The Implications of *Bassiouni v. Prime Minister* for Humanitarian Professionals in Gaza

POLICY BRIEF
August 2010

PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH
HARVARD UNIVERSITY

Introduction

In September 2007, Israel's security cabinet approved restrictions on travel, trade, and the amount of electricity and fuel to be allowed into Gaza, formalizing a blockade that had been in effect since Hamas' takeover of power in June of that year.[1] By June 2009, the monthly percentage of goods allowed to enter Gaza had been reduced by seventy-five percent, while the amount of industrial diesel imported to generate electricity had fallen by sixty-three percent, resulting in power outages that average five hours per day.[2] Despite the widespread damage to buildings and infrastructure in Gaza incurred during Operation Cast Lead, construction materials, such as glass and cement, are not allowed in by Israel.[3] It may be useful for agencies working within this context to know what, if any, restrictions the Israeli legal system has placed on the blockade. To do so, this policy brief looks at the Israeli Supreme Court's January 30, 2008 *Bassiouni v. Prime Minister* decision, written in response to a petition submitted to the Court challenging the 2007 cabinet decision.

While the petition addressed only electrical and fuel supply cuts, the Court's decision has much broader legal implications. If the Court had found that such cuts were not legal due to obligations borne by Israel under the laws of belligerent occupation, then Israel would be required to fulfill the many positive obligations placed on occupying powers. As discussed below, International Humanitarian Law (IHL) places *positive obligations* on belligerent occupants to ensure the well-being of the civilian population, such as providing food and medical supplies. However, IHL generally places only *negative obligations* regarding the civilian population on non-occupying parties to a conflict. Therefore, if the Court had found that the cuts were lawful because Israel was not an occupying power, the result according to IHL would be that Israel would not have positive obligations to the citizens of Gaza.

In responding to a legal challenge to electricity and fuel cuts, the Israeli Supreme Court's January 30, 2008 *Bassiouni v. Prime Minister* decision upheld the legality of the cuts and, contrary to the opinion of some legal scholars, treated the Gaza Strip as non-occupied territory.[4] Interestingly, however, the Court recognized that Israel still has certain positive legal obligations to Gaza, regardless of whether Gaza is occupied as such. According to the decision, these obligations derive from the laws of war, Israel's control over border crossings, and Gaza's historical dependency on Israel.[5]

This brief will explore the legal implications of *Bassiouni v. Prime Minister*. Arguments derived from occupation law are not within the scope of this brief because the brief assumes for the

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[1] Press release issued by the Prime Minister's Office, "Security Cabinet Declares Gaza Hostile Territory," September 19, 2007, http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm: "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. Restrictions will also be placed on the movement of people to and from the Gaza Strip."

[2] Gisha, "Two Years by the Numbers," June 6, 2009, available at: http://www.gisha.org/index.php?intLanguage=2&intItemId=1529&intSiteSN=113&OldMenu=113.

[3] Ethan Bronner, "Misery Hangs Over Gaza Despite Pledges to Help," *New York Times*, May 28, 2008, available at: http://www.nytimes.com/2009/05/29/world/middleeast/29gaza.html?_r=1.

[4] H.C.J. 9132/07 *Jaber Al-Bassiouni v. Prime Minister*, Judgment of January 30, 2008, http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.htm.

[5] Ibid., at para. 12.

sake of argument that the decision was decidedly correctly in that regard. For more on the debate as to whether Gaza is occupied, please see HPCR's September 2008 policy brief, "Occupation, armed conflict, and the legal aspects of the relationship between Israel, the West Bank, and the Gaza Strip: A resource for practitioners."[6] Similarly, the law pertaining to Israel's actions taken during Operation Cast Lead will not be analyzed in this paper. This brief is designed to answer questions about the legal framework the Government of Israel (GoI) applies when assessing its humanitarian obligations to the Gaza Strip, and Operation Cast Lead has not generally altered that framework.

The brief first will detail the legal arguments of both the petitioners and respondents in regard to Gaza's status and Israel's obligations to the Gaza Strip. Next, the brief will address the Israeli Supreme Court's decision and the implications of the Court's decision for NGOs and UN agencies operating in the Gaza Strip. In doing so, it will examine possible ways in which Israel's obligations to a non-occupied Gaza could extend beyond the basic laws of war. Scholars have posited two justifications for such an extension: (1) the extra-territorial application of international human rights law (IHRL) to Gaza, and (2) Israel's post-occupation obligations. Lastly, we will discuss Egypt's purported obligations vis-à-vis Gaza.

