What Constitutes Occupation? Israel as the occupying power in the Gaza Strip after the Disengagement.

Dikker Hupkes, S.D.

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Foreword

by John Dugard

Gaza is in the forefront of today's news. Whether it be because of Palestinians firing rockets into the neighbouring town of Sderot or because of Israeli Defence Forces attacks that cause heavy loss of life and destruction in Gaza, Gaza is seldom out of the news. The rift between Fatah and Hamas that has resulted in the separation of the Palestinian territory into two is another source of regular news. Events of this kind tend to obscure the dispute which is central to an understanding of the 'Gaza problem' - whether Gaza remains 'occupied' territory, with all the consequences this entails, or whether it has ceased to be 'occupied' territory since the withdrawal of Israeli forces and settlers in August 2005.

Israel maintains that Gaza ceased to be occupied territory when it withdrew its forces in 2005 and that Gaza is now a 'hostile entity', whatever this may mean, which may be subjected to military attacks in the name of self-defence, and in respect of which no humanitarian obligations arise. The United Nations and most of the international community take a very different position. For them Gaza was militarily occupied by Israel in 1967 and remains occupied territory, despite the withdrawal of Israeli forces.
This means that Israel is bound by the provisions of international humanitarian law, particularly the Fourth Geneva Convention, which oblige the occupying power to provide for the humanitarian needs of the occupied people and to desist from collective punishment of the people in the name of self-defence. Essentially the dispute centres on the question of effective control. If Israel continues to exercise effective control over the territory it remains an occupying power. If not, it has ceased to be a military occupant.

Sander Dikker Hupkes' excellent study examines the issues pertaining to both military occupation in general and the occupation of Gaza in particular. It provides an examination of the evolution of the rules of international law governing occupation from the nineteenth century to the present day, with special emphasis on the Hague regulations of 1899 and 1907, the jurisprudence of Nuremberg and the Fourth Geneva Convention. Having laid the legal framework, Dikker Hupkes then proceeds to the question whether Israel exercises effective control over Gaza despite the fact that it no longer has a permanent military presence in the territory. No study of this kind can confine itself to the applicable rules of law. On the other hand, no such study can

examine the factual situation without regard to the governing legal rules. The present study succeeds in portraying the law through the facts and the facts through the law. It is essential reading for anyone wishing to obtain a clear and accurate understanding of the conflict over Gaza. Without such an understanding public opinion will be uninformed and unable to contribute to the resolution of a dispute that threatens world peace and the governance of occupied territories in accordance with humanitarian law.

John Dugard
Formerly Professor of International Law at Leiden University and Special Rapporteur to the Human Rights Council on the Human Rights Situation in the Occupied Palestinian Territory

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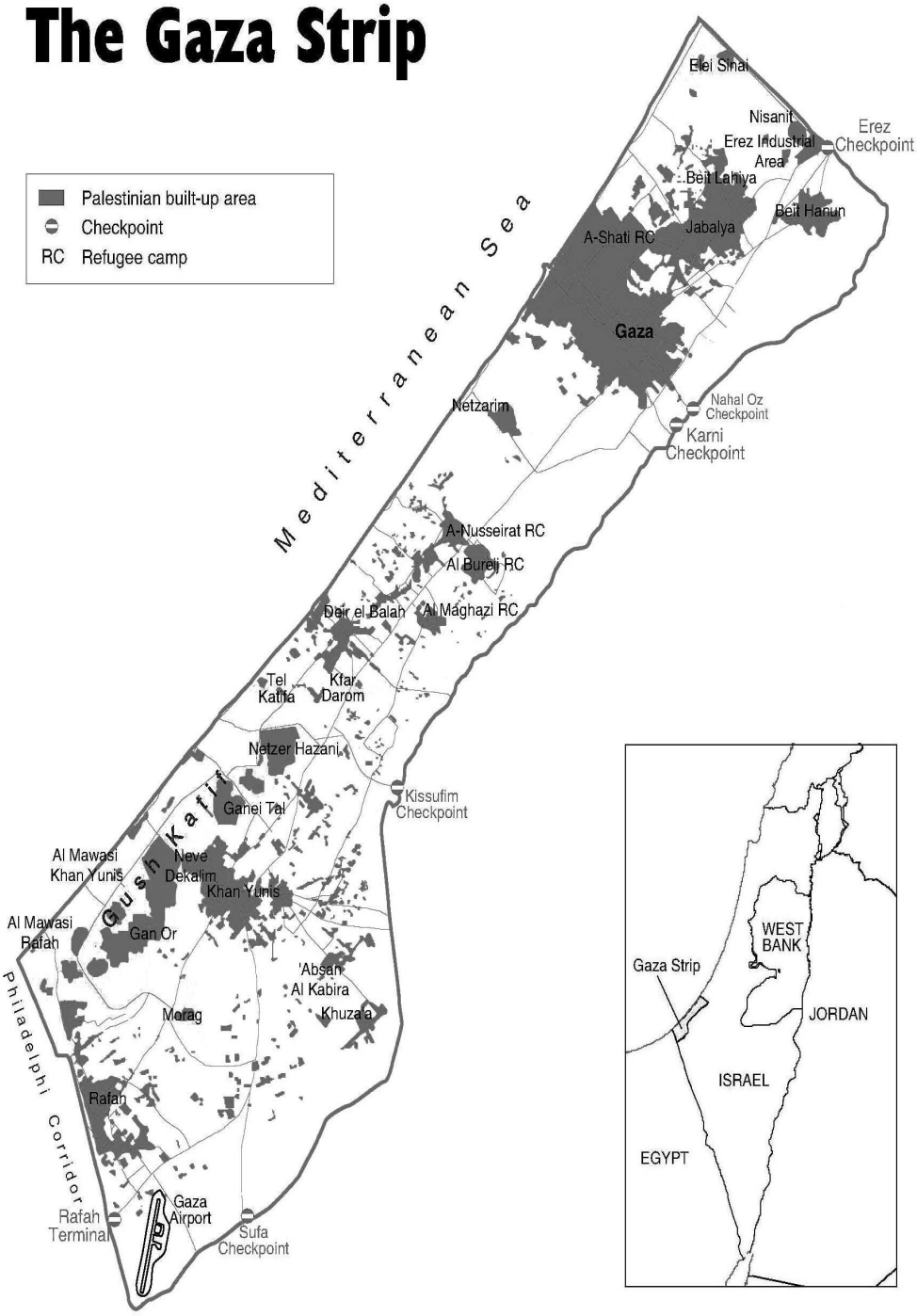
List of abbreviations

art.	article
AJIL	American Journal of International Law
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
CPA	Coalition Provisional Authority in Iraq
doc.	document
DoP	Declaration of Principles
ed(s).	editor(s)
EU(BAM)	European Union Border Assistance Mission
ECOSOC	UN Economic and Social Council
EMHRN	Euro-Mediterranean Human Rights Network
GC IV	1949 Fourth Geneva Convention
GCMHP	Gaza Community Mental Health Programme
GYIL	German Yearbook of International Law
HPCR	Harvard Program on Humanitarian Policy and Conflict Research
HRC	Human Rights Council (UN)
HRW	Human Rights Watch
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal of the Former Yugoslavia
IDF	Israeli Defense Force
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Law Materials
IMT Nuremberg	International Military Tribunal at Nuremberg
IRRC	International Review of the Red Cross
ISC	Israeli Supreme Court
IYHR	Israeli Yearbook of Human Rights
OCHA	UN Office for the Coordination of Humanitarian Affairs
OPT	Occupied Palestinian Territories
PA	Palestinian Authority
para.	paragraph
PCA	Permanent Court of Arbitration
PCHR	Palestine Center for Human Rights
PHR-Israel	Physicians for Human Rights – Israel
p.	page
pp.	pages
Res	Resolution
S-G	Secretary-General of the UN

UN	United Nations
UN Charter	Charter of the United Nations (1945)
UNGA	UN General Assembly
UNSC	UN Security Council
UNTS	UN Treaty Series
VCLT	Vienna Convention on the Law of Treaties (1969)
Vol.	Volume
WAFA	Palestine News Agency WAFA
YIMEL	Yearbook of Islamic and Middle Eastern Law

The Gaza Strip



Source: map from B'Tselem March 2005, edited by author

Introduction

An essay on the law of occupation and the Gaza Strip; a (un)timely subject

The Israeli-Palestine conflict is one of the greatest challenges to international law today. The law's vision is blurred by the complex history of the conflict, as well as the strong political and religious convictions of the parties involved. As a result, Israel and the Occupied Palestinian Territories (OPT) form an unique testing ground for issues of contemporary international law. In my view, complex conflicts such as this must be treated by international lawyers, academic or otherwise, in the most objective way possible in order to be able to find some legal truths under the veil of politics. This is of course difficult when one deals with a conflict which has been highly politicized since its origin. In a conflict so strongly divided into two main sides, it is almost impossible to remain 'in the middle'. Still, in the essay now before you I attempted to do just that, while not preventing myself from drawing my own conclusions from what in my view constitutes the law and the relevant facts.

1 CHOICE AND SCOPE OF SUBJECT MATTER

This essay deals with the part of international humanitarian law known as the law of occupation. The focus will be on what exactly constitutes and ends occupation, rather than on the rights and duties derived from the law of occupation. The relevance of this subject matter was fueled in 2005 by a historical event; the unilateral evacuation of Israeli armed forces and the Israeli colonists from the Gaza Strip. This evacuation, which was completed on 12 September 2005, followed from the implementation of the Israeli Disengagement Plan of 6 June 2004.

Unfortunately, from 25 June 2006 onwards, the situation in the Gaza Strip deteriorated rapidly. This was the direct consequence of the capture of an Israeli soldier by Palestinian extremists based in the Gaza Strip. The Israeli armed forces started a heavy offensive on Gaza Strip territory to retrieve their missing soldier. These events blurred the legal status of the Gaza Strip even further, since Israeli armed forces once again moved into the Gaza Strip.

At the time of writing, March 2008, the situation in the Gaza Strip has become even more worrying, to say the least. IDF forces are fighting in the Gaza Strip on a daily basis, while the humanitarian situation of the Palestinian civilians is alarming due to serious shortages in basic necessities such as food,

medicine and fuel for the power generators. This will be elaborated upon later in this chapter.

From the viewpoint of the international law of occupation, the period after the implementation of the Israeli Disengagement Plan, but prior to the capture of the Israeli soldier is the most interesting period. In that period, Israel arguably had the least control over the Gaza Strip since its occupation in 1967. For the benefit of the legal analysis of the law of occupation and the subsequent factual analysis of the situation in the Gaza Strip, this essay is based on the facts as they presented themselves between 12 September 2005 and 25 June 2006. Thus, in this essay the (past) situation in the Gaza strip is used as a case study to test and illustrate the conclusions in this essay.

As a result, the more recent developments in the Gaza Strip are not taken into account. Nevertheless, I think it is necessary to provide at least a brief overview of the current state of affairs, to further illustrate some of the conclusions drawn in the subsequent chapters.

2 Current factual situation in the Gaza Strip

Firstly, it is important to provide a brief factual account of the recent situation as it is presented in numerous authoritative sources. Since June 2006, there have been many reports of the deteriorating humanitarian situation in the Gaza Strip. One of the most recent of these reports, which was drawn up by a coalition of humanitarian and human rights organizations, states that the humanitarian situation in the Gaza Strip is the worst since 1967.[1] Most reports identify Israeli policy as one of the main reasons for this deterioration.

Israeli control over the Gaza Strip through military activities and incursions

There are numerous reports of recent military actions in the Gaza Strip carried out by the IDF.[2] These actions were often in response to the indiscriminate rocket attacks on Israel by Palestinian militants in the Gaza Strip and directed towards those militants. The Israeli military actions, executed from the ground as well as from the air, resulted in numerous casualties and wounded. According to several authoritative sources, like the ICRC and the HRC, there were numerous civilians among the victims.[3] There are also reports of destruction

1 Oxfam a.o. Coalition Report 03/2008.

2 OCHA 27/02/08-03/03/08; Report of Special Rapporteur Dugard of January 2008, p. 8-9; UN press release 23/01/08 (HRC 6th Special Session); BBC 13/03/08; Amnesty International 03/03/08; PHR-Israel /0303/08; HRW 07/02/08; PHR-Israel, Al Mezan & GCMHP 24/01/08; Report of Special Rapporteur Dugard of August 2007, p. 8.

3 ICRC Report 07/03/08; UN-HRC Res. A/HRC/7/L.1; Report of Special Rapporteur Dugard of August 2007, p. 9-10; BBC 13/03/08; Amnesty International 03/03/08; HRW 07/02/08; PHR-Israel, Al Mezan & GCMHP 24/01/08.

of houses and civilian property, as well as medical facilities and vehicles.[4] Sections of the Gaza Strip are designated as "no-go" zones, which the IDF enforces strictly with lethal force.[5]

Israeli Control over the Gaza Strip through closure of its borders for electricity, fuel, humanitarian aid and (medical) supplies

Israel frequently cuts off power supplies to the Gaza Strip. Although the Israeli Supreme Court approved these power cuts in January 2008,[6] numerous sources state that the power cuts, together with the closure of all borders, amount to a form of collective punishment under international humanitarian law.[7] The power cuts already resulted in a strongly diminished availability of drinking water for the population, diminished capacity and closure of hospital wards, nonfunctioning of essential medical equipment, and inadequate sewage treatment and waste disposal.[8]

Israel has closed down the Gaza borders for goods and people more and more often, especially after Hamas seized power in the Gaza Strip in June 2007.[9] Only humanitarian equipment and basic food supplies are allowed into the Gaza Strip by Israel. In deciding which goods are allowed into the Gaza Strip in order to maintain a 'minimum humanitarian standard', Israeli authorities maintain a very strict definition of what comprises 'essential humanitarian assistance'.[10] Furthermore, Israel often places such a stringent closure upon the border crossings of the Gaza Strip, that all food, fuel and medicines are refused entry. This includes humanitarian aid and spare parts for medical equipment.[11] According to authoritative sources, more then 80 percent of the

4 Joint Statement UN Organisations, 13/06/07; OCHA 27/02/08-03/03/08; Amnesty International 03/03/08; PHR-Israel 03/03/08.

5 Report of Special Rapporteur Dugard of January 2008, p. 8.

6 ISC H.C. 9132/07 (30/01/08).

7 UN-HRC Res. A/HRC/7/L.1; UN press release 23/01/08 (HRC 6th Special Session); Report of Special Rapporteur Dugard of August 2007, p. 10-11; Oxfam a.o. Coalition Report 03/2008, p. 6, 13; HRW 07/02/08; GCMHP 22/01/08; Amnesty International 21/01/08; PHR-Israel, Al Mezan & GCMHP 24/01/08; B'Tselem Report 2007, p. 15, 18.

8 ICRC Report 07/03/08; OCHA 27/02/08-03/03/08; OCHA – Holmes press release 15/02/08; OCHA 18-24/01/08; Report of Special Rapporteur Dugard of January 2008, p. 12; Oxfam a.o. Coalition Report 03/2008, p. 9-10; GCMHP 22/01/08; Amnesty International 21/01/08; HRW 07/02/08; PHR-Israel, Al Mezan & GCMHP 24/01/08; B'Tselem Report 2007, p. 15.

9 OCHA 18-24/01/08; Oxfam a.o. Coalition Report 03/2008, p. 8; HRW 07/02/08; B'Tselem Report 2007, p. 16.

10 OCHA – Holmes press release 15/02/08; UN press release 23/01/08 (HRC 6th Special Session); Oxfam a.o. Coalition Report 03/2008, p. 8; HRW 07/02/08; B'Tselem Report 2007, p. 15; PHR-Israel 01/11/07.

11 OCHA 18-24/01/08; Oxfam a.o. Coalition Report 03/2008, p. 7; GCMHP 22/01/08; Amnesty International 21/01/08; HRW 07/02/08; PHR-Israel 01/11/07.

population in the Gaza Strip is dependent on humanitarian aid for their basic food supplies.[12]

The medical supplies of the hospitals and physicians of the Gaza Strip are running low and are mostly dependent on support from the ICRC.[13] Essential medical equipment is not present or not functional due to the lack of spare parts.[14] Due to the closure of the borders for persons, it is very difficult for the population of Gaza to receive medical treatment which is not available in the Gaza Strip. A medical referral to an Israeli hospital is not sufficient to assure entry into Israel and there are reports of patients dying because of this.[15]

Other forms of Israeli control over the Gaza Strip

The closure of the borders resulted in a further deterioration of the economic situation in the Gaza Strip: factories were forced to close down and construction projects to be put on hold due to shortage in material, and unemployment rates increased dramatically.[16] Export of agricultural produce has nearly ceased.[17]

According to numerous sources, Israel still controls Gaza's airspace and territorial waters and evidently also the external land perimeters.[18] Israel still collects taxes like the VAT on behalf of the Palestinian Authority.[19] These taxes are for example used to pay for the electricity that Israel sells to Gaza.[20] Israel exercises significant control over the financial situation in the Gaza Strip through its banking facilities and currency regulation.[21] As is clear from the facts as presented above, Israel exercises significant control over the supply

12 OCHA – Holmes press release 15/02/08; UN press release 23/01/08 (HRC 6th Special Session); Oxfam a.o. Coalition Report 03/03/08, p. 7; B'Tselem Report 2007, p. 13.

13 ICRC Report 07/03/08; OCHA 27/02/08-03/03/08; Report of Special Rapporteur Dugard of January 2008, p. 12; PHR-Israel 03/03/08; B'Tselem Report 2007, p. 12; PHR-Israel 01/11/07.

14 OCHA – Holmes press release 15/02/08; Amnesty International 03/03/08.

15 Report of Special Rapporteur Dugard of January 2008, p. 9, 11; UN press release 23/01/08 (HRC 6th Special Session); Report of Special Rapporteur Dugard of August 2007, p. 10; Oxfam a.o. Coalition Report 03/2008, p. 11; PHR-Israel 03/03/08; Amnesty International 21/01/08; B'Tselem Report 2007, p. 17; PHR-Israel 01/11/07.

16 ICRC Report 07/03/08; Report of Special Rapporteur Dugard of January 2008, p. 11; Report of Special Rapporteur Dugard of August 2007, p. 11; Oxfam a.o. Coalition Report 03/2008, p. 8; HRW 07/02/08; B'Tselem Report 2007, p. 16.

17 Report of Special Rapporteur Dugard of August 2007, p. 11; Oxfam a.o. Coalition Report 03/2008, p. 8; B'Tselem Report 2007, p. 16.

18 Report of Special Rapporteur Dugard of January 2008, p. 8; Report of Special Rapporteur Dugard of August 2007, p. 8; Oxfam a.o. Coalition Report 03/2008, p. 13; HRW 07/02/08; B'Tselem Report 2007, p. 13.

19 Report of Special Rapporteur Dugard of August 2007, p. 8; B'Tselem Report 2007, p. 13.

20 HRW 07/02/08.

21 Report of Special Rapporteur Dugard of January 2008, p. 10; CIA World Fact Book.

of electricity and fuel to the Gaza Strip. It also has control over the sewage and telecommunication networks and the population registry.[22]

Assessing the Israeli control over the Gaza Strip

The facts as described above are highly relevant for the determination whether or not the Gaza Strip is still under Israeli occupation. For this introduction it suffices to state that, in my opinion, it is absolutely clear that the Gaza Strip is still under Israeli occupation to this date. This legal determination is based on the theory as set out in Part I of this essay on what constitutes occupation under international humanitarian law. This is further clarified in Part II of this essay by a similar, albeit more elaborate assessment to the one made above of the factual situation in the Gaza Strip, regarding the period between September 2005 and June 2006.

For the basis of the assertion that the Gaza Strip is still occupied, I gladly refer to these subsequent parts. Nevertheless, it is interesting to note that this assertion is supported by the UN organizations working in the OPT,[23] the UN Human Rights Council,[24] the UN Special Rapporteur on the situation of human rights in the OPT[25] and numerous NGO's.[26] Also interesting to note is that in its resolutions on the situation in the Occupied Palestinian Territory, the UN General Assembly makes mention of the Gaza Strip and of Israel's disengagement, but refrains from stating that this resulted in the end of the occupation.[27]

Nevertheless, Israel refuses to accept the status of occupied territory for the Gaza Strip and instead has officially designated it as a "hostile entity", by virtue of a decision of the Israeli Security Cabinet on 19 September 2007.[28] In consequence, Israel asserts that numerous punitive measures, directed at the population of Gaza, are allowed.[29] Thus, this claimed legal status intends to legalize the measures which are designated by many as collective punishment, as was shown above.

The research for the theoretical part (part I) of this essay was concluded in November 2006. Therefore, subsequent publications on the subject are not taken into account. However, one report was brought to my attention as it was referred to by the Special Rapporteur on the situation of human rights

22 Report of Special Rapporteur Dugard of January 2008, p. 8; Report of Special Rapporteur Dugard of August 2007, p. 8; HRW 07/02/08; B'Tselem Report 2007, p. 13-14.
23 Joint Statement UN Organisations, 13/06/07.
24 UN press release 23/01/08 (HRC 6th Special Session); UN-HRC Res. A/HRC/7/L.1.
25 Report of special Rapporteur Dugard of January 2008, p. 7-8; Report of special Rapporteur Dugard of August 2007, p. 6.
26 Oxfam a.o. Coalition Report 03/2008, p. 6; PHR-Israel 03/03/08; HRW 07/02/08; PHR-Israel, Al Mezan & GCMHP 24/01/08; B'Tselem Report 2007, p. 17.
27 UNGA Res 62/181; UNGA Res 62/108.
28 Israel MFA press release 19/09/07; Report of Special Rapporteur Dugard of January 2008, p. 8; B'Tselem Report 2007, p. 14.
29 B'Tselem Report 2007, p. 14.

in the OPT in several of his reports.[30] The report referred to was issued by the Israel-based NGO Gisha, the Legal Center for Freedom of Movement, and is titled "Disengaged Occupiers: The Legal Status of Gaza" (January 2007).[31] As does the essay now before you, it deals with the legal status of the Gaza Strip from the viewpoint of the law of occupation. This report also deals with significant parts of the factual and legal considerations made in subsequent chapters of this essay and reaches the same conclusions. The most important conclusions of the Gisha report, and of this essay, are the following. Whether a situation constitutes occupation is a factual determination, the relevant test for which is whether there exists 'effective control' over the territory which is assumed to be occupied. This form of control is construed more broadly then the mere physical presence of military forces or of institutions acting as government. It deals with control over government functions and control over the wellbeing of the population.[32] The factual determination of the situation in the Gaza Strip can lead to only one conclusion: the Gaza Strip is, and has been since 1967, territory occupied by Israel.

3 STRUCTURE OF THIS ESSAY

Before concluding this introductory chapter I would like to clarify the structure of the present essay. In Part I of this essay, a theoretical analysis will be made of the law of occupation, focusing on what exactly constitutes occupation. As will become clear in this essay, it is my view that two different definitions of occupation exist: (1) occupation in the meaning of the Hague Regulations and (2) occupation in the meaning of the Fourth Geneva Convention. While it is relatively clear what constitutes occupation in the meaning of the Hague Regulations, the definition of occupation in the meaning of the Fourth Geneva Convention is not so clear. Nevertheless, I have tried to formulate a usable set of criteria for determining whether factual situations can be considered as occupation in the meaning of the Fourth Geneva Convention. Both definitions are summarized in the conclusion of Part I.

In Part II of this essay, the focus will be on the factual situation in the Gaza Strip, up until 25 June 2006. The status of the Gaza Strip prior to the Disengagement is discussed, as well as the contents of the Israeli Disengagement Plan, which is annexed to this essay. After analysis of the Disengagement Plan, the factual implementation of that plan is evaluated by means of reports of the media, international organizations and human rights organizations.

30 Report of special Rapporteur Dugard of January 2008, p. 8; Report of special Rapporteur Dugard of August 2007, p. 8.
31 Gisha Report 01/2007.
32 Gisha Report 01/2007, p. 69-74, 76-80, 98-99.

In a final conclusion, the theory as discussed in Part I is applied to the practice as discussed in Part II.

4 ACKNOWLEDGEMENTS

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The Hague, March 2008

Part I

1 The development of the international law of occupation

In this chapter I will briefly discuss the most important developments in the law of occupation. After dealing with the concept of occupation from the early times until the 19th century, I will discuss the main instruments which contributed to the contemporary international law of occupation. I will pay specific attention to the views expressed in the different instruments about what exactly constitutes occupation. The instruments that I will discuss are the following: The Lieber Code of 1863, the Brussels Code of 1874 and the Oxford Code of 1880.

1.1 The early practice of occupation and annexation

The gaining control over land resulting from warfare is as old as war itself. Until the 19th century, the military occupation of territory made that territory the property of the occupying sovereign. No rules obliged the occupant to treat the occupied territory with special care. In those days occupation was seen as a legitimate way of gaining territory and was not really distinct from annexation.[33] Since there was no real distinction between these forms of control there were no specific rules concerning occupation as we know it, and the question when territory was effectively occupied according to those standards is thus irrelevant for this essay.

In the 19th century the law of occupation started to develop. There were some writers who paid attention to the subject of occupation, but numerous scholars agree that the foundations for the international law of occupation were laid by Dr. Francis Lieber.[34]

33 Graber 1968, p. 13; Von Glahn 1957, p. 7; Oppenheim-Lauterpacht 1952, p. 432.

34 Von Glahn 1957, p. 8; Graber 1968, p. 6; Benvenisti 1993, p. 7 f.n. 3; Levie in Carey/Dunlap/Pritchard 2003, p. 182.

1.2 The Lieber Code of 1863

History and relevance

The document 'Instructions for the Government of Armies of the United States in the Field'[35] (hereinafter: the Lieber Code) was issued in 1863 to the Union Forces in the American Civil War.[36] It was prepared by the German-American Professor Dr. Francis Lieber and revised by a board of military officers.[37] Since this document was issued by one country it was, of course, not binding on other countries, but it served as an important source for subsequent military manuals and international attempts to codify the law of occupation.[38]

The Lieber Code was a big development in the direction of contemporary principles of occupation law, but not on all aspects of that law. In article 33 of the Lieber Code it is suggested that it is possible for the occupying power to declare that the occupied territory becomes part of the sovereign territory of the occupant.[39] This phrasing suggests that occupation was accepted as a legitimate way of gaining territory.[40] As will become clear from the following paragraphs, this contradicts the modern view on occupation.[41]

The conditions for 'occupation' according to the Lieber Code

Article 1 of the Lieber Code states that "the presence of the hostile army proclaims its Martial law".[42] The concept of Martial law is explained in Article 4 as "military authority exercised in accordance with the laws and usages of war".[43] The same article states that Martial law is executed by military force. This suggests that what amounts to occupation is the actual physical presence of military forces on the territory. Only then is the Martial law proclaimed, placing the territory under military authority.

