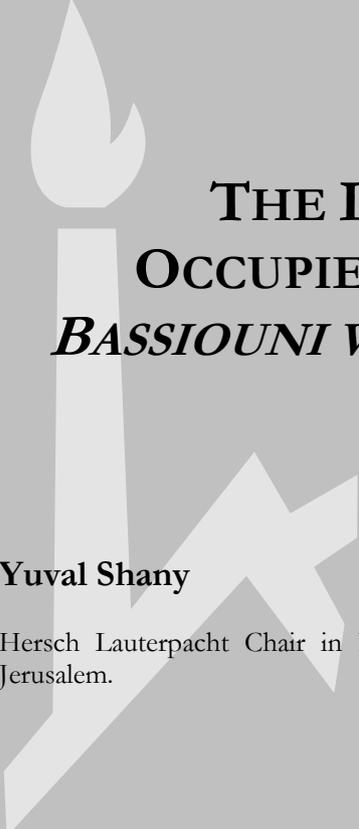




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**THE LAW APPLICABLE TO NON-
OCCUPIED GAZA: A COMMENT ON
*BASSIOUNI V. PRIME MINISTER OF ISRAEL***

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ABSTRACT

On 30 January 2008, the Israeli Supreme Court rendered its decision in *Bassiouni v. Prime Minister* – a case dealing with a challenge to the legality of cuts in the supply of electricity and fuel to Gaza. These cuts, together with trade and travel restrictions, were decided upon by Israel's security cabinet in September 2007 as a reaction to the assumption of power by Hamas in Gaza and the escalation of rocket and mortar attacks from the Gaza Strip to adjacent Israeli towns and villages.

This note analyzes and assesses the findings reaching by the Court in paragraph 12 of the *Bassiouni* judgment that contains the Court's position on the applicable legal framework against which the sanctions should be evaluated. The Court identified in this paragraph certain factors that allegedly justify the imposition – in subsequent parts of the judgment - of a duty on Israel to continue and provide some basic supplies to Gaza. But, although this outcome may be intuitively right and just, the Court did not carefully explain the legal theory which connects (a) the factual relations that characterize the relations between Israel and Gaza; to (b) Israel's legal obligations vis-à-vis Gaza. Hence, the full implications of the decision are unclear and invite further analysis.

The present note seeks to fill some of the gaps in the Court's judgment. It examines the Supreme Court's position that Gaza is no longer occupied and discusses three possible bases for imposing on Israel certain duties towards the residents of Gaza notwithstanding the end of occupation: obligations under international humanitarian laws (IHL) which ensue from the conclusion that Gaza is a non-occupied territory but subject to a state of siege, extra-territorial application international human rights law to the situation in Gaza, and possible post-occupation obligations.

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INTRODUCTION

On 30 January 2008, the Israeli Supreme Court rendered its decision in *Bassiouni v. Prime Minister* – a case dealing with a challenge to the legality of cuts in the supply of electricity and fuel to Gaza¹. These cuts, together with trade and travel restrictions, were decided upon by Israel's security cabinet in September 2007 as a reaction to the assumption of power by Hamas in Gaza and the escalation of rocket and mortar attacks from the Gaza Strip to adjacent Israeli towns and villages.² Thus, these measures constituted a form of economic sanctions.³

Although the cabinet decision called for legal examination of the humanitarian consequences of the aforementioned sanctions and clarified that they are not designed to generate a humanitarian crisis in Gaza, Palestinians and Israeli NGOs have argued that the decision is likely to result in dire humanitarian consequence and submitted a petition to the Supreme Court challenging the lawfulness of the new governmental policy. After a few court sessions in which the possibility of issuing interim orders was discussed and rejected, and information on the implications of the intended supply cuts gathered, the Court issued a short final judgment (covering 12 pages) that was written by President Beinisch.

The key preliminary question which the Court had to decide, before addressing the merits of the case, pertained to the status of Gaza: that is, whether Gaza is occupied or not. Of course, if Gaza still constitutes an occupied territory, sanctions of the kind approved by the Israeli cabinet would most probably constitute a form of prohibited collective punishment⁴ and conflict with some of the occupier's other obligations towards the protected population (e.g.,

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¹ H.C.J. 9132/07 *Gaber Al-Bassiouni v. Prime Minister*, Judgment of 30 Jan. 2008. For an unofficial translation, see <http://www.adalah.org/eng/features/gaza/gaza%20_eng.rtf>.

