

“We Didn’t Want to Hear the Word
‘Calories’”: Rethinking Food Security, Food
Power, and Food Sovereignty—Lessons
from the Gaza Closure*

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“Everybody is hungry, nobody is starving.”
Chirster Nordhal¹

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1. Director of UNRWA Gaza Operations, quoted in LAILA EL-HADDAD & MAGGIE SCHMITT, *THE GAZA KITCHEN: A PALESTINIAN CULINARY JOURNEY* 26 (2013).

ABSTRACT

In the summer of 2007 Israel imposed a yet-to-be lifted closure on the Gaza Strip, restricting the movement of goods and people into and out of Gaza. Israel holds its closure policy to be legal under international law so long as it meets the humanitarian minimum standard and allows the entry of what is necessary for the subsistence of Gaza's population. Israel has repeatedly asserted that since there is no starvation in the Gaza Strip, there is no humanitarian crisis and no violation of international law.

This stance disregards power relations and the broader contexts of the closure and its effects. *Food power* is exercised not only through direct control over food supply and food availability, but also by impacting people's access to adequate food. The restrictions on the inflow of raw materials and construction materials, exports, and the movement of people have had a significant long-term effect. By crippling the Gaza economy, Israel's closure policy has impoverished the civilian population and considerably diminished *food security*.

Analyzing the situation through the framework of International Humanitarian and Human Rights Law, the article examines the relationship between food security, food power, and *food sovereignty* and the right to food. It argues that the concept of food power should be expanded to include situations like Israel's closure on Gaza. It also puts "sovereignty" back into the concept of "food sovereignty" and refers to it as a framework that complements, rather than replaces, food security.

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INTRODUCTION

In the summer of 2007, the Israeli government imposed a yet-to-be-lifted closure on the entire Gaza Strip, restricting the movement of goods and people into and out of the Strip to a “humanitarian minimum.” This came in response to the Palestinian Islamist Hamas Movement seizing control of the Gaza Strip and ousting the Fatah Movement, which had ruled there since 2005 following Israel’s disengagement from the territory, which it had occupied since 1967.² Israel holds its “economic warfare” policy to be legal under international law provided it adheres to a humanitarian minimum standard and allows what is necessary for the basic survival of the population. By sustaining a “just-above-minimum” level, made possible largely due to the involvement of international aid organizations, Israel has managed to quell international pressure to lift the restrictions. The Israeli government has repeatedly asserted that there is no starvation or hunger³ in the Gaza Strip and thus no humanitarian crisis necessitating international intervention. In other words: it is all much ado about nothing.

Official bodies of review, Israeli and international alike, have either implicitly or explicitly affirmed this stance. On a number of occasions the Israeli Supreme Court has approved the humanitarian-minimum standard and refrained from a review of the legality of the closure policy in general. The Turkel Commission, which was appointed by the Israeli government to investigate the Israeli raid on the Gaza aid flotilla in May 2010 and to examine the legality of the naval blockade of Gaza, was more direct in its concurrence with the official Israeli line. The Commission concluded that since the closure had not been imposed for the purpose of starving the civilian population, and given the Israeli government’s implementation of monitoring and protection mechanisms

2. See Iain Scobbie, *Gaza*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 280 (Elizabeth Wilmschurst ed., 2012), for a review of the disengagement and shift of power in Gaza from Fatah to Hamas.

3. As in the quote in the epigraph, “starvation” is usually used in reference to a longer-term phenomenon and the effects on the body of not having enough food, whereas the term “hunger” usually refers to the physical experience of a desire for food, which may be more short term in nature. In practice, however, the two are often used interchangeably. In this Article, we use the term that appears in the source we are citing. The humanitarian legal sources we draw on usually refer to starvation, which is considered a prohibited policy under international law. In this context, the distinction between the two terms could be the difference between the one that describes the aims of a policy (“starvation”) and the one that refers to its consequences (“hunger”). Our thanks to Harry West for helping clarify this point.

designed to prevent a humanitarian crisis in the Gaza Strip, the closure was lawful and met the proportionality requirement. The Commission significantly downplayed the data submitted by human rights organizations regarding the extremely high levels of food insecurity in Gaza that had resulted from the closure's complete devastation of the Gazan economy. The United Nations (UN)-appointed Palmer Committee reached similar conclusions in its inquiry into the closure and flotilla raid.

This Article examines the legality of the Gaza closure, in the particular form it took between 2007 and 2009, the period on which the Turkel Commission and Palmer Committee reports focused. It explores the holes and legal flaws in the Israeli stance and the two reports, all of which alluded to a minimum-humanitarian standard and assessed the closure's legality based on reductive costs-benefit and causality tests. These tests, we will argue, disregard power relations and the broader, more nuanced contexts of the closure and the food insecurity the closure generates. In contrast, we propose examining the closure and its effects in a broader and less restricted context, not only from the perspective of international humanitarian law, but also in terms of the right to food. This examination will focus on food security, food power, and food sovereignty and the role of food within the complex matrix of power relations. In the course of this analysis, we propose a revised conception of food power and food sovereignty and of their relationship to food security. In addressing food security, we adhere to the Food and Agriculture Organization (FAO) World Summit definition of the concept, namely, that food security exists "when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life."⁴

In Part I, we will discuss the Israeli policies relating to the inflow of foodstuffs into the Gaza Strip and describe the legal struggle that was waged for these policies to be made public. In Part II, we will present and analyze empirical findings on the state of food insecurity that has emerged in the Gaza Strip and the connection to the Israeli closure policy. We argue that "starvation" and "humanitarian crisis" may not be the appropriate frameworks for understanding the profound impact of the closure on the lives and, in particular, the food security of the Gaza Strip's more than 1.5 million residents. In Part III, we will focus on the findings of the Turkel Commission and Palmer Committee on the legality of the closure in general and the naval blockade in particular. We then proceed, in Part IV, to propose alternative frameworks for analyzing the issue of food security given the profound deficiencies of the "humanitarian-

4. Food & Agric. Org. [FAO], *Rome Declaration on World Food Security, Plan of Action*, ¶ 1 (Nov. 13, 1996), available at <http://www.fao.org/docrep/003/w3613e/w3613e00.htm> [hereinafter *Rome Declaration*].

minimum” standard. We will argue that while the notion of *food security*, as a corollary to the *right to food*, is crucial to fully understanding the violations of human rights entailed by the Gaza closure, the focus in this context should shift from which foodstuffs were allowed into Gaza to the impact of the closure on the population’s buying power. The arbitrary restrictions on the entry of foodstuffs undoubtedly played an important role in Israel’s show of power and significantly affected food security, which relates to people’s food preferences as well. But restrictions on the inflow of raw materials, construction materials, and exports and on the free movement of people have had a more significant long-term impact, particularly on the population’s buying power. By successfully crippling the Gaza Strip economy, Israel’s closure policy has impoverished the Gazan civilian population, considerably diminished food security there, and increased dependence on international aid. The Gaza closure thus is a unique context for examining the concept of food security, in that it involves policy aimed at undermining, rather than ensuring, food security. Understanding this is critical for comprehending why the lifting of restrictions on the entry of foodstuffs after the 2010 flotilla incident, addressed in the Article, did not remedy the problem of food security in Gaza—a crucial background factor in the most recent round of hostilities between Israel and Hamas, in the summer of 2014.

In our analysis, we will examine how food-power mechanisms are used to manipulate food transfers as a means of warfare, punishment, and humiliation of civilian populations. We will argue that the concept of “food power,” generally considered archaic and obsolete, should be revived, revised, and expanded to include situations like Israel’s exercise of power over food in Gaza, which resulted in violations of Gazans’ right to food. In the past, the term food power was usually used in reference to situations in which one State sought a coercive advantage over other States by manipulating the volume and timing of its food exports, for example by imposing a selective embargo on food exports to a target country so as to punish the latter or force it to make a policy change. In contrast, we argue that there is a need to breathe new life into this concept by expanding its scope to encompass a broader range of contexts. With regard to “food sovereignty,” we will argue that its current articulation is too narrow in scope. This is most prominent in the case of the Gaza closure, which illustrates the need for a shift in the analysis of food sovereignty, from emphasis on the ability to locally produce food and be protected against the forces of globalization to the ability to make decisions about food in ways that guarantee food security—perhaps putting the “sovereignty” back into “food sovereignty” and viewing food sovereignty as a framework that complements, rather than replaces, food security. The Conclusion will wrap up the discussion by reflecting on how the story of the Gaza closure and food security is not *only*

about food. The Israeli restrictions on the entry of foodstuffs into Gaza and, consequently, the supply of food there was only one of a number of factors—and not necessarily the most significant one—that impacted access to food and, therefore, food security.