1.3 The Brussels Code of 1874

History and relevance

The 'Project of an international declaration concerning the laws and customs of war'[44] (hereinafter: the Brussels Code) is the first attempt on the international plane to codify the laws and usages of war. The document was drafted

35 Text reproduced in Schindler/Toman 2004, p.4.
36 Graber 1968, p. 14.
37 Schindler/Toman 2004, p.4.
38 Levie in Carey/Dunlap/Pritchard 2003, p. 182; Von Glahn 1957, p. 8.
39 Schindler/Toman 2004, p. 8.
40 Graber 1968, p. 40.
41 Oppenheim-Lauterpacht 1952, p. 432.
42 Schindler/Toman 2004, p. 4.
43 Schindler/Toman 2004, p. 4.
44 Schindler/Toman 2004, p. 23.

at the Brussels Conference of 1874, which was organized by Russia with the purpose of drawing up a convention on the laws of war by European states.[45] Delegates from 15 European countries attended the conference.[46] 17 Of the 65 articles in this final document deal with belligerent occupation.[47]

Based heavily on the Lieber Code, the Code was not intended to create new laws, but to make a statement of what all states viewed as the existing international law on the subject.[48] However, the Brussels Code was never ratified by the participating states.[49] Nevertheless, the importance of this code is obvious when one looks at the Hague Regulations: both conventions are clearly based on the articles from the Brussels Code. The same goes for a large number of military manuals in that time.[50]

The articles based on article 33 of the Lieber Code do not repeat the phrases which suggest that sovereignty can be transferred to the occupant. Furthermore, according to article 2 of the Brussels Code, the authority of the legitimate sovereign is only 'suspended'.[51] This suggests that it is no longer legitimate for an occupant to place the occupied territory under its sovereignty.[52]

The conditions for occupation according to the Brussels Code

At the beginning of the debate on draft article 1, this article stated that territory had to be in fact placed under military authority, and the occupation lasted only as long as the military was in the position to exercise this authority.[53] Effective control was seen as a basic requirement for occupation. All delegates agreed that the power to suppress insurrection in the occupied territory was necessary for effective control.[54]

The German delegate was of the opinion that it was not necessary to have physical military presence in the territory for that territory to be effectively occupied.[55] The Swiss delegate believed that it was not necessary to have a large military presence, although there should be some sign that the territory is under the control of the occupant.[56] The Dutch delegate found such a symbolic presence not sufficient for occupation. According to him, the military presence should always be able to enforce the occupation.[57] A statement on the duration of occupation was considered but not incorporated in the final

45 Graber 1968, p. 20.
46 Graber 1968, p. 21, 22.
47 Graber 1968, p. 24.
48 Graber 1968, p. 20, 24.
49 Von Glahn 1957, p. 8; Graber 1968, p. 26.
50 Von Glahn 1957, p. 8, 9; Graber 1968, p. 26.
51 Schindler/Toman 2004, p. 23.
52 Graber 1968, p. 47.
53 Nouveau Recueil Général de Traités 1879, p. 208; Graber 1968, p. 44.
54 Bordwell 1908, p. 106.
55 Nouveau Recueil Général de Traités 1879, p. 73.
56 Nouveau Recueil Général de Traités 1879, p. 74.
57 Nouveau Recueil Général de Traités 1879, p. 74.

draft to prevent the suggestion that the physical presence of troops is essential to occupation.[58]

Article 1 of the Brussels Code did not give a definitive statement on whether physical occupation is necessary or when an occupation can be considered effective.[59] It only stated that territory can be considered occupied when it is 'actually placed' under the authority of the occupant.[60] The application of the principle of effective control was left to the governments concerned.[61]

1.4 The Oxford Manual of 1880

History and relevance

'The Laws of War on Land' published by the Institute of International Law[62] (hereinafter: the Oxford Manual) is a revision of the Brussels Code combined with the views expressed in a number of national military handbooks of that time.[63] This resulted in a document which was written as a manual for soldiers and which attempted not to create new laws but to codify and specify the existing laws. Its purpose was to make the laws of war more easily understandable and more commonly accepted.[64] It was sent to a number of European governments with the intention to have those governments implement the code into their military manuals, but there is little evidence that the Oxford Manual was actually implemented by these governments.[65] While the Oxford Manual was not followed by official implementation or endorsement by states, it is seen as a code of very high quality.[66]

The conditions for occupation according to the Oxford Manual

Article 41 of the Oxford Manual gives the definition of occupation. It states that the invading state must alone be in a position to maintain order in the occupied territory.[67] This suggests that the occupant must have effective control, as was discussed and defined at the Brussels Conference.[68] It is not made clear whether or not physical presence of troops is essential to occupation.

58 Graber 1968, p. 53.
59 Graber 1968, p. 45.
60 Schindler/Toman 2004, p. 23.
61 Bordwell 1908, p. 106.
62 Schindler/Toman 2004, p. 29.
63 Von Glahn 1957, p. 9.
64 Bordwell 1908, p. 113; Graber 1968, p. 28, 29.
65 Bordwell 1908, p. 113, 115; Graber 1968, p. 30.
66 Von Glahn 1957, p. 9; Bordwell 1908, p. 113.
67 Schindler/Toman 2004, p. 35.
68 See paragraph 1.3.

Article 41 provides two more elements which are essential to occupation. The first is that the occupation must be the consequence of invasion by hostile forces. The second one is that the state to which the territory "belongs has ceased, in fact, to exercise its ordinary authority therein".[69] Interesting to note is that the phrasing of this article suggests that the authority only ceases in fact, not in law. In other words, the sovereign authority over the territory is not altered by the occupation. This confirms the views expressed in paragraph 1.3 of this essay.[70]

The last phrase of article 41 is the following: "The limits within which this state of affairs exists determine the extent and duration of the occupation". This confirms that occupation only exists in the parts where the occupant is the only power which exercises factual authority and has effective control.

69 Schindler/Toman 2004, p. 35.
70 See also Oppenheim-Lauterpacht 1952, p. 433.

2 The Hague Regulations of 1899 and 1907

2.1 History of the Hague Regulations of 1899 and 1907

In 1899, an international conference was organised in The Hague on initiative of the Czar of Russia. Delegations of twenty-six states attended the Conference.[1] One of its purposes was to revise the Brussels Code of 1874 in such a way that it was acceptable to all states. This revision of the Brussels Code was named the 'Regulations Respecting the Laws and Customs of War on Land' (hereinafter: the Hague Regulations 1899).[2] The document was annexed to the 'Convention (II) with Respect to the Laws and Customs of War on Land' (hereinafter: the Hague Convention 1899),[3] which resulted from the conference. The Hague Regulations 1899 still closely resemble the Brussels Code. Thus, the law of occupation has developed little in the 25 years between the drafting of the two instruments.[4]

Ex article 1 Hague Convention 1899 the state parties were obliged to instruct their armed forces in conformity with the Hague Regulations 1899. Thus, the principles laid down in the Hague Regulations were of an obligatory character, but states were not obliged to adopt the Hague Regulations 1899 word for word.[5] Of the 26 participating states, 24 signed and ratified the Hague Convention 1899. But only few of these states actually issued instructions in accordance with the Hague Regulations 1899 before the second conference of 1907.[6] Article 43 of the Hague Regulations was then already accepted as being part of customary international law and thus directly binding, since it was considered a restatement of the law that was already codified in the instruments discussed in chapter 1 of this essay.[7]

The 1907 Hague Convention

In 1907 another conference was held in The Hague. This conference was attended by 44 states, representing almost the entire civilised world.[8] Its

1 Graber 1968, p. 30; Bordwell 1908, p. 128, 129.
2 Schindler/Toman 2004, p. 66.
3 Schindler/Toman 2004, p. 60.
4 Graber 1968, p. 33; Von Glahn 1957, p. 9.
5 Bordwell 1908, p. 135, 136; Graber 1968, p. 32, 34.
6 Graber 1968, p. 33.
7 Benvenisti 2004, p. 8; Dinstein 1995, p. 2, 3; Von Glahn 1957, p. 11; Graber 1968, p. 143.
8 Bordwell 1908, p. 182; Graber 1968, p. 34.

purpose was to discuss the Hague Regulations of 1899 in more detail and to make amendments where necessary and possible.[9] The provisions of the Hague Regulations regarding occupation underwent only very small changes.[10] The document which resulted from this revision was again called the 'Regulations Respecting the Laws and Customs of War on Land'[11] (hereinafter: the Hague Regulations) and was annexed to the 'Convention (IV) Respecting the Laws and Customs of War on Land' (hereinafter: the Hague Convention 1907).[12]

2.2 Status of the Hague Regulations

The Hague Regulations form the basis of most of the principles of the contemporary law of occupation,[13] and are directly binding on state parties. This is clearly illustrated by article 3, which provides for state responsibility and liability as consequences of violation of the Hague Regulations.[14]

Moreover, the Hague Regulations are accepted as being part of customary international law.[15] This is confirmed in judgements of the International Military Tribunal of Nuremberg[16] and the International Court of Justice.[17] It has also been accepted as customary international law by the Israel High Court.[18] Thus, the Hague Regulations are binding on all states as customary law, whether they are party to the Hague Convention 1907 or not.[19]

2.3 Object and purpose of the Hague Regulations

At the time of drafting of the Hague Regulations, war was seen as only concerning the armies and governments of the states involved in the conflict. Civilians were kept out of the war.[20] The individual was no more than an object under international law and human rights were regarded as outside the scope of international law.[21] Governments were not yet involved in their

9 Bordwell 1908, p. 181, 182; Graber 1968, p. 34.
10 Bordwell 1908, p. 185; Von Glahn 1957, p. 9; Graber 1968, p. 34.
11 Schindler/Toman 2004, p. 66.
12 Schindler/Toman 2004, p. 60.
13 Benvenisti 2004, p. 9; Von Glahn 1957, p. 9.
14 Graber 1968, p. 34, 35.
15 Von Glahn 1957, p. 11; Gasser in Fleck 1995, p. 241; Kalshoven/Zegveld 2001, p. 38.
16 IMT Nuremberg *Major War Criminals*, p. 467.
17 ICJ *Wall*, para. 89; ICJ *Nuclear Weapons*, para. 75, 80, 81.
18 ISC H.C. 785/87 *(Affo v IDF Commander)*, p. 163.
19 Pictet 1958, p. 614; Shaw 2003, p. 835; Dinstein 2004, p. 7; Scobbie in 11 YIMEL, p. 7.
20 Draper 1965, p. 119, 121; Benvenisti 2004, p. 27.
21 Shaw 2003, p. 45, 252.

states' economic and social life.[22] The Preamble of the Hague Convention 1907, which puts the emphasis on the conduct between belligerents,[23] warrants the conclusion that the Hague Regulations were not drafted for the protection of the human rights and the economic and social life of the population under occupation.[24] The main object and purpose of the Hague Regulations are the regulation of conduct between the armed forces and the protection of state interests.[25]

2.4 THE APPLICABILITY OF THE HAGUE REGULATIONS

The title of the Hague Regulations provides their applicability to war on land.[26] Article 2 of the Hague Convention 1907 provides that the Hague Regulations are only applicable between Contracting Powers.[27] This suggests that the Hague Regulations are applicable in all cases where a formal state of war exists, which is being fought on land between Contracting Powers.[28] The distinction between Contracting and non-Contracting powers in Article 2 of the Hague Convention 1907 has lost its relevance, as the Hague Regulations are binding on all states as customary international law.[29]

The necessity of a formal state of war, created by an official declaration of war by the states concerned,[30] flows from the fact that at the time of drafting this was the only way to constitute a war in the legal sense.[31] However, the interpretation of the concept of war has developed significantly, now encompassing any international armed conflict.[32] States have accordingly interpreted the word 'war' in accordance with these developments in international law.[33] This method of interpretation is endorsed by the ICJ in the *Namibia Advisory Opinion*.[34]

22 Graber 1968, p. 35; Kalshoven/Zegveld 2001, p. 65; Benvenisti 2004, p. 27.
23 Preamble, Hague Convention 1907, in: Schindler/Toman 2004, p. 60, 61.
24 Greenwood in Kalshoven 2000, p. 217.
25 Pictet 1958, p. 614; Draper 1968, p. 122; Kalshoven/Zegveld 2001, p. 15; Benvenisti 2004, p. 28, 29, 99, 110.
26 Title Hague Regulations, in Schindler/Toman 2004, p. 66.
27 Art. 2 Hague Convention 1907, in Schindler/Toman 2004, p. 62.
28 Greenwood in Kalshoven 2000, p. 192, 193; Kalshoven/Zegveld 2001, p. 38, 39.
29 Greenwood in Kalshoven 2000, p. 194; Kalshoven/Zegveld 2001, p. 38; see also paragraph 2.2.
30 Von Glahn 1957, p. 20; Greenwood in Kalshoven 2000, p. 194.
31 Kalshoven/Zegveld 2001, p. 39.
32 Pictet 1958, p. 20; Greenwood in Kalshoven 2000, p. 193; Kalshoven/Zegveld 2001, p. 38, 39.
33 Greenwood in Kalshoven 2000, p. 193.
34 ICJ *Namibia*, para. 53; see also paragraph 2.5.2.

2.5 THE BEGINNING OF OCCUPATION ACCORDING TO THE HAGUE REGULATIONS

Article 42 of the Hague Regulations determines when territory is considered occupied. This definition was not altered in 1907 and is thus the same as in the Hague Regulations 1899. The definition of occupation under the Hague Regulations can also be considered the same as under the Brussels Code since the formulation of the Brussels Code was adopted.[35]

Two elements of occupation can be derived from article 42 of the Hague Regulations. These elements are (1) effective control over the territory and (2) the establishment of a directly exercised authority.[36]

2.5.1 The establishment of a military authority

The latter element entails that the occupant is obliged to establish a direct military authority.[37] This can be concluded from the second part of article 42 and the title of Section III of the Hague Regulations: *"Military Authority over the territory of the hostile state"*.[38] This authority must be exercised directly[39] and should have an open and identifiable command structure.[40] However, it is not a basic condition; without such a military authority, occupation can still exist.[41] The purpose of this element is thus not to limit the applicability of the provisions on occupation, but to facilitate the compliance with the obligations of an occupant under the Hague Regulations.

2.5.2 Effective control

The first element is a basic condition for any occupation and entails that the occupant must establish and continue to exercise effective control.[42] This expresses the factual character of occupation.[43] Von Glahn suggests that effective control consists of two different elements: the control over a territory, and

35 Graber 1968, p. 61.
36 Art 42 Hague Regulations, in Schindler/Toman, p. 77, 78.
37 Oppenheim-Lauterpacht 1952, p. 434; Von Glahn 1957, p. 28; Roberts 1985, p. 252; Greenwood in Playfair 1992, p. 246; Bothe in Bernhardt 1997, p. 764; Benvenisti 2004, p. 4; Scobbie in 11 YIMEL, p. 15.
38 Schindler/Toman 2004, p. 77; see also Roberts 1985, p. 251, 252.
39 Von Glahn 1957, p. 28; Bothe in Bernhardt 1997, p. 764; Benvenisti 2004, p. 4.
40 Roberts 1985, p. 252.
41 ICJ *Congo v. Uganda*, para. 173; ICJ *Congo v. Uganda*, Sep. Op. Kooijmans, para. 41; Oppenheim-Lauterpacht 1952, p. 434; Benvenisti 2004, p. 5; Gasser in Fleck 1995, p. 244; Cavanaugh in Wippman/Evangelista 2005, p. 246; Scobbie in 11 YIMEL, p. 15.
42 Von Glahn 1957, p. 28; Gasser in Fleck 1995, p. 243; Bothe in Bernhardt 1997, p. 764; Cavanaugh in Wippman/Evangelista 2005, p. 245.
43 Oppenheim-Lauterpacht 1952, p. 435.

the power to enforce this control when necessary. In the words of Von Glahn: "as long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists in a legal point of view".[44]

The establishment and maintenance of effective control

The latter element of Von Glahn's definition deals with the role of the military in the establishment and the maintenance of effective control. Since the Hague Regulations are part of *jus in bello*, physical presence of armed forces is considered necessary for the establishment of effective control.[45] In this context, supremacy in the air alone does not establish effective control.[46] However, once effective control is already established, air supremacy may be enough to maintain it when this military element is available and sufficient to suppress insurrection and enforce obedience.[47] Such a military power over the occupied territory is the minimum of what must be available.

This is consistent with the views expressed at the Brussels Conference in 1874,[48] and is confirmed by the Military Tribunal at Nuremberg.[49] It implies that physical presence of armed forces on the ground at all times is not a prerequisite for maintaining effective control. That the military power is in fact capable of enforcing the will of the occupant within a reasonable time is sufficient.[50] The difference between the amount of military power necessary for the establishment of effective control on the one hand and the maintenance of effective control on the other, flows logically from the fact that the forces fighting against the occupant are significantly weaker once effective control is established.[51]

The object of the effective control

Effective control is in its nature, as occupation itself, a factual question.[52] However, the question remains what it is exactly that must be brought under the effective control of the occupant and enforced by its military. What is the object of effective control, placing a territory under occupation in the meaning of Von Glahn's definition?

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44 Von Glahn 1957, p. 29.
45 Von Glahn 1957, p. 28; Roberts 1985, p. 251; Gasser in Fleck 1995, p. 243; HPCR Bruderlein 2004, p. 9.
46 Gasser in Fleck 1995, p. 243; HPCR Bruderlein 2004, p. 9.
47 Von Glahn 1957, p. 28; Scobbie in 11 YIMEL, p. 19.
48 See paragraph 1.3.
49 IMT Nuremberg *Wilhelm List*, p. 56; HPCR Bruderlein 2004, p.8.
50 Oppenheim-Lauterpacht 1952, p. 435; HPCR Bruderlein 2004, p. 9; Cavanaugh in Wippman/ Evangelista 2005, p. 245; Scobbie in 11 YIMEL, p. 19.
51 See also Scobbie in 11 YIMEL, p.19.
52 Oppenheim-Lauterpacht 1952, p. 435; Von Glahn 1957, p. 29; Gasser in Fleck 1995, p. 243; Roberts 1985, p. 256; HPCR Bruderlein 2004, p. 8.

In order to answer this question the relevant provisions of the Hague Regulations need to be interpreted. Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which reflects customary international law,[53] prescribes that a treaty shall be interpreted in accordance with the ordinary meaning of the text of the treaty provisions, seen in their context and in the light of the object and purpose of the treaty.[54] The primary method of interpretation is interpreting treaty provisions in the ordinary meaning of their text. The ICJ and the ILC confirmed that this method of interpretation, which is also known as the objective or textual approach, should be seen as the primary method of interpretation.[55]

Article 43 of the Hague Regulations states that what must pass into the hands of the occupant is the authority of the legitimate power.[56] This suggests that the methods of exercising this authority, the government functions, have to come under the effective control of the occupant. Or, as the ICJ has put it, that the occupant must substitute its own authority for that of the legitimate government.[57]

If one looks at the context of the provisions of the Hague Regulations, this interpretation is confirmed.[58] Other provisions all imply the exercising and thus control over government functions, like territory administration (article 55), the maintenance of law and order (article 43) and the levying of taxes (articles 48, 49 and 51).

The third element of the rule of interpretation of the VCLT is the object and purpose of a treaty. This method of interpretation, which is based on a teleological approach, should not be given preference over the textual approach and must not be relied on too much, but it is nevertheless an important aspect in the interpretation of a treaty.[59] The main purpose of article 42 at the time of drafting was to protect the interests of the legitimate sovereign when another state exercises authority on its territory.[60] This suggests that it is not the control over the daily life of the civilians that is relevant for the establishment of effective control, but the regulation of the exercise of the government functions of the legitimate authority in its absence.[61]

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53 ICJ *Wall*, para. 94; Cassese 2005, p. 179; Fitzmaurice in Evans 2006, p. 199.
54 art 31 VCLT, in Elementair Internationaal Recht 2001, p. 88.
55 Brownlie 2003, p. 602; Anton/Mathew/Morgan 2005, p. 304, 305; Fitzmaurice in Evans 2006, p. 199.
56 Art. 43 Hague Regulations, in Schindler/Toman, p. 78.
57 ICJ *Congo v. Uganda*, para. 173.
58 art 31 VCLT, in Elementair Internationaal Recht 2001, p. 88; Fitzmaurice in Evans 2006, p. 199.
59 ICJ *Namibia*, para. 53; Brownlie 2003, p. 607; Cassese 2005, p. 179; Anton/Mathew/Morgan 2005, p. 304, 305; Fitzmaurice in Evans 2006, p. 199, 202.
60 See paragraph 2.3.
61 Oppenheim-Lauterpacht 1952, p. 436; Greenwood in Kalshoven 2000, p. 217; see also paragraph 2.3.

What can be concluded from this interpretation is that for occupation to exist under the Hague Regulations, the government functions of the legitimate authority must be brought under the effective control of the occupant.[62] This is confirmed by the Military Tribunal at Nuremberg.[63]

As will become clear in chapter 3, the concept of effective control is also the key aspect of occupation in the meaning of the Fourth Geneva Convention, the other treaty in which the law of occupation is laid down. As will be discussed in chapter 3, the object of the effective control under the Fourth Geneva Convention (hereinafter: GC IV-effective control) is wider than the object of the effective control in the meaning of the Hague Regulations (hereinafter: HR-effective control).[64] As is stated by the ICJ in the *Namibia Advisory Opinion*, the interpretation of a treaty provision cannot be unaffected by subsequent developments in international law, and international instruments must be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[65] So if the GC IV-effective control could be considered as a development of the HR-effective control, the former could replace the latter when applying the Hague Regulations.

The GC IV-effective control will be discussed extensively in paragraph 3.5 of this essay. There it will be made clear that the nature of GC IV-effective control differs from that of HR-effective control in such a way that application of the former to the Hague Regulations cannot be justified by interpretation. The wider concept of GC IV-effective control is contrary to the text and context, as well as the object and purpose of the Hague Regulations, and can therefore not be seen as a development in the application of that treaty.

2.5.3 The government functions which have to be under effective control

The government functions which have to be under the effective control of the occupant are not specified in doctrine. It flows from the factual character of occupation that it is case-specific, depending for example on the way in which the legitimate sovereign exercised its authority. It is clear that the management of the internal and external security of the territory is one of the key functions of a government, which is confirmed in the Hague Regulations.[66] The control over the international borders, which includes the control over import and export of the territory as well as the movement of people across those borders, is also a key function of a government.[67] Further issues which can be identi-

62 Oppenheim-Lauterpacht 1952, p. 435, 436; Benvenisti 2004, p. 181, 182.
63 IMT Nuremberg *Wilhelm List*, p. 55, 56; HPCR Bruderlein 2004, p. 9.
64 Commentary Pictet 1958, p. 60; Roberts 1985, p. 253; see paragraphs 3.5, 3.5.2.
65 ICJ *Namibia*, para. 53; Cassese in Playfair 1992, p. 424.
66 HPCR Bruderlein 2004, p. 9; Oppenheim-Lauterpacht 1952, p. 435, 437; Art. 43 Hague Regulations, in Schindler/Toman, p. 78.
67 HPCR Bruderlein 2004, p. 9.

fied as government functions are the passing of legislation, the maintenance of basic utilities like postal services and sanitation, the development of the political and economic system and the maintenance of the international contacts of the territory.[68]

The functions above translate into effective control over the police force, military and border patrol, customs, civil administration, the banking system and so on. Government functions are not limited to the above mentioned functions. Likewise, it is not necessary that the occupant controls all the above mentioned government functions. It is neither necessary that the occupant maintains control over all the government functions it had under effective control at the start of the occupation, as long as the overall control can still be considered effective. In most cases, the minimum of control necessary in order to be effective, will be control over the government functions which are necessary for the enforcement of the authority. This entails police and military, but depending on the geography of the region could also entail border control. This also provides the minimum of effective control necessary to comply with the obligations of article 43 of the Hague Regulations.[69]

2.6 The ending of occupation according to the Hague Regulations

No article in the Hague Regulations specifically refers to conditions for the ending of occupation. However, article 42 states that occupation only extends to the territory where the control can be exercised.[70] Thus, when the control is no longer effective, the occupation has ended. The ending of occupation is just like its establishment a question of fact.[71] Oppenheim states that occupation traditionally ends when an occupant withdraws from the territory or is driven out of it.[72] However, it can be assumed that the reason why control ceases to be effective, whether it is the defeat of the occupant, withdrawal or otherwise, is of no relevance.

68 Oppenheim-Lauterpacht 1952, p. 435; HPCR Bruderlein 2004, p. 9.
69 Art. 43 Hague Regulations, in Schindler/Toman 2004, p. 78.
70 Art. 42 para. 2 Hague Regulations, in Schindler/Toman 2004, p. 78.
71 HPCR Bruderlein 2004, p. 10.
72 Oppenheim-Lauterpacht 1952, p. 436.

3 The Fourth Geneva Convention 1949

3.1 History of the Fourth Geneva Convention

In February 1945 the International Committee of the Red Cross (ICRC) commenced with the preparatory work for the revision of the existing humanitarian law instruments and the development of new rules in this area.[1] The purpose of the revision was to incorporate the experiences of the Second World War into humanitarian law so as to prevent the atrocities of this war in the future.[2] The preparatory work resulted in four Draft Conventions, which were used as 'working documents' for the 'Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of the War', held from April to August 1949.[3] 63 States were represented at the conference, while 61 of them signed all four of the new Geneva Conventions.[4]

One of those conventions is the 'Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War' (hereinafter: the Fourth Geneva Convention). According to article 154 of the Fourth Geneva Convention it is supplementary to sections II and III of the Hague Regulations.[5] Section III of the Hague Regulations deals with occupation.[6] The effect of this provision on the convention will be discussed in paragraph 3.5 of this essay.

3.2 Status of the Fourth Geneva Convention

The Fourth Geneva Convention is ratified by 194 states, which makes it universally accepted.[7] Besides the fact that this makes it universally binding as treaty law, this could be an indication that the Fourth Geneva Convention as a whole is part of customary international law.[8] The ICJ has stated in the *North Sea Continental Shelf Judgement* that a conventional rule can become a

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1 Pictet 1951, p. 464.
2 Gutteridge 1949, p. 295; Pictet 1951, p. 463, 473.
3 Gutteridge 1949, p. 295, 296; Pictet 1951, p. 467.
4 Gutteridge 1949, p. 294, 296; Pictet 1951, p. 468.
5 Art. 154 GC IV, in Commentary Pictet 1958, p. 613.
6 See paragraph 2.5.1.
7 Pellet in Playfair 1992, p. 189; Dinstein 2004, p. 11; ICRC State Parties List; ICRC Customary IHL 2005, p. xliv; ICRC Press Release 21/08/2006.
8 Meron 1987, p. 366; ICRC Customary IHL 2005, p. xlii, xliii.

rule of customary international law by a very widespread and representative participation in the convention.[9] Also, in the *Military and Paramilitary Activities in and against Nicaragua Judgement*, the ICJ saw the almost universal ratification of the UN Charter and the acts of states in accordance with obligations under the UN Charter as an important indication for constituting customary international law.[10] In this judgement it is noted that such acts by states can be seen separately from their treaty obligations.

