

*"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 Weisglass, Senior Advisor to Israeli Prime Minister Ariel Sharon

### **Legal Analysis:**

Israel's proposed "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 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 Occupied Palestinian Territory would become part of Israel in any permanent status agreement.[2] Third, as Israeli Bureau Chief Dov Weisglass confessed, 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 legal 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, 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 will remain 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.

## **I. ISRAEL OCCUPIES THE GAZA STRIP**

### **A. Israel Occupies the Palestinian Territories**

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 law [7] and has been reaffirmed and expounded upon at the Nuremberg Tribunal, [8] in the Fourth Geneva 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 Territories"). [11] Ever since, Israel has maintained actual

and effective control over the Palestinian Territories and the indigenous Palestinian population thereon. Consequently, Israel belligerently occupies the Palestinian Territories as a matter of law.

## **B. The International Community Recognizes Israel as the Occupying Power of the Palestinian Territories**

Since 1967, the International Community has consistently held that Israel occupies the Palestinian Territories. 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 States[13]—has consistently reaffirmed that the territories, including East Jerusalem, are “occupied” as a matter of law. Indeed, both the U.N. Security Council and the General Assembly reiterated in May 2004 that the Palestinian Territories are “occupied” as a matter of law. [14]

## **C. Israel’s Supreme Court Recognizes Israel as the Occupying Power of the Palestinian Territories**

The Israeli Supreme Court routinely refers to the Palestinian Territories[15] as occupied and selectively enforces international law with respect to the Israeli military presence there.[16]

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 Territories are 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 Territories] in belligerent occupation.”[20]

Therefore, even though Israeli politicians may rhetorically dispute Israel’s occupation of the Palestinian Territories, Israeli courts continually recognize the Israeli military as the Occupying Power of the Palestinian Territories.

## **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 Territories 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 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 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 Territories 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 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 WILL REMAIN OCCUPIED TERRITORY EVEN AFTER IMPLEMENTATION OF THE “DISENGAGEMENT” PLAN**

### **A. Israel Will Retain Effective Control over the Gaza Strip and Will Therefore Remain the Occupying Power**

Under the “Disengagement” Plan, Gazans will still be subjected to the effective control of the Israeli military. Although Israel will supposedly remove its permanent military presence, Israeli forces will retain the ability and right to enter the Gaza Strip at will.[28]

Further, Israel will retain control over Gaza’s airspace, sea shore, and borders.[29] Under the Plan, Israel will unilaterally control whether or not Gaza opens a seaport or an airport. Additionally, Israel will control all border crossings, including Gaza’s border with Egypt.[30] And Israel will “continue its military activity along the Gaza Strip’s coastline.”[31] Taken together, these powers mean that all goods and people entering or leaving Gaza will be subject to Israeli control.

Finally, Israel will prevent Gazans from engaging in international relations.[32] Accordingly, if it enacts the “Disengagement” Plan as envisaged, Israel will effectively control Gaza—administratively and militarily.[33] 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 Nuremburg Tribunal expounded upon The Hague Regulations’ basic definition of occupation in order to ascertain when occupation ends.[34] 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.”[35] 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 will retain ultimate authority over Gaza and to a much greater degree than Germany in The Hostages Case: The Israeli military expressly reserves itself the right to enter the Gaza Strip at will. Further, Israel will not just retain the ability to exercise control over Gaza, but it will also retain effective control over Gaza’s borders, air and sea space, overall security, and international relations.

### **C. As an Occupying Power, Israel Must Protect Palestinians and Their Lands**

Since Israel will continue to occupy the Gaza Strip, Israel will still be 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, 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.[36] Moreover, the occupying power’s activity in occupied territory must, inter alia, be for the benefit of the population it occupies.[37]

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. Article 6 proclaims that an Occupying Power will only be held to the provisions of the Convention “to the extent that such Power exercises the functions of government.”[38] Accordingly, Israel will continue to “occupy” the Gaza Strip, but will only be bound to those aspects of the Geneva Convention within the ambit of its exercise of authority.

However, 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 relations[39]—Israel will still be bound to nearly all provisions of the Fourth Geneva Convention, 1907’s Hague Regulations, and the customary international law related to occupation.

### **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 Occupied Palestinian Territories 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 the Gaza 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**

While the world publicly debates the “Disengagement” Plan, Israel has been constructing the Wall in the Occupied West Bank. The Wall severs Palestinians from their lands, communities, and homes, while illegally appropriating more land and natural resources for Israeli colonies. In addition, Israel continues to expand illegal colonies in the Occupied West Bank. Since the ICJ issued its ruling on July 9, 2004 holding that the colonies 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 colonies (which he termed “Israeli population centers”) in any permanent status agreement. President Bush further expressed U.S. opposition for 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 colonists and stretch many miles into Occupied Palestinian Territory. Thus, Israel will demographically, and permanently, entrench its presence in the West Bank. Therefore, the Gaza withdrawal plan has less to do with what Israel is giving up in Gaza and more to do with what Israel plans on taking from the West Bank.

### **IV. CONCLUSION: CONSTRUCTIVE SOLUTIONS**

Israel will retain effective military, economic, and administrative control over the Gaza Strip and will therefore continue to occupy the Gaza Strip—even after implementation of its Disengagement Plan

as proposed. Because Israel will continue to occupy Gaza, it will still be bound by the provisions of 1907's Hague Regulations, the Fourth Geneva Convention and relative international customary law.

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.

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[1] Gaza "Disengagement" Plan, Section II.A.3, available at << <http://www.nad-plo.org/gazaplan.php>>>, last checked September 21, 2004.

[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 July 25, 2004. Cf. Joel Singer, legal adviser to the Israeli Ministry of Foreign Affairs, who stated after the signing of the Oslo Accords that "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 June 9, 2004 (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.

[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, 2003, released February 25, 2004, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm#occterr>>, last checked June 27, 2004 (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 252.

[16] Although the Israeli Supreme Court does recognize Palestinian territories 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.

[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 Territories "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/wprimary.php>>>, last checked July 4, 2004.

[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.

[31] *Id.* at Section III.A.1.

[32] *Id.* generally.

[33] 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.

[34] See note 4 *supra* and accompanying text.

[35] U.S.A v. Wilhelm List, Nuremberg Tribunal, 1948.

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

[37] 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).

[38] Fourth Geneva Convention (1949), Article 6.

[39] See Section II.A, *supra*.

[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.*