As the Article will show, the closure of the Gaza Strip and its effect on food security raise a host of complex issues lying at the heart of contemporary international humanitarian law and international human rights law. These issues include: the application of the law of occupation in Gaza; the parallel application of international humanitarian law and international human rights law and the interrelationship between the two; extraterritorial obligations relating to human rights and, specifically, social and economic rights; and the law of armed conflict, particularly concerning naval blockades, and its relationship to the law of occupation and international human rights law. Naturally, the discussion here cannot exhaust all of these broad issues; instead we take specific stances on aspects of these issues where germane to the legal analysis of the issues and note the relevant legal sources for these stances. In the case of the Gaza closure, arguments from international law played a central role in the Israeli justification of policies whose purpose and outcome were the undermining of food security. Accordingly, we suggest that our study illustrates how legal positions taken at various junctures in time have served to entrench—and how alternative legal positions could have undermined—the legal “stamp of approval” given to these policies by the Turkel Commission and Palmer Committee. We maintain that in order to fully grasp the role of international law in protecting (or, as we argue, undermining) food security in this situation, we must examine not only the path taken by these two bodies, but also the path not taken. To this end, the Article critiques some of the prevalent modes of analysis in international humanitarian law as applied by the Turkel Commission and Palmer Committee, while proposing an alternative route anchored in humanitarian and human rights law. Under the latter approach, the usefulness of the concept of food security in assessing such situations emerges, made especially apparent by the risk that actually materialized in the Gaza case, in which a humanitarian-law analysis will consider only whether the bare minimum has been met.

I.

THE CLOSURE OF GAZA: BACKGROUND

On September 19, 2007, the Israeli Security Cabinet issued a statement declaring the Gaza Strip to be hostile territory and its decision to impose a closure on it.⁵ This decision validated a policy that had, in fact, been in force

5. Press Release, Israel Ministry of Foreign Aff., Security Cabinet Declares Gaza Hostile Territory (Sept. 19, 2007), *available at*

since Hamas had taken control of the Gaza Strip in June 2007, whereby the movement of goods and people into and out of the Gaza Strip was restricted to a so-called humanitarian minimum. Israel's declared intention was to block the passage of goods in excess of what it deemed "essential for the survival of the civilian population," thereby halting exports, economic activity, and production and preventing the entry into Gaza of items deemed "luxury."⁶ Although framed at first as "sanctions," the policy was subsequently referred to as "economic warfare."⁷ In essence, it was designed, according to Israel, to press the residents of the Gaza Strip to pressure Hamas to cease firing rockets at Israel and to release the Israeli soldier Gilad Shalit, held captive by Hamas since June 2006.⁸

Israel's ability to enforce its closure policy and determine almost entirely what and who enters or leaves the Gaza Strip is the result of its control over the Gaza Strip's borders and land crossings. Since its occupation of Gaza following the 1967 Arab-Israeli War, Israel has controlled the land crossings as well as Gaza's airspace and territorial waters. Israel has exercised this control in various manners and to different degrees over the years, in line with policy changes and the different restrictions it has enforced. This control is usually justified by reference to security needs. Despite Israel's "disengagement" from the Gaza Strip in 2005 and its subsequent declaration that it had thereby ended its occupation there, it has in fact maintained control over Gaza's borders and other significant elements of civilian life, most notably the population registry and major components of the tax system.⁹ As part of its closure policy, for example,

<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

6. Letter from Brigadier-General Eitan Dangot, Coordinator for Gov't Activities in the Territories (COGAT), IDF, to Gisha, Legal Center for Freedom of Movement (Jan. 13, 2010) (on file with authors).

7. State's Response at ¶¶ 43–44, HCJ 9132/07 Al-Bassiouni v. Prime Minister [Jan. 30, 2008] (unpublished) (Isr.), *available at*

http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/state_response_2_11_07.pdf. An unofficial English translation of these passages is available at <http://www.gisha.org/UserFiles/File/Israelusestheclosureaseconomicwarfare.pdf>.

8. See Sari Bashi, *Controlling Perimeters, Controlling Lives: Israel and Gaza*, 7 *LAW & ETHICS HUM. RTS.* 243, 272–73 (2013). Gilad Shalit was released on October 18, 2011, in exchange for 1027 Palestinians held in Israeli prisons as part of a prisoners-exchange deal. Ethan Bronner, *Israel and Hamas Agree to Swap Prisoners for Soldier*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/12/world/middleeast/possible-deal-near-to-free-captive-israeli-soldier.html?ref=giladshalit&r=0>.

9. Sari Bashi & Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* 29–62 (Gisha: Legal Center for Freedom of Movement, Position Paper, Jan. 2007), *available at* [http://www.gisha.org/userfiles/File/Report for the website.pdf](http://www.gisha.org/userfiles/File/Report%20for%20the%20website.pdf). [hereinafter Gisha, *Disengaged Occupiers*]; Sari Bashi & Tamar Feldman, *Scale of Control: Israel's Continued Responsibility in the Gaza Strip* 12–25 (Gisha, Nov. 2011), *available at* http://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf [hereinafter Gisha, *Scale of*

all border crossing points between Israel and the Gaza Strip have been shut except for the Erez Crossing, where the passage of Palestinian residents has been limited to a bare minimum, and the Kerem Shalom Crossing, which is the sole passageway for consumer goods. Moreover, since 2005, very limited movement of people has been allowed through the Rafah Crossing connecting Gaza with Egypt, and it no longer serves as a passageway for goods, as it had in the past.¹⁰ It is noteworthy, however, that the tunnels built by Palestinians underneath the Gaza-Egypt border, which were primarily used for smuggling weapons during the two intifadas, were gradually converted into passageways for smuggling goods in demand after the Israeli disengagement in 2005. This practice intensified after the tightening of the closure in 2007.¹¹ This tunnel-trade, which began as an unregulated market, evolved into a lucrative, albeit dangerous, enterprise governed by Hamas. Egypt's own closed-border policy and Hamas' control of the tunnel-trade have had some impact on the local Gaza economy and food market and contributed, in some measure, to Israel's closure of Gaza.¹² However, since their effect on the availability and accessibility of

Control].

10. Until its disengagement from the Gaza Strip in September 2005, Israel held full control of the Rafah Crossing, which was used for the limited passage of some goods, mostly aggregates, into the Gaza Strip. The Agreement on Movement and Access (AMA) between Israel and the Palestinian Authority (PA), signed in 2005, established that the Rafah Crossing would be used for the movement of people only. Israel has maintained a high degree of influence on the extent to which the Crossing is opened, which has been periodic and on an ad-hoc basis only, for a few days at a time. See Noga Kadman, *Rafah Crossing: Who Holds the Keys?* 26–27 (Gisha, Mar. 2009), available at http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf [hereinafter Gisha & PHR, *Who Holds the Keys*]. Israel's control over the opening of the Rafah Crossing lessened after the May 2010 Gaza aid flotilla events and even further following the Egyptian Revolution of 2011, when the new Egyptian government opened the Crossing to the movement of people on a regular basis, except when security considerations required otherwise. For an overview of changes in policy on the movement of people and related data, see *Movement of People via Rafah Crossing*, GISHA, http://www.gisha.org/graph.asp?lang_id=en&p_id=1235 (last visited Aug. 27, 2014). More recently, with the ousting of President Morsi and following Islamist attacks on Egyptian security forces in the Sinai Peninsula, the Egyptian Army closed the Rafah Crossing, and it has since been operating under restricted conditions. *Restricted Access at Rafah Crossing Blocks Gaza Residents' Main Route Abroad*, GISHA (July 15, 2013), http://www.gisha.org/item.asp?lang_id=en&p_id=2037.