On the other hand, the ICJ has stated in the *North Sea Continental Shelf Judgement* that acts by states which are bound by a treaty are potentially acting in the application of this treaty and therefore these acts cannot be seen as evidence for the existence of a rule of customary international law.[11] Thus, wide accession to a treaty could create difficulties for the determination of that treaty as customary international law, since actions and declarations of state parties are to be seen as conforming to their treaty obligations instead of forming the necessary state practice and *opinio juris*.[12]

The Report of the Secretary-General of the UN pursuant to paragraph 2 of Security Council resolution 808 (1993), which has been unanimously adopted by the Security Council,[13] states that it is beyond doubt that the Geneva Conventions of 12 August 1949 for the Protection of War Victims have become part of customary international law.[14] Support can also be found in doctrine for the view that the Fourth Geneva Convention as a whole is accepted as being part of customary international law.[15]

The relevant paragraph of the report of the Secretary-General is also quoted by the ICJ in its *Use of Nuclear Weapons Advisory Opinion*.[16] Although this would suggest that the ICJ endorses the conclusion of the Secretary-General, this is not supported by the subsequent text of the opinion. Instead, the ICJ has stated in that same Advisory Opinion that the great majority of the rules which are laid down in the Geneva Conventions *"constitute intransgressible principles of international customary law"*.[17] There can also be found support in doctrine for this assessment of the status of the Fourth Geneva Convention.[18]

Since both the ICJ and the ICRC, in its authoritative study concerning customary international humanitarian law, recently explicitly stated that merely

9 ICJ *Continental Shelf cases*, para. 73.
10 ICJ *Nicaragua*, para. 188; ICRC Customary IHL 2005, p. xliii.
11 ICJ *Continental Shelf cases*, para. 76.
12 Meron 1987, p. 365.
13 ICJ *Nuclear Weapons*, para. 81.
14 S-G Report 1993, para. 35.
15 Commentary Pictet 1958, p. 9; Roberts in Playfair 1992, p. 35; Pellet in Playfair 1992, p 189; Cavanaugh in Wippman/Evangelista 2005, p 231.
16 ICJ *Nuclear Weapons*, para. 81.
17 ICJ *Nuclear Weapons*, para. 79, 82.
18 Roberts, in Playfair 1992, p. 35; ICRC Customary IHL 2005, p. xxx, xliv.

a great majority of the provisions in the Fourth Geneva Convention can be regarded as customary international law, it cannot be held that the convention as a whole constitutes customary international law.[19]

3.3 Object and purpose of the Fourth Geneva Convention

A good indication of the object and purpose of the convention can be found in its title: 'the protection of civilian persons in time of war'. However, the convention is not so much concerned with the dangers to civilian persons of the military operations themselves. Its main purpose is to protect civilians against arbitrary action by the enemy.[20] Unlike the Hague Regulations, it was not drawn up to serve state interests.[21] It is foremost a minimum and essential set of rules for the protection of civilians, to which every human being is entitled in the widest possible range of situations.[22]

3.4 The applicability of the Fourth Geneva Convention

While article 154 of the Fourth Geneva Convention states that the convention is supplementary to parts of the Hague Regulations, the convention clearly has its own rules of applicability.[23] The main provision on applicability of the Fourth Geneva Convention is article 2, which provides the situations in which the convention as a whole is applicable. Article 6 paragraph 1 determines that the Convention as a whole is applicable from the outset of the situations referred to in article 2. Another important article is article 4, which determines the individuals who enjoy the protection of the provisions in the convention, once the convention is applicable.[24]

3.4.1 Article 2 of the Fourth Geneva Convention

Of the two paragraphs on applicability in article 2 of the Fourth Geneva Convention, the first is the most important one. It states that the Convention is applicable in all cases of armed conflict between two or more of the High Contracting Parties.[25] Although at first sight the second paragraph seems to be the most interesting rule of applicability for this essay, since it explicitly

19 ICJ *Nuclear Weapons*, para. 79, 82; ICRC Customary IHL 2005, p. xxx, xliv.
20 Commentary Pictet 1958, p. 10, 11; Benvenisti 2004, p. 110.
21 Commentary Pictet 1958, p. 21, 614; Benvenisti 2004, p. 110.
22 ICJ *Wall*, para. 95; Commentary Pictet 1958, p. 9, 13, 14; Roberts 1985, p. 256.
23 Commentary Pictet 1958, p. 617.
24 Commentary Pictet 1958, p. 59.
25 Article 2 GC IV, in Commentary Pictet 1958, p. 17.

mentions occupation, it is only meant for situations in which no armed conflict has arisen. In cases of occupation during armed conflict, the applicability of the Convention can already be based on the first paragraph.[26] Therefore, when the occupation occurs in armed conflict, it is not relevant whether the territory under occupation belongs to one of the High Contracting Parties. A differing view, as held by Israel, will be discussed more extensively in Part II of this essay.[27]

The first condition for application is that there is an international armed conflict. Conflicts not of an international character are dealt with in article 3 of the Fourth Geneva Convention. A formal declaration of war or recognition of the state of war is no longer necessary for this instrument of humanitarian law to be applicable. In the spirit of this development, the definition of armed conflict is not complex. Any dispute between states which involves armed forces amounts to an armed conflict.[28]

The second condition is that the armed conflict must be between two High Contracting Parties. All states are bound by the great majority of provisions of the Fourth Geneva Convention since they form part of customary international law.[29] Thus, with respect to the provisions which form part of customary international law, the distinction between a High Contracting Party and a state which is not a party to the convention in the sense of article 2 of the Fourth Geneva Convention has lost its relevance.

It is important to note that when an occupation occurs during an armed conflict to which the Fourth Geneva Convention applies, the convention is applicable to the territory under occupation irrespective of the status of that territory. In other words, the Fourth Geneva Convention is applicable whether the territory is part of one of the parties to the conflict or not.[30] This is supported by the wording of article 4 and article 2. The view that the status of the territory under occupation is of no relevance is further supported by the 1977 Geneva Protocol I, which is supplementary to the Geneva Conventions. This document is discussed further in chapter 4.[31]

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26 ICJ *Wall*, para. 95; Commentary Pictet 1958, p. 21; Roberts 1985, p. 253; Roberts in Playfair 1992, p. 47; Falk/Weston in Playfair 1992, p. 132; Benvenisti 2004, p. 110; Cavanaugh in Wippman/Evangelista 2005, p. 241.

27 See paragraph 7.2.

28 Commentary Pictet 1958, p. 20.

29 See paragraph 3.2.

30 Commentary Pictet 1958, p. 22; Roberts in Playfair 1992, p. 47; Greenwood in Playfair 1992, p. 243, 244; Benvenisti 2004, p. 110; Cavanaugh in Wippman/Evangelista 2005, p. 241, 242.

31 See paragraph 4.4.2.

3.4.2 Article 6 paragraph 1 of the Fourth Geneva Convention

Article 6 paragraph 1 determines that the Convention as a whole is applicable from the outset of the situations referred to in article 2.[32] This is an expression of the view that the protection which the convention provides for civilians, should be applicable from the moment that those civilians could be affected by the consequences of armed conflict, irrespective of the duration or the size of the armed conflict.[33]

3.4.3 Article 4 of the Fourth Geneva Convention

Article 4 defines the persons who are protected by the convention. These are persons

> "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[34]

The words 'in case of a conflict or occupation' refer to article 2, which provides the rules of applicability. This affirms the connection between the two articles.[35] Article 4 does not specify whether the person who is in the hands of a party to the conflict must be on the territory of one of these parties. It is sufficient that one of the parties actually has control over the person or group of persons. This confirms the view that the status of territory is of no relevance for the application of the convention.

The important question is when persons can be considered as being 'in the hands of a Party to the conflict'. The ICRC Commentary suggests that the article was mainly intended for two categories: (1) persons of enemy nationality living on the territory of a party to the conflict and (2) the inhabitants of occupied territories.[36] Nevertheless, the wording of the provision clearly is not limited to those two categories. Accordingly, the ICRC Commentary explicitly states that the words "at a given moment and in any manner whatsoever"[37] are intended to ensure that all situations and cases, in which persons are in the hands of a party to the conflict, are covered.[38] This is in accordance with

32 Art 6 para. 1 GC IV, in Commentary Pictet 1958, p. 58.
33 Commentary Pictet 1958, p. 59.
34 Art 4 paragraph 1 GC VI, in Commentary Pictet 1958, p. 45.
35 Commentary Pictet 1958, p. 47.
36 Commentary Pictet 1958, p. 45.
37 Art 4 paragraph 1 GC IV, in Commentary Pictet 1958, p. 45.
38 Commentary Pictet 1958, p. 47.

the object and purpose of the convention, which are to provide a minimum amount of protection to the civilian population in a wide range of situations.[39]

Whether a person is in the hands of a party to the conflict is a question of fact.[40] It is not necessary to be under direct physical control of the party to the conflict, as for example a person in detention is, to enjoy the protection of the Fourth Geneva Convention.[41]

A party to the conflict must exercise control over the person, irrespective of when and how this control was established.[42] Bearing in mind this broad wording of article 4, it is my view that such control is established when the physical, economic and social wellbeing of an individual are in the hands of a party to the conflict. This is what should be protected and is indeed what the Fourth Geneva Convention aims to protect.[43] The broad scope of this article is endorsed by the Trial Chamber of the ICTY.[44]

It is logical that all civilians who find themselves in occupied territory are considered to be Protected Persons in the meaning of this article.[45] But it is not clear how the definition of Protected Persons influences the definition of occupation in the meaning of the Fourth Geneva Convention. This will be discussed in paragraph 3.5.

3.5 The beginning of occupation according to the Fourth Geneva Convention

3.5.1 A new perspective in determining occupation

Article 154 of the Fourth Geneva Convention states that the convention is supplementary to parts of the Hague Regulations, including article 42, which is discussed in chapter 2. However, the definition of occupation as found in article 42 of the Hague Regulations does not have a direct influence on the applicability of the Fourth Geneva Convention, or at least not as far as individuals are concerned.[46] Instead, the rules of applicability of the Fourth Geneva Convention, as elaborated on in the previous paragraph, provide when the provisions in the Fourth Geneva Convention become fully applicable with respect to civilians.[47] Nevertheless, Section III of the Fourth Geneva Conven-

39 See paragraph 3.3.
40 Commentary Pictet 1958, p. 47; Roberts 1985, p. 256; Benvenisti 2004, p. 160.
41 Commentary Pictet 1958, p. 47.
42 Art 4 paragraph 1 GC VI, in Commentary Pictet 1958, p. 45.
43 See paragraph 3.3, 3.5.3.
44 ICTY *Rajić*, para. 36.
45 Commentary Pictet, p. 47.
46 Commentary Pictet 1958, p. 60, 617.
47 Commentary Pictet 1958, p. 60; Dörmann/Colassis 2004, p. 299, 301, 304; ICRC Official Statement 21/11/2005.

tion explicitly refers to occupied territories. This suggests that the provisions contained in that section only apply to territories under occupation.[48] The Fourth Geneva Convention itself does not contain a clear definition of when territory becomes occupied.[49] This lack of clarity on what forms the definition of occupation under the Fourth Geneva Convention is discussed below.

Article 42 of the Hague Regulations as defining occupation

One approach in finding a definition of occupation for Section III of the Fourth Geneva Convention, is to use article 42 of the Hague Regulations as providing the applicability of section III. This view is expressed by the Trial Chamber of the ICTY.[50] It is also supported by some scholars.[51] In my view however, article 42 of the Hague Regulations, which entails that occupation only exists when the government functions are under the effective control of the occupant, would provide a too narrow scope of protection for civilians. To support this view, I will use the rule of interpretation as is laid down in article 31 of the VCLT, which is discussed in paragraph 2.5.2 of this essay.

The text of article 4 of the Fourth Geneva Convention, as discussed above, provides the clearest evidence for this view. This article states that protection to a person is granted once control over that person is established in any manner whatsoever.[52] This clearly encompasses more than effective control of a party over the government functions of the legitimate authority. The definition of occupation under the Fourth Geneva Convention, and more specifically the object of the effective control of the occupant, must be construed broader than that of the Hague Regulations.[53]

In the context of the Fourth Geneva Convention, this interpretation is confirmed by article 47 of the convention. This article determines that persons enjoy the protection they are entitled to under the convention, irrespective of the mode of governance in the territory.[54] The title and preamble of the Fourth Geneva Convention, which are also part of the context of the convention,[55] explicitly refer to the protection of civilians in time of war, which confirms that the focus is primarily on the civilians instead of the protection of the interests of the legitimate authority.[56] This seems contrary to the narrow scope of article 42 of the Hague Regulations.

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48 Commentary Pictet 1958, p. 272; Roberts 1985, p. 256; Zwanenburg 2004, p. 749; Dörmann/Colassis 2004, p. 300.
49 Dörmann/Colassis 2004, p. 298.
50 ICTY *Kordić,* para. 338, 339; ICTY *Naletilić and Martinović*, para. 216-218.
51 Gutteridge 1949, p. 299; Roberts 1985, p. 256; Gasser in Fleck 1995, p. 243.
52 Art 4 paragraph 1 GC VI, in Commentary Pictet 1958, p. 45; see also paragraph 3.4.3.
53 Commentary Pictet 1958, p. 60; Roberts 1985, p. 253.
54 Art 47 GC IV, in Commentary Pictet 1958, p. 273.
55 Brownlie 2003, p. 605.
56 Title and Preamble GC IV, in Commentary Pictet 1958, p. 10, 11.

Another indication for the view that the object of HR-effective control is narrower than the object of GC IV-effective control can be found in article 6 paragraph 3 of the Fourth Geneva Convention. This article suggests that a territory can be occupied even if the Occupying power does not exercise government functions.[57]

Lastly, the object and purpose of the Fourth Geneva Convention are not in conformity with the narrow scope of the HR-effective control. As stated above, the object and purpose are to create a minimum and essential set of rules for the protection of civilians, to which every human being is entitled in the widest possible range of situations.[58] Limiting the scope of occupation to situations in which the government functions are under the control of the occupant will exclude a wide range of factual situations in which civilians are in need of the protection provided for in the Fourth Geneva Convention, while the situation does not yet amount to occupation.

The definition of Protected Persons as defining occupation

Another approach in finding a definition of occupation, is to view article 4 of the Fourth Geneva Convention as defining occupation from a different viewpoint: not the effective control of a state over the territory and its authority, but the broader effective control of a state over the civilian population of a territory. Then, the rules concerning occupied territories become fully applicable for a group of persons when it is placed under the effective control of a party to the conflict.[59] This view is supported by the ICRC, as well as the Trial Chamber of the ICTY.[60] However, this still would only concern individuals and does not extend to, for example, property under occupation.[61] This leaves open the question when territory becomes occupied as a whole, most likely leading to two different definitions of occupation under one convention. This is unsupported by the convention itself, since, as mentioned earlier, this does not take into account the difference between the articles providing general protection, and Section III of the convention, which contains rules applicable only to occupied territories.[62]

Evidently, there is a considerable gap between the two methods of determining occupation as described above. This becomes very obvious when one looks at the inconsistencies in the decisions of the ICTY Trial Chamber, as well

57 Art 6 paragraph 3 GC VI, in Commentary Pictet 1958, p. 58; Commentary Pictet 1958, p. 62, 63; HPCR Policy Brief 2004, p. 7.

58 See paragraph 3.3.

59 See also paragraph 3.4.3.

60 ICTY *Naletilić and Martinović*, para. 221; Commentary Pictet 1958, p. 60; Dörmann/Colassis 2004, p. 299, 301, 304; ICRC Official Statement 21/11/2005.

61 ICTY *Naletilić and Martinović*, para. 222; but see ICTY *Rajić*, para. 36-42 and ICTY *Blaćkić*, para. 150.

62 Commentary Pictet 1958, p. 272; Roberts 1985, p. 256; Zwanenburg 2004, p. 749; Dörmann/Colassis 2004, p. 300.

as at the writings of scholars which do not provide a comprehensive definition. The Fourth Geneva Convention itself does not provide clarity on which method must prevail. In its judgements, the ICJ does not acknowledge any differing definitions of occupation under the different instruments.[63] Still, in my view the definition of the Hague Regulations is too strict for the text and context, as well as for the object and purpose of the Fourth Geneva Convention. On the other hand, the conflation of the definition of Protected Persons and the definition of occupation does not do justice to the title and wording of Section III. For that same reason, the using of two different definitions of occupation under the Fourth Geneva Convention is questionable.

The solution to this problem could be found in the character of the law of occupation. It is widely accepted that whether or not occupation exists must be determined on a factual basis.[64] Furthermore, it must be stressed that the basic protection which the law of occupation intends to provide does not benefit from a strict legalistic approach. Quite correctly, some scholars warn not to make the law of occupation dependent on definitional wrangles and legal niceties.[65] As Roberts states, there are different types of occupation to which the same law of occupation is applicable.[66] In my opinion, this flexibility of the law of occupation warrants the use of the different interpretations mentioned above together as indicators for control. This makes it possible to determine the existence of occupation on a case-by-case basis, judged by the scale of effectiveness of the control over the territory in a broad sense.

3.5.2 Effective control in the meaning of the Fourth Geneva Convention

This proposed concept needs clarification. The basis for the concept is that sovereignty lies in the people.[67] This sovereignty is what is subject to occupation. In this respect, the exercise of government functions are only expressions of that sovereignty, not its source. Accordingly, the effective control over the people and their territory can exist in more ways than just the control over the government functions. Preventing the government functions to be effectively exercised, without actually taking over the exercise of those government functions, may create obligations under the law of occupation as the responsibilities for those government functions are transferred to the occupant.

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63 ICJ *Wall,* para. 90-101; ICJ *Congo v. Uganda*, para. 167-180.

64 ICTY *Naletilić and Martinović,* para. 211; Von Glahn 1957, p. 29; Roberts 1985, p. 256; Pellet in Playfair 1992, p. 191; Gasser in Fleck 1995, p. 243; Zwanenburg 2004, p. 748; Dörmann/ Colassis 2004, p. 298.

65 Roberts 1985, p. 251, 256; Bothe in Bernhardt 1997, p. 764.

66 Roberts 1985, p. 260, 262.

67 Pellet in Playfair 1992, p. 174; Shaw 2003, p. 231; Benvenisti 2004, p. 29.

Indicators for the existence of effective control

The people of a territory that are 'in the hands of a party to the conflict' can be considered to be under occupation. The effective control over their physical, economic and social wellbeing is a strong indicator that occupation exists, especially when the legitimate authority hardly has any residual control over the physical, economic and social wellbeing of its population. Of course, a neighbouring state may often have influence on the economic and social wellbeing of the civilians of another state. This influence can become quite considerable when there is inequality between military and political power of the two states. However, since the concept of occupation is part of the *jus in bello*, it applies only in situations of armed conflict, in accordance with its provisions of applicability. This provides for a different legal setting than the coercion and influence between states in their regular interaction.

Also, an important indicator for the existence of occupation is whether the party to the conflict has such control that it influences humanitarian situations which the Fourth Geneva Convention is envisaged to protect. Such possible situations are treatment of prisoners or the basic food supply. If the influence is significant, the need for protection is obvious and the determination of the situation as occupation might be called for. This is further explained in paragraph 5.3 of this chapter.

When aspects of the sovereignty of the people are under the control of a party to the conflict, this is also a strong indication that occupation exists. These aspects are largely similar to the government functions which have to be under effective control in the meaning of the Hague Regulations, but are supplemented with, for example, territorial integrity and the principle of non-intervention. This will be illustrated in Part II of this essay, when dealing with the control that Israel maintains in the Gaza Strip.[68] As mentioned earlier, it can also entail actions of the occupant rendering the exercising of government functions by the legitimate authority ineffective.

The indicators discussed above combine HR-effective control with the definition of Protected Persons under the Fourth Geneva Convention. When the criteria for occupation under the Hague Regulations are met, it is obvious that the control of the occupant also amounts to effective control under the Fourth Geneva Convention. If the criteria under the Hague Regulations are not completely met, the indicators discussed above could function as additional methods in determining whether there is GC IV-effective control. Depending on the factual situation, other indicators not discussed above could also play a role in such a determination. Although the HR-effective control forms the basis, it remains the overall balance, taking into account the factual situation on the ground, which determines GC IV-effective control.

68 See chapter 8.

The establishment and maintenance of effective control

As stated, the difference between the two concepts of effective control is in the object of the established effective control and not in how it is established. The military aspect in the establishment of GC VI-effective control is still of paramount importance and what is remarked in paragraph 2.5.2 of this essay is equally applicable. This flows from the rules of applicability laid down in article 2 of the Fourth Geneva Convention, which determines that there must be an armed conflict for the convention to apply. Thus, physical presence of armed forces is considered necessary for the establishment of effective control.[69] This makes the indicators mentioned above not so much soft criteria for determining influence, but more a finding of consequences of military action.

It flows from the factual criteria for occupation that it is not necessary that GC IV-effective control is actively maintained by the military.[70] However, it is most likely that military actions function as an instrument of maintenance of the effective control. It is certain that physical presence of armed forces on the ground at all times is not a prerequisite for maintaining effective control. That the military power is in fact capable of enforcing the will of the occupant is sufficient.[71] What is remarked in paragraph 2.5.2 of this essay about the difference between the amount of military power necessary for the establishment of effective control on the one hand and the maintenance of effective control on the other, remains equally applicable.

3.5.3 Obligations and responsibilities of the occupant under the Fourth Geneva Convention

Under the Fourth Geneva Convention an array of obligations and responsibilities are imposed on the occupant. This raises the question whether the proposed concept of GC IV-effective control creates occupants which are not able to take on these obligations and responsibilities. As Gasser states, an occupant must be able to actually assume the responsibilities which attach to an occupying power.[72] Therefore I will briefly discuss the obligations for an occupant in the light of the proposed definition of GC IV-effective control.

As stated, the physical, economic and social wellbeing of the civilian population is what the Fourth Geneva Convention aims to protect. This is evident in for example article 50, which creates the obligation for an occupant to facilitate the care and education of children.[73] The same goes for article

69 Von Glahn 1957, p. 28; Roberts 1985, p. 251; Gasser in Fleck 1995, p. 243.
70 Pellet in Playfair 1992, p. 191.
71 Cavanaugh in Wippman/Evangelista 2005, p. 245.
72 Gasser in Fleck 1995, p. 243.
73 Commentary Pictet 1958, p. 284, 286.

55, which obligates the occupant to facilitate food and medical supplies, and article 56, which is aimed to maintain hygiene and public health.[74] Article 59 imposes the obligation to agree to relief schemes. All these articles impose obligations on the occupant. And without a doubt these obligations entail a considerable effort for any occupant.[75] But what these articles aim to protect is for a very important part what needs to be under the effective control before occupation exists under the Fourth Geneva Convention. Thus it is not only a big effort, it is the basic responsibility of every occupant.

In this respect, the obligations mentioned above can be used as a guideline in determining whether there is GC IV-effective control. If a state has the influence which is presupposed by these articles, and the other rules of applicability are fulfilled, effective control may well exist, making the occupant fully bound by the Fourth Geneva Convention. This flows logically from the point of view that control comes with responsibility and the need for protection.

Other provisions containing obligations, such as the articles on penal legislation, provide a scheme of protection, which only comes into force in the cases that an occupant enacts penal legislation. It is likely that it does, especially if it controls the government functions of a state, but these provisions cannot be interpreted as demanding that every occupant must actually have the power to do so. This is confirmed by section IV concerning the treatment of internees. This very elaborate section must be seen as providing the fundamental rights and basic necessities for internees. Once a state interns persons of another party in the course of an armed conflict, this section starts to apply. However, this does not presuppose that every occupant interns protected persons, or must do so before it becomes an occupant.

The last section that imposes obligations on the occupant is Section V, concerning the Information Bureaux. However, this section is already applicable upon the outbreak of a conflict.[76] Accordingly, such Bureaux should already be in place irrespective of territory becoming occupied.[77]

In conclusion, no articles in the Fourth Geneva Convention are contrary to the broad scope of occupation as discussed in this paragraph. On the contrary, the obligations which are imposed on the occupant are additional basis for the proposed concept of GC IV-effective control.

In my opinion, it is now also obvious that the wider concept of GC IV-effective control is contrary to the text, context and object and purpose of the Hague Regulations and can therefore not be seen as a development in the application of that treaty.[78]

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74 Commentary Pictet 1958, p. 309, 314.
75 Commentary Pictet 1958, p. 309, 310, 313.
76 Art. 136 GC IV, in Commentary Pictet 1958, p. 523.
77 Commentary Pictet 1958, p. 523.
78 See paragraph 2.5.2.

3.6 THE ENDING OF OCCUPATION

Just like the beginning of occupation is a question of fact, the ending must be judged on the same factual criteria. However, as was discussed in the previous paragraph, the factual criteria with respect to military presence that are necessary to establish effective control are stricter than the criteria by which the maintenance of the effective control must be judged. Furthermore, as will be discussed in the next paragraph, the application of part of the provisions of the Fourth Geneva Convention to occupied territory is made dependable of the elapsing of time.

3.7 ARTICLE 6 PARAGRAPH 3; THE 'ONE YEAR AFTER-RULE'

Special reference must be made to article 6 paragraph 3 of the Fourth Geneva Convention. This paragraph determines that the convention ceases to be applicable in occupied territory, one year after the general close of military operations. Only if the Occupying power exercises government functions in the occupied territory, a 'hard core' of provisions of the convention remain applicable.[79] The provisions that remain applicable in such instances provide for the basic rights of persons in occupied territory.[80]

As noted in paragraph 3.5.1 of this essay, the wording of this article suggests that the situation might still constitute occupation in the meaning of the Fourth Geneva Convention, but the selected provisions of the convention only remain applicable to the occupied territory when the occupant exercises government functions. Thus, one year after the general close of military operations, the applicability of the selected provisions no longer depends on whether the occupant has GC IV-effective control, but rather on whether the occupant has HR-effective control.[81]

Article 6 paragraph 3 was drafted with some occupations of that time in mind: the occupation of Germany and of Japan, following World War II. This partly explains the apparent illogical connection between protection of civilians and the elapsing of time.[82] The provision is subject of much debate and attempts have been made to remove this provision from the law of occupation.[83] However, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the OPT*, the ICJ still applied article 6 paragraph 3, when

79 Art. 6 para. 3 GC IV, in Commentary Pictet 1958, p. 58, 59; Roberts in Playfair 1992, p. 38; Gasser in Fleck 1995, p. 251.
80 Commentary Pictet 1958, p. 63; Roberts in Playfair 1992, p. 37; Gasser in Fleck 1995, p. 251.
81 See paragraph 2.5.2.
82 Commentary Pictet 1958, p. 62, 63.
83 See paragraph 4.3.2.

it dealt with the question of which provisions of the Fourth Geneva Convention are applicable to the situation in the West Bank.[84]

84 ICJ Wall, para. 125.

4 The Geneva Protocol I of 1977

4.1 History of Protocol I

In the wake of the 4 Geneva Conventions of 1949, the ICRC organized two conferences of government experts, with the purpose of furthering the protection of civilians against the effects of armed conflict. The two draft protocols which resulted from these conferences were used as basic documents at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. It was convened by the depositary of the Geneva Conventions, Switzerland, and was held in four sessions from 1974 to 1977. This conference, which was attended by delegates from up to 124 states, resulted in the adoption of the two Additional Protocols to the Geneva Conventions on 8 June 1977.[1]

One of those two protocols is the 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (hereinafter: Protocol I).

4.2 Status of Protocol I

Protocol I does not enjoy the universal acceptance of the Geneva Conventions, although with 166 state parties it is very widely accepted.[2] However, Protocol I is not binding on Israel as treaty law, since Israel has not ratified it.[3]

It has not been convincingly argued that Protocol I as a whole is part of customary law. However, it is argued that most provisions of Protocol I are part of customary international law.[4] Provisions which are relevant to the law of occupation, for example, contain principles that have been codified earlier and must be seen as reflecting customary law. These principles will be discussed in paragraph 4.4.2 of this essay.

