



REPORT

ISSUES ARISING FROM THE IMPLEMENTATION OF ISRAEL'S DISENGAGEMENT FROM THE GAZA STRIP

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This report is a lightly edited version of a 2005 study commissioned by the Canadian government's International Development Research Centre (IDRC) in anticipation of Israel's disengagement from the Gaza Strip slated to take place by the end of 2005. The study addresses possible implications of the disengagement, particularly for the international community, and makes recommendations for an international response. In preparing the study, the author conducted numerous interviews with a wide range of Israeli officials, experts, and others involved in the disengagement process, many of whom were prepared to speak only without attribution. The report is valuable not only for the issues it lays out, but also for the light it sheds on the thinking of the Israeli political and security establishment concerning how to implement and present the disengagement and what is required to secure international recognition of the end to Israel's occupation of Gaza and hence of its responsibility for the population.

IN NOVEMBER 2004, the Israeli Knesset endorsed the Gaza disengagement plan put forward by Prime Minister Ariel Sharon in April 2004 and approved by the cabinet two months later. According to the plan, Israel intends to complete the evacuation of all settlements and military installations in the Gaza Strip, with the prominent exception of the Gaza-Egypt border area (Philadelphi corridor) and associated border crossings, by the end of 2005. The plan also involves the evacuation of four settlements in the Jenin region of the West Bank, though the contours of Israel's redeployment there are still unclear.

When Prime Minister Sharon announced in early 2004 his intention to withdraw unilaterally from the Gaza Strip, one of his declared strategic objectives was to end Israel's role and responsibility as occupying power in the Gaza Strip and *to be certified by the international community as having done so*. Thus, one of the "key principles" of the disengagement plan as published

15 April 2004 was that the move would “obviate the claims about Israel with regard to its responsibility for the Palestinians in the Gaza Strip” (Article I, section F).¹ The plan further noted (Article II, section A, point 2) that with the completion of the withdrawal, after which “no permanent Israeli civilian or military presence” in the evacuated areas would remain, there would “be no basis for the claim that the Gaza Strip is occupied territory.” The reference to Gaza as “occupied territory” in this latter clause was eliminated by the cabinet in its endorsement of the plan on 6 June 2004 for two reasons. First, because Israel has never formally acknowledged that it rules Gaza as an “occupying power,” there was no reason to do so at this stage. Second, Israeli policymakers were made aware that the claim to end the occupation cannot be maintained as long as it remains in the Philadelphi corridor (and, arguably, in control of ports and airports) after disengagement. Remaining in control of these areas is recognized as sufficient to invest Israel with de facto control over the territory in question, thus meeting the international standard for the continuing characterization of Israel’s role as an occupying power. With the “occupied territory” reference removed, the clause as modified by the cabinet reads: “completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.”

WHEN IS AN OCCUPATION TERMINATED?

There are no internationally accepted guidelines concerning what constitutes an end to occupation or what is required for certifying that it has ended. The international community’s response to Israel’s disengagement plan thus far has been to emphasize its relationship to the moribund “road map.” Thus, for example, the European Union (EU) ministers on 23 February 2004 noted that any disengagement and settlement dismantlement “should take place in the context of the road map; it should be a step towards a two-State solution” and that “Israel should facilitate rehabilitation and reconstruction in Gaza.”² Similarly, on 22 September 2004, the Quartet “reiterate[d] that a withdrawal from Gaza should be full and complete and be undertaken in a manner consistent with the road map, as a step toward an end to the Israeli occupation that began in 1967, through direct negotiations between the sides, leading to the goal of two states, Israel and a sovereign, independent, viable, democratic and territorially contiguous Palestine, living side by side in peace and security.”³

What the EU, the Quartet, and the international community in general did *not* do was address with any specificity measures Israel must take to end its occupation of Gaza. In Israel, however, the implications of the disengagement and the requirements for ending the occupation have been the subject of intense debate within the security, legal, and political establishment. In general, three main issues were raised as being relevant to a formal end to occupation: (1) what constitutes an end to “effective military control”; (2) the extent to

which an occupation is “divisible”; and (3) whether a “sovereign successor” needs to be in place for an occupation to be seen as ended.