11. The transfer of goods through underground tunnels became a lifeline for the Gaza population and a means of bypassing the blockade imposed by Israel and supported by Egypt. These tunnels gave Gaza's residents access to a wide range of commercial goods, including livestock, food, fuel, clothes, car parts, and building supplies. In 2010, it was estimated that approximately 7000 people worked on constructing over 1000 tunnels. *Egypt Strengthens Blockade on Gaza*, ALT. INFO. CTR. (Oct. 7, 2013), <http://www.alternativenews.org/archive/index.php/politics/palestinian-society/7125-egypt-strengthens-blockade-on-gaza>. Since 2011, the Egyptian military has overseen the demolition of over a thousand tunnels, most of which were destroyed in 2013, particularly in the aftermath of Morsi's ousting in July 2013. See *Egypt Sharply Increased Destruction of Tunnels to Gaza after Morsi*, WORLDTRIBUNE.COM (Oct. 7, 2013), <http://www.worldtribune.com/2013/10/07/egypt-sharply-increased-destruction-of-tunnels-to-gaza-after-morsi/>.

12. For a discussion of the responsibility of different actors, including third parties such as the

goods in Gaza has been secondary, and Israel's closure policy—particularly in the period in which restrictions were tightened—has been the primary factor, our discussion in this Article will center on the latter.

In a September 2007 decision, the Israeli Security Cabinet stated, “The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the desire to avoid a humanitarian crisis.”¹³ Hence, the closure policy was aimed at causing damage to the Gaza economy and bringing the population to the *verge* of a humanitarian crisis (a term we elaborate on below), by preventing the entry of “luxuries” but ensuring the “humanitarian minimum.”¹⁴ From the outset, then, this policy was characterized by considerable obfuscation. Other than this Cabinet decision, no information or documents on the policy and its on-the-ground implementation were released to the public. Attempts to uncover what the referred to “minimum” included and why were met with very vague, general responses. The Coordinator of Government Activities in the Territories (COGAT)¹⁵ consistently stated that Israeli “policy changes from time to time, in response to security and political circumstances.” In general, Israel allowed the entry of the basic commodities necessary for the survival of the population, including basic foodstuffs, medicine, and hygiene products.¹⁶

The underlying principles of this policy were challenged early on, in October 2007, in a petition brought before the Israel Supreme Court by a group of ten Palestinian and Israeli human rights organizations together with residents of the Gaza Strip. In *Al-Bassiouni v. Prime Minister*, which focused on the restrictions on the supply of fuel and electricity to the Gaza Strip,¹⁷ the petitioners argued that the deliberate worsening of the quality of life of the inhabitants of the Gaza Strip to a state of minimal existence for the sole purpose

European Union and the United States, for the closing of the Rafah Crossing, see Gisha & PHR, *Who Holds the Keys*, *supra* note 10, at 143–75.

13. See *supra* note 5.

14. Adi Ophir, *The Politics of Catastrophization: Emergency and Exception*, in CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS 59, 77–82 (Didier Fassin & Mariella Pandolfi eds., 2010). See also ARIELLA AZOULAY & ADI OPHIR, *THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE* 170–79 (2012).

15. This is a high-ranking army officer in charge of the implementation of the Israeli government's policy vis-à-vis the Occupied Palestinian Territory, including the blockade imposed on the Gaza Strip.

16. COGAT, Response to Gisha's Freedom of Information Request to Reveal Closure Policy Documents (Jan. 13, 2010), available at <http://www.gisha.org/UserFiles/File/LegalDocuments/meida/COGATresponse.pdf>.

17. HCJ 9132/07 *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.), unofficial English translation available at http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/ElectricityPetition9132-07_English.pdf.

of putting pressure on Hamas constitutes collective punishment which is strictly prohibited under international law regardless of whether or not a humanitarian crisis has arisen on the ground.¹⁸ In its response, the state claimed that its closure policy is a legitimate form of “economic warfare,” and it presented a set of calculations it had used to establish the minimum humanitarian fuel needs in the Gaza Strip, including industrial diesel for the power plant.¹⁹ Yet this minimum was knowingly calculated based on figures below the average, but above the minimum need for electricity in the Gaza Strip and, therefore, reflected an intentional policy to exacerbate the chronic shortage of electricity in Gaza.²⁰

The Supreme Court ruled that Israel’s positive obligations towards the Gaza Strip are based on three factors: (1) its control over the land crossings and borders; (2) Gaza’s almost complete dependency on Israel to supply its electricity, which had developed over the course of the prolonged occupation; and (3) the ongoing state of belligerence in Gaza.²¹ In the end, however, the Court authorized the electricity and fuel restrictions, based on the State’s calculations. In so doing, it gave its stamp of approval to the closure policy in its entirety and de facto accepted the “humanitarian-minimum standard” as a legitimate benchmark.²²

The *Al-Bassiouni* case brought a host of legal issues to the forefront, including the legitimacy of using a closure as a means of war to weaken a civilian population, and the obligations a State bears when it yields power and control over such a population. Moreover, it raised questions regarding the very use of the humanitarian minimum as a standard, but this issue was addressed only in the context of its calculations with regard to fuel supplies and not regarding the limitations placed on foodstuffs and other civilian commodities.

18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 43, Aug. 12, 1949, 75 U.N.T.S. 287 (explicitly prohibiting collective punishment); *See also* Brief for Petitioner, *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.) *unofficial English translation available at* http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/ElectricityPetition9132-07_English.pdf.

19. *See* State’s Response, *supra* note 7.

20. For Gisha’s response to the State’s position in *Al-Bassiouni*, including the calculations of electricity consumption, *see* http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/response_27_11_07_no_detail.pdf.

21. *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.) *unofficial English translation available at* <http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/HCI913207EnglishVerdictfinal.pdf>. *See also* Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, 42 ISR. L. REV. 10 (2009) (analyzing the verdict).

22. *See* *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.), *supra* note 20.

Although never officially made public, over time, the details of the closure policy became more apparent from its implementation in practice. Coordination officers and merchants on the Palestinian side gradually learned through direct experience which imports into the Gaza Strip were permitted and which were forbidden.²³ The list of permitted items expanded over time. In the beginning, in 2007, imports were restricted to fifteen very basic categories of items.²⁴ This gradually increased to approximately thirty categories by 2008 and forty-one by 2009.²⁵ Imports continued to expand more intensively until June 2010, when many of the restrictions on the entry of civilian goods were completely lifted following the May 2010 flotilla events.²⁶

In the period between 2007 and 2010, some products were excluded from the list of permitted imports apparently because they were designated a “luxury” by the Israeli government, such as chocolate and sweets. Other changes could be explained as an attempt to hurt the local industry and cripple the economy, such as banning the import of industrial margarine but allowing margarine in small consumer packages. However, some of the changes seemed completely arbitrary

23. Merchants as well as Palestinian coordination officers became familiar with the details of Israel’s policy through trial and error and gradually adjusted their orders to match the restrictions. For example, a local merchant who knew that Israel had not been allowing the transfer of biscuits and stationery for a long time simply stopped ordering those products. The coordination officers who knew that Israel was systematically preventing the entry of toys simply did not make requests for their transfer. According to these officers, they occasionally made requests for products that they knew Israel had been denying for a long time in order to check whether the policy had changed. If their requests were denied, they knew not to request the items for the time being. *See Partial List of Items Prohibited/Permitted into the Gaza Strip*, GISHA (June 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=1110.

24. These included wheat and flour, sugar, frozen foods (including frozen meat), dairy products, rice, fruits and vegetables, vegetable oil, pharmaceuticals, and fuel supplies. *See WFP, Rapid Food Security Needs Assessment in Gaza Strip: Effect of Import Restrictions and Freeze on Exports on the Food Security in Gaza Strip—Survey Report 6* (Dec. 2007), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp171915.pdf>.