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1 Sandoz/Swinarski/Zimmerman 1987, p. xxxi-xxxiii; Schindler/Toman 2004, p. 699.
2 ICRC Press Release 21/08/2006; ICRC State Parties List.
3 ICRC State Parties List.
4 Roberts in Playfair 1992, p. 36; Kalshoven/Zegveld 2001, p. 83; Dinstein 2004, p. 11.

4.3 Applicability of Protocol I

Two articles are relevant to the applicability of Protocol I. Firstly article 1, which provides for the situations to which Protocol I is applicable. Secondly article 3, which determines the beginning and end of applicability.

4.3.1 Article 1

Article 1 paragraph 3 of Protocol I states that the protocol is applicable in the situations referred to in article 2 common to the Geneva Conventions of 1949.[5] Thus, the terms for applicability are the same as for the Fourth Geneva Convention.[6]

However, article 1 paragraph 4 provides for an important additional factor in the applicability of Protocol I. Here it is stated that

> "the situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".[7]

The wording of paragraph 4 suggests that it is only an explanatory paragraph, clarifying the situations to which article 2 of the Fourth Geneva Convention is applicable.[8] This is not supported by the drafting history of the Fourth Geneva Convention.[9] After heavy debate, article 3 of the Fourth Geneva Convention was accepted. This article specifically deals with non-international armed conflicts and provides a protection that is far less extensive than for international armed conflicts.[10] At the time of drafting, wars of national liberation were seen as non-international conflicts.

Article 1 para. 4 of Protocol I intends to bring wars of national liberation under the notion of international armed conflict.[11] The debate on this paragraph focussed on whether wars of national liberation now constitute international armed conflicts as a consequence of the development of international law.[12] If this is the case, article 2 of the Fourth Geneva Convention should

5 Art. 1 para. 3 Protocol I, in Schindler/Toman 2004, p. 715.
6 Bothe/Partsch/Solf 1982, p. 45; Sandoz/Swinarski/Zimmerman 1987, p. 39; see also paragraph 3.4.
7 Article 1 para. 4 Protocol I, in Schindler/Toman 2004, p. 715.
8 Bothe/Patsch/Solf 1982, p. 38.
9 Pictet 1958, p. 30-33; Bothe/Partsch/Solf 1982, p. 39; Sandoz/Swinarski/Zimmerman 1987, p. 39, 41, 46.
10 Art. 3 GC IV, in Pictet 1958, p. 25.
11 Detter 2000, p. 51; Kalshoven/Zegveld 2001, p. 85.
12 Bothe/Partsch/Solf 1982, p. 40, 45; Sandoz/Swinarski/Zimmerman 1987, p. 47, 49; Gasser in Meyer 1989, p. 94, 95.

be interpreted accordingly.[13] This question is not free of controversy and it is not necessary to resolve it for the purpose of this essay. As will become clear, the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories does not depend on the answer to this question. It is noteworthy that article 1 paragraph 4 is one of the main reasons why Israel and the United States of America have not ratified Protocol I.[14]

4.3.2 Article 3

Article 3 of Protocol I deals with the beginning and end of application of Protocol I and the Fourth Geneva Convention. Paragraph (a) of this article, which is based on article 6 para. 1 of the Fourth Geneva Convention, states that the conventions and the protocol apply from the beginning of any situation referred to in article 1.[15] For state parties to Protocol I the provisions in the Fourth Geneva Convention on beginning and end of applicability are replaced by article 3. This implies that article 1 para. 4 also deals with the applicability of the Fourth Geneva Convention, but only for parties bound by the protocol.[16]

Paragraph (b) of article 3 provides rules governing the end of application of the two instruments. For occupied territories it is determined that the conventions and the protocol only cease to apply when the occupation is terminated. This abrogates the 'one year after'-rule of article 6 Fourth Geneva Convention and renders the difficult factual test of this article, the 'general close of military operations', without meaning for the applicability of the law of occupation. However, since article 3 only replaces article 6 of the Fourth Geneva Convention for parties bound by the protocol, a discrepancy exists between the rules of applicability for both instruments. As is stated in paragraph 4.2 of this essay, Israel is not bound by Protocol I. Article 3 paragraph (b) shows the intention of the majority of states to change the 'one year after'-rule, making the applicability of the whole body of occupation law solely dependent on the factual criteria for occupation. This view is supported by doctrine.[17] However, it cannot be maintained that this new rule applies to other states than those party to Protocol I, since it lacks customary character.[18]

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13 Sandoz/Swinarski/Zimmerman 1987, p. 51.
14 Aldrich 1991, p. 4-7; Meron 1994, p. 678, 682, 683.
15 Art. 3 para. (a) Protocol I, in Schindler/Toman 2004, p. 716.
16 Bothe/Partsch/Solf 1982, p. 57; Sandoz/Swinarski/Zimmerman 1987, p. 66, 67; Kalshoven/Zegveld 2001, p. 86.
17 Bothe/Partsch/Solf 1982, p. 59; Sandoz/Swinarski/Zimmerman 1987, p. 68; Roberts in Playfair 1992, p. 38, 39; Bothe in Bernhardt 1997, p. 764.
18 Roberts in Playfair 1992, p. 38; Gasser in Fleck 1995, p. 251, 252; Kalshoven/Zegveld 2001, p. 86.

This is confirmed by the recent application of article 6 paragraph 3 of the Fourth Geneva Convention by the ICJ.[19]

4.4 Provisions relevant to the law of occupation in Protocol I

There are no clarifications of key concepts like effective control in Protocol I. However, the following provisions contain principles which are relevant to the law of occupation.

4.4.1 Preamble

The preamble of the protocol states that:

> "(…) the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict".[20]

It states that *jus ad bellum* cannot affect *jus in bello*. In other words, this reaffirms the principle of equal application of the laws of war to all parties to the conflict, without prejudice to the political and legal background to the conflict.[21] Thus, it confirms that the application of humanitarian law is neutral, providing protection to those who need it. This is in conformity with the Fourth Geneva Convention and can thus be considered as a principle of customary law.[22] Its relevance to the humanitarian law in general is clear and is the same as for the law occupation; whether the occupation of territory was out of self-defence or otherwise legitimate under international law, or that it is the result of an unlawful use of force, the laws of occupation apply in full.

4.4.2 Article 4

Article 4 of Protocol I is of high importance since it contains important principles on the legal status of parties to the conflict, territories and persons

19 ICJ *Wall*, para. 125.
20 Preamble Protocol I, in Schindler/Toman 2004, p. 715.
21 Bothe/Partsch/Solf 1982, p. 33; Sandoz/Swinarski/Zimmerman 1987, p. 28, 29; Greenwood in Kalshoven 2000, p. 178; Benvenisti 2004, p. 190.
22 Pictet 1958, p. 44; See paragraphs 3.2 and 3.3.

involved. On close reading it can be seen that article 4 contains three different rules:[23]

1. the application of the conventions and protocol does not affect the legal status of the parties to the conflict;
2. the application of the conventions and protocol do not affect the legal status of the territory to which it is applied;
3. the occupation of territory does not affect the legal status of that territory.

The third rule is an important principle of international humanitarian law already seen in the Hague Regulations and the Fourth Geneva Convention. It reaffirms that annexation of an occupied territory is not recognized under international law, and neither is any other change in the governance or the status of the territory.[24] However, it does not have any bearing on the applicability of the Fourth Geneva Convention and Protocol I, since it does not directly deal with the protection of civilians. It merely reiterates the temporary character of occupation. Already under the Fourth Geneva Convention it is stated that the changes mentioned above do not have any influence on the protection of civilians.[25]

Rules 1 and 2 are exemplary of the object and purpose of the Fourth Geneva Convention and Protocol I. These instruments do not intend to define the relationship between the parties in the armed conflict, but only intend to provide protection to the civilians involved in the armed conflict.[26] Accordingly, these instruments do not intend to make a legal determination on the status of (occupied) territory or on the persons the convention and protocol are applied to. Thus, its mere application cannot entail a change in legal status. Rules 1 and 2 ensure that political motives, such as the fear that a third party may implicitly recognize political claims of one party to the conflict, can lead to denying a person the basic humanitarian protection he or she is entitled to under international law.[27] This principle can also be found in article 3 of the Fourth Geneva Convention. While this article only deals with non-international armed conflicts, it is a basic principle in the application to all armed conflicts and is of customary character.[28] It is also repeated in article 5 paragraph 5 of Protocol I.[29]

Article 4 provides the basis of international humanitarian law in that everybody is entitled to the same protection. Technically speaking however,

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23 Art. 4 Protocol I, in Schindler/Toman 2004, p. 716.
24 Bothe/Partsch/Solf 1982, p. 62; Sandoz/Swinarski/Zimmerman 1987, p. 73, 74.
25 Art. 47 GC IV, in Pictet 1958, p. 273; Sandoz/Swinarski/Zimmerman 1987, p. 74; see paragraph 3.5.1.
26 See paragraph 3.3.
27 See Pictet 1958, p. 44 on the comparable article 3 of the Fourth Geneva Convention..
28 Pictet 1958, p. 44; Bothe/Partsch/Solf 1982, p. 61; Sandoz/Swinarski/Zimmerman 1987, p. 73.
29 Art. 5 para. 5 Protocol I, in Schindler/Toman 2004, p. 717.

the application of the Fourth Geneva Convention to an occupied territory does influence the legal status of the party exercising effective control over the territory; it creates for this party the legal status of occupant.[30]

30 Bothe/Partsch/Solf 1982, p. 62.

5 Recent occupations and their consequences for the law of occupation

In recent time, the international community has been confronted with several occupations. The situations in which these occupations have occurred were very diverse and generated numerous reactions from the international community. It falls outside the scope of this essay to discuss the differences and similarities of these occupations in general. Therefore only two occupations relevant to this essay will be briefly discussed.

5.1 The Western Sahara

The occupation of Western Sahara by Morocco in 1976 was preceded by an Advisory Opinion of the ICJ, in which the right of self-determination of the people of the Western Sahara, then a Spanish colony, was confirmed.[1] The decolonisation process which followed the judgement was effectively hampered by Morocco and Mauritania. Both states occupied considerable parts of the Western Sahara territory when Spain withdrew as the colonial power. After the withdrawal of Mauritanian forces from their part in 1979, Morocco moved in and occupied the rest of the Western Sahara. An administration was set up and a vast amount of Moroccan armed forces remain present in the occupied territory. Morocco eventually claimed to have annexed the territory, making it a province of Morocco.[2]

Since Morocco has set up an administration and maintained a large amount of military forces present, there clearly was HR-effective control.[3] Since the criteria for occupation to exist in the meaning of the Hague Regulations are met, the situation also constitutes occupation in the meaning of the Fourth Geneva Convention.[4] Only the question whether the situation qualifies as an international armed conflict provides for some difficulty. The international community has proclaimed the situation to constitute occupation on several occasions.[5] In 1979, the UN General Assembly stated that Morocco's presence

1 ICJ *Western Sahara*, para. 162.
2 Franck 1976, p. 712, 715; Benvenisti 2004, p. 151, 152.
3 See paragraph 2.5.2.
4 See paragraph 3.5.2.
5 Benvenisti 2004, p. 152, 153.

in the Western Sahara constituted occupation.[6] Apparently, the armed conflict between the national liberation movement of the Western Sahara, the POLISARIO, and Morocco was deemed sufficient to constitute occupation. This is in line with the view that the sovereignty lies in the people, whether this is the people of an established sovereign state or a people of which the right of self-determination is recognized. It is also in conformity with Protocol I, albeit Morocco was not and to this date is not a party to that document. Until 1980, neither was Mauritania.[7]

5.2 OCCUPATION FOR THE BENEFIT OF THE OCCUPIED TERRITORY; IRAQ AFTER SADDAM HUSSEIN

On 20 March 2003 air strikes on Iraq commenced, carried out by a coalition of states led by the United States of America (US) and the United Kingdom (UK). These air strikes, which were followed by military actions on the ground, constituted an international armed conflict.[8] After the defeat of the armed forces of Iraq, the US, UK and their coalition became the *de facto* authority in Iraq, and created an administration.[9] This administration, which is called the Coalition Provisional Authority (CPA), is intended to act as a government for Iraq, vested with executive, legislative and judicial authority.[10] This effective control in an international armed conflict over the territory of Iraq is undoubtedly enough to constitute occupation.[11] This is confirmed by the UN Security Council.[12]

The most important question in this occupation is not its existence, but its ending. According to the Security Council, the occupation of Iraq ended on the 30th of June 2004 because of the reassertion of full authority and sovereignty by the newly formed Interim Government of Iraq.[13] The real reassertion took place on 28 June 2004. But it is far from obvious that this was the real ending of occupation. Is the declared ending of occupation by the Security Council in conformity with the law of occupation and the proposed concept for the determination of effective control in the meaning of the Fourth Geneva Convention?

First of all, it must be understood that the determination of the Security Council is not a factual determination based on the situation on the ground.

6 UNGA Res 34/37.
7 ICRC State Parties List.
8 Zwanenburg 2004, p. 745, 747; Dörmann/Colassis 2004, p. 295.
9 Zwanenburg 2004, p. 747; Dörmann/Colassis 2004, p. 297.
10 CPA Order No. 1, Section 1.
11 HPCR Roberts 2004, p. 4; Zwanenburg 2004, p. 748; Dörmann/Colassis 2004, p. 302; Walker in Wippman/Evangelista 2005, p. 260.
12 UNSC Res 1483 (2003), Preamble p. 2.
13 UNSC Res 1546 (8 June 2004), Preamble and para. 2.

How could it be, given the fact that the Resolution of the Security Council mentioned above was issued 3 weeks before the date of envisaged ending of the occupation? It is more a political statement, anticipating on a future situation and based on the narrow definition of occupation in the meaning of the Hague Regulations. If full sovereignty can once again be exercised by the legitimate authority in Iraq, occupation will have ended. However, whether this is the case remains a factual determination, not influenced by the exchange of documents but by the factual transfer of power. At the time of drafting of the Security Council resolution, it was the intention of the CPA to dissolve itself and transfer its powers to the Interim Government.[14] But at that point in time it remained to be seen whether this 'transfer' would indeed have that effect, or that the 'transfer' would just be a political act, in no way diminishing the effective control of the occupying power. Thus, the resolution of the Security Council is hard to reconcile with the Hague Regulations. It must also be stressed that the resolution of the Security Council, as proof of recognition by the international community, is only an indicator that the occupation has ended. It is not a final legal determination.[15]

To make this determination, the factual situation as of 28 June 2004 must be assessed. Are the changes that have taken place enough to end the occupation under the Hague Regulations as well as under the Fourth Geneva Convention? As this is a complex legal issue, the interesting facets of this issue will only be briefly discussed. Overall, what is most important is to note the intertwinement of the aspects of occupation under the Hague Regulations and the Fourth Geneva Convention.

The US and the CPA stated numerous times that after 28 June 2004 the Interim Government would posses full sovereignty over Iraq. In this context there was spoken of a 'transfer of sovereignty', but this wording is incorrect. Occupation does not transfer sovereignty to the occupant, so the latter cannot transfer it back; it remains vested in the people of Iraq. What is meant, is the transfer of authority, or the control of the state institutions.[16] It seems that this control over the government functions was effectively transferred to the Interim Government on the 28th of June 2004.[17] Thus, at least occupation in the meaning of the Hague Regulations seems to have ended.

One of the reasons for this assumption is that the Interim Government has the authority to request the coalition forces to leave.[18] By not making that choice it seemingly legitimates the continued presence of the coalition forces.

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14 HPCR Roberts 2004, p. 10, 11; Walker in Wippman/Evangelista 2005, p. 266.

15 HPCR Roberts 2004, p. 15, 16; Zwanenburg 2004, p. 753; Dörmann/Colassis 2004, p. 311; Walker in Wippman/Evangelista 2005, p. 284.

16 HPCR Roberts 2004, p. 13.

17 HPCR Roberts 2004, p. 11; Zwanenburg 2004, p. 753; Walker in Wippman/Evangelista 2005, p. 266.

18 HPCR Roberts 2004, p. 15; Dörmann/Colassis 2004, p. 311; Walker in Wippman/Evangelista 2005, p. 284.

But as a result of the continued presence, the coalition forces in Iraq continue to have considerable influence on the physical, economic and social wellbeing of the civilian population.[19] This is a proposed indicator for effective control in the meaning of the Fourth Geneva Convention.[20]

Furthermore, according to article 47 of the Fourth Geneva Convention, the civilian population is entitled to protection, no matter what form of administration is established in the territory. While this article primarily seeks to prevent that occupants evade their responsibilities by installing puppet regimes, it also aims to protect legitimate authorities against a foreign power imposing its will through this authority. The fact remains that the amount of actual control of a party to the conflict, over the civilian population or in this case the authority in place, determines whether or not a territory is occupied.[21]

The intention of the coalition forces seems to be to promote the best interests of the civilian population, so the political will to move the situation outside the law of occupation is understandable. One must not forget the negative image that comes with the term occupation.[22] However, the continued presence of coalition forces, their considerable influence on the political process and their considerable influence on the physical, social and economic wellbeing of the civilian population are all arguments which indicate that occupation in the meaning of the Fourth Geneva Convention might not have ended. This uncertainty is also evident in the writings of scholars on this subject.[23] Some scholars state that the law of occupation under the Fourth Geneva Convention should 'at least' be used as 'guidance or minimum standards'.[24] This is further evidence that it is considered necessary that the minimum standards of the law of occupation are applicable in a wide range of situations.

19 HPCR Roberts 2004, p. 14; Dörmann/Colassis 2004, p. 311; Walker in Wippman/Evangelista 2005, p. 259, 285.
20 See paragraph 3.5.2.
21 Dörmann/Colassis 2004, p. 309, 310.
22 HPCR Roberts 2004, p. 5; Walker in Wippman/Evangelista 2005, p. 260.
23 HPCR Roberts 2004, p. 18, 19; Dörmann/Colassis 2004, p. 312, 313; Walker in Wippman/Evangelista 2005, p. 283.
24 Dörmann/Colassis 2004, p. 314.

6 Conclusion: what constitutes occupation under the contemporary law of occupation?

6.1 Common principles of the law of occupation

There is a solid body of common principles which have been developed through time to form the basis of the law of occupation, whether it is laid down in customary international law, the Hague Regulations or in the Fourth Geneva Convention. These principles will be discussed in this paragraph.

Occupation does not transfer sovereignty
Although the effective control over the territory is in the hands of the occupant, sovereignty remains with the legitimate power. But occupation can exist regardless of whether there was a sovereign power prior to the occupation. This principle therefore does not create a separate condition for occupation.[1]

Occupation is not a legitimate way of acquiring territory
Based on the principle that occupation does not entail a transfer of sovereignty, it is clear that occupation has long since been abandoned as a legitimate way to acquire territory. This is in conformity with the customary rule of international law that states that acquiring territory with the use of force is illegitimate.[2]

Occupation does not influence the legal status of the territory and the parties
The legal status of a territory is not altered when the territory becomes occupied. This ensures that the status of occupation is accepted by parties even if one party does not recognize another party's claims regarding the territory. Occupation also does not influence the legal status of the parties involved in the occupation. These principles are of paramount importance to the application of the law of occupation in practice.[3]

Occupation is a factual situation, not a legal fiction
Occupation is a factual situation. Therefore, whether a situation constitutes occupation must be assessed on the basis of factual criteria. For example, occupation cannot be created by a declaration alone. In the same respect,

1 Paragraph 1.3; paragraph 1.4.
2 Paragraph 1.3; paragraph 1.4.
3 Paragraph 3.4.1; paragraph 3.4.2; paragraph 4.4.2.

occupation can exist even if both parties refuse to accept it. Flowing from this factual character, occupation only extends to that part of the territory that is effectively occupied. It does not extend to the rest of the territory which is part of the (sovereign) territorial unit.[4]

6.2 Common conditions for applicability of the law of occupation

The law of occupation is part of the *jus in bello*. This provides for some common conditions for applicability, as well as some rules of applicability which are specific to the Hague Regulations or the Fourth Geneva Convention. The common rules of application are the following.

The occupation must occur in the context of an international armed conflict
For both the applicability of the Hague Regulations and the Fourth Geneva Convention the existence of an international armed conflict is required. Whether this armed conflict follows from violations of the *jus ad bellum* is irrelevant. For states who are party to Protocol I, the scope of armed conflicts to which the law of occupation applies, is wider.[5]

The parties to the international armed conflict must be bound by the instruments in which the law of occupation is laid down
The instruments in which the law of occupation is laid down are the Hague Regulations and the Fourth Geneva Convention. The Hague Regulations are binding on all states since they form part of customary international law. A large part of the provisions in the Fourth Geneva Convention also forms part of customary international law. In addition to that, the Fourth Geneva Convention is binding on all states as treaty law.[6]

The status of the territory prior to the occupation is irrelevant to the applicability
Occupation can occur when there exists an international armed conflict. For occupation it is irrelevant what the status of the territory was prior to it becoming occupied. Thus, it is also irrelevant whether the territory which becomes occupied is under the control of a party to the conflict. Only the occupant has to be a party to the international conflict for an occupation to occur therein.[7]

4 Paragraph 1.3; paragraph 1.4; paragraph 2.5.2; paragraph 3.5.1; paragraph 3.6.
5 Paragraph 2.4; paragraph 3.4; paragraph 4.3.1; paragraph 4.4.1.
6 Paragraph 2.2; paragraph 3.2.
7 Paragraph 3.4.1.

Occupation is established by a military presence on the territory in question
Since occupation must occur in the context of an international armed conflict, it is logical that the control which constitutes occupation is established by a military presence. However, the maintenance of that control is not dependent of a physical military presence in the occupied territory itself. For example a military threat combined with occasional enforcement, thus enforcing the will of the occupant, can be sufficient.[8]

Occupation only exists when a territory is under the effective control of a party to the conflict
Flowing from the principle that occupation is a factual situation, the control that is established by the military presence must be effective. Whether control is considered effective depends on the instrument on which basis the situation is assessed.[9]

Occupation ends as soon as the control is no longer effective
In accordance with the factual character of occupation, it only ends when the effective control of the occupant is relinquished or diminished in such a way that it can no longer be regarded as effective. Statements made by whatever party are, without subsequent action, not sufficient to end an occupation.[10]

6.3 Occupation according to the Hague Regulations

Definition of occupation
According to the Hague Regulations, occupation exists when the territory is brought under the effective control of a party to an international conflict by means of that party's military presence. Control is considered effective under the Hague Regulations when the occupant exerts control over the government functions.[11]

Effective control over government functions
These government functions entail, but are not limited to: the management of the internal and external security of the territory, the control of the international borders including the control of import and export, the passing of legislation, the development of the economic system and the maintenance of the international contacts of the territory.[12]

8 Paragraph 1.3; paragraph 2.5.2; paragraph 3.5.2.
9 Paragraph 1.3; paragraph 1.4; paragraph 2.5; paragraph 3.5.
10 Paragraph 2.6; paragraph 3.6; paragraph 5.2.
11 Paragraph 2.4; paragraph 2.5.
12 Paragraph 2.5.2; paragraph 2.5.3.

The functions above translate into effective control over the police force, military and border patrol, customs, civil administration, the banking system and so on. It is not necessary that the occupant controls all the above mentioned government functions. It is neither necessary that the occupant maintains effective control over all the government functions it had under effective control at the start of the occupation, as long as it still amounts to a minimum of effective control necessary.[13]

What amounts to the minimum of effective control necessary for occupation is in its nature case-specific. However, what can be maintained as a bare minimum, is that the government functions necessary for the enforcement of the authority are under the control of the occupant. This entails police and military, and, depending on the geography of the region, could also entail border control. This also provides the minimum of effective control necessary to comply with the obligations of article 43 of the Hague Regulations.[14]

The establishing of an administration

The obligation under the Hague Regulations to establish an administration, cannot be seen as a criterion for the application of the law of occupation as laid down in the Hague Regulations. This obligation is not intended to limit the scope of the law of occupation. Nevertheless, the existence of an administration is in itself an important indication of effective control.[15]

6.4 Occupation according to the Fourth Geneva Convention

Definition of occupation

According to the Fourth Geneva Convention, occupation exists when the population of a territory is brought under the effective control of a party to an international conflict by means of that party's military presence. Control is considered effective under the Fourth Geneva Convention when the people of a territory are in fact under such control, that the protection of the law of occupation as laid down in the Fourth Geneva Convention is warranted.[16]

Factual situation as most important factor

The application of the law of occupation as laid down in the Fourth Geneva Convention should not be made dependent on a legalistic approach. The facts indicating the overall control of a party should be weighed as a whole to decide whether a situation constitutes occupation. The key factor is that the

13 Paragraph 2.5.3.
14 Paragraph 2.5.3.
15 Paragraph 2.5.1.
16 Paragraph 3.5.

overall control over the population is effective albeit possibly not directly exercised by the occupant.[17]

The elapsing of time as a factor in the application of provisions of the Fourth Geneva Convention

Notwithstanding what is stated below on the object of effective control in the meaning of the Fourth Geneva Convention, it seems that one year after the general close of military operations, the Fourth Geneva Convention ceases to apply to occupied territory. Only a hard core of provisions remains applicable, and then only when the occupant has such control over the territory that it amounts to effective control in the meaning of the Hague Regulations.[18]

Effective control under the Fourth Geneva Convention and the government functions

The government functions do not necessarily have to be under the control of the occupant for occupation to exist. Occupation can be constituted by other forms of control, judged by indicators as described below. Thus, the definition of what constitutes occupation under the Fourth Geneva Convention is broader than under the Hague Regulations.[19]

Indicators for effective control over the sovereignty of the people

This list of indicators for effective control over the sovereignty of the people contains the most important indicators, but naturally it is not exhaustive.[20]

- The people of the territory are considered as Protected Persons under the Fourth Geneva Convention. They can be qualified as such when for example the control exercised by the party to the conflict strongly influences the physical, economic and social wellbeing of the population.[21]
- The control exercised by the party to the conflict, irrespective of the way this control is exercised, strongly influences the humanitarian situations which the Fourth Geneva Convention envisages to protect.[22]
- Aspects of the sovereignty of the people are under the control of a party to the conflict. These aspects are largely similar to the government functions discussed in the previous paragraph, but are supplemented with for example territorial integrity and the principle of non-intervention. It is also a broader concept, entailing not only the government functions actively exercised by the occupant, but also actions of the occupant rendering the exercising of government functions by the legitimate authority ineffective.[23]

17 Paragraph 3.5.1; paragraph 3.5.2.
18 Paragraph 3.7.
19 Paragraph 2.5.2; paragraph 3.5.1; paragraph 3.5.2.
20 Paragraph 3.5.2.
21 Paragraph 3.4.2; paragraph 3.5.2.
22 Paragraph 3.5.2; paragraph 3.5.3.
23 Paragraph 2.5.3; paragraph 3.5.2.

Part II

7 Was the Gaza strip Occupied Territory prior to the Disengagement?

For a good understanding of the current situation in the Gaza Strip, it is important that the status prior to the Disengagement is discussed. It lays the groundwork for the assessment of the current situation and it gives an understanding of the opinion of Israel and the international community.

