeli Society* (Oxford University Press 2013) 45, 46; Dinstein (n 23) 28–30.

[221] Ben-Naftali (n 122) 538; Ben-Naftali, Gross and Michaeli (n 186) 551, 556.

basis. In addition, since Egypt controls the Rafah crossing between it and the Gaza Strip, it has a legal duty to ensure the ongoing and regular operation of this crossing.

However, such actors cannot replace Israel with regard to its own independent responsibilities. Since certain governmental authorities in Gaza are exercised solely by Israel (mainly movement in and out of Gaza, the entry of goods and the supply of basic infrastructure), it is Israel that is under a legal obligation to execute them in accordance with the LoAC, the law of occupation, IHRL and, of course, Israeli administrative law. Other parties' obligations towards the residents of Gaza cannot reduce or vitiate Israel's own obligations towards them.

The result of Israel's deliberate policy is that Gaza residents are left with no governmental authority to turn to in order to fulfil some of their basic freedoms and rights – such as freedom of movement, the right to family life, the right to food and the right for an appropriate standard of living.[222] Given the nearly complete acceptance of this policy by the Israeli courts, legal redress is also almost unattainable for Gaza residents. They have thus become disenfranchised persons in the fullest sense of the term.

The writings of the philosopher Giorgio Agamben painfully correspond with Israel's policy towards Gaza residents and its devastating results. In his essay 'Homo Sacer' Agamben claims that we live in an age where the 'camp' – extermination camp, concentration camp and refugee camp – has become the 'hidden matrix' of modern politics. The life of the inhabitants of the camp is an 'exposed life': devoid of any rights, lacking legal protection, derelict by the arbitrary violence of the sovereign, when all that is left is their naked biological corporeality.[223]

Agamben's description of the 'camp' can sadly be analogous to the state of Gaza residents as of today. These residents, who are living in what may be called a camp or a closed prison, are bereft of fundamental rights, devoid of legal protection and deserted by the outer world. They are left alone to handle the violence and arbitrariness of Israel's actions towards them.[224] Azoulay and Ophir describe this situation remarkably well:[225]

> The non-citizens Palestinians in the Gaza Strip have ceased to be the subjects of the Israeli regime not because they became subject of another regime, but rather because they were tossed outside the domain of nationality. The day after the 'Disengagement', being in a state of lawlessness between suspended war and suspended catastrophe, the non-citizens in the Gaza Strip have become abandoned. The 'Disengagement' constituted Gaza as no man's land, outside the reach of the Israeli law, allegedly outside the range of responsibility of the Israeli sovereign, but entirely within its control, and that is why the Palestinians in Gaza are 'the deserted' of the Israeli Regime.

[222] See Scobbie (n 38) 26; Azoulay and Ophir (n 206) 308. See also Zemach (n 31) 89 (who acknowledges that 'a situation where the local population is left in a 'legal vacuum' – in which it is impossible to point to a legal entity in International Law that is in charge of ensuring public order and safety, as well as the population's basic needs – is a catastrophe, and International Law aims to prevent this').
[223] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1995) 166–80.
[224] Azoulay and Ophir (n 206) 296–300, 308–09.
[225] ibid 308.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

5. CONCLUSION

In 1985 Ann Lesch described the Gaza Strip as the 'forgotten corner of Palestine',[226] referring mostly to the tendency to forget Gaza when dealing with the 'Palestinian problem'. Indeed, for many years Gaza was absent from the legal and political discourse on the status or future of the Palestinian Territories and the legal regime existing therein. Thirty years after Lesch's diagnosis, unfortunately the Gaza Strip remains the 'forgotten corner of Palestine'. The increase in international and academic interest in Gaza since 2005 is largely the product of the interesting legal questions this case poses with regard to the application of the law of occupation and other branches of law in such a unique situation. However, Gaza itself, its inhabitants, their lives and dreams, their rights and freedoms, have been largely forgotten.

In this forgotten corner of the world, far from international sight, Israel acts uninterruptedly to diminish its legal obligations towards Gaza residents and, correspondingly, to vanquish their rights. While ostensibly obligated to ensure their 'humanitarian needs', Israel's de facto policy strips them of all rights or entitlements. By terming them 'foreign residents', and occasionally 'special residents', by narrowly interpreting their 'humanitarian' needs or ignoring them altogether, Israel has succeeded in exempting itself from all legal duties.

More than ten years after the 'Disengagement', Israel continues to maintain control over many elements of life in Gaza, primarily the inhabitants' ability to receive goods and equipment needed for their survival, and their freedom of movement, which is a fundamental right required for fulfilling many other rights: political, social, cultural and economic. Such control is a fact that cannot be disputed; nor should it be met with a legal position that promotes zero responsibility on the part of Israel. This position is contrary to the fundamental purpose of IHL, to the HCJ's own original ruling, and to basic moral and legal standards.

A proper reading of the purposes and provisions of IHL, applied to the unique characteristics of the situation in Gaza, should lead to an international demand that Israel assume greater legal responsibility towards the residents of Gaza. This is particularly true in light of the increasing and expanding Israeli control over Gaza in recent years and its deepening relations with its inhabitants. Israel's duties can be derived from any branch of law that has relevance to this situation, be it the LoAC, the law of occupation, IHRL, post-occupation law and siege law. Each of these normative frameworks, applied in whole or in part, delineates Israel's de jure legal obligations towards Gaza residents and their corresponding legal rights. The application of these frameworks must lead to an international demand for Israel to urgently change its policy towards Gaza.

Such a demand must continue to be brought before the HCJ, though an examination of its rulings so far leads to a bleak prognosis for the future. Indeed, Israel has managed to entrench its legal policy so well in the domestic legal arena that it is practically futile for a lawyer to employ arguments from the realm of international law in defence of Gaza residents. The HCJ

[226] Ann M Lesch, 'Gaza: Forgotten Corner of Palestine' (1985) 15(1) *Journal of Palestine Studies* 43.

https://doi.org/10.1017/S0021223718000110 Published online by Cambridge University Press

must be reminded, time and again, of its primary role as defender of human rights and the flag bearer of international law in Israel.[227]

To conclude, shying away from the academic debate on Gaza's international status to the actual status of *Gaza residents* in the eyes of Israel exposes an extremely narrow legal position that leads to a de facto legal lacuna or vacuum in the protection afforded to these residents. Such a position and the movement policy derived therefrom, though sanctioned by the HCJ, are contrary to the basic norms of IHL and are morally reprehensible. After more than a decade of legal desertion and neglect, Gaza residents deserve full protection of their rights and freedoms under the law.

[227] Kretzmer (2012) (n 122) 236; Amichai Cohen, 'The Influence of International Law on Israel in the Era of Global Jurisdiction' (2010) *Parliament – The Israel Democracy Institute* 65; Guy Harpaz, 'The Israeli Supreme Court in Search of Universal Legitimacy' (2006) 65 *Cambridge Law Journal* 7.