² Press Release issued by the Prime Minister's Office, Security Cabinet declares Gaza hostile territory, 19 Sept. 2007,

<<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>> (last visited on 28 Dec. 2008).

³ *Ibid* ("Additional *sanctions* will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity")(emphasis added).

⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 33, 75 U.N.T.S. 287 (hereinafter GC IV)("Collective penalties and likewise all measures of intimidation or of terrorism are prohibited").

the duty to maintain public services, the duty under the ICESCR to provide adequate standards of living, etc.).⁵ On the other hand, if Gaza is not occupied than the much looser legal framework governing economic sanctions between warring parties, would seem to apply, and the sanctions may be permissible.⁶ Hence, before examining the legality of the sanctions, the Court had to determine the status of the Gaza Strip under international law and to identify the scope of Israel's obligations vis-à-vis the residents of Gaza

Paragraph 12 of the judgment contains the Court's position on the applicable legal framework against which the sanctions should be evaluated. The paragraph, whose significance can hardly be overestimated, reads as follows:

"[S]ince September 2005, Israel no longer has effective control over the events in the Gaza strip. The military government that had applied to that area was annulled in a government decision, and Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to look after the welfare of the residents of the strip or to maintain public order within the Gaza Strip pursuant to the entirety of the Law of Belligerent Occupation in International Law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip. In the circumstances which have been created, the main duties of the State of Israel relating to the residents of the Gaza Strip are derived from the situation of

⁵ See e.g., GC IV, art. 56 (the duty to maintain health services); *ibid*, art 59 (the duty to facilitate relief schemes); Hague Convention and Regulations on the Laws and Customs of War on Land, 18 October 1907, Annex, art. 43, 205 Consol. T.S. 277 (hereinafter Hague Convention or Hague Regulations) (duty to ensure public order and life); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 69(1), 1125 U.N.T.S. 3 (hereinafter AP I) ("the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory"); International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, art. 11-12, 993 U.N.T.S. 3 (duty to realize the right to adequate standard of living and the highest attainable standard of health). For a legal analysis of the permissibility of applying collective sanctions to the inhabitants of occupied territories, see Gisha, *Gaza Closure Defined: Collective Punishment* (2008), <[http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Gaza%20Closure%20Defined%20Eng\(1\).pdf](http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Gaza%20Closure%20Defined%20Eng(1).pdf)>.

⁶ For a discussion of the legal framework governing economic sanction applied between warring parties, see Amichai Cohen, 'Economic Sanctions in IHL – Suggested Principles' in this symposium.

armed conflict that exists between it and the Hamas organization controlling the Gaza Strip; these duties also stem from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip, as well as from the relations which has been created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the area, as a result of which the Gaza Strip has now become almost completely dependent upon supply of electricity by Israel."

This note analyzes and assesses the findings reaching by the Court in paragraph 12 of the *Bassiouni* judgment. To be sure, the Court identified in this paragraph certain factors that allegedly justify the imposition – in subsequent parts of the judgment - of a duty on Israel to continue and provide some basic supplies to Gaza (electricity and fuels at levels needed to maintain basic humanitarian needs). But, although this outcome may be intuitively right and just, the Court did not carefully explain the legal theory which connects (a) the factual relations that characterize the relations between Israel and Gaza; to (b) Israel's legal obligations vis-à-vis Gaza. Hence, the full implications of the decision are unclear and invite further analysis.

The present note seeks to fill some of the gaps in the Court's judgment. Part One examines the Supreme Court's position that Gaza is no longer occupied. Parts Two to Four then try to identify three possible bases for imposing on Israel certain duties towards the residents of Gaza notwithstanding the end of occupation. Part Two looks at the obligations under international humanitarian laws (IHL) which ensue from the conclusion that Gaza is a non-occupied territory but subject to a state of siege; Part Three discusses the possibility of applying extra-territorially international human rights law to the situation in Gaza; and Part Four briefly assesses whether post-occupation situations give rise to moral or legal obligations. Hopefully, the discussion of legal policy and doctrine offered here will help to improve our understanding of the judgment and its future implications.

PART ONE: IS GAZA STILL OCCUPIED?