7.1 The status of the Gaza Strip prior to the Six Day War of 1967

Until 1948, the United Kingdom effectively controlled the Gaza Strip, as part of the territory of Palestine which the UK held under mandate of the League of Nations. The UK did not have sovereignty over Palestine. The government of the UK asked the UN, as successor to the League, to come up with a solution for the division of the territory after the ending of their mandate in 1948.[1] According to the 1947 UN Partition Plan, which was drafted for that purpose, the Gaza Strip was intended for the Palestinian people.[2] The declaration of the state of Israel, on 14 April 1948, was directly followed by an attack on Israel by Egypt, Jordan, Iraq, Lebanon and Syria. These states had rejected the UN Partition Plan and wanted to prevent its implementation by the new state.[3] In 1948, in the course of this Arab-Israeli War, the Gaza Strip came under Egyptian military occupation and remained under occupation until 1967. Since the rejection of the UN Partition Plan it has been under military occupation.[4] It is important to note that, while the Gaza Strip was under occupation and subject to the mandate of the UK, there has been no legitimate sovereign in the Gaza Strip. Egypt did not assert sovereignty.

The Gaza Strip was occupied by Israel in the course of the Six Day War in June 1967. This war, which started with the preventive attack by Israel on the air forces of Egypt, Iraq, Jordan and Syria and was preceded by increased tensions in the region, also led to the occupation of the old city of Jerusalem, the Golan Heights, most parts of the Sinai Peninsula and the West Bank.[5] The situation in the Gaza Strip constituted occupation in the meaning of the Hague

1 Partsch in Bernhardt 1995, p. 1460.
2 UNGA Res 181(II), Part II, Annex A.
3 Partsch in Bernhardt 1995, p. 1461, Malanczuk in Bernhardt 1995, p. 1480, 1481.
4 Benvenisti 2004, p. 108; HPCR Policy Brief 2004, p. 3.
5 Playfair in Playfair 1992, p. 4; Malanczuk in Bernhardt 1995, p. 1462.

Regulations and the Fourth Geneva Convention, contrary to the official position previously held by Israel. This will be discussed in the following paragraphs.

7.2 Position of Israel

Israel has contested the *de jure* application of the Fourth Geneva Convention from the start of the occupation.[6] The main argument of the Israeli government for this position, which has been named the "missing reversioner" argument, was first introduced by the Israeli legal scholar Yehuda Blum. It has also been promoted by Meir Shamgar, a former Attorney-General and former President of the Supreme Court of Israel. The argument is premised on the assumption that for occupation to exist, a legitimate sovereign must have been ousted by the occupying forces. If the territory in question did not belong to a sovereign power prior to the occupation, the Fourth Geneva Convention does not apply.[7]

This argument is based on an interpretation of article 2 of the Fourth Geneva Convention, which differs from the one as set out in chapter 3 of this essay. According to the "missing reversioner" argument, only paragraph 2 of article 2 of the Fourth Geneva Convention determines when that convention is applicable to occupation, instead of paragraph 1 of that article. According to this argument, a territory can only be considered occupied when it is territory of a High contracting party.[8] Since Egypt was only an occupying power in the Gaza Strip, there was no sovereign power over the Gaza Strip at the time of occupation. Thus, no sovereign power was ousted by Israel's occupation. According to Israel this leads to the conclusion that the Fourth Geneva Convention does not apply.[9] As explained in Part I of this essay, this argument is premised on an incorrect interpretation of article 2 of the Fourth Geneva Convention, and thus has no validity under the law of occupation.[10] Furthermore, the ICJ has discussed this argument in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, and has expressly stated that it is without legal merit.[11]

The Israeli Supreme Court has not used the argument mentioned above as the basis for its position that the Fourth Geneva Convention is not applicable to the OPT.[12] With respect to the applicability of the Hague Regulations to

6 Qupty in Playfair 1992, p. 101; Benvenisti 2004, p. 109; Al Mezan Report 2005, p. 11.
7 Shamgar 1971, p. 263-266; Qupty in Playfair 1992, p. 102; Falk/Weston in Playfair 1992, p. 131; HPCR Policy Brief 2004, p. 4; Cavanaugh in Wippman/Evangelista 2005, p. 239; Al Mezan Report 2005, p. 11.
8 Art. 2 para. 2 GC IV, in Commentary Pictet 1958, p. 17.
9 Qupty in Playfair 1992, p. 101, 102; HPCR Policy Brief 2004, p. 3, 4; Cavanaugh in Wippman/Evangelista 2005, p. 239; Al Mezan Report 2005, p. 12.
10 See paragraph 3.4.1.
11 ICJ *Wall,* para. 90-101.
12 Qupty in Playfair 1992, p. 103, 104, 105; Cavanaugh in Wippman/Evangelista 2005, p. 240.

the OPT, the Israeli Supreme Court has accepted that the Hague Regulations are directly applicable in municipal courts since they form part of customary international law. This position was first taken by the court in the case of *Hilu v. Government of Israel* of 1972.[13] However, with respect to the Fourth Geneva Convention, the Israeli Supreme Court has maintained that it is not applicable because it is not customary international law, but contractual international law. According to the court, the latter is only binding between states and does not directly apply in municipal courts, as it cannot be considered part of internal Israeli law without adoption by the Knesset. The court has taken this position in, for example, the *Beit El Settlement* case of 1978, the *teachers' Housing Cooperative Society* case of 1982 and the *Affo v. IDF Commander* case of 1987.[14] However, in a recent judgement, the court has stated that the Hague Regulations and the Fourth Geneva Convention are both applicable to the military operations in the Gaza Strip to the extent that they affect civilians.[15]

Israel has stated that it is applying the 'humanitarian provisions' of the convention in the OPT on a *de facto* basis.[16] It is noteworthy that this statement has led the Israeli Supreme Court to assume that certain provisions of the Fourth Geneva Convention are applicable tot the OPT.[17] However, Israel has not provided any clarification as to what these humanitarian provisions are. In my view, it is not reconcilable with the Fourth Geneva Convention that its parties unilaterally decide which provisions do protect the basic needs of the population and which do not. This statement is contradictory to the object and purpose of the Fourth Geneva Convention, which is the protection of the basic humanitarian needs of the civilian population.[18]

7.3 Occupation in the meaning of the Hague Regulations

Applicability and occupation

It is clear that the Six Day War of 1967 constituted an international armed conflict, as it was an armed conflict between states.[19] As mentioned in chapter 2 of this essay, the Hague Regulations have become part of customary inter-

13 ISC H.C. 302/72 (*Hilu)*, para. 180; see also Qupty in Playfair 1992, p. 88, 89, 90; Cavanaugh 2003, section III, fn 38.

14 ISC H.C. 606/78 (*Beit El),* p. 119, 120; ISC H.C. 393/82 (*Teachers' Housing Cooperative Society)*, p. 793, 802; ISC H.C. 785/87 *(Affo v IDF Commander)*, p,. 194, 195; see also Qupty in Playfair 1992, p. 90, 105, 106; Cavanaugh 2003, section III, fn 43; HPCR Policy Brief 2004, p. 5; Cavanaugh in Wippman/Evangelista 2005, p. 240.

15 ISC 30/05/2004, as quoted in ICJ *Wall*, para. 100; see also HPCR Policy Brief 2004, p. 5.

16 Shamgar 1971, p. 262; Watson 2000, p. 139; Benvenisti 2004, p. 109; HPCR Policy Brief 2004, p. 4; Cavanaugh in Wippman/Evangelista 2005, p. 238.

17 ISC H.C. 7015/02 and 7019/02 *(Ajuri v IDF Commander)*, p. 547.

18 See paragraph 3.3.

19 ICJ *Wall*, para. 101; UNSC Res 242 (1967).

national law and are therefore binding upon all. Thus, the Hague Regulations are applicable to all parties to the conflict.

As stated in Part I of this essay, occupation exists when the territory is brought under the effective control of a party to an international conflict by means of that party's military presence. Control is considered effective under the Hague Regulations when the occupant exerts control over the government functions.[20] Israel has gained control over the Gaza Strip by military means in the course of an international armed conflict. Subsequently, it has created an extensive administration for the Gaza Strip.[21] Thus, it is clear that Israel exercised effective control over the government functions in the Gaza Strip after the Six Day War. Whether this control was previously exercised by the legitimate sovereign or by another occupying force does not matter.[22] The Gaza Strip was under occupation in the meaning of the Hague Regulations. The applicability to the OPT as indeed being occupied territory is explicitly confirmed by the UN General Assembly.[23] In addition, the applicability of the Hague Regulations to the OPT is accepted by Israel and confirmed by the Supreme Court of Israel.[24]

7.4 Occupation in the meaning of the Fourth Geneva Convention

The Six Day War constituted an international armed conflict. Furthermore, both Egypt and Israel were parties to the Fourth Geneva Convention at the outbreak of the conflict.[25] As the occupation of the Gaza Strip by Israel occurred during this conflict, the Fourth Geneva Convention is applicable in the Gaza Strip. This line of reasoning was also followed by the ICJ when it determined the Fourth Geneva Convention applicable to the occupation of the West Bank as part of the OPT.[26]

Since the factual situation in the Gaza Strip prior to the Disengagement constituted occupation in the meaning of the Hague Regulations, there is little doubt that it also constituted occupation in the meaning of the Fourth Geneva Convention. Israel had an extensive administration of the territory, complete control over airspace and territorial waters, as well as far-reaching influence on the physical, economic and social wellbeing of the civilian population.

20 See paragraph 6.3.
21 Playfair in Playfair 1992, p. 8, 10; HPCR Bruderlein 2004, p. 6.
22 See paragraph 6.2; HPCR Policy Brief 2004, p. 7.
23 UNGA Res 58/97; UNGA Res 58/292; UNGA Res ES-10/2.
24 ISC H.C. 302/72 (*Hilu)*, p. 180; ISC H.C. 393/82 (*Teachers' Housing Cooperative Society)*, p. 793, 802; Qupty in Playfair 1992, p. 90; HPCR Policy Brief 2004, p. 5, 7, 11; HPCR Bruderlein 2004, p. 5.
25 ICRC State Parties List.
26 ICJ *Wall*, para. 101.

Therefore, the control exercised by Israel extended far beyond the minimum requirements for occupation.

The applicability of the Fourth Geneva Convention, with Israel as the Occupying power, has frequently been affirmed by the UN Security Council.[27] The General Assembly has also affirmed this in its regulars sessions and in the 10th Emergency Special Session,[28] as has the ECOSOC[29] and the UN High Commissioner for Human Rights.[30] This was endorsed by the ICRC in an official statement.[31]

While confirming that the situation in the Gaza Strip constitutes occupation, the ICJ has stated in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the OPT* that only those articles referred to in article 6 paragraph 3 of the Fourth Geneva Convention remain applicable in the West Bank. The reason for this limited applicability is that "the military operations leading to the occupation of the West Bank in 1967 ended a long time ago".[32] It can be assumed that the same reasoning applies to the situation in the Gaza Strip. In my opinion, this limited applicability of the Fourth Geneva Convention is, although understandable from a legal point of view, highly unsatisfactory when the military forces of the occupant still conduct military operations in the occupied territory on a daily basis.

7.5 The impact of the Oslo Accords

The Oslo Accords are a variety of agreements concluded between Israel and the PLO. The first agreement was the Declaration of Principles (hereinafter: the DoP) of 1993.[33] It envisaged a withdrawal by the military from the Gaza Strip.[34] In practice, the military did not completely withdraw from the Gaza Strip, but merely redeployed in and around settlements.[35] The DoP also envisaged a transfer of power from Israel to the Palestinians in the Gaza Strip, to be specified in the Interim Agreement.[36] Israel transferred the responsibility for the internal security of the Gaza Strip to the Palestinians, while retaining

27 See for example UNSC Res 452 (1979); UNSC Res 681 (1990); UNSC Res 1544 (2004).
28 UNGA Res 56/60; UNGA Res 58/97; UNGA Res 58/292; UNGA Res ES-10/2; UNGA Res ES-10/11.
29 ECOSOC Res 2001/19.
30 Statement UN High Commissioner for Human Rights 05/12/01.
31 ICRC Official Statement 05/12/2001, para. 2.
32 ICJ *Wall*, para. 125.
33 Declaration of Principles on Interim Self-Government Arrangements (13/09/93), in Watson 2000, p. 317.
34 Art. XIV DoP 1993; Shehadeh 1997, p. 24, 25; Watson 2000, p. 41, 42.
35 Shehadeh 1997, p. 52; Watson 2000, p. 106, 107.
36 Art. VI and VII DoP 1993; Shehadeh 1997, p. 16, 17, 24; Watson 2000, p. 41, 42.

the responsibility for defending it against external threats and in the 'overall security of Israelis'.[37]

Another important agreement is the Interim Agreement of 1995 (also known as Oslo II).[38] This is the detailed implementation of the DoP. By virtue of the Interim Agreement, Israel transferred part, but not all, of the powers and responsibilities from the military government and Civil Administration to the Palestinians.[39] Furthermore, it provided for a scheme on the transfer of territorial jurisdiction, in which settlements, Israelis and military installations areas remained under the jurisdiction of Israel.[40] Israel also retained all the powers necessary to protect the Israelis and settlements, continued to carry the responsibility for the defense against external threats,[41] and retained legal jurisdiction over foreign relations, borders and Palestinian refugees.[42]

As a result of the above mentioned documents, which have been elaborated on in numerous appendices, a large part of the powers and responsibilities for the OPT was transferred to the Palestinians. However, an equally large part of powers and responsibilities remained with Israel. As politically important as it was to provide the Palestinians with a considerable level of self-governance, this did not alter the legal status of occupied territory. Israel still had a military presence in the Gaza Strip. Israel retained considerable powers and responsibilities by virtue of the Oslo Accords. In addition to what was explicitly determined in those agreements, Israel also retained all powers and responsibilities not transferred to the Palestinians.[43] In conclusion, Israel still had effective control over the Gaza Strip, amounting to occupation in the meaning of the Hague Regulations as well as the Fourth Geneva Convention.

It seems apparent that the Oslo Accords were not intended to alter the legal status of the OPT. In the Interim Agreement it is specifically determined that it was not intended to change the status of the West Bank and the Gaza Strip, and that neither party waived any existing rights, claims or positions.[44]

The view that the Gaza Strip and the rest of the OPT remained occupied territory after the Oslo Accords was confirmed by the ICJ,[45] the UN Security Council,[46] and the UN General Assembly.[47]

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37 Art. VIII DoP 1993.
38 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28/09/95), in Watson 2000, p.349.
39 Art. I.1 Interim Agreement 1995; Shehadeh 1997, p. 34.
40 Art. XI.2 and XVII.2-a Interim Agreement 1995; Shehadeh 1997, p. 35, 36, 37.
41 Art. XII.1 Interim Agreement 1995.
42 Art. XVII Interim Agreement 1995; Shehadeh 1997, p. 35, 36.
43 Art. XVII.1-b Interim Agreement 1995.
44 Art. XXXI.6 and XXXI.7 Interim Agreement 1995; HPCR Bruderlein 2004, p. 6; Al Mezan Report 2005, p. 16.
45 ICJ *Wall,* para. 78.
46 UNSC Res 1544 (2004); see also paragraph 7.3.
47 UNGA Res 58/292; see also paragraphs 7.2 and 7.3.

7.6 CONCLUSION

The Gaza Strip has been under Israeli occupation since 1967. Although Israel has always contested the applicability of the Fourth Geneva Convention to the OPT, it has recognized its status as occupying power. Its denial of the applicability of the Fourth Geneva Convention is without legal grounds. This is confirmed by the view of the international community. It is also confirmed in numerous documents issued by UN organs, such as the Security Council, the General Assembly and the ICJ. The Oslo Accords did not change the legal status of the Gaza Strip.

8 The revised Disengagement Plan of 6 June 2004

8.1 The aim of the Disengagement Plan

In April 2004 the government of Israel presented a Disengagement Plan, with the purpose of regulating the withdrawal of Israel from the Gaza Strip. After the rejection of this Disengagement Plan in Israel's internal political process, a revised version was presented.[1] This was the 'Revised Disengagement Plan of 6 June 2004' (hereinafter: the Plan).[2]

According to this Plan "the completion of the plan will serve to dispel claims regarding Israel's responsibility for the Palestinians in the Gaza Strip".[3] This expresses the view of the government of Israel that the implementation of the Plan will end the occupation of the Gaza Strip, since that is the basis of Israel's responsibilities for the Palestinians in the Gaza Strip.[4]

By implementing the plan, Israel intended to create a better security, political, economic and demographic situation.[5] Although it is not specified whether this intention extends to the whole region or just Israel, it can be assumed that it primarily applies to the latter. It is clear that the Plan has a unilateral character, which is confirmed by the plan itself.[6]

8.2 The control over the Gaza Strip which is relinquished by Israel

The Plan stipulates that after its implementation there will be no permanent presence of Israeli Security forces in the areas of the Gaza Strip territory that have been evacuated.[7] Thus, all military bases will be dismantled and evacuated.[8] Also, all roadblocks and checkpoints on the roads of the Gaza Strip which were in place[9] will disappear, since there will be no military forces

1 HPCR Bruderlein 2004, p. 4.
2 Revised Disengagement Plan 06/06/2004 (Addendum A-Main Principles). See annex.
3 Disengagement Plan, para. 1 principle 6.
4 HPCR Bruderlein 2004, p. 1, 7; Al Mezan Report 2005, p. 3.
5 Disengagement Plan, para. 1 principle 2.
6 Disengagement Plan, para. 1 preamble and principle 1, para. 13; Al Mezan Report 2005, p. 5.
7 Disengagement Plan, para. 2.3.1 principle 2.
8 Disengagement Plan, para. 4.
9 Report of Special Rapporteur Dugard of December 2005, para. 6.

to give effect to these measures. Since the settlements are also being evacuated from the Gaza Strip, the military force assigned to protect the settlers will no longer be there.[10]

However, the wording of the principles discussed in this paragraph implies that there are also parts of Gaza Strip territory that will not be evacuated and will therefore continue to have a permanent presence of Israeli security forces. On further examination of the Plan it can be seen which parts are meant by this, or at least some of them.

8.3 Continued military presence in the Gaza Strip

The Plan stipulates that Israel will continue to exercise security activity in the sea off the coast of the Gaza Strip.[11] This entails continued military presence in its territorial waters. Israel also maintains exclusive authority over the airspace of the Gaza Strip.[12] This entails continued military presence in the skies above the Gaza Strip and may well entail military presence on the airport of the Gaza Strip, although this has been disabled by the IDF in earlier military actions.

Israeli military forces will remain present in the border area between the Gaza Strip and Egypt (also known as the 'Philadelphi Route').[13] In addition to this, the Plan explicitly provides the possibility that the area where military forces remain present will be expanded when this is required by 'security considerations'.[14]

Israel will also continue to guard and monitor the rest of the external land perimeter of the Gaza Strip.[15] It is not specified in the Plan whether this will consist only of guarding and monitoring the border on Israeli territory or whether this also entails military presence on the territory of the Gaza Strip. The latter will be the case when the arrangements for guarding and monitoring the rest of the border remain unchanged, as they do at the border between the Gaza Strip and Egypt.[16] Paragraph 3.1 principle 1 of the Plan, in which the provision on border-control is laid down, further only prescribes continuing, unchanging control over the Gaza Strip. The placement of this provision within the Plan confirms that continuing military presence for the purpose of border control on the Gaza side of the border is a realistic possibility.

10 Disengagement Plan, para. 2.3.1 principles 1 and 2.
11 Disengagement Plan, para. 3.1 principle 1.
12 Disengagement Plan, para. 3.1 principle 1.
13 Disengagement Plan, para. 2.3.1 principle 1; Disengagement Plan, para. 6.
14 Disengagement Plan, para. 6.
15 Disengagement Plan, para. 3.1 principle 1.
16 Disengagement Plan, para. 11.a principle 1; see also paragraph 8.4.2.

8.4 Continuing control over the Gaza Strip by Israel

The principle of state sovereignty is not directly applicable to the relation between Israel and the Gaza Strip, because the latter is part of a territorial unit which is not a state. However, the sovereignty of an occupied territory is an important aspect of the law of occupation. Regardless of its applicability, the principle of state sovereignty is an important instrument in determining the effectiveness of control of the occupant.[17] Therefore, this principle is used in the current paragraph for placing the continuing control of Israel over the Gaza Strip in the context of international law.

8.4.1 Continuing control over Gaza territory, airspace and territorial waters

An important part of state sovereignty is territorial sovereignty, which relates to the exclusivity of the competence of the state regarding its own territory.[18] Territorial sovereignty also extends to the airspace.[19] As stipulated in the Plan, Israel will continue to maintain exclusive authority over the airspace of the Gaza Strip.[20] If the Gaza Strip would be part of a state this would be a serious violation of the principle of territorial sovereignty.

Territorial waters are also subject to the territorial sovereignty of a state, only restricted by the right of innocent passage.[21] The Plan stipulates that Israel will maintain its control over the territorial waters of the Gaza Strip.[22] If the Gaza Strip would be part of a state it would be a serious violation of the principle of territorial sovereignty to maintain military presence off the coast of the Gaza Strip for security reasons.

Exclusive competence regarding a state's territory would also extend to the maintenance and development of the infrastructure on its territory. The Plan suggests that authorities in the Gaza Strip will not be allowed to establish a seaport or airport in the Gaza Strip without the approval of Israel.[23] If the Gaza Strip would be part of a state, this too would be a violation of the territorial sovereignty.

It is suggested that such permission will depend on (security) arrangements between Egypt and the authorities in the Gaza Strip.[24] By this Israel clearly intends to influence the security system and the economic system of the Gaza Strip. If the latter would be part of a state this influence would be contrary

17 See paragraph 3.5.
18 PCA *Island of Palmas*, p. 838.
19 ICJ *Nicaragua*, p. 14, 128; Shaw 2003, p. 464.
20 Disengagement Plan, para. 3.1 principle 1.
21 Shaw 2003, p. 506, 507.
22 Disengagement Plan, para. 3.1 principle 1.
23 Disengagement Plan, para. 6.
24 Disengagement Plan, para. 6.

to the principle of non-intervention. This principle is linked to the principle of state sovereignty and can be derived from article 2(1) of the UN Charter.[25] It is part of customary law,[26] and contains a duty not to intervene with the internal or external affairs of a state.[27] The internal security of the territory undoubtedly falls within the internal affairs of the state.[28] These internal affairs also include the choice of political, economic and social systems.[29]

8.4.2 Control over the external land perimeter of the Gaza Strip

The Plan explicitly states that the arrangements for the passage of the border between Egypt and the Gaza Strip remain unchanged.[30] This control is effectuated by the continued presence of the military in the border area. With regard to the rest of the external land perimeter of the Gaza Strip, it is made clear that Israel will guard and monitor it. As discussed in the previous paragraph there is a realistic possibility that the monitoring of this part of the border, including arrangements for the passage of persons, will also remain unchanged. However, it is stated in the Plan that the Erez Checkpoint, on the northern border between the Gaza Strip and Israel, will be moved to a location within Israel sometime after the implementation of the Plan.[31]

The Plan makes no arrangements for the passage of persons between the Gaza Strip and the West Bank. Passage between these two pieces of land, which together are considered one single territorial unit by Israel and the Palestinians,[32] can only be realised by transfer over Israeli territory. This fact, together with the lack of mentioning of passage between the Gaza Strip and the West Bank in the Plan, suggests that such passage will remain fully under the control of Israel. This suggestion is strengthened by the apparent lack of change in other border arrangements.

The Plan also stipulates that there will be no change in the regime regarding the entry and exit of goods between the Gaza Strip, the West Bank, Israel and abroad.[33] This is a very important stipulation, since it effectively keeps all international trade of the Gaza Strip under the control of Israel. It further hampers the transfer of goods within the single territorial unit which is formed by the West Bank and the Gaza Strip.

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25 Brownlie 1998, p. 293; Nolte in Simma 2002, p. 151.
26 ICJ *Nicaragua*, para. 202; Shaw 2003, p. 191, 1039.
27 ICJ *Nicaragua*, para. 205; Brownlie 1998, p. 293; Shaw 2003, p. 191, 572.
28 HPCR Bruderlein 2004, p. 9.
29 ICJ *Nicaragua*, para. 205 ; HPCR Bruderlein 2004, p. 9.
30 Disengagement Plan, para. 11.a principle 1.
31 Disengagement Plan, para. 12.
32 Art. IV DoP 1993; Report of Special Rapporteur Dugard of December 2005, p. 8.
33 Disengagement Plan, para. 10 principle 1.

The regulating of the external borders falls within the internal as well as external affairs of a state. International trade is an important part of the economic system of a state, and can be seen as part of the external affairs of a state.[34] If the Gaza Strip would be part of a state, Israel's stipulated control over the external land perimeter of the Gaza Strip, including the entry and exit of persons and goods and the control of international trade, would thus be a serious violation of the principle of non-intervention.[35] The hampering of movement of goods and persons between the Gaza Strip and the West Bank is contrary to the territorial integrity of this territorial unit.[36]

8.4.3 Continuing control over the 'internal affairs' of the Gaza Strip

It is stipulated in the Plan that, among others, the following arrangements will remain in force: the tax and customs regime, the monetary regime and postal and telecommunications arrangements.[37] As stated, it is prohibited to intervene with the internal affairs of a state, which include the choice of political, economic and social systems.[38] In my view, these systems would include all those arrangements mentioned in the Plan.

The Plan also determines that Israel maintains the authority to decide whether a foreign security force is allowed to enter the Gaza Strip.[39] As stated above, the security of the territory would definitely qualify as part of the internal affairs of a state. If the Gaza Strip would be part of a state, this stipulation would be a violation of the principle of non-intervention. The authority to allow a foreign security force into one's territory flows directly from the territorial sovereignty of that state.[40]

8.5 Other issues relating to the Plan and the law of occupation

The Plan also determines that the process described in it is without prejudice to the relevant agreements between Israel and the Palestinians.[41] This would also include the Oslo Accords. This suggests that it is not Israel's intention to go against what is stated in those accords, and more specifically that it is not contesting that the Gaza Strip is still seen as one single territorial unit

34 HPCR Bruderlein 2004, p. 9.
35 See also paragraph 8.4.1.
36 Report of Special Rapporteur Dugard of December 2005, p. 8.
37 Disengagement Plan, para. 10 principles two, three and four.
38 ICJ *Nicaragua*, para. 205 ; See also paragraph 8.4.1.
39 Disengagement Plan, para. 5.
40 Shaw 2003, p. 192.
41 Disengagement Plan, para. 1 principle 7.

together with the West Bank.[42] This creates some inconsistency with other provisions of the Plan.[43]

What is also relevant for the question of occupation is Israel's stipulated right of self-defence. It is stipulated in the Plan that Israel "reserves its fundamental right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip".[44] It must be stressed here that preventive self-defence is contrary to article 2(4) and 51 of the UN Charter.[45] Assuming the occupation would end, Israel's right of self-defence is based on customary international law and the UN Charter. A preventive right of self-defence in this situation could only flow from a broader scope of powers under the international law of occupation.[46] This would be contradictory to Israel's own statement on the ending of occupation.

