

## **Al-Haq's Rejoinder to Gisha's 'Scale of Control' Report:**

### **Israel's Continued Responsibility as the Occupying Power in the Gaza Strip**

In November 2011, the Israeli human rights organisation Gisha published the position paper '*Scale of Control: Israel's Continued Responsibility in the Gaza Strip*.' Readjusting its own previous assessment of the situation in the Gaza Strip after the 2005 unilateral 'disengagement',<sup>1</sup> Gisha maintains that the international law of occupation currently applies in the Gaza Strip only insofar as Israel persists in directly exercising governmental powers over the territory and population of the Gaza Strip. Gisha's report asserts that where governmental powers are exercised by the Palestinian authorities, Israel's obligations would instead stem from a different legal framework identified as "post-occupation obligations", which provides protection to the civilian population during transition from occupation to the "fulfilment of lawful sovereignty."<sup>2</sup>

In order to reach its conclusions, which it claims to do by applying accepted international law doctrines,<sup>3</sup> Gisha's report challenges some of the most basic principles of the international law of belligerent occupation and international human rights law. The purpose of this rejoinder is, therefore, to reaffirm the relevance of these principles as part of the applicable legal framework setting out Israel's responsibilities towards the population in the Occupied Palestinian Territory (OPT).

#### **1. International law of belligerent occupation fully applies to territory placed under the 'effective control' of a hostile power**

In 2005 Israel withdrew most of its troops and evacuated the settlements from the Gaza Strip. According to Israel's "Disengagement Plan", approved by the Israeli Parliament (*Knesset*), these measures were deemed sufficient to refute claims regarding Israel's continued responsibility for the Palestinian population of the Gaza Strip.<sup>4</sup> However, as Gisha's report points out, Israel persists in directly exercising some forms of governmental authority over the Gaza Strip. For instance, it retains control of the population registry, preventing the Palestinian authorities from issuing identity

<sup>1</sup>Gisha, 'Disengaged Occupiers: The Legal Status of Gaza' (January 2007) <[http://www.gisha.org/UserFiles/File/publications\\_english/Publications\\_and\\_Reports\\_English/Disengaged\\_Occupiers\\_en.pdf](http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf)> accessed 5 December 2011.

<sup>2</sup> Gisha, 'Scale of Control: Israel's Continued Responsibility in the Gaza Strip' (November 2011) <[http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol\\_en.pdf](http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf)> accessed 5 December 2011, 10 (hereinafter: Gisha's 'Scale of Control').

<sup>3</sup> *Ibid*, 6.

<sup>4</sup> 'Resolution Regarding the Disengagement Plan of 6 June 2004, Addendum A – Revised Disengagement Plan – Main Principles' (6 June 2004) <<http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June+2004.htm#A>> accessed 5 December 2011, paragraph 1.

cards and changing addresses between the West Bank and the Gaza Strip<sup>5</sup>; blocks the delivery of gas and electricity to the local population; and controls international traffic of people and goods from and to the Gaza Strip, collecting, and frequently retaining, custom duties on behalf of the Palestinians.<sup>6</sup> Israeli troops remain stationed along the borders between Israel and the Gaza Strip, enforcing the so-called “buffer zone” – an area extending over approximately 17 per cent of the territory of the Gaza Strip barred to Palestinian access<sup>7</sup> – and conducting regular raids into cities and villages. Additionally, Israel retains exclusive jurisdiction over the territorial waters and airspace of the Gaza Strip and full control over its land borders, with the exception of the Rafah crossing.<sup>8</sup> Israel intensified its comprehensive closure regime on the Gaza Strip in 2007, preventing the movement of goods and people to and from the Gaza Strip by land and sea. Resultantly, the ability of the Palestinian authorities to exercise governmental powers is thereby significantly limited, even in those domains where Israel has allegedly relinquished its authority.

According to Gisha’s report, the present situation calls for a ‘functional approach’ to the application of the international law of belligerent occupation, whereby the relevant provisions of the 1907 Hague Regulations and Fourth Geneva Convention would apply to the OPT only insofar as Israel persists in directly exercising governmental powers therein. Whereas in the fields in which it has diminished its authority, Israel’s responsibility as an Occupying Power should be considered extinguished.<sup>9</sup> Claims for a ‘functional approach’ have been advanced in the past by scholars and international tribunals<sup>10</sup> with the purpose of extending some of the guarantees provided by the international law of belligerent occupation to civilians who find themselves in the hands of an invading army that has yet to gain full control over the territory.<sup>11</sup> It is however disingenuous and legally erroneous to invoke the ‘functional approach’ to challenge the widely accepted position of international law according to which a territory can either be occupied or not, with no intermediary status.

Notwithstanding Israel’s 2005 unilateral ‘disengagement’, the Gaza Strip remains under occupation, as affirmed by the ICRC<sup>12</sup> numerous States<sup>13</sup> and UN bodies.<sup>14</sup> Under Article 42 of the

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<sup>5</sup> HaMoked, Btselem, ‘Separated Entities: Israel Divides Palestinian Population of West Bank and Gaza Strip’ (September 2009) <[www.btselem.org/download/200809\\_separated\\_entities\\_eng.pdf](http://www.btselem.org/download/200809_separated_entities_eng.pdf)> accessed 10 December 2011.