25. Israel expanded this list using information from the Palestinian Authority’s coordination and liaison office. Since 2009, more accurate lists have been compiled by PALTRADE and Gisha, *see supra* note 23. For lists of permitted goods obtained from COGAT following a freedom of information petition filed by Gisha, Physicians for Human Rights-Israel, and HaMoked: Center for Defense of the Individual, see AdminC (TA) 22775-02-11 *Gisha v. COGAT* (unpublished) (Isr.). Links to the documents obtained from COGAT can be found on the Gisha Info Sheet, *A Guide to the Gaza Closure: In Israel’s Own Words 6* (Gisha Info Sheet, Sept. 2011), available at http://www.gisha.org/UserFiles/File/publications/gisha_brief_docs_eng_sep_2011.pdf.

26. Press Release, Isr. Ministry of Foreign Aff., Prime Minister’s Office Statement Following the Israeli Security Cabinet Meeting (June 20, 2010), available at http://www.mfa.gov.il/mfa/pressroom/2010/pages/prime_minister_office_statement_20-jun-2010.aspx. *See also Reconstructing the Closure: Will Recent Changes to the Closure Policy Be Enough to Build in Gaza?* (Gisha, Dec. 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=1106. *See infra* notes 60-67 an accompanying text for an elaboration on the shift in the closure policy following the flotilla event of May 2010.

and unrelated to any of the declared or attributed rationales for the closure. Such was the case with ground coriander, which was no longer allowed into Gaza, whereas other herbs, like hyssop, were permitted.²⁷

The list of items permitted for import into Gaza was, therefore, never a fixed one. Even in the period during which the list expanded, it was subject to constant change, with some products added and others removed. This instilled in Gazans a strong sense of uncertainty and complete lack of control over their food choices.²⁸ Some of the additions to the list were even made to further Israeli economic interests, such as protecting the market prices of local Israeli farmers with excess agricultural produce.²⁹ Other items were added purely due to international political pressure. For example, Israel had continuously banned the entry of pasta into the Gaza Strip until the direct intervention of John Kerry, at the time a U.S. Senator, when he discovered this item was prohibited while rice was being allowed in.³⁰

27. Amira Hass, *Why Won't Israel Allow Gazans to Import Coriander?*, HAARETZ, May 7, 2010, <http://www.haaretz.com/print-edition/news/why-won-t-israel-allow-gazans-to-import-coriander-1.288824>.

28. See Bashi, *supra* note 8, at 258–63, describing some of these fluctuations as reflected in documents released pursuant to the freedom of information petition after the easing of the closure, and see further discussion at *infra* notes 41–53 and accompanying text. Some of the documents included weekly instructions to military officials as to which goods should be permitted. Bashi argues that these documents expose the “hyper-categorization” of the quota policy.

29. See Uri Blau & Yotam Feldman, *Gaza Bonanza*, HAARETZ, June 11, 2009, <http://www.haaretz.com/gaza-bonanza-1.277760> (exposing the different Israeli economic interests involved in the closure policy and identifying its economic beneficiaries). The authors noted,

Summaries of the discussions about entry of food into Gaza show just how deeply the captains of the defense establishment seem to care about the income of Israeli farmers. Hence, in a discussion that took place in the office of Deputy Minister Vilnai, it was decided that every day, 15 trucks filled with agricultural produce would be brought in. “The problem right now is the emphasis on melons and fruit in general,” Agriculture Ministry Director General Yossi Yishai said at the meeting. At the conclusion of the discussion, Vilnai instructed that three trucks with melons be brought into Gaza each week, “So as not to cause a market failure in Israel.”

Furthermore, a senior COGAT officer was quoted in the article as saying, “There was a vague, unclear policy, influenced by the interests of certain groups, by this or that lobby, without any policy that derived from the needs of the population. . . . What happened was that the Israeli interest took precedence over the needs of the populace.”

30. See Avi Issacharoff & Barak Ravid, *Clinton Warns Israel over Delays in Gaza Aid*, HAARETZ, Feb. 25, 2009, <http://www.haaretz.com/print-edition/news/clinton-warns-israel-over-delays-in-gaza-aid-1.270882>:

[W]hen Senator John Kerry visited the Strip, he learned that many trucks loaded with pasta were not permitted in. When the chairman of the Senate Foreign Affairs Committee inquired as to the reason for the delay, he was told by United Nations aid officials that “Israel does not define pasta as part of humanitarian aid—only rice shipments.” Kerry asked Barak about the logic behind this restriction, and only after the senior U.S. official’s intervention did the defense minister allow the pasta into the

Some food products were dropped from the list for no apparent reason. Fresh meat and cattle were initially allowed in, albeit subject to strict quotas, but prohibited altogether after the Israeli “Cast Lead” military operation in the Gaza Strip in early 2009.³¹ This ban, compounded by the widespread damage to livestock, sheep, and poultry farms in Gaza during the military operation,³² and the restrictions on access to grazing land in the “buffer zone” along the Israel-Gaza border significantly reduced the availability of fresh meat in Gaza.³³ The frequent power cuts in Gaza—resulting from Israel’s “humanitarian minimum” policy—also contributed to the shortage, since meat and dairy products could not be properly stored.³⁴ Although limited amounts of cattle and small ruminants were brought into Gaza from Egypt through the tunnels, much of the livestock was diseased and posed a public health risk, exacerbated by the unreliable veterinary vaccines in Gaza due to the closure.³⁵ As a consequence, fresh meat became scarce and unaffordable for most Gazan households,³⁶ who were forced to resort to frozen meat, thereby reducing the quality of their food.

Strip.

31. Initially, Israel restricted the entry of cattle into Gaza to 300 calves per week, with some exceptions, for example, during Ramadan. However, after Operation Cast Lead, Israel decided to halt all imports of calves into the Gaza Strip, except for occasional “humanitarian gestures” on Muslim holidays. Consequently, the Israeli company Mitrael and its Palestinian business partner in Gaza, Al-Afana Brothers, petitioned the Israel Supreme Court to revoke the ban. H CJ 2650/09 Mitrael vs. Ministry of Agric. (Apr. 1, 2009) (unpublished) (Isr.). The Court rejected the petition saying that the closure policy is a political-security matter and that since the humanitarian needs of the population are not compromised, there is no justification for the Court to intervene in the government’s decision.

32. WFP & FAO, *2010 Socio-Economic and Food Security Survey: West Bank and Gaza Strip, Occupied Palestinian Territory* 16 (Feb. 2011), available at <http://home.wfp.org/stellent/groups/public/documents/ena/wfp232398.pdf> [hereinafter WFP & FAO, *2010 Socio-Economic and Food Security Survey*]; WFP & FAO, *Report of the Rapid Qualitative Emergency Food Security Assessment (EFSA)—Gaza Strip* 4, 12 (Feb. 24, 2009) [hereinafter WFP & FAO, EFSA], available at http://www.ochaopt.org/documents/opt_food_wfp_fao_rapid_food_security_assessment_efs_a_feb_2009.pdf.

33. FAO, *Gaza’s Farmers Unable to Recover from Operation Cast Lead* (Mar. 2009), <http://unispal.un.org/UNISPAL.NSF/0/6E287317A63CA2FA8525759100436788#sthash.LbUkyjq6.dpuf>.

34. Palestinian Center for Human Rights, *Food Prices Double in Besieged Gaza*, THE ELECTRONIC INTIFADA (Mar. 27, 2008), <http://electronicintifada.net/content/food-prices-double-besieged-gaza/3343>.

35. See Special Focus Rep. of the U.N. Office for the Coordination of Humanitarian Aff. [OCHA], *Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip* 10 (Aug. 2009), available at <http://unispal.un.org/UNISPAL.NSF/0/0DFF75BB11E6929285257612004B4859>.

