

PLO NEGOTIATIONS AFFAIRS DEPARTMENT

THE ISRAELI “DISENGAGEMENT” PLAN: GAZA STILL OCCUPIED

UPDATED DECEMBER 2005

“The significance of the disengagement plan is the freezing of the peace process... Effectively, this whole package called the Palestinian state, with all that it entails, has been removed indefinitely from our agenda... All with a presidential blessing and the ratification of both houses of Congress.”

- Dov Weissglas, Senior Advisor to Israeli Prime Minister Ariel Sharon

LEGAL ANALYSIS:

Israel’s “Disengagement” plan from the Gaza Strip states that once fully enacted “there will be no basis to the claim that the Strip is occupied land,”¹ even though the Plan envisages indefinite Israeli military and economic control over the Gaza Strip.

Israel’s eagerness to declare an end to the Gaza Strip’s occupation illustrates the strategy behind the Plan. First, Israel seeks to proclaim an end to the Gaza Strip’s occupation—ostensibly in order to absolve Israel of all legal responsibilities as an “occupying power”—while simultaneously retaining effective military control over the Gaza Strip and its inhabitants. Second, it hopes to garner international support for retaining and even expanding illegal settlements (colonies) in the occupied West Bank in exchange for a withdrawal from Gaza. This strategy’s success was most apparent in the April 14, 2004 Bush-Sharon press conference during which President Bush praised Sharon’s withdrawal plan and announced that “existing Israeli population centers” in the occupied Palestinian territory (oPt) would become part of Israel in any permanent status agreement.² Third, as Israeli Bureau Chief Dov Weissglas admitted, Israel hopes to indefinitely freeze the peace process.

Variations of this strategy are not new: during the interim period of the Oslo Accords, Israel similarly carved away Palestinian population centers while retaining control over Palestinian movement, economy, and natural resources. Although Israel maintained effective military control over the evacuated areas (“Area A”)—and was therefore legally bound by its obligations as an occupying power—some Israeli government advisors argued that Area A was no longer occupied territory and absolved themselves of all legal responsibility.³ In public and even some diplomatic discourse the occupation disappeared,

¹ Gaza “Disengagement” Plan, Section II.A.3, available at <<http://www.nad-plo.org/inner.php?view=disengagement_doc_gazaplan>>, last checked December 1, 2005.

² George W. Bush, Letter of Assurances to Israeli Prime Minister Ariel Sharon,

³ See, e.g., Dore Gold, *From ‘Occupied Territories’ to ‘Disputed Territories,’* January, 2002, available at <<<http://www.jcpa.org/jl/vp470.htm>>>, last checked December 1, 2005. Cf. Joel Singer, legal adviser to the Israeli Ministry of Foreign Affairs, who stated after the signing of the Oslo Accords that

occupied territory became “disputed” territory, and the conflict was no longer one between an occupying power and an occupied population but rather a land dispute between two equal parties.

Notwithstanding the terms of the Plan, Israel remains an occupying power under international law after “Disengagement” from Gaza and is therefore bound by the obligations of an occupying power under international customary law and the Fourth Geneva Convention.

A version of this updated legal analysis was originally released in October 2004. An updated version was distributed during “Disengagement,” and again in December 2005. This update is still accurate today, despite recent developments along the occupied Gaza Strip’s border with Egypt and coordination activities with the Palestinian Authority.

I. ISRAEL OCCUPIES THE GAZA STRIP

A. Israel Occupies the Palestinian Territory

The term “occupation” describes a regime of control over territory and population by a foreign sovereign’s military.⁴ When a foreign sovereign occupies land, international law obligates that sovereign to uphold basic standards to protect both the population under its control and the land on which that population lives.⁵

The Hague Regulations of 1907 set forth the basic legal standard: “Territory is occupied when it has actually been placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.”⁶ This definition represents customary international law⁷ and has been reaffirmed and expounded upon at the Nuremberg Tribunal,⁸ in the Fourth Geneva

“notwithstanding the transfer of a large portion of the powers and responsibilities currently exercised by Israel to Palestinian hands, the status of the West Bank and Gaza Strip will not be changed during the interim period.” Joel Singer, “The Declaration of Principles on Interim Self-Government Arrangements,” I JUSTICE 4, 6 (Int’l Assn of Jewish Lawyers and Jurists, 1994).