Effective Military Control

The most important criterion of occupation, certainly, is effective military control. The Hague Regulations of 1907 establish the basic legal standard for a territory’s being occupied, noting, “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.” Clearly, Israel’s status in the Gaza Strip and West Bank currently meets this “effective military control” test, notwithstanding the Oslo II agreement transferring limited responsibilities to the Palestinian Authority (PA). As for Gaza’s situation post-disengagement, the plan stipulates that Israel will continue to “supervise and guard the external envelope on land, will maintain exclusive control in the air space of Gaza, and will continue to conduct military activities in the sea space of the Gaza Strip” (Article III, section A, point 1). The plan does state that the external envelope may eventually be evacuated (“contingent on, among other things, the security reality”) and envisages examining the possibility of establishing a seaport and an airport there “if and when conditions emerge for the evacuation of this area” (Article IV). If the security envelope is retained, however, Israel would still qualify as the occupying power under the internationally accepted Hague standard insofar as it would still be exercising effective military control of the Strip. Israel’s retention of effective control over the area as a consequence of its continuing control of Gaza’s “security envelope” is generally recognized, even within Israel’s legal establishment, as inconsistent with a claim to end occupation.

Still, a number of ranking members of Israel’s security establishment maintain that even if Israel remains in at least partial control of the security envelope, there are options that would permit it to argue that its status as occupying power has ended, thus terminating its responsibilities to Gaza’s Palestinian population.

Option one: Israel could leave the Philadelphi corridor while maintaining its sea and air access. According to Shavit Matias, deputy to the attorney general for international law and a key Israeli official on this issue, “When we quit Philadelphi, even if the Palestinians don’t yet have a port or airport, the responsibility will no longer be ours. The area will not be considered occupied territory. When the Palestinians have a crossing to Egypt and additional options for transferring merchandise, even if there is no port yet, we have no responsibility.”⁴

Option two: Israel could remain in the Philadelphi corridor but allow the Palestinians to operate a seaport, even while maintaining effective security monitoring in international waters (as it has done on occasion in Lebanon). Operating a seaport would give the Palestinians access to the outside world, thus allowing Israel, according to some experts, to claim the end of its responsibilities.

Such an option, it has been noted, could be characterized as “soft quarantine.” One Israeli official suggested that a situation of “quarantine” rather than occupation could be claimed even if Israel remains in the Philadelphi corridor and maintains control over air and sea access. The official, thinking out loud, offered a comparison to the U.S. quarantine of Cuba during the 1962 missile crisis. Nonetheless, quarantines have historically been short-term measures and dependent upon international support for their success. The international community cannot be expected to acknowledge an end to occupation only to accept the imposition of a quarantine in which Israel continues to maintain and exercise effective control over the Strip.

Option three: Israel could declare that its status as occupying power applies only to those areas in which it remains in effective control, that is, the Philadelphi border area. One official who suggested this approach, however, also acknowledged that “to the extent that Israel retains power and responsibilities, it must bear those responsibilities. There is no half-occupation.” This characterization would appear to apply to the above options as well. A former Israeli official with intimate experience in the drafting of the Egyptian-Israeli treaty and the Oslo agreements also noted that an Israeli presence in the Philadelphi corridor is “tantamount to occupying the Gaza Strip as a whole.”

Option four: Israel might, according to some officials, argue that its effective control of the Egypt-Gaza border after disengagement is not inconsistent with the terms of its 1979 peace treaty with Egypt, which provides for a limited Israeli military presence in “zone D,” a strip east of the international border between Israel and Egypt that, obviously, includes the Gaza area. It should be noted, however, that the treaty specifies that its definition of the border as “the recognized international boundary between Egypt and the former mandated territory of Palestine” was to be “without prejudice to the issue of the status of the Gaza Strip.”⁵ In any case, neither Egypt nor Israel can surrender rights over territory that is not theirs.

Option five: Israel could reach an agreement with the PA that would allow its military forces to remain in effective control of Gaza’s border with Egypt and to maintain air and sea access. Israel, like the United States in Iraq after the establishment of the interim Iraq government in mid-2004 (see below), could be “invited” to remain in security control of the Philadelphi border area. Such a request, however unlikely, would establish a consensual basis for Israel’s continuing presence. The Oslo framework offers ample precedent of PLO acquiescence to a controlling Israeli military presence, albeit without recognition of the end of occupation.

Option six: A more explicit agreement between Israel and the PLO could establish peaceful relations between the parties that could accommodate continuing effective Israeli control of Gaza’s security envelope. A belligerent occupation is not possible in a time of peace.

Of the above options, only the last two would be likely to win acceptance by the international community as signifying an end to occupation. Without an explicit Palestinian request or the establishment of formal peaceful relations

between the parties, a controlling Israeli presence anywhere except for the shared northern border of Gaza (including the moribund safe passage route) signifies continuing occupation.