The Petitioners' Position

The petition against the Ministerial Committee on National Security Affairs' September 19th decision was filed on October 28, 2007. The petitioners included Ahmed Jaber Al-Bassiouni, a resident of Beit Hanoun; Najar Maher, the deputy director of the Coastal Municipalities Water Utility in the Gaza Strip; and 10 Israeli and Palestinian non-governmental organizations.

The petitioners argued that the respondents failed to meet their obligations deriving from constitutional law, local administrative law, and customary international law. They contended that the cuts in electric and fuel supplies to Gaza contravened (a) the prohibition against collective punishment, (b) the principles of distinction and proportionality, (c) the principle of military necessity, and (d) the duties owed by the respondents as an occupying power to the citizens of the Gaza Strip.

The petitioners alleged that the GoI's restrictions on the supply of fuel and electricity amounted to collective punishment. In support of this proposition, the petitioners cited the universal nature of the cuts and media reports of Israeli cabinet ministers who had publicly stated that economic punitive steps should be taken against the residents of the Gaza Strip in response to the firing of Kassam rockets into Israel.[7] The ban on collective punishment is expressed in Article 50 of the Hague Regulations, Article 33 of the Fourth Geneva Convention, and Article 75(2)(d) of the Additional Protocol I. While Israel is not a party to Additional Protocol I, the Israeli Supreme Court has held that parts of that Protocol reflect

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[6] Available at http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=2043.

[7] Specifically, the petition cites comments made by then Deputy Prime Minister Chaim Ramon and Minister Itzhak Cohen. Yedi'ot Aharonot, "הקבינט יכריע אם ינותק החשמל בעזה," April 9, 2007, available at http://news.walla.co.il/?w=/1/1170765. ("המשנה לראש הממשלה חיים רמון אמר בתחילת ספטמבר, כי לדעתו על ישראל לנקוט צעדי ענישה כמו ניתוק זרם החשמל והמים לרצועה.")

international customary law and that the GoI is bound by international customary law.[8]

The petitioners further argued that the reduction of electrical and fuel supplies violated the principle of distinction and the principle of proportionality. The principle of distinction requires belligerent parties to distinguish between combatants and civilians and to avoid indiscriminate or intentional harm to civilians. Because the reduction in electrical and fuel supplies targeted the Gaza Strip as a whole, and does not distinguish between combatants and civilians, the petitioners asserted that the GoI violated the principle of distinction. The petitioners further argued that the GoI violated the principle of proportionality, which generally prohibits attacks if they cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the anticipated concrete and direct military advantage of the attack. While not central to their argument, the petition alleged that the blockade was also prohibited under the principle of military necessity.

The petitioners, in agreement with prevailing scholarship, maintained that the GoI was an occupying power in Gaza. If the GoI was found to be occupying power, several additional duties would be placed on it in addition to the basic humanitarian obligations placed on all belligerent parties. The petitioners listed Article 43 of the Hague Regulations, which requires occupiers to maintain "public order and civic life," as well as obligations to protect hospitals and maintain a normal functioning health system (articles 18, 56, and 57), and to ensure food and medical supplies (articles 55 and 59), as obligations the GoI must bear. As mentioned previously, the obligations imposed on occupying powers are positive ones, and would require Israel to actively ensure that the Gaza Strip had sufficient humanitarian supplies, including fuel and electricity. In essence, occupation law requires the occupying power to step into the shoes of the existing government in a "caretaker" role until the reinstitution of the indigenous sovereign.[9]

The Government of Israel's Position

Central to the State's argument was the notion that the GoI was engaged in "economic warfare." Its obligations, the government argued, derived solely from the armed conflict between the State of Israel and Hamas and "the need to avoid harm to the civilian population that finds itself in the combat zone."[10] According to the GoI, occupation law no longer applied in Gaza, and therefore only the law of armed conflict pertaining to hostilities applied. Under the laws of war, the GoI's obligations vis-à-vis the population of Gaza would be minimal in degree and negative in nature.

While the Israeli Supreme Court has held that some portions of Additional Protocol I reflect customary international law and are therefore binding on Israel, the GoI cited only Article 23 of the Fourth Geneva Convention and did not mention the relevant portions of Additional

[8] HCJ 769/02 *The Public Committee Against Torture vs. The Government of Israel*, Judgment of December 14, 2006, http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf. While the Court has not specifically addressed whether 75(2)(d) reflects customary law, the petitioners cite scholars who claim that it has obtained such a status.