The first conclusion offered by the Supreme Court relates to the post-disengagement status of the Gaza Strip and serves as the point of departure for the subsequent discussion of Israel's obligations towards Gaza. On this question, the Court appears to embrace an unequivocal stance: Since the occupation regime was formally abrogated⁷ and since no Israeli troops are permanently stationed in Gaza, Israel actually no longer has effective control over the territory.

Of course, it is well established in legal doctrine that an occupier can exercise effective control over an entire area without maintaining troop presence in parts thereof. For example, the military tribunal in Nuremberg held in the *List* case that Germany occupied some areas of Greece and Yugoslavia which were outside its actual control at certain times since it was established that "the Germans could at any time they desired assume physical control of any part of the [Greece and Yugoslavia]".⁸ In the same vein, Israel's Supreme Court held in *Tsemel* that it suffices to establish the potential for exercising effective control over a foreign area, in which the troops are stationed,⁹ and the ICTY held in *Naletilić* that one of the guiding principles in determining the applicability of occupation law to certain areas is whether the occupying army has with relation to such areas "the capacity to send troops within a reasonable time to make the authority of the occupying power felt".¹⁰

It is therefore significant that the Supreme Court conclusions in *Bassiouni* address not only the lack of actual effective control by Israel but also the lack of the capacity to exercise

⁷ Press Release issued by the IDF Spokesperson, Exit of IDF Forces from the Gaza Strip completed, 12 Sept. 05, <<http://www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm> > (last visited on 28 Dec. 2008).

⁸ *U.S. v. List* (*Hostages* case), VIII *Law Reports of Trials of Major War Criminals* 38, 55-56 (1949)

⁹ H.C.J. 102/82 *Tsemel v. Minister of Defence*, 37(3) P.D. 365. But see *Armed Activities on the Territory of the Congo*, 2005 I.C.J. 166, at para. 173 ("In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question"). Arguably, this formulation emphasizes the actual and not potential exercise of authority.

¹⁰ Case No. IT-98-34-T *Prosecutor v. Naletilić*, Judgment of 31 March 2003, at para. 217 (Trial Chamber). This *dictum* seems to mirror the language of the U.S. Field Manual 27-10, sec. 356. Department of the Army, Field Manual 27-10: The Law of Land Warfare, 18 July 1956 (revised 15 July 1976)

effective control: "[n]or does Israel have effective *capability*, in its present status, to enforce order and manage civilian life in the Gaza Strip" (emphasis added).

A comprehensive analysis of the conditions for occupation under IHL and the post-engagement status of the Gaza Strip exceeds the scope of the present comment.¹¹ It suffices to note, at this stage, that I am in fundamental agreement with the Court's findings on the matter, mainly for the two following reasons: (a) the existence within Gaza of an organized government (the Palestinian Authority and, subsequently, the Hamas) that openly exercises power and authority (which are clearly not sanctioned by Israel) implies that the one of the basic conditions for occupation – the substitution of local authority by a foreign power - is no longer met.¹² In other words, the territory is governed by an effective Palestinian government, not the Israeli government; (b) the existence of locally organized military forces in Gaza means that any attempt by Israel to "make its authority felt" in Gaza would be met with considerable local resistance. Hence, Israel would need, in essence, to reoccupy the Gaza Strip – a process expected to be lengthy and costly - before it is able to exercise significant powers of government there. This state of affairs appears to fall short of the test for potential control laid down by the U.S Field Manual¹³ and the *List* and *Naletilić* cases,¹⁴ which requires the occupier to have the capacity for exercising its authority over the territory in question within a reasonable time.

More generally, the Court was right, in my mind, in linking between the question of whether Israel meets the conditions for occupation under article 42 of the Hague Regulations, and the question whether it has the capacity to restore and ensure public order and life as required by article 43. It makes little sense from a legal policy perspective to recognize a foreign power as an occupier for the purposes of article 42 (thereby entrusting it with international legal responsibilities for the territory in question) notwithstanding the fact that

¹¹ For a more detailed exposition of my position on the matter, see Yuval Shany, "Faraway So Close: The Legal Status of Gaza after Israel's Disengagement", 2005 *Yearbook of International Humanitarian Law* (vol. 8 2007) 359.

¹² See *Naletilić*, *supra* note 10, at para. 173 ("the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly"). See also Adam Roberts, "What is a Military Occupation?" 53 *B.Y.B.I.L.* (1984) 249, 300.