Is Occupation Divisible?

The second issue relevant to ending occupation being debated in Palestinian as well as Israeli circles is whether occupation is “divisible”—that is, whether the occupation of one part of an occupied territory can be said to end if the remainder continues to be occupied. In short, can Israel be considered to end its occupation of Gaza while it remains the occupying power on the West Bank?

Much has been made of the fact that the Oslo II agreement specifies that the West Bank and Gaza Strip are to be considered a single territorial unit and that nothing can be done to change their status during the agreement’s interim period. In fact, however, not only has Israel’s military rule in Gaza been functionally, administratively, and in some respects legally separate from that in force in the West Bank, but the PA itself maintains certain legal distinctions between the two areas based partly on the differing Egyptian and Jordanian legal codes operative there. More important, the single territorial unit clause was inserted at the Palestinian negotiators’ request with the intent to prevent Israel from *annexing* territory, not to prevent it from *withdrawing* from territory. Clearly, the PA today is not using the indivisibility of Gaza and the West Bank to argue that Gaza’s occupied status must be maintained so that it will have the same status as the West Bank. Rather, the argument is that the indivisibility of the two areas mandates Israel’s withdrawal from the West Bank as well. Fatah’s National Action Program, as presented by Mahmoud Abbas on 9 January 2005 during the presidential electoral campaign, affirmed that

the readiness of the Palestinian National Authority (PNA) to exercise its authority on any Palestinian land from which the Israeli military occupation forces withdraw depends on the preservation of the geographical and legal unity of the two branches of the Palestinian homeland in the West Bank and Gaza Strip, and that the withdrawal should constitute a first step in a plan to end the Israeli military occupation of all the Palestinian territories occupied in 1967. And we affirm our rejection of any interim or transitional accords.⁶

There is therefore nothing to suggest that the PA/PLO will refuse to accept the termination of Gaza’s status as Israeli-occupied territory, but rather that they will demand that the end to Gaza’s occupation be linked to a plan to end the occupation in its entirety. More telling with regard to Palestinian attitudes are the secondhand reports of the views of imprisoned Fatah leader Marwan Barghouti, who was quoted by the *Jerusalem Post* on 28 December 2004 as telling Muhammad Dahlan that Palestinians should turn the “‘liberated areas’ into a model of political success.”⁷

Is a Sovereign Successor Regime Necessary?

The question of whether a sovereign successor needs to be in place for an occupation to be seen as ended is relevant given the uncertainty surrounding Gaza's future status. As early as March 2004, I raised this issue with a senior member of Israel's national security establishment, noting what appeared to be three options for filling the role surrendered by Israel following the end of occupation in Gaza: (1) Palestinian sovereignty; (2) Egyptian rule; and (3) third-party administration. I was told that there was a fourth option: "None of the above." In other words, an acceptable scenario for Israel would be the continuation of the control and authority exercised by Palestinian institutions created by Israel and the PLO under the Oslo accords, but now expanded *de facto* by an end to occupation. Without the creation of a sovereign successor in the wake of Israel's withdrawal, the Gaza Strip under this scenario would belong to no state (*terra nullus*). This is an extraordinary proposition, but one that up to now has not been challenged by the Palestinians or by the international community. The Palestinians, by refraining from explicitly creating state institutions, and the international community, by deciding against establishing a sovereign address for Gaza, have apparently decided to leave the anomaly unaddressed.

In conclusion, of the three criteria discussed above for determining whether an occupation is ended, the last two do not meet the test of practical or political relevance, if only because the Palestinians and international community will not make them issues. The question of effective military control, however, does bar international certification of Israel's ending responsibility for the population of Gaza. If the disengagement is implemented as planned, Israel, by virtue of its continuing control over Gaza's security envelope, will remain the occupying power and Palestinian governing institutions will continue to be subject to effective Israeli control; that is, the legal status quo will continue to prevail. Clear adoption by the international community of the Hague standard—effective military control—is the most appropriate international benchmark for characterizing Israel's relationship to Gaza after disengagement and the one most likely to result in an Israeli decision to surrender its effective military control. In the meantime, it is incumbent upon Palestinians and the international community to address seriously the *prospective* implications of an Israeli decision to evacuate the Philadelphi corridor and agree to Palestinian operation of an airport and seaport.