⁴ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227, entered into force Jan. 26, 1910, hereinafter “The Hague Convention.”

⁵ Customary international law governs these basic obligations, which are articulated in 1907’s Hague Convention, 1949’s Fourth Geneva Convention, and 1977’s First Protocol to the Fourth Geneva Convention.

⁶ The Hague Conventions, see note 4 *supra*.

⁷ Robbie Savel, *The Problematic Fourth Geneva Convention: Rethinking the International Law of Occupation*, The Jurist, available at <<<http://jurist.law.pitt.edu/forum/forumnew120.php>>>, last checked December 1, 2005 (asserting that the Hague Regulations have achieved status as customary international law—that is, a set of binding international norms recognized by the community of nations—and that most of the provisions of the Fourth Geneva Convention and its 1st Additional Protocol have also achieved that status).

⁸ *U.S. v. Wilhelm List*, Nuremberg Tribunal, 1948.

Convention (1949) and in its First Additional Protocol (1979),⁹ in state practice, in United Nations' resolutions, and in the judgment of the International Court of Justice.¹⁰

In June 1967, the Israeli military took control over the West Bank, including East Jerusalem, and the Gaza Strip (together, the "Palestinian territory").¹¹ Ever since, Israel has maintained actual and effective control over the Palestinian territory and the indigenous Palestinian population thereon. Consequently, Israel belligerently occupies the Palestinian territory as a matter of law.

B. The International Community Recognizes Israel as the Occupying Power of the Palestinian Territory

Since 1967, the International Community has consistently held that Israel occupies the Palestinian territory. United Nations Security Council resolution 242 called, in part, for Israel to withdraw from territories it "occupied."¹² Since then, the international community—including the United States¹³—has consistently reaffirmed that the territory, including East Jerusalem, is "occupied" as a matter of law. Indeed, both the U.N. Security Council and the General Assembly reiterated in May 2004 that the Palestinian territory is "occupied" as a matter of law.¹⁴

C. Israel's Supreme Court Recognizes Israel as the Occupying Power of the Palestinian Territory

The Israeli Supreme Court routinely refers to the Palestinian territory¹⁵ as occupied and selectively enforces international law with respect to the Israeli military presence there.¹⁶

⁹ Geneva Convention relative to the protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (1979).

¹⁰ See note 21 *supra* and accompanying text.

¹¹ Israel also assumed control over Syria's Golan Heights and Egypt's Sinai Peninsula. While Israel returned the Sinai to Egypt, Israel still occupies Syria's Golan Heights.

¹² United Nations Security Council Resolution 242 (1967).

¹³ See, e.g., U.S. State Department Country Report on Israel and the Occupied Territories, 2004, released February 25, 2004, available at <<<http://www.state.gov/g/drl/rls/hrrpt/2004/41723.htm#occterr>>> last checked December 1, 2005 (referring to the West Bank, Gaza, and East Jerusalem as "occupied territories").

¹⁴ United Nations Security Council resolution 1544 (2004) (cites Israel's obligations as an "occupying Power" under international law and references the territories "occupied" since 1967); United Nations General Assembly resolution 58/292 (2004) (affirming "that the status of the Palestinian Territory occupied since 1967, including East Jerusalem, remains one of military occupation").

¹⁵ Israel, however, claims to have annexed East Jerusalem and the Golan Heights pursuant to domestic Israeli law, which the international community has rejected *en masse*. See, e.g., United Nations Security Council Resolution 2.