36. See, e.g., FAO, *The Humanitarian Situation in Gaza and FAO’s Response* (Jan. 23, 2009), available at http://www.fao.org/fileadmin/templates/tc/tce/pdf/FAO_brief_on_Gaza_23_Jan_09.pdf; Erica Silverman, *Festive Season Highlights Deprivation in Gaza*, AL-JAZEERA (Nov. 9, 2011, 5:14 PM),

Israeli policymakers gave no consideration to whether omitting fresh meat from Gazans' daily menu would accord with the local culinary culture or how it might impact their preferences and, thus, diets. As policymakers repeatedly stated, the basic "food basket" was designed to meet the "humanitarian needs" in Gaza³⁷—no more, and no less. The effect of this indifference is exemplified by the case of tahini, ground sesame paste. In Gaza, red tahini is a staple made from toasted sesame with a distinct color and rich flavor. During some periods, sesame seeds were banned as an import into Gaza and entered mostly by way of the tunnels from Egypt. This drove the price of Gazan-made tahini above that of Israeli-produced tahini, which was allowed as an import into Gaza, making the Gazan product unaffordable to those who cherished it. The dependency on tahini imported from Israel thus undermined local traditions³⁸ in a way that impaired food security, as we explore below. Even more impactful to the Gazan diet has been the fact that the international aid agencies in Gaza distribute mainly white flour and fewer traditional grains, like frika (green wheat), burghul, and barley. Due to the Gazan population's dependence on aid agencies for food, these nutritive grains have been almost entirely eliminated from their diet,³⁹ undermining both the local cultural cuisine and nutrition.

For over two years, the Israeli government denied the existence of lists of permitted and forbidden products. In 2010, a freedom-of-information petition to the Tel Aviv Administrative Court forced it to admit to and publicize these lists as well as other, ancillary documents concerning the closure policy.⁴⁰ The documents were released by the Coordinator of Government Activities in the Territories (COGAT) only after the amendment of the closure policy subsequent to the May 2010 flotilla incidents. This also led to the disclosure of the mechanisms used to implement the closure. The list of allowed and prohibited items presented by the State was the expanded one in effect on the eve of the flotilla incident on May 30, 2010 and was a significant improvement relative to the 2008–2009 restrictions on imports. The two other documents that were disclosed along with the list were entitled "Permission to Transfer Goods into the Gaza Strip" and "Procedure for Monitoring and Assessing Inventories in the

<http://www.aljazeera.com/indepth/features/2011/11/2011119132516295366.html>. See also OCHA, *supra* note 35.

37. See the State's response to the *Mitrael* petition. HCJ 2650/09 *Mitrael vs. Ministry of Agriculture* unpublished, ¶ 3 [2009] (Isr.).

38. EL-HADDAD & SCHMITT, *supra* note 1, at 5, 31.

39. *Id.* at 56.

40. AdminC (TA) 2744/09 *Gisha v. Ministry of Defense* (unpublished [2009]) (Isr.). Due to *Gisha's* Petition: Israel Reveals Documents Related to the Gaza Closure Policy, GISHA (Oct. 21, 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=517. An unofficial English translation of these documents is available at <http://www.gisha.org/UserFiles/File/HiddenMessages/DefenseMinistryDocumentsRevealedFOIAPetition.pdf>.

Gaza Strip.” These documents described the policy on the entry of goods into Gaza and included formulas applied in its implementation. Although both documents were officially classified as drafts, they, in practice, constituted instructions for Israeli authorities and were in effect until the government changed its policy.⁴¹ As explained in the first document, the rules and formulas were designed to allow the entry into Gaza of goods that would “supply the basic humanitarian needs of the Palestinian population.” The document enumerates seven considerations to be weighed when determining which goods should be permitted: (1) security needs; (2) the necessity of the product to meet humanitarian needs, including public health (in the Gaza Strip and Israel); (3) the perception of the product as a luxury or non-luxury item; (4) legal obligations; (5) the consequences of the use made of the product (for preservation, reconstruction, or development), with an emphasis on the impact of its transfer on the status of the Hamas government; (6) sensitivity to the concerns of the international community; and (7) the existence of alternative products.⁴²

The quantities of goods to be allowed into the Gaza Strip were determined using a “breathing room” formula developed by COGAT authorities to calculate the number of days remaining until the supply of any given product ran out in Gaza. There were two types of thresholds: the “upper warning line” and the “lower warning line.” The “upper warning line,” which identified surpluses, was defined as an inventory exceeding twenty-one days for products with a short shelf life and eighty days for those with a long shelf life. COGAT maintained, however, that this parameter was never put to any practical use. The second “lower warning line” identified shortages; it was defined as an inventory of less than four days for products with a short shelf life and less than twenty days for products with a long shelf life. If supplies dropped below the determined threshold, there was a set of procedures in place to ensure entry of the product into Gaza, unless it was subject to a policy of targeted restriction. The formula was based on data gathered weekly on food products, animal feed, and fuel supplies entering Gaza, as follows:⁴³

Daily consumption per capita per product = A

Gaza Strip population = B

41. Amira Hass, *Israel Releases Papers Detailing Formula of Gaza Blockade*, HAARETZ (Oct. 26, 2010, 1:35 AM), <http://www.haaretz.com/print-edition/news/israel-releases-papers-detailing-formula-of-gaza-blockade-1.321154>.

42. *Id.*

43. COGAT, PROCEDURE FOR MONITORING AND ASSESSING INVENTORIES IN THE GAZA STRIP, App. B (Apr. 2009), available at <http://www.gisha.org/UserFiles/File/HiddenMessages/DefenseMinistryDocumentsRevealedFOIAPetition.pdf> (unofficial English translation).

Daily Consumption = C

A x B = C

Daily quantity of relevant product entering the Gaza Strip = X

Existing reserves in the Gaza Strip (minus amount transferred the same day) = Y

Quantity of reserves in the Gaza Strip = Z

X + Y – C = Z

Breathing space (in days) = D

Z / C = D⁴⁴

The documents further revealed that the Israeli government had approved “a policy of deliberate reduction” of the supply of basic goods in the Gaza Strip even below the lower warning line.⁴⁵ The government claimed that such a reduction had never been authorized in practice, and it did not specify just what these “basic goods” were.⁴⁶

COGAT was also eventually forced to release another document, “Food Consumption in the Gaza Strip—Red Lines” (the “Red Lines Document”). This document, first exposed in a June 2009 investigative report in the Israeli daily *Haaretz*,⁴⁷ was only fully and formally released to the public in September 2012.⁴⁸ Drafted in January 2008, it summarized work that security authorities conducted in collaboration with the Israeli Ministry of Health analyzing the

44. Eyal Weizman translates this formula into what he calls “simple language” as follows: “[I]f you divide food in the Strip by the daily consumption needs of residents, you will get the number of days it will take before people run out of basic provisions and start dying.” EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* 84-85 (2012).

45. See COGAT, *supra* note 43, art. 4.h.4.

46. See Gisha, *supra* note 40.

47. See Blau & Feldman, *supra* note 29 (exposing the various Israeli economic interests involved in the closure policy and identifying its beneficiaries).

48. “*Red Lines*” Presentation: *New Details About the Old Policy, While the Current Policy Remains Shrouded in Secrecy*, GISHA (2012), http://www.gisha.org/item.asp?lang_id=en&p_id=1699. This occurred following the Israeli Supreme Court’s decision in *Ministry of Defense v. Gisha*, APA 11/3300 *Ministry of Defense v. Gisha* unpublished [2012] (Isr.), in which it held that the army must release the document under the Freedom of Information Act. An unofficial English translation of the Red Lines Document is available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

regular food consumption of Gaza Strip residents. The document presented calculations made by the Ministry of Health determining the number of calories and quantities of various basic food items Gaza residents required to subsist, by age and gender. These figures were, in turn, used to calculate the number of trucks needed daily and the details of their contents to meet this consumption level, taking into account local production of vegetable produce, dairy, and meat products.⁴⁹

COGAT claimed that this was simply a draft document that had never been used in actual decision-making.⁵⁰ Yet the quantities calculated and presented therein corresponded precisely to some of the quotas set for imported goods during the relevant time period. In fact, in the early stages of the closure, immediately after Hamas took control of the Strip, even fewer quantities of goods were cleared for entry into Gaza than what the Red Lines Document allowed for. The calculations in the Document led to the conclusion that 106 trucks transporting food from Israel five days a week would be necessary to supply Gaza's residents with the "daily humanitarian portion."⁵¹ In the first year after Hamas' takeover and the tightening of the closure (July 2007 to June 2008), however, an average of only 90 trucks entered the Strip every scheduled working day.