[9] *See* HPCR, "Israel's Obligations under IHL in the Occupied Palestinian Territory," Policy Brief (January 2004), http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=769.

[10] Judgment, para. 12.

Protocol I. The fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War and its supplement, the first Additional Protocol of 1977, articulate the basic protections afforded to civilians by IHL during international conflicts. Geneva IV, to which Israel is a party, protects civilians "in the hands of a Party to the conflict...of which they are not nationals."[11] Additional Protocol I, in addition to providing broader guaranties for civilians, also protects civilian objects.[12]

Article 23 of Geneva IV allows the free passage of medical supplies as well as food for children under fifteen years old, pregnant women, and new mothers, subject to the consent of the party. Article 70 of Additional Protocol I exhorts parties to a conflict to "allow and facilitate rapid and unimpeded passage of all relief consignments" when the civilian population of *any territory under the control of any party* to the conflict, other than occupied territory, is "not adequately provided" with clothing, bedding, shelter, or food supplies, subject to the consent of the party. Both Article 23 and Article 70 allow aid to be suspended for reasons of military necessity; however, these suspensions are to "remain exceptional."[13] In summary, the GoI argued that its obligations to the Gaza strip were limited only by Article 23 and as such were much narrower in nature than the petitioners argued, and subject to military necessity.

According to the GoI, its actions did not constitute collective punishment, and even if they could be characterized as collective punishment, such actions would not be barred in the applicable situation. The GoI described its actions as "economic warfare," which it contended the Fourth Geneva Convention implicitly allows by placing limitations on it in Article 23. The GoI further stated that the class of persons protected by the prohibition on collective punishment includes those who reside within occupied territory, and the GoI believed that Gaza was not occupied. Additionally, the GoI argued that restrictions were directed at the "terrorist organization in the Gaza Strip," and only indirectly affected the population of Gaza. An action, the GoI continued, can be characterized as collective punishment only if it is a "direct punishment of the population."

The restrictions were reasonable and proportional, according to the GoI, because the proportionality and reasonableness of any action must be measured in comparison to possible alternative measures. The only alternative, according to the GoI, would be a military operation in the Gaza Strip, an operation that would entail worse humanitarian consequences for Gaza's residents.

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[11] Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

[12] Several articles refer to "civilian objects;" however, Article 54, which protects "objects indispensable to the civilian population," is most relevant to the discussion at hand. Article 54 of 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, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

[13] ICRC, Commentary on the Additional Protocol 1 of June 8, 1977 to the Geneva Conventions of August 12, 1949 (Yves Sandosz, Christophe Swinarski, Bruno Zimmermann eds.) 1987, para. 2808, available at http://www.icrc.org/ihl.nsf/COM/470-750089?OpenDocument.

The Decision

The Court's test for whether the reduction in fuel and electric supplies was legal was whether the reduction harmed the "essential humanitarian needs" of Gaza's residents. The Court held that the reductions did not harm the residents' "essential humanitarian needs." Despite finding that the State was meeting its obligations, however, the Court did not accept the GoI's characterization of those obligations. The GoI claimed that its obligations to Gaza flowed from its conflict with Hamas and the humanitarian obligations owed by contracting parties to civilians in conflict zones. The Court added two more sources triggering the GoI's obligations: Israel's control over the border crossings between it and the Gaza Strip, and Israel's historical relationship with Gaza, which left Gaza dependent on Israel for its electrical supply. Additionally, and perhaps most importantly, the Court found that the GoI had positive obligations to the residents of Gaza.

The Court held that Gaza was non-occupied

While the Court never expressly states that Israel once occupied the Gaza Strip, it did point to Israel's September 2005 withdrawal from the Gaza Strip as the point from which Israel no longer exerted "effective control" over Gaza. While there is some debate as to whether the occupancy test should be one of actual or potential control, the Court held that in any event Israel lacks the ability to effectively control Gaza.[14]According to the Court, three facts led to an end of Israeli effective control: Israel absolved its military government in the territory, Israel withdrew its (once permanently) stationed soldiers, and Israeli soldiers are no longer in charge of what happens there.[15] Therefore, the Court held, Israel no longer has a duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip under international law applicable to a belligerent occupation as such.[16]

