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Israel's status in the north of the Gaza Strip

1. The scope of Israel's obligations with regard to humanitarian relief for the population of Gaza as a whole, and the population of the area north of Wadi Gaza (hereinafter: **north Gaza**) stems, in part, from Israel's status vis-à-vis this area according to the laws of war.¹ During active hostilities that do not involve control of territory, **negative** duties apply. These duties demand that a party to hostilities refrain from interfering with humanitarian relief provided by third parties, subject to the party's rights to ensure that the aid is not diverted to benefit the enemy and to stipulate technical arrangements for its transfer.² However, when a territory is under the belligerent occupation of one party to the hostilities, these obligations become **positive**. In other words, the party must actively ensure the local population has sufficient access to the supplies needed for its survival.³
2. These positive obligations are a special case of the more general obligation under the laws of belligerent occupation to ensure public order in the occupied territory.⁴ As part of the duty to ensure humanitarian relief in occupied territories, and as part of the general duty to maintain public order, the occupying power must ensure the safety of aid convoys and protect personnel delivering aid.⁵ **It should be emphasized, in this context**, that the presence of international organizations, including United Nations (UN) agencies, in the area does not relieve the occupying power of this duty. The occupying power may avail itself of their assistance, but they do not replace it as the party ultimately responsible for what occurs on the ground.
3. In order for belligerent occupation to exist, there must be effective control.⁶ Prior to the current war, there were various approaches to the question of whether the Gaza Strip was under belligerent occupation.⁷ The Supreme Court addressed this question as well.⁸ However, it is our view that the current situation is different, and that there is no doubt that, at least in north Gaza, belligerent occupation by the Israel Defense Forces (IDF) does exist. We note that the military itself announced in December that "operational control" had been achieved in the area.
4. It should also be noted that once the enemy regime has been vanquished and the army forces effectively control the area, including by preventing the regime from regaining control, the legal situation is one of belligerent occupation, even if some hostilities continue. This is evidenced by the fact that despite the occurrence of hostilities in certain parts of the West Bank, there is no dispute that the area is held by the IDF under belligerent occupation. Moreover, as long since ruled by the High Court of Justice,

¹ It should be noted that obligations may also arise from other sources such as international human rights law and Israeli administrative law. This expert opinion refers exclusively to the laws of war and belligerent occupation, but should not be construed as excluding positive obligations arising from other areas of law.

² Art. 23 of the Fourth Geneva Convention; Art. 70 of Additional Protocol (I) to the Geneva Conventions; Rule 55, IHL Customary, ICRC.

³ Art. 55 of the Fourth Geneva Convention; Art. 69 of Additional Protocol (I).

⁴ Art. 43 of the Hague Regulations (1907).

⁵ Art. 71 of Additional Protocol (I).

⁶ Art. 42 of the Hague Regulations (1907).

⁷ For an overview of the positions on the status of the Gaza Strip after disengagement and before the war, see: AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 204-47 (2017).

⁸ HCJ 9132/07 **al-Basyuni v. Prime Minister et al.** (reported in Nevo, January 30, 2008).

for belligerent occupation to exist in the legal sense, there is no precondition for the army to have officially established a military government in the area.⁹

5. Furthermore, reducing the number of active ground forces and transitioning to a phase of combat that relies on raids in certain areas does not necessarily preclude the existence of belligerent occupation. Indeed, control for purposes of a determination of belligerent occupation does not require the continual presence of the army everywhere within the territory. Thus, the Military Tribunal at Nuremberg, followed by other bodies such as the American Department of Defense, ruled that the question is whether the military can, at any given moment, assume physical control of a certain area within the territory.¹⁰ The invasion into and the withdrawal from Shifa Hospital in March, for instance, aptly demonstrates the IDF's ability to assume full physical control of a certain area in north Gaza within a short time.
6. Additionally, according to media reports, the IDF has split the Gaza Strip using a road ("Netzarim Road"), on which it maintains a constant presence for the purpose of securing control over movement from the south to the north of the Gaza Strip and enabling rapid deployment of forces to any location in the area. This too reinforces the conclusion that the area is under the IDF's effective control. Furthermore, the IDF has reportedly created a "buffer zone" at least one kilometer wide inside the Strip, which also reflects control of the area.
7. In addition, according to media reports, the IDF has complete control over the movement of aid convoys inside Gaza, particularly in the north, including the approval of drivers taking part in transporting aid.
8. All the aforementioned elements of control are an addition to preexisting elements of influence or control, which, together, form a critical mass of control that we maintain amounts to full belligerent occupation.
9. To conclude this point, the following factors lead us to the conclusion that the IDF currently exercises effective control over at least the north of the Gaza Strip: The massive ground invasion by IDF troops into the area; the elimination of Hamas's civilian control in the area; the fact that the IDF is preventing any other civilian entity from ruling; the presence of a large number of IDF troops in or around the area, or, alternatively, the presence of that are forces in a position to enter the area rapidly; the encirclement of the area using a road and the creation of a buffer zone; the fact that these factors supplement preexisting elements of control.
10. It should be noted, in this context, that on March 28, 2024, the International Court of Justice in The Hague issued two additional orders for provisional measures in the case brought against Israel by South Africa. The first order reads:

The State of Israel shall... Take all necessary and effective measures to **ensure**, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic

⁹ HCJ 82/102 **Tsemel v. Minister of Defense**, (1983). See also, Pictet's approach, according to which some of the laws of belligerent occupation apply at the "invasion phase" as well, in direct proportion to the scale of control; Pictet ed. ICRC, COMMENTARY ON IV GENEVA CONVENTION 60 (Jean S. 1958). It should be noted, in this context, that some read the majority opinion in *Congo v. Uganda* as directing a different conclusion on this issue.

Nevertheless, aside from the fact that this opinion has been heavily criticized and is, in our view, subject to debate, it runs counter to the HCJ ruling in **Tsemel**. See, on this, ELIAV LIEBLICH AND EYAL BENVENISTI, OCCUPATION IN INTERNATIONAL LAW 62-63 (2023); ICRC, Commentary on IV Geneva Convention 60 (Jean S. Pictet ed. 1958).

¹⁰ U.S. v. List, Case No. 47: The Hostages Trial, VIII United Nations War Crimes Commission, Law Reports of Trials of War Criminals 34, 56 (U.S. Military Tribunal, Nuremberg). See also ICRC, COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (2016) ¶ 316; U.S. Dep't Def., Law of War Manual, 767 (July, 2023), at 776– 777.

services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary.¹¹

(emphasis added)

The use of the term "ensure" in the language of the order signifies the ICJ's understanding that, at this point, there are positive obligations to ensure aid, not simply to allow it. Notably, Judge ad hoc Barak was in favor of this measure, holding that it reflected the duties already incumbent upon the State of Israel pursuant to existing applicable law.¹²

11. This means that Israel has an active obligation to ensure humanitarian relief for residents of the area, including by providing it itself insofar as this is necessary and in light of the specific provisions of the laws of occupation, as well as the general obligation to ensure public order in the area.¹³

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¹¹ APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (SOUTH AFRICA v. ISRAEL) (Order of 28 March, 2024), ¶51.

¹² Separate Opinion of Judge ad hoc Barak, ¶30.

¹³ It should be noted, in this context, that according to media reports, currently, aid distribution is most difficult and the risk of famine is highest in the north of the Gaza Strip, i.e., in an area under Israeli belligerent occupation. This state of affairs casts doubt on the claims made by various officials to the effect that responsibility for the situation rests solely with other parties.