¹⁶ Although the Israeli Supreme Court does recognize Palestinian territory as "occupied" under international law, it does not recognize *de jure* application of the Fourth Geneva Convention, contrary to universal international *opinio juris*. For a discussion on this distinction and its lack of legal foundation, see Claude Bruderlein, "Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law," Harvard University Program on Humanitarian Policy and Conflict Research (August, 2004). However, the Supreme Court selectively does apply some humanitarian provisions of the Fourth Geneva Convention.

In 1979, for example, the Israeli Supreme Court stated: “This is a situation of belligerency and the status of [Israel] with respect to the occupied territory is that of an Occupying Power.”¹⁷ In 2002, the Israeli Supreme Court held again that the West Bank and Gaza Strip “are subject to a belligerent occupation by the State of Israel.”¹⁸

Most recently, in June, 2004, the Israeli Supreme Court reaffirmed that the territory is occupied under international law.¹⁹ In order to find the putative legal authority to confiscate thousands of acres of Palestinian land to construct its Wall, the High Court proclaimed: “Since 1967, Israel has been holding [the Palestinian territory] in belligerent occupation.”²⁰

Therefore, even though Israeli politicians may rhetorically dispute Israel’s occupation of the Palestinian territory, Israeli courts continually recognize the Israeli military as the occupying power of the Palestinian territory.

D. The International Court of Justice Recognizes Israel as the Occupying Power

In July 2004, the International Court of Justice held that “. . .[t]he territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power.”²¹

E. Israel Remains an Occupying Power under the Oslo Accords

Israel maintained effective military control over the Palestinian territory during the Oslo period (roughly 1993-2000), satisfying the *general* international legal standard for occupation. During Oslo, the Israeli military continued land confiscation and nearly doubled the population of its illegal settlements (colonies). Further, it continued building bypass roads and infrastructure, rendered Palestinian movement even more difficult, and frequently conducted military operations in and around the areas in which it had putatively ceded control.

Since Oslo, the erection of Israel’s Wall inside the occupied West Bank provides another example of Israel’s ongoing control over Palestinians and their land.²² The Wall—a

¹⁷ 606 Il. H.C. 78, *Ayub, et al. v. Minister of Defence, et al.* (The Beth Case); 610 Il. H.C. 78, *Matawa et al. v. Minister of Defence, et al.* (The Bekaot Case), reprinted in Antoine Bouvier and Marco Sassoli, *HOW DOES LAW PROTECT IN WAR? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, pps. 812-817, Geneva, 1999, hereinafter “ICRC 1999.” Ironically, the Supreme Court terms the Palestinian territory “occupied” so that it can confiscate Palestinian land: Under the Law of Occupation, the occupying power’s military boasts authority to temporarily confiscate land necessary to achieve military objectives.

¹⁸ *Adjuri v. IDF Commander*, 7015 Il. H.C. 02, 7019 Il. H.C. 02 (2002).

¹⁹ 2056 Il. H.C. 04 (2004).

²⁰ *Id.* at ¶ 1.

²¹ Int’l C.J. *Advisory Opinion on the L. Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at ¶ 112 (2004).

²² For more information on Israel’s Wall, please visit << <http://www.nad-plo.org/facts/wall/WallMagazine%207-2005.pdf>>>, last checked September 11, 2005.

regime of concrete, electrified fences, trenches, razor wire and sniper towers—effectively divides Palestinians from their agricultural and water resources, limits access of Palestinians to their property and restricts the freedom of movement of Palestinians within their own territory.