DISENGAGEMENT'S IMPACT ON ISRAEL'S RESPONSIBILITIES

Whether or not Israel fulfills the conditions necessary for a formal end to occupation (if the Hague standard is adopted), there is no doubt that the permanent removal of all Israeli civilian settlements in Gaza and the withdrawal of permanently deployed Israeli troops (from all but the Philadelphi corridor) to Israeli territory will fundamentally change Israel's relationship to the Gazan population. Indeed, both Israelis and Palestinians acknowledge that there are "degrees of occupation." This has a basis even in international law: besides the

basic legal standard of the Hague Regulations, there is also a “Geneva standard” based upon a practical test of government functionality. The PLO’s Negotiations Affairs Department (NAD), which notes that “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,” specifically refers to Article 6 of the Fourth Geneva Convention as contemplating “changes in the degree of occupation.”⁸ Quoting the article’s statement 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,’” the NAD concludes that “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.”⁹ One international legal expert noted that the Geneva standard would be easier for Israel to address in the context of a Gaza disengagement.

Israel has yet to clarify the relationship that it will have toward Gaza and its residents in the aftermath of disengagement. In principle, it remains averse to codifying this relationship in formally recognized international protocols with third parties, an attitude similar to its preferences since the June 1967 occupation began. In practice, Israel is interested in retaining as much flexibility in humanitarian and security dimensions as permitted by circumstances and a dynamic political environment.

As an occupying power, Israel has three principal responsibilities: (1) to maintain the security of the territories; (2) to insure public order and safety; and (3) to act for the welfare of the local population. In practice, Israel cannot be said to fulfill any of these responsibilities toward the Palestinian population. It nonetheless intends that disengagement will result in a recognized end to its humanitarian responsibilities associated with the occupation as well as those responsibilities related to the Gaza Strip’s internal security. This being the case, whatever residual obligations, if any, that Israel continues to assume in the aftermath of disengagement (either humanitarian or in the security realm) will be exercised in a context other than the one defined by its (former) responsibilities/rights as an occupying power.

Israeli officials recognize that “to the extent that Israel retains powers and responsibilities it must bear responsibility.” But Israelis are themselves unclear about the nature of their residual obligations after disengagement. Some have suggested that Israel after disengagement and a recognized end to its role as occupying power would legally have no obligations to the Palestinians beyond the maintenance of proper relations with neighbors. Specifically, under this view, Israel would be freed from the obligation noted in Article 43 of the Hague Convention to insure public order and safety. As a consequence, it would have no particular obligation to intervene, for example, in the event of a breakdown in internal security. Similarly, it would not intervene or feel responsible for preventing or ameliorating a breakdown in the educational system (notwithstanding the fact that Israel today does not do so). Other officials, however, have suggested that Israel would maintain “residual responsibility” in humanitarian-related areas. Thus, while some officials state that Israeli would

not, for example, facilitate the travel of Gaza students via Israel to a West Bank university, others believe that Israel would facilitate such requests.

Permitting Israel to redefine its occupation as a basket of residual responsibilities—an “occupation lite” from which it can pick and choose according to circumstances—establishes a weak and ambiguous foundation for the conduct of international and third-party policy.

One official at the center of interagency debate on the implications of disengagement argued that Israel would retain unspecified residual rights—particularly in the security realm—“by necessity.” Two points should be made here. Permitting Israel to redefine its occupation as a basket of residual responsibilities—an “occupation lite” from which it can pick and choose according to circumstances—establishes a weak and ambiguous foundation for the conduct of international and third-party policy (the very reason the prospect is so attractive to some Israelis). Israel’s sense of residual yet undefined “special responsibility” for Gaza in the aftermath of disengagement is a laudable sentiment insofar as it relates to the provision and facilitation of humanitarian assistance. Israel’s provision of electricity

and water, according to commercial agreement, cannot be said to fall under this category. Yet the acceptance of an Israeli formula that establishes for Israel “a significantly diminished responsibility for anything that goes on in Gaza” may well establish a rationale for Israel to exercise invasive and disruptive internal security functions that will undermine the exercise of Palestinian self-rule.

In light of the above, the international community would be well advised to clarify and define with Israel an agreed view of its residual responsibilities in the humanitarian dimension after implementation of the disengagement plan. It needs to be understood that the disengagement plan, imposed and effected in the vacuum created by the moribund road map, requires an adept international response if its potential for the exercise of Palestinian sovereignty is to be realized. Indeed, even if Israeli withdrawal from Gaza falls short of fully meeting the Hague Standard, the international community would do well to acknowledge the changes resulting from implementation of the disengagement plan, which at the very least will encompass the permanent removal of all Israeli settlers in the Gaza Strip and the withdrawal of permanently deployed Israeli troops to Israeli territory (the Philadelphi corridor excepted). One Israeli official argued that it is dangerous in terms of domestic Israeli politics for the international community not to recognize a material change in Israel’s status and responsibilities resulting from implementation of the disengagement plan. “Even if an academic analysis suggests [continuing] occupation,” explained the official, “the legal environment should be sensitive and practical and not counterproductive.”