Cases cited by the Court

The Court cited few cases in its opinion. When maintaining that the GoI must operate according to the rules of international law during war, the Court cited HCJ 3451/02 *Almadani v. Minister of Defence* and HCJ 168/91 *Morcus v. Minister of Defence*.[17] Another 2002 judgment, HCJ 3114/02 *Barakeh v. Minister of Defence*, was cited as authority to reaffirm that Israel must meet its humanitarian obligations and that it must do "everything...in order to protect the civilian population."[18] Finally, in order to stress its conviction that rule of law and warfare may work in conjunction, the Court quoted a passage from HCJ 320/80 *Kawasma v. Minister of Defence* that can be summed up thusly: "The war against terrorism is also the struggle of the law against those who seek to undermine it."[19]

[14] Judgment, para. 12.

[15] Ibid.

[16] Ibid.

[17] 3451/02 *Almadani v. Minister of Defence*, Judgment of April 25, 2002, http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.htm.

[18] HCJ 3114/02 *Barakeh v. Minister of Defence*, Judgment of April 14, 2002, http://elyon1.court.gov.il/files_eng/02/140/031/A02/02031140.a02.htm.

[19] HCJ 320/80 Kawasma v. Minister of Defence, 35 (1) P.D. 617.

Which questions were answered and which questions were left unanswered?

The Court clarified that, at least within the Israeli legal framework, Gaza is not occupied by the GoI. Israel purportedly lacked the capacity to "ensure the welfare" of Gaza's residents. In finding that Israel lacked the capacity to "maintain public order" in the Gaza Strip, the Court indicated that Israel was not responsible for complying with Article 43 of the Hague Regulations. Instead, Israel had to meet the "essential humanitarian needs" of the Gaza Strip.[20]

The decision did not explain what Gaza's "essential humanitarian needs" are, nor did it provide a framework to assess whether something is essential to the residents of Gaza more generally. The most prominent IHL questions remaining are: (a) What does "essential humanitarian needs" mean; (b) is Gaza besieged, and if so what legal implications arise; and (c) why does Israel have positive obligations to a non-occupied Gaza?

What does "essential humanitarian needs" mean?

The GoI was, according to the Court, prohibited from taking actions that would violate the "essential humanitarian needs" of the Gaza Strip. The Court uses the term "essential" fourteen times in its decision, each time in reference to goods, services, or humanitarian needs. The decision concludes, for example, that the supply of fuel and electricity the State intends to allow in the Gaza Strip "are capable of satisfying the essential humanitarian needs of the Gaza Strip at the present."[21]

Nonetheless, the decision failed to elaborate what was meant by "essential humanitarian needs," giving little indication as to why the Court found that the GoI was satisfying them, beyond stating the GoI was monitoring the situation and had previously increased the amount of fuel supplied in order to provision ambulances and hospitals. "Essential" is also used in Article 23 of the Fourth Geneva Convention, which states that contracting parties must allow, among other things, the free flow of all "essential foodstuffs." There is no evidence that the Court had this passage in mind, however, or that the phrase held any technical meaning for them beyond its general definition.[22]

Is Gaza a Non-Occupied Territory Subject to a Siege?

As discussed more fully below, Shany writes that the ongoing conflict between Israel and Hamas, as well Israel's direct control over Gaza's airspace, ports, and every border crossing with the exception of Rafah (over which it has some influence[23]), has created a situation amounting to a siege.

[20] Judgment, para. 11.

[21] Judgment, para. 22.

[22] The original Hebrew text uses the word "חיוני," meaning "essential" or "crucial" in this context.

[23] Gisha and PHR, "Rafah Crossing: Who holds the keys?," March 2009, p. 160, available at http://www.gisha.org/UserFiles/File/publications_/Rafah_Summary_Eng.PDF(July 9, 2009) ("Egypt, which has the physical capacity to open Rafah Crossing, closes it as a result of pressure exerted on it by Israel and other parties and in order to promote its own interests…").

Are sieges illegal under IHL?

By its very nature, a siege entails the cutting off and withdrawal of basic necessities to a population by a besieging army. Yoram Dinstein writes that "[t]o be fully effective, siege warfare must posit the deprivation of nourishment from the besieged. If no such deprivation is permitted, a siege becomes devoid of its central hallmark."[24] According to Dinstein, sieges are not prohibited under contemporary IHL so long as the purpose is military in nature and not solely or primarily directed at starving the civilian population. The 1998 Rome Statute of the International Criminal Court prohibits, as a crime in international armed conflicts, the intentional use of "starvation of civilians as a means of warfare;" the Rome Statute does not make such actions a crime in non-international armed conflicts.