What must further be noted is that nowhere in the Plan arrangements are made with respect to the civilian prisoners originating from the Gaza Strip and being detained by Israel. Successfully ending the occupation should entail arrangements concerning civilians imprisoned during the occupation.[47]

8.6 Conclusion

The Plan proposes considerable changes in the factual situation in the territory of the Gaza Strip, leading to free movement of the people within the Gaza Strip. However, it also contains numerous provisions which maintain Israel's continuing control over the Gaza Strip and its population. This includes monitoring and controlling all means of entry and exit of the Gaza Strip. Considering this continuing control, occupation may not have ended. It is stated by Israel that its responsibility for the Palestinians in the Gaza Strip will end by implementation of the Plan.[48] It remains to be seen whether Israel's assertion is correct.

42 Art. IV DoP 1993; Report of Special Rapporteur Dugard of December 2005, p. 8.
43 See paragraph 8.4.2.
44 Disengagement Plan, para. 3.1 principle 3.
45 Shaw 2003, p. 1029, 1030; HPCR Bruderlein 2004, p. 13.
46 HPCR Bruderlein 2004, p. 13.
47 HPCR Bruderlein 2004, p. 13; Report of Special Rapporteur Dugard of December 2005, p. 8.
48 See paragraph 8.1.

9 The situation in the Gaza Strip subsequent to the Disengagement

9.1 The implementation of the Plan

The implementation of the Plan took place in August and September 2005 and was officially completed on 12 September 2005.[1] Based on the wide acceptance of this date as the completion date of implementation of the Plan, it can be assumed that all aspects of the Plan were implemented. The implementation of elements of the Plan, which are important for the assessment whether occupation still exists, is further illustrated by media reports and other sources.

9.2 Military presence and military actions leading to control over the territory

The freedom of movement of the Palestinians inside the Gaza Strip improved after the Disengagement. Israeli checkpoints which impeded the freedom of movement are no longer present in the Gaza Strip.[2]

The exclusive authority over the airspace of the Gaza Strip lies with Israel and is enforced strictly.[3] There are numerous reports of Israeli military aircrafts opening fire on installations on the ground.[4] The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has confirmed, as have other sources, that these attacks have resulted in civilian casualties and injured civilians, including women and children, in numerous occasions.[5] Also worrying is the new practice of mock attacks by Israeli warplanes, as well as Israeli warplanes making so-called sonic booms. These actions create panic among

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1 Report of Special Rapporteur Dugard of December 2005, p. 2, 6, 8; PCHR 19/09/05; PCHR 21/09/05; PHR-Israel 26/09/05; PCHR 05/10/05; Amnesty International 07/10/05; B'Tselem 26/04/06; HRW Overview 2005.

2 Report of Special Rapporteur Dugard of December 2005, p. 8; B'Tselem 26/04/06.

3 Al-Dameer 24/09/05; Amnesty International 07/10/05; PCHR 10/10/05; HRW 23/12/2005; Report of Special Rapporteur Dugard of December 2005, p. 9; B'Tselem 26/04/06; BBC Country Profile; BBC Interview 08/2006 Hourani.

4 WAFA 26/09/05; WAFA 25/10/05; WAFA 14/12/05; HRW Overview 2005; B'Tselem 07/03/06; Amnesty International 11/04/06; OCHA 12/04/06; B'Tselem 22/05/06; OCHA 07/06/06; OCHA 21/06/06; B'Tselem 22/06/06.

5 OCHA 12/04/06; WAFA 24/09/05 (air strikes); WAFA 25/10/05; WAFA 14/12/05; Amnesty International 11/04/06; B'Tselem 22/06/06.

the population of the Gaza Strip and occasionally causes material damage. There are also reports of medical complaints due to these actions by the Israeli Air Force.[6] The Special Rapporteur of the UN Commission on Human Rights, John Dugard, as well as several human rights organizations, have qualified these sonic booms as a way of collective punishment, which is prohibited under the Fourth Geneva Convention.[7]

The control over the territorial waters of the Gaza Strip by Israel is obvious.[8] It is enforced strictly by the Israeli navy. There are reports of Israeli gunboats opening fire on fishermen, as well as on other civilians and civilian installations on shore. There are reports of casualties and injured civilians, including women and children, as a result of these attacks.[9] Israel also has imposed severe restrictions on fishing.[10]

Israeli armed forces have made numerous incursions into the Gaza Strip. OCHA has confirmed, as have other sources, that Palestinian civilians were injured and killed during these incursions.[11] The population in civilian residential areas of the Gaza Strip has also been subject to Israeli artillery fire. There are reports of numerous injured and high amounts of casualties due to these attacks.[12] Among those victims are several women and children. OCHA has stated that the artillery bombardments cause severe psycho-social strain on the civilian population, especially on children. OCHA also points to the risks associated with the large amount of unexploded artillery shells.[13]

9.3 Border control by Israel

As stipulated in the Plan, Israel monitors and guards the borders of the Gaza Strip. However, the way in which this guarding takes place was not stipulated in the Plan. Over the whole length of the border with Israel, Israeli troops are deployed on the territory of the Gaza Strip, where Israel has created a buffer zone of up to 300 metres wide. Israeli armed forces have demolished houses

6 WAFA 24/09/05 (air strikes); Al-Dameer 27/09/05; WAFA 28/09/05 (mock raids); WAFA 25/10/05; WAFA 26/10/05; WAFA 28/12/05; BBC Interview 08/2006 Hourani.

7 Report of Special Rapporteur Dugard of December 2005, p. 8, 9; GCMHP 14/11/05; PHR-Israel 14/11/05.

8 Report of Special Rapporteur Dugard of December 2005, p. 9; HRW Overview 2005; Amnesty International 07/10/05; PCHR 10/10/05; WAFA 16/10/05; B'Tselem 26/04/06; BBC Country Profile.

9 WAFA 24/09/05 (navy attacks); WAFA 25/09/05; WAFA 12/11/05; WAFA 03/12/05; HRW 20/06/06.

10 PCHR 11/2005.

11 WAFA 04/10/05; WAFA 10/10/05; WAFA 10/11/05; PCHR 11/2005; WAFA 03/12/05; Amnesty International 11/04/06; OCHA 07/06/06; BBC Interview 08/2006 Fayyad.

12 PCHR 11/2005; WAFA 04/12/05; HRW Overview 2005; Amnesty International 11/04/06; B'Tselem 16/04/06; HRW 20/06/06; OCHA 12/04/06; OCHA 07/06/06; OCHA 21/06/06.

13 OCHA 12/04/06.

and agricultural land to establish this buffer zone and ordered every Palestinian to leave these areas.[14] These areas are frequently fired upon, and there are reports that the Israeli armed forces have received orders to open fire at anyone who enters the buffer zone.[15]

In addition to this stringent border guarding policy, Israel has full control over the few crossings between the Gaza Strip and Israel, and it frequently uses this control to close down these crossings.[16] Israel imposes these closures despite the Agreement on Movement and Acces of 15 November 2005 between Israel and the PA.[17] According to OCHA and other sources, the closures of these crossings, and especially the frequent closure of the Karni crossing, have a very negative influence on basic food supplies and medical supplies of the population of the Gaza Strip, as well as on the development of the economy of the region because of the discontinued flow of workers and products.[18]

Directly after the implementation of the Plan, the Rafah crossing between the Gaza Strip and Egypt was still controlled by Israeli armed forces, despite the fact that it is not a border of Israeli territory. Directly following the implementation of the Plan, Israel imposed a closure of the Rafah crossing which had a very negative influence on the medical care, education and economic situation of the population of the Gaza Strip.[19] Since the Agreement on Movement and Access between Israel and the PA of 15 November 2005, the Rafah crossing has been under direct Palestinian control, with the support of EUBAM, the EU Border Assistance Mission.[20] However, Israel still has some residual control over the crossing, because it is monitored by Israeli officials. In combination with this, Israel maintains the right to complain about who crosses at Rafah and has already done so.[21] The crossing is still only open for pedestrians and outgoing goods.[22]

Following the restrictions on movement in and out of the Gaza Strip, and despite the earlier mentioned Agreement on Movement and Access, the movement between the West Bank and the Gaza Strip is still completely under

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14 HRW 29/10/04; HRW 02/11/04; PCHR 19/09/05; PCHR 09/2005; WAFA 25/12/05; WAFA 28/12/05 (flyers); B'Tselem 29/12/05; Report of Special Rapporteur Dugard of December 2005, p. 9; OCHA 07/06/06; BBC Country Profile.

15 WAFA 27/12/05; WAFA 28/12/05 (flyers); B'Tselem 29/12/05; B'Tselem 28/02/06; OCHA 07/06/06; OCHA 21/06/06.

16 Amnesty International 07/10/05; Report of Special Rapporteur Dugard of December 2005, p. 9; HRW Overview 2005; OCHA 19/03/06; Amnesty International 23/03/06; B'Tselem 26/04/06; BBC Country Profile.

17 UNSC 01/12/05; OCHA 19/03/06; OCHA 07/06/06.

18 PHR-Israel 26/09/05; GCMHP 06/10/05; HRW 23/12/05; OCHA 19/03/06; Amnesty International 23/03/06; Amnesty International 25/04/06; OCHA 07/06/06; BBC Country Profile.

19 Al-Dameer 24/09/05; PCHR 05/10/05; GCMHP 06/10/05; Amnesty International 07/10/05; EMHRN 21/10/05.

20 EU 15/11/05; UNSC 01/12/05; OCHA 07/06/06; Amnesty International 23/03/06.

21 Report of Special Rapporteur Dugard of December 2005, p. 9.

22 UNSC 01/12/05; Amnesty International 23/03/06; BBC Country Profile.

Israeli control and is subject to severe restrictions.[23] These restrictions have a negative influence on the health care in the Gaza Strip.[24] This movement between the two parts of the Palestinian self-determination unit is also influenced by Israel through their continuing control over the issuance of identity documents.[25]

9.4 Other forms of control which are retained by Israel

Israel still administers the population register of the Gaza Strip, which provides Israel with control over the issuance of identity documents to the population of the Gaza Strip.[26] The control over the population register, and thereby over the issuance of identity documents to the Palestinians, provides Israel with considerable influence over who can move in and out of the territory. This includes travel between the Gaza Strip and the West Bank.[27]

The Gaza Strip also remains dependent on Israel for the supply of electricity. By threatening to cut off the electricity, Israel uses this dependence to put pressure on the population of the Gaza Strip.[28] The valid currency of the Gaza Strip is still the New Israeli Shekel, which leads to full Israeli control over the monetary system.[29] Israel also has substantial control over the tax system of the Gaza Strip.[30] Moreover, Israel maintains control over vital parts of the infrastructure of the Gaza Strip, such as the telecommunication network, the water supplies and the sewage networks.[31]

In addition, Israel still holds approximately 650 prisoners originating from the Gaza Strip. According to article 77 of the Fourth Geneva Convention, these prisoners should be released at the close of occupation. The fact that this release has not yet taken place shows the unwillingness of Israel to comply with its international obligations and its unwillingness to release control over the population of the Gaza Strip.[32]

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23 PHR-Israel 26/09/05; Amnesty International 07/10/05; WAFA 05/11/05; UNSC 01/12/05; Report of Special Rapporteur Dugard of December 2005, p. 9; Amnesty International 25/04/06; B'Tselem 26/04/06.

24 PHR-Israel 26/09/05; Amnesty International 07/10/05; B'Tselem 26/04/06.

25 See paragraph 9.4.

26 Report of Special Rapporteur Dugard of December 2005, p. 9; HRW 23/12/05; HRW Overview 2005; B'Tselem 26/04/06.

27 Report of Special Rapporteur Dugard of December 2005, p. 9.

28 Report of Special Rapporteur Dugard of December 2005, p. 9; HRW 23/12/05.

29 HRW 29/10/04; HRW 02/11/04; CIA World Fact Book.

30 B'Tselem 26/04/06.

31 HRW 23/12/05; HRW Overview 2005.

32 Art. 77 GC VI, in Pictet 1958, p. 366; Report of Special Rapporteur Dugard of December 2005, p. 9; Al-Dameer 24/09/05; WAFA 18/09/05; PCHR 21/09/05.

10 Is the applicability of the law of occupation influenced by the right of self-determination of the Palestinian people?

One issue that is of primary importance to the Israeli-Palestine conflict is the law of self-determination. The concept of self-determination, as well as its applicability to the Palestinian people, has been dealt with extensively by legal scholars, as well as the ICJ and the UN.[1] Since this essay only intends to deal with the law of occupation as applicable in the Israeli-Palestine conflict, the law of self-determination on itself is not elaborated upon here. However, some legal scholars put forward the opinion that the right of self-determination of the Palestinian people is of direct influence on the question whether or not the Gaza Strip is still occupied by Israel. Special Rapporteur John Dugard, in his report of December 2005, briefly refers to such a connection between occupation and self-determination.[2] However, it is not a widespread view under legal scholars writing on the situation in the Gaza Strip or the law of occupation in general.

It is noteworthy that the ICJ, in dealing with the law of occupation as applicable to the OPT, does refer to the right of self-determination of the Palestinian people, but does not make mention of a direct influence of the latter on the applicability of the former.[3] Some scholars discussing the applicability of the law of occupation to the OPT do not refer to the influence of the law of self-determination on the existence of occupation in any way.[4] Other scholars do discuss the influence of the law of self-determination on the law

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1 For an extensive discussion of the law of self-determination in theory and practice, although not on the question of the Palestinian people specifically, see Raič 2002; See also Cassese 1995, especially p. 230-247 on the Palestinian rights; For a detailed overview of the development of the right of self-determination of the Palestinian people, see UN Report on Self-Determination of Palestinian people 1979; another authoritative work on the Palestinian right of self-determination is Mallison/Mallison 1986, p. 188-204; For a critical view on the work of Mallison and Mallison, and an Israeli perspective on the law of self-determination of the Palestinian people, see Stone 1981; For an interesting presentation of the pro-Palestinian versus the pro-Israeli views of the discussion on the right of self-determination, see ASIL Proceedings 1988; For another historical appraisal of the development of the right of self-determination of the Palestinian people and the two-state solution, see Hodgkins 2004; For an authoritative statement on the existence of the right of self-determination of the Palestinian people, see ICJ *Wall*, para. 88, 149, 155, 159; In this respect see also UNGA Resolution 58/163.

2 Report of special Rapporteur Dugard of December 2005, p. 9.

3 ICJ *Wall*, para. 88, 89-101.

4 Dinstein 1995; Cavanaugh in Wippman/Evangelista 2005; Al Mezan Report 2005.

of occupation. However, these scholars do not view the right of self-determination as being of influence on the question whether a territory is under occupation.[5] Falk and Weston do not refer to the continued existence of occupation as obligatory until the complete exercise of the right of self-determination. They treat these issues separately, although they do correctly state that occupation violates the right of self-determination.[6] Pellet discusses the influence of self-determination on the rights and duties of an occupant extensively.[7] However, he also emphasises that the existence of occupation is fully dependent on the factual effective control of the occupant, without which occupation cannot exist.[8] Bruderlein states that while occupation may end by the successful exercise of self-determination, the relevant criteria always remain factual.[9] Accordingly, he does not consider violation of the right of self-determination to be one of the legal consequences of the end of occupation in the Gaza Strip.[10]

To my best knowledge, the only legal scholar who discusses the abovementioned opinion extensively, is Professor Iain Scobbie in his article on the withdrawal of Israel.[11] Therefore, I will show why, in my opinion, the law of self-determination is not of direct influence on occupation by reviewing the arguments of Professor Scobbie. I feel compelled to make two general remarks. Firstly, I fully agree with Professor Scobbie that the right of self-determination is of paramount importance to the Israeli-Palestine conflict, albeit I do not agree with some of the consequences attributed to this right by him. Secondly, I am of the opinion that Israel remains responsible for the population of the Gaza Strip since, as I will show in the conclusion of this essay, in my view the Gaza Strip remains under Israeli occupation.

Arguments and conclusion of Professor Scobbie

The key issue for the assessment whether the law of self-determination is of direct influence on the law of occupation is the following: what will the status be of the Gaza Strip, if it is no longer occupied? Scobbie discusses in his article various propositions of what that legal status could be, and eventually reaches the conclusion that there are no other options but for the Gaza Strip to become the territory of a sovereign Palestinian state. However, he convincingly argues that this option is at this point not possible under international law. For this, he has the following arguments:

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5 Falk and Weston in Playfair 1992; Pellet in Playfair 1992; HPCR Roberts 2004; HPCR Bruderlein 2004.
6 Falk and Weston in Playfair 1992, p. 144-149.
7 Pellet in Playfair 1992, p. 180-187.
8 Pellet in Playfair 1992, p. 174-176.
9 HPCR Bruderlein 2004, p. 10.
10 HPCR Bruderlein 2004, p. 12, 13.
11 Scobbie in 11 YIMEL, *An intimate disengagement: Israel's withdrawal from Gaza, the law of occupation and of self-determination*.

- Through Israel's unilateral ending of occupation, the Gaza Strip would be forced to exercise its right of self-determination. This is contrary to what Scobbie identifies as the process aspect of self-determination: the right of a people to freely determine, without external interference, their political status. By ending the occupation, Israel would force the population of the Gaza Strip to exercise their right, instead of letting them choose freely. Thus, Israel would violate the law of self-determination.[12]
- By forcing the population of the Gaza Strip to emerge as a separate state, Israel would violate what Scobbie identifies as the substantive aspect of self-determination; the right of self-determination of a people implies a title to a distinct territorial unit. This unit possesses some form of territorial integrity under the law of self-determination. By forcing the Gaza Strip to attain a different legal status then the West Bank, this territorial integrity, and thus the law of self-determination, would be violated by Israel.[13]
- A sovereign Palestinian state can only emerge when it fulfils all the criteria for statehood under international law. Even if the Gaza Strip fulfils the traditional conditions as laid down in the Montevideo Convention, it does not fulfil the normative component that it must be created in conformity with international law. Creation of a Palestinian state on the Gaza Strip is contrary to both the procedural and substantive aspect of self-determination, and can therefore not be seen as created in accordance with international law.[14]

Based on these arguments, Scobbie reaches the conclusion that there is no other possibility than to view the situation as continued occupation until the self-determination unit as a whole can become a sovereign Palestinian state. Ending of the occupation when this condition is not met, is contrary to the law of self-determination and thus void.[15]

A different view on the nature of the law of occupation

My view of the nature of the law of occupation and the legal status of the Gaza Strip leads to a different conclusion. There are two main reasons for that. Firstly, I believe there is another option for the status of the Gaza Strip besides occupation and the emergence of a Palestinian state. Secondly, in my view occupation and (newly established) sovereignty are not interchangeable legal statuses. Since these two reasons are very closely intertwined, I will discuss the nature of occupation in comparison to that of the principal legal status of a territory first.

12 Scobbie in 11 YIMEL, p. 24, 25.
13 Scobbie in 11 YIMEL, p. 23, 24.
14 Scobbie in 11 YIMEL, p. 27, 28, 29.
15 Scobbie in 11 YIMEL, p. 21, 29-30.

It is widely accepted that when (part of) a sovereign state becomes occupied, this occupation does not transfer or destroy the state sovereignty over that territory. Although the sovereignty of the territory is violated by the occupation because of another state's control over the territory, the occupied territory remains (part of) a sovereign state.[16] Occupation is only a factual situation of a temporary nature, while state sovereignty remains the principal legal status of an occupied territory. Occupation is thus in its nature different from the principal legal status of a territory, as it can co-exist on a territorial unit.

The principal legal status of the Gaza Strip

Thus, occupation cannot be the principal legal status of a territory in itself, but rather is a factual situation which violates the principal legal status. There is a principal legal status 'underneath the blanket of occupation', and the question arises what the principal legal status of the Gaza Strip is.

History shows that this is exactly the key issue concerning this unique piece of world territory. Until 1947, the principal legal status of the Gaza Strip was that of territory under British mandate. After the ending of the mandate, this legal status ceased to exist and the territory was occupied by Egypt.[17] As explained above, occupation cannot be considered as the principal legal status of a territory. Egypt's occupation was followed by the Israel's occupation of the Gaza Strip, which likewise did not provide the territory with a principal legal status.

Of course this does not mean that the Gaza Strip has no principal legal status at all. As is recognized by the ICJ and the international community, including Israel, the Palestinian people possess the right of self-determination.[18] Part of this right of self-determination is what Scobbie identifies as the substantive aspect. It is recognized by all authorities that the territorial self-determination unit which the Palestinian people is entitled to, is formed by the West Bank and the Gaza Strip together.[19] The occupation of Israel of the whole of this territorial unit has never negatively influenced this right of self-determination. This right exists and is connected to the territory regardless of its occupied status.

It seems that the principle of self-determination functions just like the principle of state sovereignty under the law of occupation. From both principles flows some form of territorial integrity, and respect for both principles is an obligation *erga omnes* and possibly *ius cogens*.[20] Both principles are undeniably violated by occupation, but both are neither transferred nor annulled

16 Paragraph 6.1.
17 Paragraph 7.1.
18 ICJ *Wall*, para. 118; UNGA Res 58/163.
19 Scobbie in 11 YIMEL, p. 23, 24.
20 Scobbie in 11 YIMEL, p. 10-11, 20-21, 22-23.

by occupation. The violation of both flows logically from the nature of the law of occupation, which is based on effective control over the territory.

In my view, the right of self-determination of the Palestinian people, by virtue of its substantive aspect, should be seen as the principal legal status of the self-determination unit. Even besides the connection and commonalities between the principles of state sovereignty and self-determination, it is the only possible legal status. Historically, there is no other principal legal status since the British mandate. In addition, no other legal status would be acceptable now because of that same right of self-determination; any other state that would claim legal rights over part of the territory of this self-determination unit would be condemned by the international community for breaching the Palestinian people's right of self-determination.

The different options for a legal status as discussed by Professor Scobbie

This being said, the different options discussed by Scobbie can be seen from a different perspective. Besides the emergence of a sovereign Palestinian state, he addresses and discards the possibility of the return of Egyptian rule.[21] Indeed this is impossible, since the only title that Egypt had with respect to the Gaza Strip was that of occupant. Returning to such a situation is not based on any factual situation, as is required under the law of occupation.

Another possibility which is addressed and discarded is that of a third-party administration. According to Scobbie, no third party has claimed rights of sovereignty or administration following withdrawal.[22] Quite logically so, because such a 'right' on itself would be hard to reconcile with the right of self-determination of the Palestinian people.

The last possibility which Scobbie addresses is that of the Gaza Strip becoming *terra nullius*; territory unclaimed by any state.[23] However, this option would in its core be contrary to the substantive aspect of the right of self-determination, which entails some form of territorial integrity. The territory is claimed by a recognized entity, although not a state, and that claim is recognized by the entire international community.

Another option for the legal status of the Gaza Strip

Indeed, all possibilities discussed by Scobbie prove to be in violation of principles of international law and can therefore not be seen as real options. However, accepting the view that the right of self-determination is in itself the principal legal status of the Gaza Strip provides another option after the end of occupation. It would mean that after the end of the Israeli occupation, the Gaza Strip would be what it is already: a substantial part of a territorial

21 Scobbie in 11 YIMEL, p. 26, 27.
22 Scobbie in 11 YIMEL, p. 26, 27.
23 Scobbie in 11 YIMEL, p. 26.

self-determination unit, which is progressing towards statehood, but has not yet fully exercised its right of self-determination.

Such a principal legal status would be very exceptional under international law. However, the legal reality of the Middle-East is nothing less then exceptional. I am of the opinion that such a exceptional status is warranted for the following reasons. If indeed the effective control of Israel over the Gaza Strip would end, there would be no basis for the qualification of the situation as constituting occupation. Only a very strained interpretation of the instruments and the whole nature of the law of occupation would make such a conclusion possible. On the other hand, the recognized right of self-determination, as an obligation *erga omnes* and perhaps even with the status of *ius cogens*, would form a much more solid and authoritative basis for the legal status of the Gaza Strip as part of a territorial self-determination unit.

The arguments of Professor Scobbie reviewed from the proposed perspective

The arguments that Scobbie presents for his view that the ending of occupation would violate the law of self-determination, will now have to be reviewed from the different perspective introduced above.

By accepting the principal legal status of the self-determination unit, the argument that the ending of occupation would violate the exercise of the process of self-determination is without merit. The ending of occupation would not force the Palestinian people to exercise their right. On the contrary: the ending of occupation, and thereby the ending of the violation of the right of self-determination in that part of the territorial unit, would only stimulate progress of the exercise of this right. It gives the Palestinian people more than ever the opportunity to determine freely their political status without external interference.

In that respect, the examples that Professor Scobbie mentions for the statement that unilateral action of an occupant cannot be seen as the exercise of the right of self-determination are irrelevant, since they all refer to an occupant which intends to alter the principal legal status which the territory had before it became occupied instead of with the factual ending of effective control.[24] The same is true with respect to the quotation from the ICRC Commentary,[25] which, when read in context, deals with the intention to annex the territory or to create a state, instead of with the release of effective control over the territory.[26]

The argument that the substantive aspect of the right of self-determination is violated, would then also be without legal merit. The core of the substantive aspect is that there is no difference between the legal status of the Gaza Strip and the West Bank. It is not the ending of occupation of part of that territorial

24 Scobbie in 11 YIMEL, p. 24, 25.
25 Commentary Pictet 1958, p. 63.
26 Scobbie in 11 YIMEL, p. 25.

unit which violates this substantive aspect, but the continuing occupation of the West Bank. However, this violation changes nothing to the legal status of the territory. In addition, to assert that a violation of the right of self-determination should continue because those violations also continue on the rest of the territorial unit is illogical.

The third argument remains fully valid. If a sovereign Palestinian state would emerge, with the Gaza Strip as the only territory of that state, then the creation of that state would violate the discussed aspects of self-determination. However, no sovereign state emerges on the Gaza Strip when one accepts the proposed point of view. Moreover, when the Gaza Strip would be an independent part of a non-state self-determination unit, arguably it is possible that a sovereign state could emerge on the whole of the territorial unit, including the still occupied West Bank. Sovereignty can co-exist with occupation. This legal theory is questionable because of the necessary effective control of the sovereign, and in practice it would be as practically impossible as it would be politically undesirable. Nevertheless, in discussing the future of a Palestinian state, legal theory should be taken into account.

Other considerations contrary to Professor Scobbie's conclusion

There are some other considerations which seem contrary to the conclusion of Professor Scobbie. A factual act like occupation, contrary to a legal act such as declaration of statehood, cannot simply be declared legally void simply because it violates the law of self-determination. Because of the factual nature of occupation and the presupposed effective control, it can only be declared illegal. And even if occupation is established illegally, it is still occupation. Likewise, if occupation in some way is ended illegally it cannot be declared void since it is still the factual end of occupation.

Furthermore, Professor Scobbie's conclusion could place a severe strain on the law of occupation. If the applicability of the law of occupation, as part of humanitarian law, or *ius in bello*, could entail that one party to the conflict suddenly becomes solely responsible for the right of self-determination of the people under occupation, the will of parties to declare this law applicable would be diminished even further.