CONSEQUENCES OF A RECOGNIZED END OF OCCUPATION

It has been suggested by some Israeli officials that after disengagement and a recognized end to Israel’s role as occupying power, Gaza will become a “foreign country,” like Albania. While such a situation would relieve Israel of certain

responsibilities, especially with regard to the population, it would also deny it certain rights available to it as an occupying power (particularly in security matters). Prominent among these latter rights are the justification of the use of force to maintain security, the right to deploy within occupied territory to ensure security, and the standing to facilitate or obstruct international intervention of whatever kind.

Yet disengagement also establishes a new and often more comfortable foundation for Israel's conduct, particularly in the security realm. If Gaza becomes a foreign country, Israel's military actions against it could either be defended as consistent with the internationally recognized right to self-defense (Article 51 of the UN Charter) and governed by the law of proportionality and international humanitarian law or condemned as armed aggression. One prominent Israeli politician believes that after disengagement Israel will enjoy greater freedom of military action, based upon the former rationale, against attacks originating in the Gaza Strip. Just as the context for defining Israeli military actions changes as a consequence of disengagement, so too will Palestinian armed actions from Gaza against Israel. These acts may no longer be viewed in the international community as part of the fight against occupation, but rather as aggression or legitimate acts of self-defense across a border. What is beyond doubt is that, to the extent that the international community recognizes an end to Israeli occupation in the Gaza Strip, it implicitly acknowledges a change in the "rules of the game" defining Israeli and Palestinian armed actions.

An end to Israel's occupation of the Gaza Strip also has important implications for the international community, removing a basic reference point for the conduct of third-party and international affairs with Israel as occupying power and with the Gaza Strip itself. This is not only because Israel intends to sever itself from responsibility for the area and its population. For some organizations—the International Committee of the Red Cross (ICRC), for example—an end to Gaza's status as occupied territory would remove the basic condition necessary for the exercise, at least in part, of its mandate. The ICRC is reportedly assessing its post-disengagement options, for example, an ICRC role monitoring Gazans who remain in Israeli custody after disengagement. (A draft analysis is said to conclude that disengagement without an end to control over the security envelope will not change Israel's status as occupying power.) The same may hold true for UN organizations, such as the rapporteur on human rights, the special committee on the occupied Palestinian territories, and the committee on rights of the child. For some of these operations to continue, a new legal or institutional basis will have to be found for some organizations, while others will have to reconfirm or establish operational protocols with Israel, the PA, and perhaps Egypt.

Israel is currently obligated to facilitate the work and access of international organizations. This presumption is inherent in its status as occupying power, even though there are manifest problems with its performance in practice. With an end to occupation, Israel, according to internationally recognized norms

relating to interstate relations, will be under no obligation to permit free passage of goods or personnel through its territory to the Gaza Strip.

There may even be changes required in the operational Israeli address after disengagement. For example, the understandings reached between the ICRC and Israel as occupying power have been bilateral understandings between the organization and Israel's Defense Ministry.

Consistent with past practice, Israel in its discussions on these issues can be expected to focus on practical operational matters rather than negotiating issues of principle. "Israel needs to be really practical concerning international organizations regarding humanitarian aid and assistance in Palestinian state-building," explained one ministry official. "The question of a legal mandate is not important to Israel." Another noted that the question international organizations need to ask is what they require in order to function, not what is the legal situation on the ground.

A Foreign Ministry official observed that Israel has not yet addressed the question of a need for the revision of protocols governing post-occupation relations with the UN Relief and Works Agency (UNRWA), the UN Office for the Coordination of Humanitarian Affairs (OCHA), and others, although he suggested that understandings regarding immunity and customs should continue.

CERTIFYING AN END TO OCCUPATION: SOME OPTIONS

It is clear that the disengagement plan as it is currently contemplated does not meet an objective international legal test for ending occupation. Both the PLO's NAD and Israel's Foreign Ministry have come to this conclusion. This critical shortcoming, however, may not prove decisive in a political environment favoring some kind of recognition of Israel's *fait accompli*, particularly in the absence of a clear, articulate presentation by a united international community of specific benchmarks that must be met by Israel—most notably its surrender of effective control over the Gaza "envelope" (including air and sea access and the land route to Egypt).