Why does Israel have positive obligations?

Extra-territorial obligations derived from international human rights law

The *Bassiouni* Court ruled that Israel's obligations extend beyond those derived from international norms governing siege. Israel, the Court held, not only has a duty to facilitate the passage of basic supplies to Gaza, but also has a duty to provide some of these supplies itself.[25] The extent to which Israel must go beyond the negative obligations of IHL is unclear, however, as is the source from which these positive obligations are derived. In its discussion of the rules of international law, the Court writes that Israel's main duties to the citizens of Gaza derive from the armed conflict between Israel and Hamas, Israel's control over the border crossings, and the relationship that was created between Israel and the territory of the Gaza Strip after years of Israeli military rule in the territory, as a result of which Gaza became dependent on Israel for fuel supplies.[26] The Court did not cite any relevant IHL or IHRL rules in support of its position, and, indeed, Shany writes that any positive obligations based on IHL would be inconsistent with the Court's position that the Gaza Strip is not occupied.[27] It follows, Shany continues, that under the *Bassiouni* regime, IHRL may serve as a more authoritative source for positive obligations than IHL.

Shany asserts that the 2004 European Court of Human Rights case *Ilaşcu* supports "the proposition that international human rights law should govern some extraterritorial application of governmental power even in the absence of effective control over a foreign

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[24] Yoram Dinstein, "Siege Warfare and the Starvation of Civilians," in *Humanitarian Law of Armed Conflict* 145, 150 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991). Similarly, in the "Siege" entry of the Crimes of War Project's "A-Z Guide" of modern warfare and IHL, Tom Gjelten writes that "Historically, a key element of siege warfare has been to...[leave] the population, civilian and military alike, to starve." Tom Gjelten, "Siege," available at http://www.crimesofwar.org/thebook/siege.html (July 9, 2009).

[25] Judgment, paras. 12, 21-22 ("In this case, the facts that were presented to us, as set out above, show that the State of Israel accepts and respects the rules provided in the laws of war, and is committed to continuing to supply the amount of fuel and electricity needed for the essential humanitarian needs of the civilian population in Gaza").

[26] Judgment, para. 12.

[27] Yuval Shany, "The Law Applicable to Non-occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*," forthcoming in Isr. L. Rev., 2009, p. 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350307.

territory or custody of persons."[28] He argues that the Israeli Supreme Court may be read as having endorsed this position in *Bassiouni*. In *Ilaşcu*, the Court held that Russia was responsible for human rights violations in Transdniestria by reason of the "effective authority, or at the very least...decisive influence" Russia had over the area's authorities. Shany believes that Israel meets the "decisive influence" test, and thereby would incur positive human rights obligations over Gaza under the *Ilaşcu* rationale. Shany notes, however, that *Ilaşcu*'s "expansive approach to jurisdiction...may encounter serious resistance in legal practice."[29]

Additional duties created by Gaza's historical dependency

Benvenisti argues that the positive obligations in *Bassiouni* could be based on the principles of the law of occupation as well as well as human rights law. He maintains that the occupant's obligations under Article 43 of the Hague Regulations of 1907 – requiring an occupying power to ensure "public order and civic life" – do not suddenly end when an occupation is terminated.[30] Instead, according to Benvenisti, the "present tense obligations of the occupant toward the occupied population should be interpreted as entailing also obligations to ensure as much as the occupant possibly can the continuation of 'public order and civil life' during and immediately after the termination of the occupation and the transition to indigenous rule."[31] Both the length of the occupation and the level of the occupied population's dependency on the occupant would be factors necessary to ascertain the scope of the occupant's post-occupation obligations. According to this view, a relatively short occupation in which the occupier's involvement in daily life and public institutions was minimal would entail a narrower post-occupation obligation than a lengthy occupation in which the occupier became heavily involved in the occupied zone's daily life and public institutions, as occurred in the Gaza Strip.

Gisha and Physicians for Human Rights (PHR), two NGOs with extensive experience in Gaza, advance a similar argument. They maintain that Israel controls life in the Gaza Strip to such a degree that it still occupies Gaza. Nonetheless, they argue that under the principle of state responsibility, Israel would still be obliged to open the border crossings and to guarantee freedom of movement to the residents of Gaza even if Gaza was not occupied.