<sup>6</sup> S Darcy, J Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’, 15 *Journal of Conflict & Security Law* 2 (2010) 211-243.

<sup>7</sup> Al-Haq, ‘Shifting Paradigms: Israel’s Enforcement of the Buffer Zone in the Gaza Strip’ (23 June 2011) <[http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item\\_id=100&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download](http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item_id=100&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download)> accessed 5 December 2011.

<sup>8</sup> Israel shares responsibility for the administration of the Rafah crossing with Egypt. Gisha, ‘Rafah Crossing: Who holds the Keys?’ (March 2009) <[www.gisha.org/UserFiles/File/publications/Rafah\\_Report\\_Eng.pdf](http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf)> accessed 6 December 2011.

<sup>9</sup> Gisha’s ‘Scale of control’, 26

<sup>10</sup> See, amongst others, E Benvenisti, ‘The Law on the Unilateral Termination of Occupation’, in T Giegerich (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Berlin: Duncker & Humblot, 2009), 371, 374-5; and TD Gill, ‘The Law of Belligerent Occupation: The Distinction between Invasion and Occupation of Disputed Territory’, in A De Guttery, H Post, G Venturini (eds.), *The 1998-2000 War between Eritrea and Ethiopia: An International Legal Perspective* (The Hague: T.M.C. Asser Press, 2009), 365. See also, *Prosecutor v Naletilić et al.* (Judgment, Trial Chamber) ICTY-98-34-T (31 March 2003), para. 221.

<sup>11</sup> See, JS Pictet, *Commentary on the Fourth Geneva Convention* (Geneva: ICRC, 1958), 60: ‘The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.’

<sup>12</sup> ICRC, ‘Gaza: no end in sight to hardship and despair’ (20 May 2011) <<http://www.icrc.org/eng/resources/documents/interview/2011/palestine-israel-interview-2011-05-19.htm>> accessed 5 December 2011.

1907 Hague Regulations, what triggers the application of the law of occupation is the establishment by a hostile power of its 'effective control' over a foreign territory and its population. In order to maintain such control, however, the Occupying Power is not required to keep its troops permanently stationed in the occupied territory,<sup>15</sup> nor does it need to be the sole authority exercising governmental powers therein. As outlined by the International Court of Justice (ICJ) in its Advisory Opinion on the Wall,<sup>16</sup> the transfer of certain governmental powers to local authorities does not absolve the Occupying Power from its responsibility under the law of belligerent occupation.<sup>17</sup> As long as the Occupant maintains paramount authority over the occupied territory, regardless of which governmental powers it has relinquished or diminished, it will still be called to fulfil all its obligations towards the local population, including ensuring that local authorities provide for the orderly administration of the occupied territory.

Ultimately, the binary test, upon which the application of the law of belligerent occupation is based, guarantees those living in territory controlled by a hostile army that the Occupying Power will assume full responsibility for life in the occupied territory until such time when it completely withdraws its authority, thus allowing the local population to freely and effectively administer their territory.

## 2. Under international law, there is no legal framework that provides for 'post-occupation obligations'

Gisha's report maintains that in the spheres in which it no longer directly exercises governmental powers, Israel owes obligations to Palestinian residents of the Gaza Strip under 'post-occupation law.' To substantiate this position, Gisha mainly relies on the concept of *residual responsibility* – elaborated by Benvenisti<sup>18</sup> and allegedly endorsed by the Israeli High Court of Justice in the *a/-Bassiouni* case<sup>19</sup> – whereby Article 43 of the 1907 Hague Regulations is seen to impose forward-looking obligations on the Occupying Power to ensure that public order and civil life are maintained after the end of occupation, until the local population regains the ability to fully exercise its

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<sup>13</sup> Ministry of Foreign Affairs of The Russian Federation, Information and Press Department, 'Press Release Concerning Completion of Withdrawal of Israeli Settlements and Military Infrastructure from Gaza Strip' (13 September 2005) <<http://unispal.un.org/UNISPAL.NSF/0/OCA77E912C1E0EA48525707B00600559>> accessed 5 December 2011 and United Nations Latin American and Caribbean Meeting on the Question of Palestine, 'Caracas Declaration' (14 December 2005) <<http://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/d3e0c3f96f0d6418852570d8006b685f?OpenDocument>> accessed 5 December 2011, para. 4.

<sup>14</sup> See, amongst others, UN Security Council Resolution 1860 (8 January 2009); UN General Assembly Resolution 63/98 (18 December 2008), para. 10; 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, John Dugard' (21 January 2008) UN Doc. A/HRC/7/17, para. 9; 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Richard Falk' (11 February 2009) UN Doc. A/HRC/10/20, para. 4; and 'Report of the United Nations Fact-finding Mission on the Gaza Conflict' (25 September 2009) UN Doc. A/HRC/12/48, para. 74.

<sup>15</sup> See 'US Field Manual', para. 356 and 'British Manual', para. 11.3.2.