Israel will remain an occupying power in the Gaza Strip as long as it maintains control of Gaza's land border with Egypt, its air traffic, and its seaport. Israel's status becomes less clear in the event that seaborne access is granted (subject to the kind of monitoring that Israel could undertake from international waters) while restrictions are maintained on land and air access or if Israel cedes effective control over the Gaza-Egypt border area (the Philadelphi corridor) but retains effective control over sea and air routes. From both the conceptual and security standpoints, however, it is probable that these elements will either remain under effective Israeli control as a group or be surrendered, if not simultaneously then at least as an integrated package.

Even if Israel remains in the Philadelphi corridor, it will attempt to secure some international, third-party recognition of the changes wrought by disengagement, at the very least recognition of its "diminished responsibility" for

Gaza. A broader disengagement would enable Israel to argue confidently that its responsibilities toward Gaza's population have ended. "I really would like to have the technical, legal international declaration that Israel is no longer responsible [in Gaza]," explained Israel's acting minister of justice Tzipi Livni. "There is a tremendous difference between if Israel stays there . . . and a situation in which Israel does everything in order to get out of there."¹⁰

According to a *Ha'Aretz* report on 22 November 2004, Israel envisages several options for defining the implications of its disengagement for its status as occupying power, including (1) a "step toward ending the occupation"; (2) a more explicit understanding of the meaning of "effective control of the area"; and (3) as part of an interim phase outlined in the Oslo accords. The first two would suggest a diminution of Israel's responsibilities as occupying power, with Israel's aim in deconstructing the nuances of "effective control" being to reduce these responsibilities still further, if not eliminate them. The third option, by establishing a diplomatic linkage between Oslo and disengagement, is unlikely to be embraced by a Sharon government.

A top Israeli national security official acknowledged that discussions with the United States about this issue have taken place (most probably with the White House National Security Council). "We expect U.S. acknowledgment," the official confirmed. U.S. acknowledgment could take the form of a "unilateral action" or be coordinated as part of an international response. In the "worst" case of the former, a U.S. statement could be issued in the context of an Israeli disengagement that leaves it in effective control of the security envelope, and thus short of the consensus view concerning the standard to be met for recognizing an end to occupation. The United States may nevertheless decide to acknowledge an end to occupation even under these conditions. According to one U.S. official, if such a decision were taken, "We can come up with a legal justification that Gaza is unoccupied."

This U.S. position would be controversial, to say the least, and would force other third parties to respond, very probably with a contrary view. One Western diplomat suggested that a Bush-Sharon exchange of letters issued under these circumstances would be "the kiss of death" and proof "of a cynical deal."

It would be most advisable if consultations were to begin now among third parties and the international organizations to chart a unified position on the issue. This cooperation is particularly important as it could exert a beneficial influence by demonstrating international willingness to address the changes created by disengagement; by demonstrating to Israel that the international community is united on the steps required in order to win an acknowledgment of an end to occupation; and by establishing a clear *quid pro quo* for Israel's surrender of effective control of the Gaza-Egypt border and for the revisiting in a similar spirit of Oslo-era protocols regarding air and sea lanes.

As for certification by the UN, Israel would "accept immediately" a UN Security Council resolution acknowledging the end of the occupation of Gaza, explained a top Israeli national security official. However, he acknowledged

that there was no chance that such a statement from the UN (as opposed to Washington) would be forthcoming as long as Israel remained in control of the security envelope. Even if Israel were to relinquish this, the official deemed a statement tailored specifically and limited exclusively to Gaza disengagement unlikely.

Israeli officials from across the institutional spectrum were similarly skeptical about the prospect or the value of UN recognition or certification, viewing the political advantage to be won as less valuable than the probable cost. Regarding a UN Security Council resolution, the legal adviser of one ministry noted that as a general matter, a UN certification on the end of occupation in Gaza would establish an (unwelcome) precedent for the West Bank by implying a need for withdrawal to the June 1967 border.

Israeli officials believe that Security Council participation should come, if at all, at the end of the process of disengagement, and not as a vehicle for establishing prescriptive guidance or for legitimizing the involvement of the UN. Other officials note that a prescriptive UN Security Council resolution, that is, one that establishes benchmarks against which to determine an end to occupation, is problematic on a number of fronts. In general, there is no Israeli confidence that such a resolution would be limited to a strict assessment of disengagement in Gaza and not raise demands for similar Israeli actions in the West Bank including East Jerusalem.