These heavy restrictions, deemed "economic warfare" by Israeli government officials, did, indeed, cause the collapse of the local economy in Gaza. The closure policy not only led to shortages of basic affordable commodities, but also created a constant cloud of uncertainty as to their future availability. The policy also had a devastating impact on local industry and other means of self-sufficiency. The prevention of entry of raw materials for local industry created an acute shortage, which forced the Palestinian Federation of Industries to close or operate at minimum capacity over ninety percent of the factories it owned in Gaza.⁵² This significantly diminished self-sufficiency in

49. *Reader: Food Consumption in the Gaza Strip—Red Lines 6–7* (Gisha Position Paper, Oct. 2012), available at <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>. See slides 6 and 7 in the unofficial English translation, available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

50. In an appeal to the Israel Supreme Court, contesting the District Court's decision ordering the release of the Red Lines Document, the State claimed that rather than adopting the "red lines" model, it had adopted a uniform model for determining the passage of essential goods into the Gaza Strip and assessment of their supply, while identifying any deficiencies and determining thresholds as had been elaborated in the previously released documents APA11/3300 Ministry of Defense v. Gisha unpublished at ¶ 16 [2012] (Isr.).

51. Gisha, *supra* note 48.

52. Immediately following the enforcement of the closure policy, between June and October of 2007, half of the food production plants that belonged to the Palestinian Federation of Industries in Gaza ceased operation. The rest of the plants continued to operate but at 30% of their capacity. The Palestinian Central Bureau of Statistics (PCBS) documented a 26.6% drop in the rate of

Gaza and intensified dependence on imported, primarily Israeli-made products.⁵³

In addition to restricting the entry of goods, Israel also restricted Gaza residents' access to farmlands located on the Gaza-Strip side of what is known as the "Green Line"⁵⁴ and to fishing areas off the Gazan coast,⁵⁵ allegedly for

employment in the agriculture and fishing sectors in Gaza. Gisha, *supra* note 49, at 7. With the partial easing of the closure in June 2010, the renewed access to formerly restricted goods, including raw materials, resulted in a limited reactivation of the manufacturing sector. According to the PCBS, between the second and fourth quarters of 2010, approximately 1200 new jobs were added in the manufacturing sector, increasing the number of employees from 7300 to 8500. This, however, was less than half the number of employed workers in the second quarter of 2007, prior to the blockade (18,500 people). Special Focus Rep. of OCHA, *Easing the Blockade—Assessing the Humanitarian Impact on the Population of the Gaza Strip* (Mar. 2011), available at http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf.

53. According to Gisha, as part of its "economic warfare" on Gaza, Israel prohibited the transfer of large blocks of margarine intended for industrial usage but allowed in small packages of margarine for household consumption; it banned the transfer of rubber, glue, and nylon, which are used in the production of diapers in the Strip, yet allowed the transfer of diapers produced in Israel; and it prevented the transfer of industrial salt, glucose, and plastic containers used to produce tahini paste, but allowed in Israeli-made tahini. *Three Years of Gaza Closure—By the Numbers*, GISHA (June 14, 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=537.

54. The Agreement on the Gaza Strip and the Jericho Area between Israel and the Palestine Liberation Organization (PLO) from May 4, 1994 (known as the "Gaza-Jericho Agreement"), which was a follow-up treaty to the 1993 Oslo Accords, established a 1000-meter-wide "security perimeter" on the Gaza side of the Green Line, designed to prevent the entry of people into Israel. In practice, restrictions on access to land have gradually increased since the beginning of the Second Intifada in September 2000; Israel has been enforcing a "no-go zone" of 0–500 meters, where access is totally prohibited and poses an extreme threat to life and a "high-risk zone," which encompasses the area stretching between 500 to 1000–1500 meters from the fence, depending on location. Between November 2012 and August 2013, 5 Palestinians were killed by Israeli forces and 125 injured when they entered one of these zones. Rep. of OCHA, *Protection of Civilians Weekly Report*, Aug. 6–12, 2013 OCHA (Aug. 2013), available at http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_08_15_english.pdf. See also OCHA & WFP, *Between the Fence and the Hard Place: The Humanitarian Impact of Israeli-Imposed Restrictions on Access to Land and Sea in the Gaza Strip* (Aug. 2010), available at <http://unispal.un.org/UNISPAL.NSF/0/E7B7B421E7EFB3E585257784004D704A>; OCHA, *The Monthly Humanitarian Monitor*, at 6 (Nov. 30, 2011), available at http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2011_12_15_english.pdf. Following the Egyptian-brokered ceasefire agreement between Israel and Hamas in early February 2013, Israel announced that Gazan farmers would be allowed access to land up to 100 meters from the fence, but a few weeks later moved this back to 300 meters and clarified that those wanting to farm closer to the fence needed to coordinate with the Israeli authorities. Fares Akram & Jodi Rudoren, *Gaza Farmers Near Fence with Israel Remain Wary*, N.Y. TIMES, June 7, 2013, http://www.nytimes.com/2013/06/08/world/middleeast/palestinian-farmers-in-gaza-buffer-zone-remain-wary.html?_r=3&.

55. Restrictions on access to maritime areas were imposed, in varying forms, throughout Israel's occupation of the Gaza Strip. Under the terms of the 1994 Gaza-Jericho Agreement, *supra* note 54, maritime areas twenty nautical miles off Gaza's coast into the Mediterranean Sea were to be open (under certain conditions) to Palestinians for fishing, recreation, and economic activities.

security reasons.⁵⁶ Overall, the restricted areas on land were estimated, in 2010, as amounting to seventeen percent of the Strip's total land mass and thirty-five percent of its agricultural lands. Gazan fishermen, in turn, were completely prevented from accessing almost eighty-five percent of the maritime areas to which they are entitled access under the 1994 Gaza-Jericho Agreement.⁵⁷ The deep channel through which great schools of fish migrate runs nine miles off the coast of Gaza, so the limitations on access dramatically reduce available catches, "forcing today's fishermen to cull from shoreline waters the undersize and juvenile fish that would guarantee future prosperity."⁵⁸ These restrictions have had a direct impact on many Gazans and hinder overall economic self-sufficiency in Gaza.⁵⁹

In June 2010, bowing to the international pressure generated by the flotilla incident, which had been part of a symbolic attempt to break the naval blockade

However, over time, the fishing zone was further reduced, first to twelve miles of the Gaza coast, then to ten and six, and, up until recently, to three. Violators of these restrictions face violent harassment from the Israeli navy, including gunfire, arrest, and seizure of their vessels. *See* OCHA & WFP, *supra* note 54.

56. Israel claims that these security needs include in particular prevention of the entry of contraband by sea. However, the frequent changes to the restrictions and their correlation with general trends in the closure policy indicate that these measures are a means of control and not driven solely by a concrete military objective. For example, in November 2012, the ceasefire agreement between Israel and Hamas following Operation Pillar of Defense eased the restrictions on the movement of farmers and fishermen in the Gaza Strip. Among other things, it was agreed that the Israeli military would allow Gaza farmers to cultivate plots located up to 100 meters from the Israel-Gaza perimeter fence and that fishermen would be able to fish up to six nautical miles off the Gaza coast, as opposed to the three-mile limit imposed prior to Operation Pillar of Defense. *Access Eased for Gaza Farmers and Fisherman*, B'TSELEM (Nov. 27, 2012), http://www.btselem.org/gaza_strip/20121127_restrictions_eased. *See also The Gaza Cheat Sheet: Real Data on the Gaza Closure* (Gisha, Jan. 21, 2013), available at http://www.gisha.org/UserFiles/File/publications/gaza_info/Info_Gaza_Eng.pdf.

57. *See also supra* note 55.