¹³ U.S. Field Manual 27-10, *supra* note 10, at sec. 356.

¹⁴ *Naletilić*, *supra* note 10, at para. 173; *List*, *supra* note 8, at p. 56.

it is not in a position to assume governmental control over the territory as article 43 requires.¹⁵ Hence, the term "authority" specified in article 42 (or the "effective control" test that was developed in the subsequent practice as a catch-all test that captures in essence the combined conditions of article 42) should mean having the capacity to fulfill the key obligations under the law of belligerent occupation. Perhaps the most significant of these obligations, which is also conceptually very close to the notions of control and authority that article 42 conveys, is the duty to restore, and ensure, as far as possible, public order and life (or safety), specified in article 43. The fact that the text of article 43 begins with the phrase "[t]he *authority* of the legitimate power having in fact passed into the hands of the occupant" is another indication of the close links between articles 42 and 43.¹⁶

So, according to the Israeli Supreme Court, Gaza is no longer occupied. Still, the peripheral control exercised by Israel – control of the airspace, the adjacent seawaters and all but the Raffah border crossing (over which, too, Israel exercises indirect power) - places Gaza under a situation analogous to that of a siege.¹⁷ As I discuss in Part Two, the characterization of the situation in Gaza as a siege implies that Israel owes certain obligations to the residents of Gaza. But siege is not occupation; and the uncommon sequence of events in Gaza – an occupation scaled down into a state of siege (as opposed to the more common transformation from siege to occupation) – does not negate the distinction between the two legal statuses.¹⁸

¹⁵ But see *R (Al Skeini) v. Secretary of State for Defence*, [2005] 2 WLR 1401, at para. 124 ("it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time"). This case thus supports the dubious proposition that occupation without significant effective control can take place.

¹⁶ For a parallel interpretative exercise, drawing from the language of article 43 in order to interpret article 42's requirement of a clear transfer of authority, see U.S. Dep't of Army Pam. 27-161-2, 2 *International Law* 160 (1962), cited in Jordan J. Paust, "ASIL Insight: The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War", < <http://www.asil.org/insigh102.cfm> > (last visited on 8 Jan. 2009).

¹⁷ Siege warfare may be defined as "encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply". Yoram Dinstein, 'Siege Warfare and the Starvation of Civilians' in *Humanitarian Law of Armed Conflict: Challenges Ahead* (Astrid J. M. Delissen and Gerard J. Tanja, eds., 1991) 145, 145.

¹⁸ For example, U.S. Field Manual 27-10 envisions both sequences of events: the existence of pockets of resistance not governed by the laws of occupation under two alternative scenarios – a fort or defended area not subjugated by the invading army (U.S. Field Manual 27-10, *supra* note 10, at sec. 356) and any part of the territory over which the power of the occupant is effectively displaced for any length of time (*ibid*, at sec. 360).

PART TWO: THE DUTY TO PROVIDE BASIC SERVICES TO THE ADVERSARY DURING ARMED CONFLICT

While the Court's position on the status of Gaza is clearly very important, the more interesting part of paragraph 12 of the *Bassiouni* judgment deals with scope of Israel's obligations vis-à-vis the resident of Gaza. Despite holding that the occupation has ended, the Court reached the rather surprising conclusion Israel continues to carry certain obligations, which derive from three distinct sources: the laws of war, Israel's control over border crossings and the historical dependency of Gaza on Israel. Parts Two to Four will examine, in turn, the legal relevance and implication of each of the sources identified by the Court.

The first, and least controversial, source of obligations identified by the Court is the armed conflict situation existing between Israel and Hamas ("the main duties of the State of Israel relating to the residents of the Gaza Strip are derived from the situation of armed conflict that exists between it and the Hamas organization controlling the Gaza Strip"). Clearly, there are relevant international legal norms governing situations of siege – e.g., the duty to allow passage of humanitarian relief supplies, the duty to spare religious building and hospitals, the prohibition against targeting civilians and employing methods designed to bring about the starvation of the local population.¹⁹ But the relevance of these provisions to the *Bassiouni* case is limited since in the circumstances of the case, Israel was not simply requested to facilitate the passage of basic supplies to Gaza, but rather to supply some of them itself.²⁰ Although the Court held that a duty to provide a minimum level of supplies exists, it did not identify in its decision any relevant rule of IHL that could serve as the basis for this positive obligation.