One Western diplomat suggested, however, that a note from the president of the Security Council simply acknowledging disengagement was not “a hopeless case.” One top Israeli politician noted that “to depend upon world reaction is hazardous because it is dependent upon political judgments.” He considered the UN certification of Israel’s withdrawal from Lebanon to be “a rare show of objectivity” unlikely to be repeated in the case of disengagement from the Gaza Strip.

TWO RECENT PRECEDENTS

Israel’s Withdrawal from South Lebanon

In May 2000, Israeli forces withdrew from Lebanon after twenty-two years of military occupation. The UN Security Council mandated the United Nations, in particular the UN secretary-general, to establish the requirements for the withdrawal and confirm its implementation. In a 16 June 2000 report to the Security Council, the secretary-general reiterated the “three principle requirements for confirming an Israeli withdrawal in compliance with resolution 425 (1978): (a) the withdrawal of Israeli military and civilian personnel from Lebanese territory; (b) the dismantling of Israel’s auxiliary force, known as the South Lebanon Army (SLA); (c) the freeing of all detainees from al-Khiam prison”¹¹ that had been laid out in his earlier 22 May 2000 report to the Security Council.¹² In the same 16 June report, he confirmed that “those requirements, endorsed by the Security Council, have been met.” Two days later, a statement from the council president endorsed the secretary-general’s finding. On 27 July 2000,

the Security Council adopted a new resolution welcoming the conclusions of the secretary-general.

In the case of Israel's occupation in Lebanon, the UN relied on its mandate—Security Council Resolution 425—and its objective—certifying an end to occupation, elements of which were explicitly defined by the secretary-general—in order to establish its recognized standing to judge the issue and to clearly define the requirements for confirming an end to occupation, and finally, to establish a mechanism for a determination of Israel's compliance.

In the case of certifying an end to occupation in Gaza, UN Security Council Resolutions 242, 338, 1397, and 1515 appear to offer the UN sufficient mandate and a standard—an Israeli withdrawal from territories occupied in June 1967 and the creation of secure and recognized boundaries. Less clear is the critical question of Palestinian sovereignty as called for in Security Council Resolution 1397, but, as noted above, the existence of a sovereign Palestinian government is not necessary to certify an end to the occupation.

Unlike Israel's occupation of southern Lebanon, a clear definition of the requirements to be fulfilled in order to confirm an end to occupation in Gaza has yet to be articulated. However, a standard of effective control, including a withdrawal of Israeli forces from the border with Egypt, and an end to Israeli prohibitions on use of an airport and construction of a seaport, could be adopted. Also unclear is the mechanism to be employed in determining whether Israel has met these conditions. A structure along the lines of the UN mission that fixed and certified the international border between Israel and Lebanon could be an appropriate model.

The U.S. Occupation of Iraq

In a carefully choreographed process, the U.S. military presence as the occupying power in Iraq was officially transformed in June 2004 into a U.S.-led international military force deployed as part of a “security partnership” created at the request of a newly sovereign interim Iraqi government appointed by the United States. The transformation was endorsed by the UN in Security Council Resolution 1546 (8 June 2004), which recognized the formation of a “sovereign, Interim Government of Iraq and the associated end of occupation by 30 June 2004.” Article 9 notes “the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq,” a request made in an exchange of letters between the incoming interim prime minister, Iyad Allawi, and the U.S. secretary of state, Colin Powell.

In this case, official recognition of an end to occupation proceeded in tandem with the reestablishment of Iraqi sovereignty, albeit represented by an appointed, unelected interim government. In the case of Gaza, disengagement is proceeding without formal reference to an elected but not sovereign Palestinian government. Israel (unlike the United States in Iraq) has no interest in maintaining a military presence in or along the Philadelphi corridor after disengagement, via agreement with the Palestinians or otherwise.

RECOMMENDATIONS

The international community should recognize Israeli disengagement as a positive development in the history of Israel's occupation of the Gaza Strip. For occupation to end, however, Israel must meet the "the Hague standard" by expanding the parameters of the disengagement plan to end its effective control over the Gaza Strip. Achievement of this goal requires at a minimum the end to Israel's effective security control over the Gaza-Egypt land border (the Philadelphi corridor), including the transit of goods and people.

A clear and unified adoption of this standard by the international community will increase the chances of its implementation and thus serve the interests of all parties. Efforts by individual countries to adopt a standard at odds with the international consensus could undermine this objective. If Israel fails to meet this standard, the occupation continues, albeit in a marginally different form, and Israel's responsibilities as occupying power to assure the security, safety, and welfare of those under occupation remain undiminished.