Moreover, the Oslo Accords specifically affirmed that the Palestinian territory would remain under Israeli occupation until the conclusion and implementation of a final peace treaty. Although the Accords permitted limited self-administration for some Palestinians, the Accords expressly reiterated that the Gaza Strip and the West Bank will continue to be considered one territorial unit, and that withdrawal from Palestinian population centers will do nothing “to change the status” of the West Bank and Gaza Strip for the duration of the Accords.²³

Finally, the United Nations,²⁴ the international community,²⁵ the Israeli Supreme Court,²⁶ and the International Court of Justice (ICJ) all held during and after Oslo that Israel continues to occupy the West Bank and Gaza Strip. The ICJ specifically emphasized that “[s]ubsequent events [to 1967’s War]...have done nothing to alter [the status of occupation].”²⁷

II. THE GAZA STRIP REMAINS OCCUPIED TERRITORY EVEN AFTER IMPLEMENTATION OF THE “DISENGAGEMENT” PLAN

A. Israel Retains Effective Control over the Gaza Strip and Therefore Remains the Occupying Power

After the “Disengagement” Plan, Palestinians in Gaza are still subjected to the effective control of the Israeli military. Although Israel removed its *permanent* military presence, Israeli forces retain the ability and “right” to enter the Gaza Strip at will.²⁸

Further, Israel retains ultimate control over Gaza’s airspace, sea shore, and borders.²⁹ Under the Plan, Israel unilaterally controls whether or not Gaza opens a seaport or an airport. Additionally, Israel controls *all* border crossings, including Gaza’s border with Egypt.³⁰ The Plan states that Israel will “continue its military activity along the Gaza

²³ Agreement on Preparatory Powers and Responsibilities (August 9, 1994), Article XIII, Secs. 4, 5.

²⁴ See notes 12-14 *supra* and accompanying text.

²⁵ *Id.*

²⁶ See notes 15 et seq. and accompanying text, emphasizing, however, that the Israeli Supreme Court does not consider East Jerusalem or the Golan Heights to be “occupied,” since Israel unilaterally annexed those territories, which the international community recognizes as “null and void.” See, e.g., United Nations Security Council Res. 478 (1980).

²⁷ Int’l C.J. Advisory Opinion on the L. Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at ¶ 78 (2004).

²⁸ Sharon’s Gaza Disengagement Plan, May 28, 2004, Section III.A.3(stating that “[t]he State of Israel reserves the basic right to self defense, which includes taking preventive measures as well as the use of force against threats originating in the Gaza Strip”).

²⁹ *Id.* at Section III.A.1.

³⁰ *Id.* at Section VI.

Strip’s coastline.”³¹ Taken together, these powers mean that, ultimately, all goods and people entering or leaving Gaza are subject to Israeli control.

Accordingly, if it enacts the “Disengagement” Plan as envisaged, Israel will effectively control Gaza—administratively and militarily.³² Therefore, Israel will remain the occupying power of the Gaza Strip.

B. Israel Will Remain the Occupying Power of the Gaza Strip so long as Israel Retains the Ability to Exercise Authority over the Strip

In *The Hostages Case*, the Nuremberg Tribunal expounded upon The Hague Regulations’ basic definition of occupation in order to ascertain when occupation ends.³³ It held that “[t]he test for application of the legal regime of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether it has the ability to exercise such power.”³⁴ In that case, the Tribunal had to decide whether Germany’s occupation of Greece and Yugoslavia had ended when Germany had ceded *de facto* control to non-German forces of certain territories. Even though Germany did not actually control those areas, the Tribunal held that Germany indeed remained the “occupying power”—both in Greece and Yugoslavia generally *and* in the territories to which it had ceded control—since it could have reentered and controlled those territories at will.

Similarly, Israel retains ultimate authority over the Gaza Strip—and to a much greater degree than Germany did in *The Hostages Case*: The Israeli military expressly reserves itself the right to enter the Gaza Strip at will. Further, Israel does not just retain the *ability* to exercise control over Gaza, but it also retains *effective* control over Gaza’s borders, air and sea space, overall security, and international relations.

Moreover, even if Israel should devolve some of its duties to third parties—either as co-occupying powers or as designees—Israel will remain an occupying power so long as it retains the ability to effectively control the Gaza Strip at will, whether with Israel’s own troops or those of its agents or partners.