¹⁹ See e.g., AP I, art. 51, 52, 54, 70; Hague Regulations, art. 27. These provisions reflect customary international law (applicable in both international and non-international armed conflicts), and thus bind Israel notwithstanding the fact that it had not joined the Protocol. Jean-Marie Henkaertz and Louise Doswald-Beck, *Customary International Humanitarian Law* (2006) 25-30, 186-200.

²⁰ Fuel is delivered to Gaza by a private owned Israeli corporation (Dor-Alon). It is thus debatable whether Israel "supplies" fuel to Gaza. At the same time, electricity is provided to Gaza by the Israel Electric Company – a government owned corporation. Avi Bar-Eli, *Palestinians Completely Dependent on Israel for Electricity, Gasoline, Fuel and Water*, Haaretz 18.6.07, < <http://www.haaretz.com/hasen/spages/872205.html> > (last visited on 15 January 2009)

As a result, to the degree that the outcome of the case is premised on IHL, the Court's opinion warrants criticism. Warring parties are not generally required by IHL to provide each other with basic supplies. Situations of occupation, where one party assumes control, responsibility and duty of care over civilians belonging to the other party to the conflict, are thus exceptional in nature. So, if the Court is right, and Gaza is no longer occupied, then article 69 of the First Additional Protocol, which requires occupiers to "ensure the provision of clothing, bedding, means of shelter [and] other supplies essential to the survival of the civilian population of the occupied territory" is inapplicable. Instead, the applicable provision - article 70 of the same Protocol - merely demands that the parties to the conflict "allow and facilitate rapid and unimpeded passage of all relief consignments" (and even this modest obligation is subject to certain limitations, which reflect military necessity and proportionality).

Since IHL appears to impose on siege-laying parties only negative obligations (in particular, not to hinder humanitarian supplies provided by third parties), a conclusion that Israel is under a positive obligation to continue and provide some electricity and fuel to Gaza, must be based on other legal grounds. Part Three looks at one possible source for such an obligation: international human rights law, as applied extra-territorially.

PART THREE: HUMAN RIGHTS LAW AND THE OBLIGATION TO PROVIDE BASIC NEEDS

The second justification offered by the Court for the conclusion that Israel continues to incur some obligations to provide basic supplies seems to derive from its allusion to the fact that Israel controls the border crossings into Gaza ("these duties also stem from the extent of the State of Israel's control over the border crossings between it and the Gaza Strip,").

But, again, the theory or doctrine used by the Court to underlay the relationship between control of borders and the obligation to provide basic supplies remains not expounded.

To the extent that the Court merely sought to reiterate the point that international law contains some legal standards that govern situations of siege (which necessarily implies control over all entry and exit points to and from the territory under siege), the reference to Israeli's control over the border crossings is not very controversial or illuminating. Of

course, article 70 of the First Additional Protocol is particularly relevant to those parties to the conflict that are situated in a position to control the passage of relief consignments to the population of the area under siege. So, alluding to control over borders crossings may simply be the same as alluding to the situation of siege and the negative obligations under IHL this state of affairs entails.

But, arguably, it is possible to read the reference to Israel's control over border crossings in a more meaningful manner – that is, in way that may underlie a theory of extraterritorial legal responsibility that exceeds the duties associated with the situation of siege under IHL. Such a broader reading is supported not only by the Court's ultimate finding that Israel incurs positive obligations but is also strengthened by the third factual consideration identified by the Court – the long duration of the relations of dependency between Israel and the territory of Gaza ("the relations which has been created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the area, as a result of which the Gaza Strip has now become almost completely dependent upon supply of electricity by Israel"). Cumulatively, the control over the border crossing and the historical dependency of Gaza on Israel underscores the *power* that Israel exercises over Gaza.

The fact that decisions taken by Israel have dramatic implications on life in Gaza – that is, on individuals living in an area situated beyond Israel's effective control, raises the question of whether a State should be required to refrain from adopting measures that entail cross-border harm. Obviously, in some areas of the law, activities with cross-border effects are strictly regulated. For example, under environmental law, states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction";²¹ and some states apply their criminal laws, securities laws and antitrust laws to extraterritorial activities which have an impact within their territory.²²

²¹ Rio Declaration on Environment and Development, Principle 2, 31 I.L.M. (1992) 874.