<sup>16</sup> See, ***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*** (Advisory Opinion), ICJ Rep 2004. The ICJ applied the international regime of belligerent occupation to the whole West Bank, notwithstanding the fact that certain governmental powers have been transferred to the Palestinian Authority.

<sup>17</sup> See, in the same vein, 'US Field Manual', paragraph 367 (b): 'The occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions. It may, for example, call upon the local authorities to administer designated rear areas, subject to the guidance and direction of the occupying power. Such action is consistent with the status of occupation, so long as there exists the firm possession and the purpose to maintain paramount authority.'

<sup>18</sup> E Benvenisti (n 7) 9.

<sup>19</sup> HCJ 9132/07, ***Jaber Al-Bassiouni v The Prime Minister of Israel*** (30 January 2008) <[http://elyon1.court.gov.il/Files\\_ENG/07/320/091/n25/07091320.n25.htm](http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.htm)> accessed 5 December 2011, para. 12.

sovereign rights.<sup>20</sup> This interpretation of Article 43, however, is inconsistent with the principle and right to self-determination of peoples, and further serves as an incentive for a hostile army to perpetuate its occupation of foreign territory.

By entrusting the Occupying Power with the preservation of public order and civil life in the occupied territory, international humanitarian law provides for an exception to the principle and right to self-determination, allowing the Occupying Power to substitute its own authority to that of the legitimate sovereign, in order to ensure its military and security needs whilst fulfilling its obligations towards the protected population. This substitution, importantly, should only be temporary: once the Occupying Power has withdrawn and completely relinquished its control, it cannot continue to interfere with the lives of the local population. The concept of *residual responsibility*, moreover, seems to be based on a misconception of the role of the Occupying Power. Under international law, it has no obligation to ensure that local authorities are ready to take up full responsibility for the administration of civil life before it fully withdraws its troops from foreign territory.

### **3. Any authority exercising governmental powers over a given territory must ensure respect for the human rights of the local population**

According to Gisha's analysis, irrespective of the question of control of the Gaza Strip, Israel owes obligations under international human rights law only to the extent that actions taken by Israel's officials have a direct and substantial effect on the residents of the Gaza Strip.<sup>21</sup> Yet, under international law, Israel – as the Occupying Power in the Gaza Strip – is not only required to respect the rights of the local population, but must also secure respect for these rights by protecting the population from violations perpetrated by governmental and non-governmental authorities. This positive obligation includes obligations to protect a range of international human rights, enshrined in treaties that Israel has ratified, which require it to prevent, investigate and repress violations of such rights in the Gaza Strip.

This conclusion does not detract from the responsibility of the Palestinian authorities since for the purpose of international human rights law jurisdiction over a given territory may simultaneously be exercised by two or more governmental authorities,<sup>22</sup> each owing respective obligations towards the civilian population. To the extent that they actually exercise elements of governmental power in the Gaza Strip, therefore, the Palestinian authorities are also duty-bound to respect customary international human rights law and to do whatever is in their power to prevent other actors from violating these rules.

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<sup>20</sup> Gisha's 'Scale of Control', 51-54.

<sup>21</sup> *Ibid*, 61.

<sup>22</sup> *Ilașcu and others v Moldova and Russian Federation* (App no 48787/99), European Court of Human Rights, 8 July 2004  
<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699762&portal=hbkmsource=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> accessed 5 December 2011.

**The analysis presented in Gisha's report demands that the following principles of international law be reiterated:**

- The Gaza Strip remains under belligerent occupation. Although most of the permanent presence of Israeli troops has been withdrawn, Israel continues to retain effective control over all aspects of civil life in the Gaza Strip on a daily basis as well as to directly exercise certain elements of governmental control over the territory and the people of the Gaza Strip;
- For as long as Israel maintains its effective control over the Gaza Strip, it must fully comply with its obligations under international humanitarian and human rights law. Israel's responsibility to ensure respect for Palestinian rights extends also to spheres in which governmental powers are exercised by Palestinian authorities. In order to comply with its obligations under international law, Israel must put an immediate end to its closure regime in the Gaza Strip and to all other practices and policies that hinder the Palestinian authorities' abilities to administer the territory and provide for the basic needs of the civilian population;
- Israel's policies in the OPT – including the closures imposed on the Gaza Strip and the restrictions on the freedom of movement between the West Bank and the Gaza Strip, amongst others practices – are perpetuating the denial of the Palestinian people's right to self-determination, in effect, creating a cultural, economical and social gap between the West Bank and the Gaza Strip. Israel must therefore immediately relinquish its control of these territories, allowing the Palestinian people to freely decide for their own future;
- Under international law, the Occupying Power has no obligation to prepare the ground for its withdrawal, nor does it bear residual responsibility after the end of occupation, until the local sovereign is able to fulfill all the duties previously imposed on the occupant. As soon as Israel terminates its control, it will cease to be responsible for ensuring public order and civil life in the OPT. The primary obligation Israel will owe at that point will concern reparations for violations of international law, including international humanitarian and human rights law, perpetrated during the occupation.