58. EL-HADDAD & SCHMITT, *supra* note 1, at 108. In March 2013, in response to rockets fired from the Gaza Strip into southern Israel by Palestinian militant groups, Israel reinstated tighter restrictions, which were then relaxed again in May 2013. OCHA, *The Monthly Humanitarian Monitor* (Mar. 2013), available at http://reliefweb.int/sites/reliefweb.int/files/resources/ocha_opt_the_humanitarian_monitor_2013_04_29_english.pdf; *see also Israel Expands Fishing Zone from Three to Six Nautical Miles*, GISHA (May 21, 2013), http://www.gisha.org/item.asp?lang_id=en&p_id=1984.

59. According to a UN study conducted in 2010, an estimated 178,000 people—twelve percent of the Gaza Strip population—were directly affected by the access regime implemented by the Israeli military. OCHA & WFP, *supra* note 54, at 5. Currently, according to the Gaza fishermen's union, more than 12,000 individuals earn their living directly in the fishing industry, and many others earn their living indirectly from it, such as carpenters, boat owners, and merchants. *Gaza 2013: Snapshot*, GISHA (June 2, 2013), <http://www.gazagateway.org/2013/06/gaza-2013-snapshot/>. Inland fish farms have sought to compensate for the lack of sea fish, but the local population is less inclined to consume farmed fish, as locals claim "it tasted like mud!" EL-HADDAD & SCHMITT, *supra* note 1, at 108.

on Gaza, the Israeli authorities released a long list of goods banned from import, including dual-use items and commodities such as construction materials, and declared that all other civilian goods would now be allowed into Gaza.⁶⁰ Thus, rather than prohibiting the entry of all commodities except those specifically permitted, the new policy generally allowed the transfer of all civilian commodities except those specifically prohibited. Over the last few years, further changes have been made to ease the restrictions.⁶¹ For example, there are no longer restrictions on the entry of food into the Gaza Strip, and Israel is no longer counting calories. However, many restrictions do remain in place, mainly on exports from the Gaza Strip into Israel,⁶² on the marketing of goods from the Gaza Strip in Israel and the West Bank,⁶³ and on the movement of people between Gaza and the West Bank.⁶⁴ The Kerem Shalom Crossing between Gaza and Israel is still the only crossing point open for the movement of goods in and out of the Strip. Gaza's dependence on the goods coming in from Kerem Shalom has increased over the last few years, as the Egyptian military has been systematically demolishing the underground tunnels connecting Gaza and Egypt, particularly since mid-2013.⁶⁵ These tunnels were used to transport whatever was short on supply and high in demand in Gaza.⁶⁶ With the easing of the Israeli closure in June 2010 and the subsequent increase in availability of consumer goods, the tunnels were used mainly to bring in fuel, which is much cheaper in Egypt than in Israel, and construction materials, which were still highly restricted by Israel.⁶⁷

Thus, although there is no shortage of food in Gaza, the poverty rate, which peaked at almost 50% in 2007,⁶⁸ was still a staggering 38.8% in 2011,⁶⁹ because

60. The updated policy and list of prohibitions can be found at the COGAT website, COGAT, RESTRICTED IMPORT LIST: GAZA STRIP 2013 (2013), available at http://www.cogat.idf.il/Sip_Storage/FILES/4/4014.pdf.

61. Sari Bashi, *What's Changed Since the Gaza Ceasefire*, DAILY BEAST, Jan. 17, 2013, <http://www.thedailybeast.com/articles/2013/01/17/what-s-changed-since-the-gaza-ceasefire.html>.

62. In 2012, approximately twenty-two truckloads of goods exited Gaza per month, about two percent of what had been exiting monthly prior to the closure. *The Gaza Cheat Sheet: Real Data on the Gaza Closure*, GISHA (Gisha, Jan. 21, 2013), available at http://www.gisha.org/UserFiles/File/publications/gaza_info/Info_Gaza_Eng.pdf.

63. *Id.*

64. *What Is the "Separation Policy"?* 5 (Gisha Position Paper, June 2012), available at <http://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>. See also *Graphing 5 Years of Closure* (Gisha Info Sheet, June 2012), available at <http://www.gisha.org/UserFiles/File/publications/5years/5-to-the-closure-eng.pdf>.

65. See *supra* note 11.

66. See discussion in notes 10–12, *supra*, and accompanying text.

67. OCHA, *The Monthly Humanitarian Monitor* (Dec. 2012), available at http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2013_01_28_english.pdf.

68. THE WORLD BANK, *COPING WITH CONFLICT: POVERTY AND INCLUSION IN THE WEST*

of commerce and movement restrictions that hindered the rehabilitation of infrastructures and economic development in Gaza. Today, over 70% of the population still relies on humanitarian aid.⁷⁰ This dire economic situation, caused to a large extent by the Israeli closure, has been the major cause of food insecurity in the Gaza Strip, which subject we now proceed to, in Part II.

II.

FOOD INSECURITY IN GAZA: ON THE VERGE OF A HUMANITARIAN CATASTROPHE

Much of the debate on food security in Gaza has focused on the prohibitions on the entry of certain foodstuffs into Gaza, as described in Part I. Yet *food insecurity*⁷¹ in the Gaza Strip is in fact the result, first and foremost, of the lack of economic access to, rather than the unavailability of, food in the local markets. According to the Food and Agriculture Organization (FAO) and the World Food Programme (WFP), Gaza residents' economic access to food is constrained by a combination of "(i) artificially high food prices due to inflated transportation costs and dependence on Israeli imported goods, and (ii) low purchasing power due to the lack of well-paid jobs, business and investment

BANK AND GAZA (2011), available at <http://go.worldbank.org/JKWJB8XGB0>.

69. PALESTINIAN CENTRAL BUREAU OF STATISTICS, ON THE EVE OF THE INTERNATIONAL POPULATION DAY (July 11, 2012), available at http://www.pcbs.gov.ps/Portals/_pcbs/PressRelease/int_Pop_2012e.pdf. According to the UN Development Programme, in 2012, 79.4% of the Gaza Strip population was living below the poverty line (\$2 per day). U.N. Development Programme, *Fast Facts* (Nov. 2012), <http://www.undp.ps/en/newsroom/publications/pdf/other/Gazafactsheet2012.pdf>.

70. *The Gaza Cheat Sheet: Real Data on the Gaza Closure* (Gisha, Jan. 19, 2015), available at http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf.

71. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32, at 5:

The definition of food insecurity in the [occupied Palestinian territory] combines income and consumption levels measured in USD per adult equivalent per day. It also includes whether there has been no change or a decrease in food and non-food expenditures. As such, the measurement of food insecurity considers only the problem of economic access to food and essential non-food items resulting from the lack of income-earning possibilities for Palestinian households. Other dimensions of food security, including food availability and food consumption, are generally less problematic. Food is generally supplied in sufficient quantities and with an acceptable variety in local markets, mainly from imports. Yet, current availability of food on the market could be hampered given the volatility of the peace process and the high dependency on Israeli and international markets.

The Annex to this report, *id.* at 23, specifies the criteria used by international aid agencies to categorize households into one of the four following groups: food insecure, vulnerable, marginally secure, and food secure. In 2010, for example, a household would be considered "food insecure" if its income and consumption were below \$5.1 per adult equivalent/day or if it were indicating a decrease in total food and nonfood expenditures, including in households unable to further reduce their expenditure patterns. *Id.*

opportunities.”⁷² Certainly, the prevention of access to certain foodstuffs has symbolic meaning and impacts food preferences, which are also a component of food security. However, to the extent that the availability of food plays a role in food insecurity, this is more due to a lack of *security* about availability, which is mostly dependent on imports and aid,⁷³ than to an actual shortage of food at any given point in time. At the core of food insecurity in the Gaza Strip, then, is the overall impoverishment of the population, caused by restrictions on imports and exports, restrictions on the access to agricultural and fishing areas, and destruction of local industry and other means of self-sufficiency.⁷⁴

While food insecurity in Gaza predated the Israeli closure,⁷⁵ the problem intensified substantially and became particularly harsh between 2007 and 2010, especially after Operation Cast Lead in 2009, when sixty percent of the population were defined as food insecure.⁷⁶ In addition, nine percent were vulnerable to food insecurity in 2009,⁷⁷ meaning that at the time, a total of sixty-

72. WFP & FAO, *Food Security and Vulnerability Analysis Report*, (Dec. 2009), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp213663.pdf>. See also FAO, URWA, WFP & PCBS, *2011 Socio-Economic and Food Security Survey* (May 2012), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp249301.pdf>; OCHA, *Fragmented Lives: Humanitarian Overview 2011*, at 56–57 (May 2012), available at http://www.ochaopt.org/documents/ocha_opt_fragmented_lives_annual_report_2012_05_29_english.pdf.