²² For a general discussion of extra-territorial jurisdiction, see Cedric Ryngaert, *Jurisdiction in International Law* (2008) 75-82 .

Arguably, the relations between Gaza and Israel feature a degree of inter-connectedness no less significant than the degree of inter-connectedness justifying the extra-territorial regulation of cross-border environmental or economic problems or problems relating to the operation of international criminal networks. Closing the border crossings between Gaza and Israel and blocking electricity and fuel supplies will surely cause no less of an impact on Gaza than cross-boundary air-pollution or cross-boundary market sharing collusion, securities fraud or criminal activities.

But what legal doctrine may serve as the basis of Israel's obligation to refrain from producing cross-border harm by way of withholding the supply of basic provisions? To my mind, international human rights law may serve as the "missing link" between Israel's *de facto* power over Gaza (which falls short, according to the Court, of "effective control") and the obligation to provide basic supplies to Gaza.

Clearly, international human rights law applies in circumstances involving some extra-territorial elements. For example, numerous European Court of Human Rights (ECtHR) and Human Rights Committee (HRC) decisions relating to deportation and extradition cases have required states to refrain from acting in ways that would expose individuals, currently subject to their jurisdiction, to a serious risk of torture or violation of other important human rights in the receiving State.²³ In addition, it is well-established that international human rights treaties apply to occupied territories and to certain acts taken by state agents in the territory of a foreign country.²⁴ Although these legal doctrines are not directly applicable to the situation in Gaza, they are indicative of the growing flexibility of human rights law and its potential extra-territorial reach.

The question before us is whether international human rights law can also apply in situations like the one in Gaza, where acts taken by Israel within its own territory (blocking the supply of electricity and fuel) have direct human rights consequences for individuals residing in Gaza - a territory outside Israel's control. In other words, are Gaza residents subject in some

²³ See e.g., *Soering v. U.K.*, 161 Eur. Ct. H.R. (ser. A)(1989); *Chahal v. U.K.*, 23 Eur. H.R. Rep. 413 (1996); *Judge v. Canada*, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

²⁴ See e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216; *López Burgos v. Uruguay*, U.N. Doc. CCPR/C/OP/1 at 88 (1984).

sense to Israel's jurisdiction? A convenient point of departure for addressing this question is found in General Comment 31, adopted by the UN HRC in 2004.²⁵ According to the General Comment, the International Covenant on Civil and Political Rights (ICCPR) applies to all individuals subject to "the *power* or effective control of that State Party, even if not situated within the territory of the State Party".²⁶ Although, the language used by the HRC is not legally binding, the reference to a new legal standard – power – as one of the triggering mechanisms of applicability suggests that human rights law may develop in a way that regulates exercises of power across state boundaries.

Arguably, using *de facto* power as a triggering mechanism for the application of international human rights law may explain some of the "state agent control" cases, where the ECtHR, HRC and UK courts have held that individuals who find themselves under the power of state agents operating in foreign territory continue to be protected under human rights law.²⁷ One could read these cases as supportive of the proposition that some extraterritorial exercises of governmental power in a foreign territory (ranging from the operation of a detention facility to issuing consular documents) should entail human rights obligations. If this is correct, then an approach which encompasses exercises of governmental power within and outside the territory of the acting state but excludes territorial exercises of power with extraterritorial effects may be regarded as incoherent and as leaving a problematic gap in the system of human rights protection. In the same vein, an approach to international human rights law which regulates territorial exercises of power with extra-territorial effects, provided that the concerned individual is present in the territory of the acting state (extradition and deportation cases) but not other exercises of territorial power with extraterritorial effects, may also be unjustified.

One relevant case that appears to support the proposition that international human rights law should govern some extraterritorial application of governmental power even in the

²⁵ Human Rights Committee, General Comment 3: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

²⁶ *Ibid*, at para. 10 (emphasis added)

²⁷ See e.g., *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 985 (2005); *Burgos*, *supra* note 24; *Montero v. Uruguay*, U.N. Doc. Supp. No. 40 (A/38/40) at 186 (1983); *Al Skeini v. Secretary of State for Defence* [2007] UKHL 26.

absence of effective control over a foreign territory or custody of persons is the 2004 ECtHR *Ilașcu* case.²⁸ In that case, involving the unlawful detention of four Moldovan nationals by the authorities in Transdniestria (an unrecognized break-away region, which declared its independence from Moldova in 1990), the Court held that Russia bears responsibility for human rights violations in Transdniestria by reason of the "effective authority, or at the very least... decisive influence" it exercises over the acts of the region's authorities through political support and military presence in the region.²⁹ In other words, it seems to be Russian power – not effective control – that served as the basis for its responsibility under human rights law (moreover, Russia was found by the Court to be in breach of positive obligations – for failing to act to prevent violations by the Transdniestrian authorities). Arguably, even if Israel does not exercise effective control over Gaza it surely has "decisive influence" over life in Gaza; thus, according to the *Ilașcu* judgment, Israel would incur certain positive obligations vis-à-vis the population of Gaza.