C. As an Occupying Power, Israel Must Protect Palestinians and their Lands

Since Israel continues to occupy the Gaza Strip, Israel is still bound by its obligations under international law—namely 1907’s Hague Regulations, the Fourth Geneva Convention, and international customary law. Under international law, an occupying power must uphold certain obligations to the people and land it occupies. For example,

³¹ Id. at Section III.A.1.

³² Claude Bruderlein, “Legal Aspects of Israel’s Disengagement Plan under International Humanitarian Law,” Harvard University Program on Humanitarian Policy and Conflict Research (August, 2004), *available upon request*.

³³ See note 4 *supra* and accompanying text.

³⁴ *U.S.A. v. Wilhelm List*, Nuremberg Tribunal, 1948.

an occupying power must maintain the *status quo* of occupied territory and may never unilaterally annex territory or transfer its civilian population into occupied territory.³⁵ Moreover, the occupying power's activity in occupied territory must, *inter alia*, be for the benefit of the population it occupies.³⁶

Nevertheless, the absence of a “*permanent*” Israeli military presence and illegal settlers will mark a significant change in Gaza’s 37-year-history of belligerent Israeli occupation. The Fourth Geneva Convention does indeed contemplate changes in the *degree of occupation*; changes in circumstances, however, do not necessarily translate into the end of occupation.³⁷ Since Israel will retain such a high-degree of administrative and military authority over Gaza—control over air space, sea space, the provision of public utility services, *all* border crossings, military security, and international relations³⁸—Israel will still be bound to all relevant provisions of the Fourth Geneva Convention, 1907’s Hague Regulations, and applicable customary international law.³⁹

III. THE STRATEGY BEHIND THE DISENGAGEMENT PLAN

A. THE DISENGAGEMENT PLAN IS DEMOGRAPHICALLY MOTIVATED

Israel’s greatest battle is not against “terrorism,” but against demography. Statistical analyses project that Palestinian Christians and Muslims will comprise the majority of persons in Israel and the oPt by the year 2020.⁴⁰ If Israel wants to remain a “Jewish state,” then it will be very difficult to maintain its Jewish identity if an ethno/religious minority continues to rule over an ethnic majority. Israeli journalist David Landau noted in a statement made to a British journalist that the Gaza Plan represents “the simplest, crudest solution [to Israel’s demographic time bomb]: to dump Gaza and its 1.3 million Arabs in the hope that that would ‘buy’ [Israel] 50 more years.”⁴¹

Therefore, one of the primary motivations behind Israel’s “Disengagement” Plan is to “dump” 1.3 million non-Jews while illegally confiscating as much Palestinian land in the West Bank as possible.

B. ISRAEL SEEKS TO CONSOLIDATE GAINS IN THE WEST BANK IN EXCHANGE FOR “CONCESSIONS” IN GAZA

³⁵ See Fourth Geneva Convention (1949), Articles 47-49 and Protocol I to the Fourth Geneva Convention (1979).

³⁶ See Int’l C.J. Advisory Opinion on the L. Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at ¶¶ 123-26 (2004).

³⁷ See Fourth Geneva Convention (1949), Articles 6.

³⁸ See Section II.A, *supra*.

³⁹ See, e.g., International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention of the Rights of Child.

⁴⁰ See, e.g., Jonathan Freedland, *A Gift of Dust and Bones: Sharon’s Plan for a Pullout Owes More to Demographic Shifts than a Belated Conversion to Peace-Making*, THE GUARDIAN, Wed. June 2, 2004.