Seeing the legal status of the OPT as either occupied or a sovereign Palestinian state, does not do justice to the obligation *erga omnes* which the law of self-determination entails.[27] This would imply that Israel has the sole responsibility for the realisation of the Palestinian state through its release of the effective control over the whole of the OPT. This is comparable to a sovereign title over such a territorial unit, which Israel does not possess. A more active role and responsibility of the international community in the promotion of the right of self-determination is justified, since it creates an

27 Scobbie in 11 YIMEL, p. 11, 21.

obligation *erga omnes*. This approach is enabled through the proposed view that the legal status of the Gaza Strip is that of part of a non-state self-determination unit. Perhaps a role could be played by the United Nations, as was also intended for East-Jerusalem under the 1947 UN Partition Plan.

11 Conclusion: Is the Gaza Strip still occupied territory after the Disengagement?

11.1 Common rules of applicability

It was already concluded in chapter 7 that both the Hague Regulations and the Fourth Geneva Convention are *de jure* applicable to the situation in the Gaza Strip and that the situation constitutes occupation under both instruments.[1] The question remains whether Israel still has effective control in the meaning of the Hague Regulations and the Fourth Geneva Convention in the changed factual situation, created by the implementation of the Plan.

It has been stated repeatedly that military presence is not in itself a condition for the maintenance of occupation. But, in order for its control to be effective, the occupying power must be able to enforce it.[2] Therefore, for the question if occupation exists, it is relevant whether Israel maintained enough military capability in and around the Gaza Strip to enforce its control over the Gaza Strip.

For the assessment of the situation, the focus will be on the amount of control that Israel has, instead of the amount of control that the authorities of the Gaza Strip have. The reason for this is that occupation is a factual situation, in which the facts are assessed from the viewpoint of the occupant.[3] Thus, the focus is on the occupant and on the amount of control which this occupant has, instead of on the lack of control of the legitimate authority of the territory. The criterion of effective control is thereby formulated as a positive question, of which the answer is easier to determine than of a negative one. Accordingly, it is much better documented which control is still exercised by Israel than what control is exercised by the authorities of the Gaza Strip and what control is not.[4]

If the control is considered effective under the Hague Regulations, it can certainly be considered as such under the Fourth Geneva Convention.[5] Furthermore, as is stated in chapters 6 and 7 of this essay, the ICJ has determined that the application of the Fourth Geneva Convention to the OPT is governed by article 6 paragraph 3 of that convention. This entails that only a limited amount

1 Paragraph 7.2; paragraph 7.3.
2 Paragraph 2.5.2; paragraph 6.1; paragraph 6.2.
3 Paragraph 6.2.
4 Chapter 9.
5 Paragraph 3.5.2.

of provisions of the Fourth Geneva Convention can be applicable to the situation in the OPT. These provisions are only applicable when the occupant exercises the functions of government in the occupied territory, and thus has HR-effective control.[6] Nevertheless, both the Hague Regulations and the Fourth Geneva Convention will be discussed separately in this chapter in order to illustrate the different legal theories on the existence of occupation under these instruments.

11.2 Assessment of the situation from the viewpoint of the Hague Regulations

Occupation in the meaning of the Hague Regulations exists when the territory is brought under the effective control of a party to an international conflict by means of that party's military presence. Control is considered effective in the meaning of the Hague Regulations when the occupant exerts control over the government functions.[7]

11.2.1 Control over the government functions

The external security of the Gaza Strip
The possibility for the Palestinian authority of the Gaza Strip to manage its external security is non-existent. It is completely dependent on the Israeli military forces for the guarding of the external land parameter.[8] The guarding of the external land parameter is implemented by deploying Israeli armed forces on the territory of the Gaza Strip.[9] Israel has full control over the airspace of the Gaza Strip, as well as over the territorial waters.[10] Israel has armed military forces present and active in the territorial waters, in the airspace and on the territory of the Gaza Strip.[11] This is sufficient evidence that the external security of the Gaza Strip is under the control of Israel. Ironically enough, Israel can be seen as the biggest external threat to the population of the Gaza Strip.

Control over the border crossings of the Gaza Strip
Israel maintains an exceptionally high level of control over the border crossings of the Gaza Strip. Israel controls all border crossings between Israel and the

6 Paragraph 6.4; paragraph 7.4; see also paragraphs 3.7 and 4.3.2.
7 Paragraph 6.3.
8 Paragraph 8.4.1; paragraph 8.4.2.
9 Paragraph 9.3.
10 Paragraph 8.4.1.
11 Paragraph 9.2; paragraph 9.3.

Gaza strip.[12] It uses this control actively by closing down crossings for large periods of time. Movement of persons and goods is completely under the control of Israel through the control over the crossings and the control over the population register.[13] Israel retains some influence on the Rafah crossing, which is hard to reconcile with the territorial sovereignty of the Gaza Strip.[14] However, the border between the Gaza Strip and Egypt is no longer under the direct control of Israel.
Together with the fact that there are no operational airports and seaports available for the movement of persons and goods from the Gaza Strip to other states,[15] it can be concluded that Israel has control over the border crossings of the Gaza Strip.

Legislation and administration
Israel maintains control over the population register. This is a very important part of the administration, since it is directly connected to the issuance of identity documents which are also used as travel documents.[16] In addition to that, Israel's continued control over the monetary system of the Gaza Strip gives Israel the power to enact legislation in the Gaza Strip on monetary affairs, regardless of the opinion of the authorities of the Gaza Strip.[17] Israel also maintains considerable control on the tax and customs regime in the Gaza Strip.[18] Thus, it can be concluded that Israel does not control all aspects of the administration and legislation of the Gaza Strip, but it does control some important aspects of it.

Providing basic facilities for the population
Sewage networks, telecommunication networks, water supplies and electricity supplies are under the control of Israel.[19] In addition, through its control over the external parameter of the Gaza Strip, Israel controls the basic food and medical supplies for the Gaza Strip.[20] Israel threatens to use, and indeed uses, this control to influence the authorities and population of the Gaza Strip.[21] Thus, it is clear that the basic facilities for the population are under the Israeli control.

12 Paragraph 8.4.2; paragraph 9.3.
13 Paragraph 9.3; paragraph 9.4.
14 Paragraph 8.4.2; paragraph 9.3.
15 Paragraph 8.3.
16 Paragraph 9.4.
17 Paragraph 8.4.3 ; paragraph 9.4.
18 Paragraph 8.4.3; paragraph 9.4.
19 Paragraph 9.4.
20 Paragraph 9.3.
21 Paragraph 9.3; paragraph 9.4.

The development of the economic system
Without the active cooperation of Israel, the economy of the Gaza Strip cannot develop sufficiently. With the active opposition of Israel, the economy of the Gaza Strip will not develop at all. Israel controls all aspects of import and export of the Gaza Strip,[22] it controls the fishing in the territorial waters of the Gaza Strip[23] and it controls the flow of workers to Israel and the West Bank including East-Jerusalem.[24] Thus Israel controls all possibilities for the development of the economy of the Gaza Strip.

11.2.2 The military aspect; the enforcement of the control over the Gaza Strip

Israel must be capable to enforce its control over all the above mentioned government functions for that control to be effective. For this, it is necessary that it has enough military capability in and around the Gaza Strip to launch military actions or pose a sufficient military threat. In my view there is no doubt that Israel has enough military forces deployed around the Gaza Strip to enforce its control when necessary. The fact that Israeli armed forces are present in the territorial waters, the air space and the border areas of Gaza Strip territory strengthens my opinion.[25] Furthermore, military actions in the Gaza Strip take place on a daily basis; in the border areas of the Gaza Strip as well as in its residential areas.[26] The military threat that Israel poses to the population in the Gaza Strip by the presence and actions of the armed forces in and around the Gaza Strip must be deemed sufficient by any standard.

11.2.3 Conclusion: the Gaza Strip is occupied in the meaning of the Hague Regulations

Based on the findings in the previous two paragraphs, it is without doubt that Israel has effective control over the government functions of the Gaza Strip and has sufficient means to enforce this effective control when necessary. The fact that Israel does not control all government functions is irrelevant, since the functions which are under Israeli control are some of the most vital to a developing territory and are sufficient to enforce its will upon the occupied

22 Paragraph 8.4.3; paragraph 9.3; paragraph 9.4.
23 Paragraph 8.4.1; paragraph 8.4.2; paragraph 9.2.
24 Paragraph 8.4.2; paragraph 9.3.
25 Paragraph 8.4.1; paragraph 9.2; paragraph 9.3.
26 Paragraph 9.2.

territory. The fact that there no longer is an official Israeli military government in the Gaza Strip is also irrelevant.[27]

11.3 Assessment of the situation from the viewpoint of the Fourth Geneva Convention

As stated at the beginning of this chapter, If the control is considered effective under the Hague Regulations, it can certainly be considered as such under the Fourth Geneva Convention.[28] However, for the benefit of the legal analysis of the law of occupation, the situation in the Gaza Strip will also be assessed from the viewpoint of the Fourth Geneva Convention.

Occupation according to the Fourth Geneva Convention exists when the population of a territory is brought under the effective control of a party to an international conflict by means of that party's military presence. Control is considered effective under the Fourth Geneva Convention when the people of a territory are in fact under such control, that the protection of the law of occupation as laid down in the Fourth Geneva Convention is warranted.[29]

11.3.1 The civilians in the Gaza Strip can be qualified as Protected Persons

The civilian population in the Gaza Strip can easily be qualified as Protected Persons as defined in article 4 of the Fourth Geneva Convention. Israel negatively influences the physical wellbeing of the population with its military actions and border control.[30] In addition, Israel negatively influences the economic wellbeing of the population through its control over import and export, its hampering of the freedom of movement and its military actions in the Gaza Strip.[31] Israel also negatively influences the social wellbeing of the population of the Gaza Strip with its military actions and the hampering of the freedom of movement.[32]

11.3.2 Influence on the humanitarian situation in the Gaza Strip

Important aspects of the humanitarian situation in the Gaza Strip which are protected by the Fourth Geneva Convention are under the control of Israel.

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27 Paragraph 6.3.
28 Paragraph 3.5.2.
29 Paragraph 6.4.
30 Paragraph 9.2; paragraph 9.3.
31 Paragraph 8.4.2; paragraph 8.4.3; paragraph 9.2; paragraph 9.3; paragraph 9.4.
32 Paragraph 9.2; paragraph 9.3; paragraph 9.4.

One indication for the conclusion that this convention should remain applicable, is that Israel remains responsible for approximately 650 prisoners from the Gaza Strip who must be returned by Israel at the end of occupation.[33] Another important indication for that conclusion is Israel's continuing full control over the supply of basic humanitarian needs to the population of the Gaza Strip. These include medical and food supplies, as well as the supply of electricity and of water to the Gaza Strip.[34] Providing such supplies, and thus also allowing these into the occupied territory, is mandatory under the Fourth Geneva Convention.[35]

11.3.3 Sovereignty of the people is under the control of Israel

Control over the sovereignty of the people largely overlaps the condition for control over government functions under the Hague Regulations, as discussed above.[36] However, it can also be construed more broadly, thereby including Israel's actions which would be flagrant breaches of the principles of non-intervention and territorial sovereignty of the Gaza Strip, if it would be part of a state.[37] Also, the interfering of Israel with the maintenance of the international relations by Gaza Strip authorities, as described in previous chapters, can be seen as an indication of Israel's overall control over the sovereignty of the people of the Gaza Strip.[38]

11.3.4 The military aspect; the enforcement of the control over the Gaza Strip

As stated in paragraph 10.2.2 the military aspect of occupation is definitely satisfied by the military presence, actions and the overall military threat which is exerted by Israeli armed forces. There are military forces present in the occupied territory, there are military forces deployed all around the occupied territory and military incursions are made frequently on occupied territory.[39]

33 Paragraph 3.5.3; paragraph 9.4.
34 Paragraph 8.4.1; paragraph 8.4.2; paragraph 8.4.3; paragraph 9.3; paragraph 9.4.
35 Paragraph 3.5.3.
36 Paragraph 6.4; paragraph 11.2.
37 Paragraph 8.4.1; paragraph 8.4.2; paragraph 8.4.3.
38 Paragraph 8.4.1; paragraph 9.3.
39 Paragraph 8.3; paragraph 9.2; paragraph 10.2.2.

11.3.5 Conclusion: the Gaza Strip is occupied in the meaning of the Fourth Geneva Convention

In most cases, the separate indicators for control as discussed in the paragraphs above might not be enough to constitute occupation. However, when all indicators are seen as a whole, the evidence for effective control over the Gaza Strip by Israel is overwhelming. This is no surprise since it was already concluded that all conditions for occupation to exist under the Hague Regulations fulfilled as well. Even when analysed separately from this previous conclusion, there is no doubt that the Gaza Strip remains occupied in the sense of the Fourth Geneva Convention.

Bibliography

All internet sources have last been checked on 20 March 2008

1. BOOKS AND ARTICLES

Aldrich, G.H., 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions', 85 AJIL (1991), at p. 1

Anton, D.K., Mathew, P. & Morgan, W., *International Law, Cases and Materials*, Oxford University Press, Oxford, 2005

Benvenisti, E., *The International Law of Occupation*, Princeton University Press, Princeton, 2004

Bordwell, P., *The Law of War between Belligerents, a History and Commentary*, Callaghan & Co., Chicago, 1908

Bothe, M., Partsch, K.J. & Solf, W.A., *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949,* Martinus Nijhoff Publishers, The Hague, 1982

Bothe, M., 'Occupation, Belligerent', in: Bernhardt, R. (ed.), *Encyclopedia of Public International Law, Volume III*, Elsevier Science B.V., Amsterdam, 1997, at p. 763

Brownlie, I., *Principles of Public International Law,* Oxford University Press, Oxford, 2003

Cassese, A.,

- 'Powers and Duties of an Occupant in Relation to Land and National Resources', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip,* Clarendon Press, Oxford, 1992, at p. 419
- *Self-Determination of Peoples, A legal reappraisal*, Cambridge University Press, Cambridge, 1995
- *International Law,* Oxford University Press, Oxford, 2005

Cavanaugh, K.A.,

- 'Selective Justice: The Case of Israel and the Occupied Territories', 26 Fordham International Law Journal (2003), at p. 934 (From Westlaw)
- 'Rewriting Law: The Case of Israel and the Occupied Territories', in: Wippman, D. & Evangelista, M. (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts,* Transnational Publishers, Ardsley NY, 2005, at p. 227

Detter, I., *The Law of War,* Cambridge University Press, Cambridge, 2000

Dinstein, Y., 'The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations', 25 IYHR (1995), at p. 1

Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, Cambridge, 2004

Dörmann, K. & Colassis, L., 'International Humanitarian Law in the Iraq Conflict', 47 GYIL (2004), at p. 293

Draper, G.I.A.D., 'The Geneva Conventions of 1949', Recueil des Cours 1965, Académie de Droit International, Volume I, at p. 59

Falk, R.A. & Weston, B.H., 'The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip,* Clarendon Press, Oxford, 1992, at p. 125

Fitzmaurice, M., 'The Practical Working of the Law of Treaties', in: Evans, M.D., *International Law,* Oxford University Press, Oxford, 2006, at p. 187

Franck, T., 'The Stealing of the Sahara', 70 AJIL (1976), at p. 694

Gasser, H.P.,

- 'Some Legal Issues concerning Ratification of the 1977 Geneva Protocols', in: Meyer, M.A. (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention,* British Institute of International and Comparative Law, London, 1989, at p. 81
- 'Protection of the civilian population', in: Fleck D., *The Handbook of Humanitarian Law in Armed conflicts,* Oxford University Press, Oxford, 1995, at p. 209

Glahn, G. von, *The Occupation of Enemy Territory, a Commentary on the Law and Practice of Belligerent Occupation,* University of Minnesota Press, Minneapolis, 1957

Graber, D.A., *The Development of the Law of Belligerent Occupation 1863-1914, a historical survey,* AMS Press, New York, 1968

Greenwood, C.,

- 'The Administration of Occupied Territory in International Law', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip,* Clarendon Press, Oxford, 1992, at p. 241
- 'International Humanitarian Law (Laws of War)', in: Kalshoven, F. (ed.), *The Centennial of the First International Peace Conference, Reports and Conclusions,* Kluwer Law International, The Hague, 2000, at p. 161

Gutteridge, J.A.C., 'The Geneva Conventions of 1949', 26 BYIL (1949), at p. 294

Hodgkins, A.B., 'Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine', Vol. 28-sum Fletcher Forum of World Affairs (2004), at p. 109 (From Westlaw)

Henckaerts, J-M. & Doswald-Beck, L., *Customary International Humanitarian Law, Volume I: Rules,* ICRC, Cambridge University Press, Cambridge, 2005

Kalshoven, F. & Zegveld, L., *Constraints on the Waging of War, An Introduction to International Humanitarian Law,* ICRC, Geneva, 2001

Levie, H.S., 'Humanitarian Law and the Law of War on Land', in: Carey, J., Dunlap, W.V. & Pritchard, R.J. (eds.), *International Humanitarian Law: Origins,* Transnational Publishers, Ardsley, 2003, at p. 181

Malanczuk, P., 'Israel: Status, Territory and Occupied Territories', in: Bernhardt R. (ed.), *Encyclopedia of Public International Law, Volume II*, Elsevier Science B.V., Amsterdam, 1995, at p. 1468

Mallison, W.T. & Mallison, S. V., *The Palestine Problem in International Law and World Order*, Longman, Harlow, 1986

Meron, T.,

- 'The Geneva Conventions as Customary Law', 81 AJIL (1987), at p. 348
- 'Editorial Comment: The Time Has Come for the United States to Ratify Geneva Protocol I', 88 AJIL (1994), at p. 678

Nolte, G., 'Article 2(7)', in: Simma, B. (ed.), *The Charter of the United Nations, a Commentary (Vol. I)*, Oxford University Press, Oxford, 2002, at p. 148

Oppenheim, L. & Lauterpacht, H., *Oppenheim's International Law, A treatise. Volume II: Disputes, War and Neutrality*, Longmans, Green and Co., London, 1952

Partsch, K.J., 'Israel and the Arab States', in: Bernhardt R. (ed.), *Encyclopedia of Public International Law, Volume II*, Elsevier Science B.V., Amsterdam, 1995, at p. 1460

Pictet, J.,

- 'The New Geneva Conventions for the Protection of War Victims', 45 AJIL (1951), at p. 462
- *Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958

Playfair, E., 'Introduction', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, at p. 1

Qupty, M., 'The Application of International Law in the Occupied Territories as Reflected in the Judgements of the High Court of Justice in Israel', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, at p. 87

Raič, D., *Statehood and the Law of Self-Determination*, Dissertation, University of Leiden, Leiden, 2002

Roberts, A.,

- 'What is a Military Occupation?', 55 BYIL (1985), at p. 249
- 'Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988', in: Playfair, E. (ed.), *International Law and the Administration of Occupied Territories, Two decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, at p. 25

Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987

Schindler, D., Toman, J. (eds.), *The Laws of Armed Conflicts, a Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff Publishers, Leiden, 2004

Scobbie, I., 'An intimate disengagement: Israel's withdrawal from Gaza, the law of occupation and of self-determination', 11 YIMEL (2004-2005), at p. 3

Shamgar, M., 'The observance of International Law in the Administered Territories', 1 IYHR (1971), at p. 262

Shaw, M.N., *International Law,* Cambridge University Press, Cambridge, 2003

Shehadeh, R., *From Occupation to Interim Accords: Israel and the Palestinian Territories,* Kluwer Law International, The Hague, 1997

Stone, J., *Israel and Palestine, Assault on the Law of Nations*, John Hopkins University Press, London, 1981

Walker, Ph. J., 'Iraq and Occupation', in: Wippman, D. & Evangelista, M. (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts,* Transnational Publishers, Ardsley NY, 2005, at p. 259

Watson, G.R., *The Oslo Accords, International Law and the Israeli-Palestinian Peace Agreements,* Oxford University Press, Oxford, 2000

Zwanenburg, M., 'Existentialism in Iraq: Security Council Resolution1483 and the law of occupation', 86 IRRC 856 (December 2004), at p. 745

2 Legal Reports and Transcripts

ASIL Proceedings of April 20-23 1988, "*Self-determination; the case of Palestine*" (Professors V. Nanda, I. Nakhleh, Y. Blum, J. Quigley, A. Gerson and E. Kwakwa) (From Westlaw)

Al Mezan Report, *The Legal and Economic Consequences for the Gaza Strip following Implementation of the Disengagement Plan,* Al-Mezan Center for Human Rights, September 2005

Gisha, *Disengaged Occupiers: The Legal Status of Gaza*, Gisha Legal Center for Freedom of Movement, January 2007, at <www.gisha.org>

HPCR – Bruderlein, C., *Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law, Legal and Policy Brief,* HPCR, November 2004

HPCR – Policy Brief, *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory,* Policy Brief HPCR, July 2004

HPCR – Roberts, A., *The End of Occupation in Iraq (2004),* HPCR, 2004

Nouveau Recueil Général de Traités, *'Actes de la Conférence Réuni à Bruxelles, du 27 Juillet au 27 Août 1874, pour Régler les Lois et Coutumes de la Guerre',* Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International, 2nd Series, Vol. 4 (1879), at p. 6

3. Treaties and Conventions

Charter of the United Nations (1945), Vol. 1 Yearbook of the UN (1946-47), at p. 831

Vienna Convention on the Law of Treaties (1969), UNTS, vol. 1155 (1969), at p. 331

Hague Convention 1899*:* 'Convention (II) with Respect to the Laws and Customs of War on Land' (1899), in: Schindler/Toman 2004, at p. 60

Hague Regulations 1899: 'Annex to Convention (II) with Respect to the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land' (1899), in: Schindler/Toman 2004, at p. 66

Hague Convention 1907: 'Convention (IV) Respecting the Laws and Customs of War on Land (1907)', in: Schindler/Toman 2004, at p. 60
Hague Regulations: 'Annex to Convention (IV) Respecting the Laws and Customs of War on Land: Regulations respecting the laws and customs of war on land' (1907), in: Schindler/Toman 2004, at p. 66
'Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War' (1949), in: Pictet 1958, at p. 10
Protocol I: 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (1977), in: Schindler/Toman 2004, at p. 715

4. United Nations Documents

UN General Assembly Resolutions
Res. 181 (II), 'Future Government of Palestine', UN doc. A/RES/II/181
Res. 34/37, 'Question of Western Sahara', UN doc. A/RES/34/37
Res. 56/60, 'Applicability of the 4th Geneva Convention to the OPT', UN doc. A/RES/56/60
Res. 58/97, 'Applicability of the 4th Geneva Convention to the OPT', UN doc. A/RES/58/97
Res. 58/163, 'Right of the Palestinian people to self-determination', UN doc. A/RES/58/163
Res. 58/292, 'Status of the OPT, including East Jerusalem', UN doc. A/RES/58/292
Res. ES-10/2, 'Illegal Israeli actions in occupied East Jerusalem and the rest of the OPT', UN doc. A/RES/ES-10/2
Res. ES-10/11, 'Illegal Israeli actions in occupied East Jerusalem and the rest of the OPT', UN doc. A/RES/ES-10/11
Res. 62/108, 'Israeli settlements in the OPT', UN doc. A/RES/62/108
Res. 62/181, 'Permanent sovereignty of the Palestinian people in the OPT over their natural resources', UN doc. A/RES/62/181

United Nations Security Council Resolutions
Res 452 (1979), 'Territories occupied by Israel', UN doc. S/RES/452 (1979)
Res 681 (1990), 'Territories occupied by Israel', UN doc. S/RES/681 (1990)
Res 1483 (2003), 'The situation between Iraq and Kuwait', UN doc. S/RES/1483 (2003)
Res 1544 (2004), 'The situation in the Middle East, including the Palestinian question', UN doc. S/RES/1544 (2004)
Res 1546 (2004), 'The situation between Iraq and Kuwait', UN doc. S/RES/1546 (2004)

United Nations Economic and Social Council Resolutions
Res 2001/19, 'Economic and social repercussions of the Israeli occupationon the living conditions of the Palestinian people in the OPT, including East-Jerusalem, and the Arab population in the occupied Syrian Golan', UN doc. E/RES/2001/19

United Nations Human Rights Council Resolutions
HRC 7th session, 'Human Rights situation in Palestine and other Occupied Arab Territories', UN doc. A/HRC/7/L., 15 March 2008

Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967
Report of Special Rapporteur John Dugard, August 2005, UN Doc. A/60/271
Report of Special Rapporteur John Dugard, December 2005, UN doc. E/CN.4/2006/029
Report of Special Rapporteur John Dugard, August 2007, UN doc. A/62/275
Report of Special Rapporteur John Dugard, January 2008, UN doc. A/HRC/7/17

United Nations Office for the Coordination of Humanitarian Affairs (OCHA)
27 Feb – 3 March 2008, 'Escalation in violence; Gaza humanitarian situation report' <http://www.ochaopt.org/?module=displaysection&section_id=11&format=html>
18-24 january 2008, 'Gaza closure; situation Report' <http://www.ochaopt.org/?module=displaysection&section_id=11&format=html>
15 February 2008 (Holmes press release), 'UN Humanitarian Chief: the situation in Gaza is "grim and miserable"' <http://www.ochaopt.org/?module=displaysection&section_id=15&static=0&format=html>
21 June 2006, 'Rise in Civilian Killings in the Gaza Strip' <http://domino.un.org/UNISPAl.NSF/fd807e46661e3689852570d00069e918/9a477b7f5b7d6c3d85257194007032e6!OpenDocument>
7 June 2006, 'Situation Report: the Gaza Strip' <http://domino.un.org/UNISPAl.NSF/fd807e46661e3689852570d00069e918/be6923d27d77fc6085257186004bf517!OpenDocument>
12 April 2006, 'Situation report 12 april 2006: increased violence in the Gaza Strip' <http://domino.un.org/UNISPAl.NSF/fd807e46661e3689852570d00069e918/0af917366d6a160e8525714f00506ac3!OpenDocument>
19 March 2006, 'The Humanitarian Impact of the Karni Crossing Closure: Bread running out in Gaza' <http://domino.un.org/UNISPAl.NSF/fd807e46661e3689852570d00069e918/67453c32078bbc1a852571380076c202!OpenDocument>

Documents of other UN organs and institutions
'The Right of Self-Determination of the Palestinian People (1979)', Committee on the Exercise of the Inalienable Rights of the Palestinian People, UN, New York, 1979, UN Doc. ST/SG/SER.F/3
'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN doc. S/25704 (03/05/1993)
Statement UN High Commissioner for Human Rights 05 December 2001, 'High Commissioner for Human Rights calls for setting up international monitoring presence in Occupied Territories' (UN Press release), <http://domino.un.org/unispal.nsf>
UN Security Council press release, 30 November 2005, 'Security Council Presidential Statement welcomes Israeli-Palestinian Agreement on Rafah Crossing as "Important step forward"', <http://www.un.org/News/Press/docs/2005/sc8565.doc.htm>
Joint Statement of UN organizations on the situation in Gaza, 13 June 2007 <http://www.ochaopt.org/?module=displaysection&section_id=15&static=0&format=html>
UN Press release (6th special session), 'HRC opens special session on violations stemming from Israeli incursions in OPT', 23 January 2008

<http://www.ochaopt.org/?module=displaysection&section_id=15&static=0&format=html>

5. ICRC Documents

ICRC List of State Parties to the Following International Humanitarian Law and Other Related Treaties (pdf, last updated: 14/03/2008) <http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc>

ICRC Report, 7 March 2008: 'Israel and the occupied territories – latest report on ICRC activities in the field' <http://www.icrc.org/web/eng/siteeng0.nsf/html/israel-palestine-opudate-070308>