According to a principle of State responsibility, a State that commits an internationally wrongful act is required to provide reparation for the injury caused. The Draft Rules on State Responsibility for Internationally Wrongful Acts, adopted by the International Law Commission and the United Nations General Assembly, define an internationally wrongful act as an act or an omission by a State which is both "attributable to the State under international law," and "[c]onstitutes a breach of an international obligation of the State." Therefore, an occupying power that does not fulfill its occupation (or, potentially, its post-occupation) obligations under IHL and IHRL would have to make reparations to the

[28] Ibid., 13–14.

[29] Ibid., 14.

[30] Eyal Benvenisti, "The Law on the Unilateral Termination of Occupation," in *Veröffentlichungen des Walther-Shückings-Instituts für Internationales Recht an der Universität Kiel* (Andreas Zimmerman & Thomas Giegerich eds. 2009), p. 9, available at http://law/bepress/taulwps/fp/art93/.

[31] Ibid., 7.

occupied population.

Shany writes that regarding Gaza direct compensation may be inappropriate and that restitution to the original condition would be impossible. In order to mitigate the consequences of the breach, however, Israel could provide basic supplies until Gaza is able to develop the capacity to independently supply itself.[32] Shany cautions that "there is little support in actual practice to this theory of post-occupation...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."[33]

What are Egypt's obligations to a non-occupied Gaza?

Israel understandably receives the most attention from scholars and those on the ground concerned with which humanitarian obligations are owed to the people of Gaza. However, an argument can also be made that Egypt has (potentially unfulfilled) obligations to the population of Gaza.

Since Hamas' assumption of power in Gaza in 2007, Egypt has refused to regularly open the only crossing on the Egyptian border with Gaza, the Rafah Crossing. Egypt has periodically opened the border to allow humanitarian aid through.[34] Normally, a sovereign State retains the power to decide who and what enters its territory; however, Israel's degree of control over the Gaza Strip may require Egypt to open the Rafah Crossing. According to two NGOs, Gisha and PHR, Israel's conduct obliges Egypt to open the Rafah Crossing.[35] The NGOs' argument is two-fold: (1) Israel's control of Gaza's airspace, ports, and border crossings into Israel has created a land-locked territory, which gives its residents the right to demand passage through Egypt, and (2) the closure of the Gaza Strip crossings is part of a policy of collective punishment, which constitutes a violation of the Fourth Geneva Convention that Egypt must respond to by opening the Rafah Crossing.[36] As a party to the Fourth Geneva Convention, Egypt is under a general obligation to take steps to ensure all other High Contracting Parties – including Israel – do not violate the provisions of the convention. Under Article 1 of the Fourth Geneva Convention, parties to the convention must "do everything in their power to ensure that the humanitarian principles underlying the

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[32] International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts, 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.")

[33] Yuval Shany, "The Law Applicable to Non-occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*," forthcoming in Isr. L. Rev., 2009, p. 17, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350307.

[34] Gisha and PHR, "Rafah Crossing: Who holds the keys?," March 2009, p. 162, available at http://www.clink.co.il/gisha/Rafah_Report_Eng.pdf (July 9, 2009).

[35] Ibid., 162.

[36] Ibid., 165.

Convention are applied universally."[37]

Conclusion

The key legal questions before the court included: were the fuel and electric supply reductions legal; was Gaza occupied territory; and what are Israel's obligations to Gaza? In effect, the Court held that the fuel and electric supply reductions made by the GoI were legal and that Gaza is not occupied territory. In addition, despite finding that Gaza is not occupied territory, the Court held that Israel has positive obligations to the population of Gaza, and that those obligations derive from the laws of war, Israel's control over border crossings, and Gaza's historical dependency on Israel.

For humanitarian professionals in Gaza, the Court's decision provides a basis on which to advocate for Israel's fulfillment of its positive obligations to the population of Gaza. According to the Court, the GoI may not take actions that would violate the "essential humanitarian needs" of the Gaza Strip. According to the Court, factors to consider when assessing the scope of Israel's obligations to the population include Gaza's historical dependency on Israel, Israel's control over border crossings, and the laws of war.

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[37] ICRC, Commentary on the IV Geneva Convention: Relative to the Protection of Civilian Persons in Time of War (Jean Pictet ed.) 1958, p. 16.

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