Admittedly, the legal construction proposed here runs contrary to the 2001 decision of the ECtHR in *Banković*.³⁰ In *Banković*, the Court rejected the applicability of the Convention to an extra-territorial bombing operation citing a number of policy considerations. Most relevant to our topic is the position of the Court on the impossibility of dividing and tailoring the Convention in different extra-territorial contexts, which led the Court to embrace an "all or nothing" approach to applicability and the rejection of the "cause and effects" theory, which would equate the term "jurisdiction" with the ability to commit human rights violations.³¹ A comprehensive analysis of the *Banković* decision also exceeds the scope of the present note. Arguably, the decision is inconsistent with other ECtHR judgments;³² moreover, its analysis of legal policy is dubious.³³ Still the *Banković* decision suggests that the expansive approach to jurisdiction discussed hereby and, possibly endorsed by the Israeli Supreme Court in *Bassiouni*, may encounter serious resistance in legal practice.

²⁸ *Ilașcu v. Moldova*, 40 Eur. Ct. H.R. 46 (2004).

²⁹ *Ibid*, at para. 392-393.

³⁰ *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 333.

³¹ *Ibid*, at para. 75.

³² See e.g., *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004); *Ilașcu*, *supra* note 28.

³³ For a discussion see e.g., Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Co-application of Humanitarian Law and Human Rights Law to the Occupied Territories', 37 *Is. L. Rev.* (2004) 17, 80-84; Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is it relevant to Extraterritorial State Action?', 2 *Eur. H.R.L. Rev.* (2005) 115.

In any event, formulating a standard for the extraterritorial application of international human rights law requires a closer analysis of the links between the manner in which cross-boundary power is exercised and the nature of the legal obligations that ensue. In other words, one has to explore the circumstances that would give rise to the obligations of State A towards population in State B (or, as is the case with Gaza, in Area B) and the scope of these obligations. Clearly, adopting a simple "cause and effect" theory would be unacceptable, as it would expose States to an infinite number of unforeseen obligations (e.g., it would be excessive to impose an obligation on State A to refrain from undertaking monetary reforms, if such new policies may result in increased unemployment in State B). Still, no obvious guidelines or limits can be identified under existing international human rights law.

One possible source of inspiration for the developments of adequate standards to control and channel extraterritorial legal responsibility for human rights violations can be found in domestic norms governing extraterritorial activities. For example, section 403(2) of the Third U.S. Restatement for Foreign Relations addresses the power of U.S. law-makers to regulate extra-territorial conduct with cross-border impact.³⁴ According to this provision, "jurisdiction to prescribe" exists when the regulated activity has "*substantial, direct and foreseeable effect* upon or in the territory" (emphasis added). Arguably, the same test could also govern the applicability of international human rights to State acts and omissions with cross-border impact. Since many exercises of governmental power will fail to reach the aforementioned standards, the Restatement test may strike an acceptable compromise between the States' need to maintain freedom of action and the interests of foreign individual affected by the State's actions. Moreover, since human rights are, by and large, relative in nature (this is in particular so with respect to positive rights), the subjecting of extraterritorial power to human rights considerations does not negate the State's ability to promote important policies or interests.

Applied in our context, it is arguable that Israel's extraterritorial power over Gaza, as reflected in the control of the border crossings and the historical dependence of Gaza on Israel, is substantial, direct and foreseeable in its effects. This state of affairs thus militate in

³⁴ Third U.S. Restatement (3rd), Foreign Relation §403(2).

favor of applying human rights standards to review the lawfulness of the decision to limit the supply of basic provisions. In view of the State interests at stake, that is, the determination of the Israeli government to resort to economic sanctions in order to reduce the level of attacks from Gaza on Israel, it appears that the Court's decision in *Bassiouni* can be regarded as the outcome of an act of balancing between the human rights of Gaza residents and Israel's national interest.