ICRC Press Release, 21 August 2006: 'Geneva Conventions of 1949 achieve universal acceptance' <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-news-210806?opendocument>

ICRC Official Statement, 21 November 2005, 'D. Thürer: Current challenges to the law of occupation' <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList594/D9A72F4F1474E9B6C12570CA0053D60E>

ICRC Official Statement, 05 December 2001, 'Conference of High Contracting Parties to the Fourth Geneva Convention, Statement by the International Committee of the Red Cross' <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JRGW?OpenDocument>

6. European Union documents

EU press release 15 November 2005, 'Summary of remarks by EU HR Javier SOLANA on the agreement on Rafah' <http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1021&lang=NL&mode=g>

7. NGO Reports, Press Releases, Media Reports

Al-Dameer Association for Human Rights Gaza

27 September 2005, 'Al-Dameer Strongly Condemns The Israeli Mock Air Raids On Gaza Strip' <http://www.aldameer.org/index.php?action=details&id=news&code=56&sid=000009_000185_000198&language=2>

24 September 2005, 'Israeli Occupation Forces Leave Its Posts in Gaza Strip' <http://www.aldameer.org/index.php?action=details&id=news&code=54&sid=000009_000185_000198&language=2>

Amnesty International

3 march 2008, 'Children and civilian bystanders in Gaza death toll' <http://www.amnesty.org/en/news-and-updates/news/children-and-civilian-bystanders-gaza-death-toll-20080303>

21 January 2008, 'Israel cuts electricity and food supplies to Gaza' <http://www.amnesty.org/en/news-and-updates/news/israel-cuts-electricity-and-food-supplies-gaza-20080121>
25 April 2006, 'Israel and the Occupied Territories: Amnesty International calls for international action to prevent human rights deterioration in the West Bank and Gaza Strip'
<http://web.amnesty.org/library/Index/ENGMDE150352006?open&of=ENG-ISR>
11 April 2006, 'Israel/Occupied Territories: Israel must halt attacks on Gaza residential areas'
<http://web.amnesty.org/library/Index/ENGMDE150312006?open&of=ENG-ISR>
23 March 2006, 'Israel/Occ. Territories: Immediate action needed to avert humanitarian crisis in Gaza' <http://web.amnesty.org/library/Index/ENGMDE150252006?open&of=ENG-ISR>
7 October 2005, 'Israel/Occupied Territories: Prolonged closure of the Gaza-Egypt border and arbitrary restrictions to freedom of movement should be lifted'
<http://web.amnesty.org/library/Index/ENGMDE150512005?open&of=ENG-ISR>

BBC News website
13 March 2008, 'Israel jets strike northern Gaza'
<http://news.bbc.co.uk/2/hi/middle_east/7293498.stm>
BBC News Country Profile: Gaza Strip (last updated: 21 January 2008)
<http://news.bbc.co.uk/2/hi/middle_east/5122404.stm>
BBC News Interview, 'Gaza one year on; Lama Hourani' (last updated: 29 August 2006)
<http://news.bbc.co.uk/2/hi/talking_point/5263524.stm>
BBC News Interview: 'Gaza one year on; Mohamed Fayyad' (last updated: 29 August 2006)
<http://news.bbc.co.uk/2/hi/talking_point/5263558.stm>

B'Tselem
2007 Annual Report, 'Human rights in the Occupied Territories'
<http://www.btselem.org/english/publications/Index.asp?TF=30&image.x=15&image.y=10>
22 June 2006, 'Israeli Air Force Attack in Gaza – Grave Suspicion of War Crime'
<http://www.btselem.org/english/firearms/20060622_Gaza_Missiles.asp>
22 May 2006, 'B'Tselem calls for investigation into the killing of civilians in targeted killing in Gaza' <http://www.btselem.org/english/firearms/20060522_Gaza_Assassination.asp>
26 April 2006, 'Israel must respect human rights of residents of the Gaza Strip'
<http://www.btselem.org/English/Special/20060426_Gaza_Status.asp>
16 April 2006, 'Israeli and Palestinian human rights organizations petition the High Court: Reducing "Safety Zone" in Shelling of Gaza Strip is Manifestly Illegal Order'
<http://www.btselem.org/English/Press_Releases/20060416.asp>
7 March 2006, 'Targeted Killing in Gaza: Grave Suspicion of a War Crime'
<http://www.btselem.org/English/Firearms/20060307_Gaza_Assassination.asp>
28 February 2006, 'Suspicion: Israel has classified areas near Gaza perimeter fence as "killing zones"'
<http://www.btselem.org/english/Firearms/20060227_Shooting_around_Gaza_Fence.asp>

29 December 2005: 'Creation of "Death Zone" in northern Gaza Strip is illegal' <http://www.btselem.org/English/Firearms/20051228_Blue_Sky_Operation.asp>

Euro-Mediterranean Human Rights Network (EMHRN)
21 October 2005, 'The Gaza Strip Is Still Occupied' <http://www.euromedrights.net/pages/274/news/focus/10469>

Gaza Mental Health Programme (GCMHP)
22 January 2008, 'Tightened siege on Gaza reaches unprecedented levels' <http://www.gcmhp.net/> (at "Press Releases")
14 November 2005, 'Israeli Supreme Court Adjourns the Petition to Stop Sonic Booms on Gaza' <http://www.gcmhp.net/> (at "Press Releases")
6 October 2005, 'Urgent Appeal; End Closures of the Gaza Strip' <http://www.gcmhp.net/> (at "Press Releases")

Human Rights Watch (HRW)
7 February 2008, 'Gaza: Israel's energy cuts violate Laws of War' <http://hrw.org/english/docs/2008/02/07/isrlpa17994.htm>
20 June 2006, 'Israel: Gaza Beach Investigation Ignores Evidence' <http://hrw.org/english/docs/2006/06/20/israb13595_txt.htm>
2005 Overview of Human Rights Developments; Israel/OPT <http://hrw.org/english/docs/2006/01/18/isrlpa12224.htm>
23 December 2005, 'Israel: Gaza Power Cut Would Violate Laws of War' <http://hrw.org/english/docs/2005/12/22/isrlpa12345.htm>
2 November 2004 '"Disengagement" Will Change Little for Gaza' <http://hrw.org/english/docs/2004/11/02/isrlpa9587_txt.htm>
29 October 2004, 'Israel: 'Disengagement' Will Not End Gaza Occupation' <http://hrw.org/english/docs/2004/10/29/isrlpa9577_txt.htm>

Oxfam and others
March 2008, 'The Gaza Strip: A Humanitarian Implosion' (Coalition report: Oxfam, Amnesty International, Christian Aid, CAFOD, Care, Medicins du Monde, Save the Children, TroCaire) <http://www.oxfam.org.uk/resources/downloads/oxfam_gaza_lowres.pdf>

Palestinian Center for Human Rights (PCHR)
November 2005, 'Weekly Report On Israeli Human Rights Violations in the OPT' No. 46/2005: 24-30 November 2005 <http://www.pchrgaza.org/files/W_report/English/2005/01-12-2005.htm>
10 October 2005, 'Some Relief for Gaza's Fishermen' <http://www.pchrgaza.org/files/PressR/English/2005/116-2005.htm>
5 October 2005, 'The Continued Closure of Rafah International Crossing Point Transforms the Gaza Strip into a Big Prison with Disastrous Impacts for Palestinian Civilians' <http://www.pchrgaza.org/files/PressR/English/2005/113-2005.htm>
21 September 2005, 'More Than 650 Palestinian Prisoners from the Gaza Strip Are Still Detained in Israeli Jails' <http://www.pchrgaza.org/files/PressR/English/2005/107-2005.htm>

19 September 2005, 'Seven Days Following Their Redeployment from the Gaza Strip, IOF Plan to Create a Buffer Zone in the North' <http://www.pchrgaza.org/files/PressR/English/2005/105-2005.htm>
September 2005, 'Weekly Report On Israeli Human Rights Violations in the Occupied Palestinian Territory' No. 37/2005: 15-21 September 2005 <http://www.pchrgaza.org/files/W_report/English/2005/22-09-2005.htm>

Physicians for Human Rights – Israel (PHR-Israel)
3 March 2008, 'Palestinian Health System in Gaza on Brink of Collapse' <http://www.phr.org.il/phr/article.asp?articleid=554&catid=55&pcat=-1&lang=ENG>
24 January 2008, 'PHR-Israel, Al Mezan Center for Human Rights , and the Gaza Community Mental Health Programme call for an immediate cessation of collective punitive measures against the civilian population in Gaza' <http://www.phr.org.il/phr/article.asp?articleid=536&catid=55&pcat=-1&lang=ENG>
1 November 2007, 'Emergency Appeal for Medical Supplies for Gaza' <http://www.phr.org.il/phr/article.asp?articleid=506&catid=55&pcat=-1&lang=ENG>
14 November 2005, 'Israeli Court Adjourns Sonic Booms Petition' <http://www.phr.org.il/phr/article.asp?articleid=276&catid=41&pcat=-1&lang=ENG>
26 September 2005, 'New Report: Gaza after Disengagement- Patients pay the Price' <http://www.phr.org.il/phr/article.asp?articleid=269&catid=41&pcat=-1&lang=ENG>

WAFA (Palestine News Agency)
28 December 2005, 'Israeli Warplanes Resume Night Mock Raids on GS' <http://www.wafa.ps/english/body.asp?id=5882>
28 December 2005, 'Israeli Aircrafts Drop Flyers on GS, Urging Citizens to Clear Areas' <http://www.wafa.ps/english/body.asp?id=5888>
27 December 2005, 'Al-Ayyam: Buffer Zone, Occupation Comes Back to Gaza Strip' <http://www.wafa.ps/english/body.asp?id=5875>
25 December 2005, 'Fateh Condemns Israeli Plans to Set up Buffer Zone Deep inside GS' <http://www.wafa.ps/english/body.asp?id=5858>
14 December 2005, 'PNA Condemns Killing of 4 Citizens in Gaza' <http://www.wafa.ps/english/body.asp?id=5752>
4 December 2005, 'Fateh Condemns Israeli Military Escalation in GS' <http://www.wafa.ps/english/body.asp?id=5663>
3 December 2005, 'Israeli Navy Kills Fisherman in Rafah' <http://www.wafa.ps/english/body.asp?id=5650>
12 November 2005, 'Israeli Navy Wounds Fisherman in GS' <http://www.wafa.ps/english/body.asp?id=4425>
10 November 2005, 'IOF Kills Citizen in GS, Arrests 6 others, Kidnaps 3 in WB' <http://www.wafa.ps/english/body.asp?id=4405>
5 November 2005, 'Rice to Israel: Gaza Cargo Crossings must Remain Open' <http://www.wafa.ps/english/body.asp?id=4361>

26 October 2005, '5 Women Miscarried of Israeli Mock Raids on Gaza'
<http://www.wafa.ps/english/body.asp?id=4281>
25 October 2005, '5 Citizens Wounded including Infant by Israeli Air Raids'
<http://www.wafa.ps/english/cphotonews.asp?num=770>
16 October 2005, 'MOFA: Gaza Still under Occupation'
<http://www.wafa.ps/english/body.asp?id=5453>
10 October 2005, 'IOF Kills 3 Youths in Middle GS'
<http://www.wafa.ps/english/body.asp?id=5402>
4 October 2005, 'Israeli Bulldozers Raze Land South of Gaza'
<http://www.wafa.ps/english/body.asp?id=5357>
28 September 2005, 'Israeli Air Strikes Continues Across Gaza'
<http://www.wafa.ps/english/body.asp?id=5305>
26 September 2005, 'Citizen Wounded, Israeli Air Strikes Continues in GS'
<http://www.wafa.ps/english/body.asp?id=5278>
25 September 2005, '2 Citizens Killed by Israeli Navy Missiles'
<http://www.wafa.ps/english/body.asp?id=5276>
24 September 2005, 'IOF Kills 4 in Air Strike on Gaza'
<http://www.wafa.ps/english/body.asp?id=5264>
24 September 2005, 'Israeli Navy Opens Fire at Fishermen'
<http://www.wafa.ps/english/body.asp?id=5266>
18 September 2005, 'Petition to Israeli High Court to Release Prisoners from GS'
<http://www.wafa.ps/english/body.asp?id=5200>
12 September 2005, 'Abbas: Israeli Withdrawal Important Step, but Not Enough'
<http://www.wafa.ps/english/body.asp?id=5136>

8. Other Internet sources

Coalition Provisional Authority in Iraq (CPA), Regulation No. 1, CPA/REG/16 May 2003/01
<http://www.iraqcoalition.org/regulations/index.html#Regulations>
CIA World Fact Book, 'The Gaza Strip' (last updated: 06/03/08)
<https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>
Israel's Revised Disengagement Plan, 06 June 2004 (Addendum A – Main Principles)
<http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm#A>
Israel Ministry of Foreign Affairs press release, 19 September 2007, 'Security Cabinet declares Gaza hostile territory'
<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>

Table of Cases

1. International Court of Justice (ICJ)

North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. the Netherlands), in: ICJ Reports 1969, at p. 3

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion), in: ICJ Reports 1971, at p. 16

Western Sahara (Advisory Opinion), in: ICJ Reports 1975, at p. 12

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), in: ICJ Reports 1986, at p. 14

Illegality of the Threat ore Use of Nuclear Weapons (Advisory Opinion), in: ICJ Reports 1996, at p. 226

Legal Consequences of the construction of a wall in the occupied Palestinian territory (Advisory Opinion), in: ICJ Reports 2004, at p. 3

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Judgement and Separate Opinion of Judge Kooijmans, at <http://www.icjcij.org>

2. International Military Tribunal sitting at Nuremberg (IMT Nuremberg)

The Trial of Major War Criminals, in: The Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany. Taken from the Official Transcript. Part 22, 1946. His Majesty's Stationery Office, London 1950 (See also <http://www.yale.edu/lawweb/avalon/imt/proc/judlawre.htm>)

The Hostages Trial; Wilhelm List and others, in: Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission. Vol. VIII, His Majesty's Stationery Office, London 1949, at p. 34

3. International Criminal Tribunal for the former Yugoslavia (ICTY)

Prosecutor v. Ivica Rajić; Review of the indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12, Trial Chamber, 13/09/1996 <http://www.un.org/icty/rajic/trialc2/decision-e/60913612.htm>

Prosecutor v. Tihomir Blaćkić; Judgement, Case No. IT-95-14, Trial Chamber, 03/03/2000 <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>

Prosecutor v. Dario Kordić and Mario Cerkez; Judgement, Case No. IT-95-14/2, Trial Chamber, 26/02/2001
<http://www.un.org/icty/kordic/trialc/judgement/index.htm>
Prosecutor v. Mladen Naletilić and Vinko Martinović; Judgement, Case No. IT-98-34, Trial Chamber, 31/03/2003
<http://www.un.org/icty/naletilic/trialc/judgement/index.htm>

4. PERMANENT COURT OF ARBITRATION (PCA)

Island of Palmas case (The Netherlands v United States), Reports of International Arbitral Awards Vol II, at p. 829

5. ISRAEL SUPREME COURT (ISC)

H.C. 9132/07 (30/01/08), *Twelve NGO petitioners v. Prime Minister & Minister of Defense (legality of power cuts)*, available in unofficial english translation at <http://www.gisha.org/index.php?intLanguage=2&intSiteSN=110&intItemId=742>
H.C. 302/72, *Hilu et al. v. The Government of Israel*, 1972, PD 27(2) at 169 (unavailable to author)
As discussed in: Qupty in Playfair 1992, p. 88-90; Cavanaugh 2003, section III
H.C. 606/78, *Ayyoub v. Minister of Defence et al.* (Beit El settlement), 1978, PD 33(2) at 113 (unavailable to author), as quoted in: Qupty in Playfair 1992, p. 105
H.C. 393/82, *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*, 1982, PD 37(4) at 785 (unavailable to author), as quoted in: Qupty in Playfair 1992, p. 90, 106; Cavanaugh 2003, section III, fn 41, 42
H.C. 785/87, *Affo and Another v. IDF Commander in the West Bank,* 10 April 1988, in: Vol. 83 International Law Reports (ILR), at p. 122
H.C. 7015/02 and 7019/02, *Ajuri and others v IDF Commander in the West Bank, IDF Commander in the Gaza Strip and others,* 3 September 2002, in: Vol. 125 International Law Reports (ILR), at p. 537

Annex

Israeli disengagement plan

The Cabinet Resolution Regarding the Disengagement Plan of 6 June 2004
Addendum A - Revised Disengagement Plan - Main Principles

Paragraph 1. Background - Political and Security Implications
The State of Israel is committed to the peace process and aspires to reach an agreed resolution of the conflict based upon the vision of US President George Bush.
The State of Israel believes that it must act to improve the current situation. The State of Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a two-sided peace process. Accordingly, it has developed a plan of revised disengagement (hereinafter - the plan), based on the following considerations:

One. The stalemate dictated by the current situation is harmful. In order to break out of this stalemate, the State of Israel is required to initiate moves not dependent on Palestinian cooperation.

Two. The purpose of the plan is to lead to a better security, political, economic and demographic situation.

Three. In any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.

Four. The State of Israel supports the efforts of the United States, operating alongside the international community, to promote the reform process, the construction of institutions and the improvement of the economy and welfare of the Palestinian residents, in order that a new Palestinian leadership will emerge and prove itself capable of fulfilling its commitments under the Roadmap.

Five. Relocation from the Gaza Strip and from an area in Northern Samaria should reduce friction with the Palestinian population.

Six. The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.

Seven. The process set forth in the plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply.

Eight. International support for this plan is widespread and important. This support is essential in order to bring the Palestinians to implement in practice their obligations to combat terrorism and effect reforms as required by the Roadmap, thus enabling the parties to return to the path of negotiation.

Paragraph 2. Main Elements

A. The process: The required preparatory work for the implementation of the plan will be carried out (including staff work to determine criteria, definitions, evaluations, and preparations for required legislation).
Immediately upon completion of the preparatory work, a discussion will be held by the Government in order to make a decision concerning the relocation of settlements, taking into consideration the circumstances prevailing at that time – whether or not to relocate, and which settlements.

The towns and villages will be classified into four groups, as follows:
Group A - Morag, Netzarim, Kfar Darom
Group B - the villages of Northern Samaria (Ganim, Kadim, Sa-Nur and Homesh).
Group C - the towns and villages of Gush Katif
Group D - the villages of the Northern Gaza Strip (Elei Sinai, Dugit and Nissanit)

It is clarified that, following the completion of the aforementioned preparations, the Government will convene periodically in order to decide separately on the question of whether or not to relocate, with respect to each of the aforementioned groups.

2.3. The continuation of the aforementioned process is subject to the resolutions that the Government will pass, as mentioned above in Article 2, and will be implemented in accordance with the content of those resolutions.

2.3.1 The Gaza Strip

1) The State of Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below.
2) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated.

2.3.2 The West Bank

3) The State of Israel will evacuate an area in Northern Samaria (Ganim, Kadim, Sa-Nur and Homesh), and all military installations in this area, and will redeploy outside the vacated area.

4) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in this area.

5) The move will enable territorial contiguity for Palestinians in the Northern Samaria area.

6) The State of Israel will assist, together with the international community, in improving the transportation infrastructure in the West Bank in order to facilitate the contiguity of Palestinian transportation.

7) The process will facilitate normal life and Palestinian economic and commercial activity in the West Bank.

2.3.3 The intention is to complete the planned relocation process by the end of 2005.

B. The Security Fence: The State of Israel will continue building the Security Fence, in accordance with the relevant decisions of the Government. The route will take into account humanitarian considerations.

Paragraph 3. Security Situation Following the Relocation

3.1*. The Gaza Strip:*

1) The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.

2) The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.

3) The State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.

3.2*. The West Bank:*

1) Upon completion of the evacuation of the Northern Samaria area, no permanent Israeli military presence will remain in this area.

2) The State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Northern Samaria area.

3) In other areas of the West Bank, current security activity will continue. However, as circumstances require, the State of Israel will consider reducing such activity in Palestinian cities.

4) The State of Israel will work to reduce the number of internal checkpoints throughout the West Bank.

Paragraph 4. Military Installations and Infrastructure in the Gaza Strip and Northern Samaria

In general, these will be dismantled and evacuated, with the exception of those which the State of Israel decides to transfer to another party.

Paragraph 5. Security Assistance to the Palestinians

The State of Israel agrees that by coordination with it, advice, assistance and training will be provided to the Palestinian security forces for the implementation of their obligations to combat terrorism and maintain public order, by American, British, Egyptian, Jordanian or other experts, as agreed therewith.
No foreign security presence may enter the Gaza Strip and/or the West Bank without being coordinated with and approved by the State of Israel.

Paragraph 6. The Border Area Between the Gaza Strip and Egypt (Philadelphi Route)

The State of Israel will continue to maintain a military presence along the border between the Gaza Strip and Egypt (Philadelphi Route). This presence is an essential security requirement. At certain locations, security considerations may require some widening of the area in which the military activity is conducted.

Subsequently, the evacuation of this area will be considered. Evacuation of the area will be dependent, inter alia, on the security situation and the extent of cooperation with Egypt in establishing a reliable alternative arrangement.

If and when conditions permit the evacuation of this area, the State of Israel will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel.

Paragraph 7. Real Estate Assets

In general, residential dwellings and sensitive structures, including synagogues, will not remain. The State of Israel will aspire to transfer other facilities, including industrial, commercial and agricultural ones, to a third, international party which will put them to use for the benefit of the Palestinian population that is not involved in terror.

The area of the Erez industrial zone will be transferred to the responsibility of an agreed upon Palestinian or international party.

The State of Israel will explore, together with Egypt, the possibility of establishing a joint industrial zone on the border of the Gaza Strip, Egypt and Israel.

Paragraph 8. Civil Infrastructure and Arrangements

Infrastructure relating to water, electricity, sewage and telecommunications will remain in place.

In general, Israel will continue, for full price, to supply electricity, water, gas and petrol to the Palestinians, in accordance with current arrangements.

Other existing arrangements, such as those relating to water and the electro-magnetic sphere shall remain in force.

Paragraph 9. Activity of Civilian International Organizations

The State of Israel recognizes the great importance of the continued activity of international humanitarian organizations and others engaged in civil development, assisting the Palestinian population.

The State of Israel will coordinate with these organizations arrangements to facilitate their activities.

The State of Israel proposes that an international apparatus be established (along the lines of the AHLC), with the agreement of Israel and international elements which will work to develop the Palestinian economy.

Paragraph 10. Economic Arrangements

In general, the economic arrangements currently in operation between the State of Israel and the Palestinians shall remain in force. These arrangements include, inter alia:

One. The entry and exit of goods between the Gaza Strip, the West Bank, the State of Israel and abroad.

Two. The monetary regime.

Three. Tax and customs envelope arrangements.

Four. Postal and telecommunications arrangements.

Five. The entry of workers into Israel, in accordance with the existing criteria.
In the longer term, and in line with Israel's interest in encouraging greater Palestinian economic independence, the State of Israel expects to reduce the number of Palestinian workers entering Israel, to the point that it ceases completely. The State of Israel supports the development of sources of employment in the Gaza Strip and in Palestinian areas of the West Bank, by international elements.

Paragraph 11. International Passages

a. The International Passage Between the Gaza Strip and Egypt

1) The existing arrangements shall continue.

2) The State of Israel is interested in moving the passage to the "three borders" area, south of its current location. This would need to be effected in coordination with the Government of Egypt. This move would enable the hours of operation of the passage to be extended.

b. The International Passages Between the West Bank and Jordan:

The existing arrangements shall continue.

Paragraph 12. Erez Crossing Point

The Erez crossing point will be moved to a location within Israel in a time frame to be determined separately by the Government.

Paragraph 13. Conclusion

The goal is that implementation of the plan will lead to improving the situation and breaking the current deadlock. If and when there is evidence from the Palestinian side of its willingness, capability and implementation in practice of the fight against terrorism, full cessation of terrorism and violence and the institution of reform as required by the Road Map, it will be possible to return to the track of negotiation and dialogue.

* * *

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Curriculum vitae

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In September 2006 he was appointed Deputy Head of the Foreign Missions, Privileges and Immunities Section (Protocol Department) of the Dutch Ministry of Foreign Affairs, after an internship and a subsequent position as legal officer at that same section. In that capacity he gave lectures to Dutch law enforcement officers on the privileges and immunities of staff members of diplomatic missions and International Organizations.

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MI-117 H.J.Th.M. van Roosmalen, *Overheidsaansprakelijkheid in Engeland en Nederland* (diss. Leiden), Den Haag: Sdu 2007, ISBN 978 90 12 11846 0

MI-118 R.W.J. Crommelin, *Het aanvullen van de rechtsgronden* (diss. Leiden), Alphen aan den Rijn: Kluwer 2007, ISBN 978 90 13 04635 9

MI-119 L.A.R. Siemerink, *De overeenkomst van Internet Service Providers met consumenten* (diss. Leiden), Deventer: Kluwer 2007, ISBN 90 13 04357 7

MI-120 I.S.J. Houben, K.J.O. Jansen, P. Memelink, J.H. Nieuwenhuis & L. Reurich (red.), *Europees contractenrecht. Techniek en moraal*, Deventer: Kluwer 2007, ISBN 90 13 04036 5

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MI-124 T. Barkhuysen, W. den Ouden & E. Steyger (red.), *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht*, Alpen aan den Rijn: Kluwer 2007, ISBN 978 90 13046 28 1

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MI-126 Z. Deen-Racsmány, *Active Personality and Non-extradition of Nationals in International Criminal Law at the Dawn of the Twenty-first Century: Adapting Key Functions of Nationality to the Requirements of International Criminal Justice* (diss. Leiden), Leiden: Leiden University Press.

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MI-134 C.L.J. Caminada, A.M. Haberham, J.H. Hoogteijling en H. Vording (red.), *Belasting met beleid*, Den Haag: Sdu 2007, ISBN 978 90 12 12470 6

MI-135 A. Vermeer-Künzli, *The Protection of Indificudals by means of Diplomatic Protection. Diplomatic Protection as a Human Rights Instrument* (diss. Leiden) 2007, ISBN 978 90 9022 487 9

MI-136 I.S.J. Houben, K.J.O. Jansen, P. Memelink, J.H. Nieuwenhuis & L. Reurich (red.), *Samenloop*, Deventer: Kluwer 2007, ISBN 978 90 13 05033 2

MI-137 T.C. Leemans, *De toetsing door de bestuursrechter in milieugeschillen. Over rechterlijke toetsingsintensiteit, bestuurlijke beslissingsruimte en deskundigenadvisering* (diss. Leiden), Den Haag: Boom Jurdische uitgevers 2008, ISBN 978 90 5454 986 4

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MI-139 A. Meuwese, *Impact Assessment in EU Lawmaking* (diss. Leiden), Zutphen: Wöhrmann Printing Service 2008

MI-140 P.C. Adriaanse e.a., *Implementatie van EU-handhavingsvoorschriften*, Den Haag: Boom Juridische uitgevers 2008, ISBN 978 90 5454 862 1

MI-141 S.D. Dikker Hupkes, *What Constitutes Occupation? Israel as the occupying power in the Gaza Strip after the Disengagement,* Leiden: Jongbloed 2008, **ISBN ??????????**

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