⁴¹ *Id.*

While the world publicly applauds the “Disengagement” Plan, Israel has been constructing the Wall in the occupied West Bank. In fact, continued construction of Israel’s Wall in the occupied West Bank is mentioned as one objective of the Plan itself. The Wall severs Palestinians from their lands, communities, and homes, while illegally appropriating more land and natural resources for Israeli settlements (colonies). In addition, Israel continues to expand illegal settlements (colonies) in the occupied West Bank. Since the ICJ issued its ruling on July 9, 2004 holding that the settlements are illegal, Israel has announced tenders for more than 2,300 housing units in the West Bank.

The success of Israel’s strategy became evident during a press conference on April 14, 2004, when U.S. President Bush, ostensibly in an effort to support the Gaza Plan, endorsed Israel’s plans to keep illegal West Bank settlements (which he termed “Israeli population centers”) in any permanent status agreement. President Bush further expressed U.S. opposition to Palestinian refugees’ right to return to homes and property inside Israel, which international law guarantees to them.

Unlike the Gaza settlements, however, the West Bank settlements that Israel would keep “in exchange” for its unilateral withdrawal from Gaza house tens of thousands of illegal settlers and stretch many miles into occupied Palestinian territory. In fact, just as Israel has evacuated 8,500 settlers from the occupied Gaza Strip and parts of the northern West Bank, it has embarked on plans to make room for 30,000 new settlers this year alone, primarily in and around occupied East Jerusalem.

Thus, Israel will demographically, and perhaps permanently, entrench its presence in the West Bank. Therefore, the “Disengagement” Plan has less to do with what Israel is giving up in Gaza and more to do with what Israel is taking from the West Bank.

IV. CONCLUSION: CONSTRUCTIVE SOLUTIONS

Israel retains effective military, economic, and administrative control over the Gaza Strip and therefore continues to occupy the Gaza Strip—even after implementation of its “Disengagement” Plan. Because Israel continues to occupy Gaza, it is still bound by the provisions of 1907’s Hague Regulations, the Fourth Geneva Convention and relative international customary law. Thus, Israel’s colonization of the Gaza Strip may have ended, but its occupation remains.

This is not to say, however, that removing Gaza’s settlers or reducing the Israeli military presence in and around the Gaza Strip could not usher in a better age for Palestinians and Israelis alike. Palestinians appreciate any movement on Israel’s part towards compliance with international law. Compliance with international law brings Palestinians closer to liberation and the region closer to stability. By providing non-violent channels to achieve fair results, international law helps silence extremist positions and activity while bringing both sides closer to a negotiated peace. Additionally, respect for international law affirms the credibility of more powerful nations who routinely invoke it as the legitimate basis for their own actions.

Israel's "Disengagement" Plan however does not represent a good faith effort at advancing peace. Rather, Israel is selectively complying with some international legal standards in the Gaza Strip to preempt criticism for massive violations in the West Bank (including East Jerusalem). In so doing, Israel ensures that the conflict will continue and perhaps intensify. If Israel maintains effective control over the Gaza Strip, denying it the ability to develop internally or trade externally, Gaza could become a greater humanitarian disaster than it already is. Or if Israel eventually proclaims Gaza the "State of Palestine," the freedom guaranteed under international law might become ever more distant for Palestinians elsewhere.

The international community should ensure that whatever unilateral measures Israel takes conform to international law and are not used to justify violations of international law elsewhere.

Today, however, Israel is making room for over 30,000 new settlers in the occupied West Bank this year alone, especially in and around occupied East Jerusalem—or almost four times the number of settlers that were evacuated from the occupied Gaza Strip as part of "Disengagement."

We now have an historic opportunity for peace in the Middle East. Rather than an illegal declaration of an end of occupation on less than 4% of the Palestinian territory that Israel occupies, Israel should join the current Palestinian Leadership in negotiating an end of conflict.

Peace is the best security for both Palestinians and Israelis and the only secure peace is an agreed peace. We know the contours of any final status agreement; we have the opportunity; and both the Palestinian and Israeli people have the will. An immediate return to bilateral negotiations, with the international community as mediator, would help to bring permanent and positive change to the Middle East.