PART FOUR: POST-OCCUPATION OBLIGATIONS?

As already noted, the Court alluded in paragraph 12 of the *Bassiouni* decision to the long historical dependency of Gaza on Israel. Arguably, this circumstance may also be relevant in assessing Israel's obligations to Gaza under bodies of law other than the laws of armed conflict or international human rights law. Perhaps, the Court meant to insinuate here that Israel had failed throughout its long occupation of Gaza to facilitate the development of local capabilities for producing basic supplies, and that, under these circumstances Israel carries a legal responsibility to remedy this omission by way of continuing to supply the essential needs of Gaza. But even if one were to accept the existence of post-occupation obligations, how exactly would such an innovative theory, which essentially reflects corrective or transitional justice considerations, translate into a concrete legal obligation remains unclear.

One can think of several legal constructions, which could have perhaps been used by the Court in this regard (although their normative status and suitability to the facts at hand is questionable). First, it could be argued that Israel had failed throughout its long presence in Gaza to administer the infrastructures in the occupied territory "in accordance with the rules of usufruct"³⁵ - an obligation that may be somewhat analogous to a trustee's duty of properly administering a trust. Alternatively, it may be argued that Israel was required under international human rights law to ascertain before leaving Gaza that the remaining conditions on the ground *after* the withdrawal would be compatible with human rights standards. This latter proposition is analogous to the underlying rationale of the aforementioned deportation or extradition cases: state A would be held accountable for

³⁵ Hague Regulations, art. 55.

violations by the State B if it created, when it had jurisdiction over the State B's nationals, conditions which directly facilitated the subsequent human rights violations.

So, if Israel violated its post-occupation obligation a remedy for this shortcoming may be appropriate. Since, in the circumstance of the case, *restitutio in integrum* is impossible to attain and compensation may be inappropriate, the requirement that Israel should continue to provide basic supplies for an interim period (until independent capabilities or an alternative source for the supplies is identified) may serve as an appropriate form of satisfaction, which does not wipe away the consequences of the breach, but mitigate it.³⁶ Still, there is little support in actual practice to this theory of post-occupation (or, more generally, post-colonial) responsibility; moreover, the rule of the Palestinian Authority over Gaza in the period of 1994-2005 may constitute an intervening event, which minimizes Israel's level of responsibility or releases it from legal responsibility altogether.

Second, considerations of equity (and maybe good neighborliness)³⁷ – which may comprise part of the applicable general principles of law – could fill the *lacunae* in existing post-occupation law.³⁸ Such principles could justify continuing to hold Israel responsible for providing basic supplies to Gaza if such an outcome were to appear just under the circumstances even if no specific legal norm which prescribes such a specific obligation can be identified. However, such a construction appears to be far-reaching in its implications and without real support in law and practice; and again, considerations relating to the contribution of the Palestinians to the current sad state of affairs would also come into play in ways that may render the outcome too abstract to apply.

³⁶ International Law Commission, Draft Articles on State Responsibility of Internationally Wrongful Act, art. 37, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) ("1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation; 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality; 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State).

³⁷ See e.g., Charter of the United Nations, art. 74.

³⁸ *North Sea Continental Shelf* (Denmark and Netherlands v. F.R.G.), 1969 I.C.J. 3, 48. Arguably, the Martens Clause, which refers to the "principles of humanity" and the "dictates of public conscience", may also support such a solution. Hague Convention, preamble; AP I, art. 1(2).

CONCLUSION

It seems that the Israel Supreme Court in *Bassiouni* felt that it would be unjust – and perhaps politically undesirable – if Israel were to be relieved from all, or almost all of its obligations vis-à-vis Gaza following its disengagement from Gaza. Although Israel no longer effectively controls Gaza, Israel's position of overwhelming physical dominance over Gaza, coupled with the historical links of dependence, were probably central to the balancing formula applied by the Court – Israel would assume obligations that go beyond the requirements of IHL in situations of siege, but that fall short of the requirements applicable in situations of occupation. This is the 'basic humanitarian needs' standard.³⁹

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

³⁹ Incidentally, a similar outcome may have been reached through application of the laws of state responsibility governing countermeasures. ILC Draft Articles, *supra* note 36, art. 50.