Israel's fulfillment of conditions necessary to end the occupation of the Gaza Strip, however, will create a new environment, redefining the international community's relationship to the Gaza Strip, the PA, and Israel. At a minimum, such a change will make it necessary to reestablish a workable basis for access of personnel, goods, and services to the Gaza Strip via Israel, and in some cases to redefine (if possible) the basis upon which such assistance, intervention, or monitoring occurs.

The end of occupation in the Gaza Strip will also raise issues that may highlight and complicate the absence of Palestinian sovereignty in this area, most vividly if Palestinians themselves choose not to exercise effective sovereignty there. In this event, the international community would be advised to promote the creation of a Palestinian government exercising sovereignty in the areas where occupation has ended in a manner that would not compromise the Palestinian claim to liberate those territories remaining under Israeli occupation.

Formal international recognition of an end to Israel's status as occupying power in the Gaza Strip may be advantageous for all interested parties. Ending the occupation of Gaza reduces, at the very least, the territorial dimensions of Israel's conflict with the Palestinians, for whom liberation of the occupied territories is the *sine qua non* of national life. Even if limited to the Gaza Strip, the end of occupation establishes a vital prerequisite for the exercise of Palestinian sovereignty. For the international community, any reduction in the scope of conflict between the parties that contains the ingredients of an end to occupation and the exercise of Palestinian sovereignty is to be encouraged. A formal acknowledgment of Gaza's changed status would enable the parties to focus more clearly on the considerable differences remaining between the protagonists.

Advantages attending international recognition, however, must be measured against the requirement, most keenly felt by Palestinians, to maintain the shared destiny of the West Bank, including East Jerusalem, and Gaza Strip. Concerns

about the economic implications of severing the territorial linkages established by occupation, principally the customs envelope linking Israel and the occupied territories, should not be minimized. Nevertheless, maintaining these linkages should not, and need not, come at the expense of expanding the contours of Palestinian control.

The United Nations—and more specifically the UN Security Council, its president, or the secretary-general—are the most appropriate vehicles for formally acknowledging an end to the occupation of the Gaza Strip. The particular form that such a certification should take—a Security Council resolution, a statement from the Security Council president or from the secretary-general—needs to be addressed. The standard to be employed for judging an end to occupation is easier to define: demarcation of the border separating the Gaza Strip from Israel and Egypt and an end to effective Israeli control in the Gaza Strip, including the withdrawal of all Israeli civilian and military personnel from the area (including from the Gaza-Egyptian border).

NOTES

1. The 14 April 2004 draft of the disengagement plan and related documents were published in *JPS* 33, no. 4 (Summer 2004), pp. 85–107.

2. European Union General Affairs and External Relations Council, “23 February 2004: Middle East Peace Process,” 23 February 2004, online at europa.eu.int.

3. Quartet press release, 22 September 2004, online at usinfo.state.gov.

4. Yuval Yoaz, “Legal Expert: Leaving Philadelphi Route Will Be Seen as End of Gaza Occupation,” *Ha’Aretz*, 19 December 2004.

5. See Article II and Annex I, Articles II.1.d, III.1, III.2, and IV.1 of the Egyptian-Israeli Peace Treaty, 26 March 1978. For the full text of the treaty and annexes, see *JPS* 8, no. 4 (Summer 1979), pp. 189–213.

6. “The National Action Program of Mr. Mahmud Abbas,” online at www.abumazen.info. Note the less equivocal language appearing in the PLO’s political program, adopted at the 12th session of the Palestine National Council on 8 June 1974: “2. The Palestine Liberation Organization will employ all means, and first and foremost armed struggle, to

liberate Palestinian territory and to establish the independent combatant national authority for the people over every part of Palestinian territory that is liberated. This will require further changes being effected in the balance of power in favor of our people and their struggle.”

7. Khaled Abu Toameh, “Barghouti: Disengagement Is a Win for Palestinians,” *Jerusalem Post*, 28 December 2004.

8. Communications Department, Negotiations Support Unit, PLO Negotiations Affairs Department (NAD), “The Israeli Disengagement Plan: Gaza Still Occupied,” October 2004, online at www.nad-plo.org.

9. NAD, “Israeli Disengagement Plan.”

10. Associated Press, “Study: Israel Legally Occupying Gaza Even after Pullout,” *Ha’Aretz*, 24 October 2004.

11. “Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978),” 16 June 2000, online at www.un.org.

12. “Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978),” 22 May 2000, online at www.un.org.