73. WFP & FAO, *Socio-Economic and Food Security (SEFSec) Survey Report 2—Gaza Strip* (Nov. 2009), available at http://reliefweb.int/sites/reliefweb.int/files/resources/CBCD0E051E978998C125766A0039933D-Full_Report.pdf.

74. See OCHA, *supra* note 35, at 5; Reham Al Wehaidy, *Private Sector: Impact of the Gaza Blockade and Strategies to Cope with the Consequences* (Pal-Think for Strategic Studies, Oct. 22, 2012), available at <http://palthink.org/en/wp-content/uploads/2012/11/Private-Sector.pdf>.

75. Special Rapporteur on the Right to Food, *Addendum: Mission to the Occupied Palestinian Territories*, U.N. Doc. E/CN.4/2004/10/Add.2 (Oct. 31, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/164/89/PDF/G0316489.pdf?OpenElement> (by Jean Ziegler) [hereinafter Special Rapporteur on the Right to Food, *Addendum*]. See the Israeli response to the Report Submitted by the Special Rapporteur on the Right to Food submitted to the United Nations High Commissioner for Human Rights on Nov. 5, 2003, U.N. Doc. E/CN.4/2004/G/14 (Nov. 26, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/169/14/PDF/G0316914.pdf?OpenElement>. Violations of the right to food in the oPt were already addressed by the same Special Rapporteur in an earlier report, Special Rapporteur on the Right to Food, *Report Submitted in Accordance with Commission on Human Rights Resolution 2001/25*, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/100/79/PDF/G0210079.pdf?OpenElement> (by Jean Ziegler).

76. This is compared to 53% in 2006 and 41% in 2003. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32; OCHA, *supra* note 35, at 9; WFP & FAO, *Report of the Food Security Assessment: West Bank and Gaza Strip* (2003), available at <http://www.fao.org/docrep/006/j1575e/j1575e00.htm>.

77. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32.

nine percent of Gazan households—over one million people—were either food insecure or vulnerable to food insecurity, and around half were further identified as having poor diets.⁷⁸ In conjunction with the significant rise in unemployment rates in Gaza immediately following the implementation of the closure,⁷⁹ most households have reported a diminished ability to produce or purchase sufficient food for consumption since June 2007.⁸⁰ The food items most frequently mentioned as having been cut out of the daily diet were fresh fruit, sweets, and meat products.⁸¹ After Operation Cast Lead, certain basic food products, such as poultry, red meat, and eggs, became unaffordable for many households due to their scarcity and rising prices.⁸² During this period, unemployment climbed to over forty percent,⁸³ and at least half of the total household expenditures were on food. As a result, the population was highly vulnerable to fluctuations in food prices and income levels.⁸⁴ Consequently, consumption patterns shifted towards cheaper food commodities and there was an overall reduction in the quantity of food purchases made by consumers. Many households, having lost their source of income due to private sector lay-offs, were reported to have reduced the number of meals and quantities of food they consumed daily and to have sold disposable assets.⁸⁵

78. WFP & FAO, *supra* note 72. By some estimates, the levels of food insecurity and vulnerability were even higher in the aftermath of Operation Cast Lead, peaking at approximately seventy-five percent or seventy-seven percent of Gazan households. See OCHA, *supra* note 35, at 9; WFP & FAO, *Food Security and Vulnerability Analysis Report*, *supra* note 72. Food insecurity levels were highest among the rural population, at sixty-nine percent of households, with an additional ten percent identified as vulnerable to food insecurity. This was largely attributed to the massive destruction of assets this population suffered during Operation Cast Lead, compounded by Israel's direct restrictive control over one-third of the rural areas (the stated "no-go zone") and over Gaza's territorial waters. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32, at 11–12.

79. From 16.9% in 1999, they rose to an average of 29.7% in 2007. PCBS, LABOR FORCE SURVEY 79 (2011), available at http://pcbs.gov.ps/portals/_pcbs/downloads/book1878.pdf. Immediately following the implementation of the closure, in June 2007, 13,000 people lost their jobs. WFP, *supra* note 24.

80. See WFP, *supra* note 24, at 12.

81. *Id.* at 15.

82. WFP & FAO, EFSA, *supra* note 32. Adequate fresh animal protein, including dairy products, and imported fruits and vegetables are virtually unattainable for many in Gaza because of prohibitive prices. See RAMI ZURAYK & ANNE GOUGH, CONTROL FOOD, CONTROL PEOPLE: THE STRUGGLE FOR FOOD SECURITY IN GAZA 2 (2013).

83. They then fluctuated between thirty-six and thirty-seven percent in 2009. WFP & FAO, *supra* note 72.

84. See WFP & FAO, *supra* note 72, at 36.

85. WFP & FAO, EFSA, *supra* note 32. UNRWA's chief in Gaza reported that families reduced the number of meals they ate per day, cut back on the amount of food at each meal, and did without basic products due to the high prices. He noted that a huge proportion of the population would have been vulnerable to hunger without food allocations from the agency. EL-

As some sources and evaluation reports noted, Israel's restrictions on Gazans' commercial access to goods, and the resulting effect on workers' access to labor markets, induced a state of de-development in which the shrinking of the private sector and stagnation of the economy drove the population into deep poverty and food insecurity.⁸⁶ Due to these dismal economic conditions and the ongoing erosion of the purchasing power of most households in the Gaza Strip, the vast majority of residents became dependent on aid. This aid was provided primarily by the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), and other international agencies.⁸⁷ The dependency rate stood at approximately seventy percent throughout most of the tight closure period from 2007 to 2010⁸⁸ and was as high as eighty-five percent during crisis points, as in early 2009, in the immediate aftermath of Operation Cast Lead.⁸⁹

Israel's relaxation of its restrictions on imports into Gaza in mid-2010 led to a significant increase in the volume and variety of goods entering the Strip and a decline in the prices of some products.⁹⁰ There has been a limited positive effect on the access to sources of livelihood for the population, despite improvements in the availability of consumer goods and certain raw materials.⁹¹

HADDAD & SCHMITT, *supra* note 1, at 26.

86. See EL-HADDAD & SCHMITT, *supra* note 1, at 6; OCHA, *supra* note 35. The term de-development was first coined, in the context of Gaza, by Sara Roy. See SARA ROY, *THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT* (1995).

87. In the past decade, UNRWA has provided humanitarian aid to registered refugees comprising approximately three-thirds of Gaza's population (almost 1.2 million people out of approximately 1.7 million residents as of January 2012), and it is the biggest relief agency operating in the Gaza Strip. With more than 11,000 staff in over 200 installations across the Strip, UNRWA provides education, healthcare, relief and social services, microcredit, and emergency assistance to registered Palestinian refugees. The United States is its largest single donor, followed by the European Union. *Frequently Asked Questions*, UNRWA, <http://www.unrwa.org/who-we-are/frequently-asked-questions> (last visited May 26, 2015). See also ZURAYK & GOUGH, *supra* note 82, at 2–3.

88. See WFP & FAO, *supra* note 73.

89. WFP, FAO & EFSA, *supra* note 32.

90. Overall, in the second half of 2010, the monthly average of truckloads of goods entering Gaza increased by sixty-six percent compared to the first half of the year, but was only thirty-five percent of the monthly average during the first five months of 2007, prior to the imposition of the closure. The proportion of nonfood items among all imports continued to be low, ranging between forty and fifty percent, compared to over eighty percent prior to the closure. OCHA, *supra* note 52, at 5.

91. During the second half of 2010, the unemployment rate in Gaza decreased by less than two percentage points, from 39.3% to 37.4%. The unemployment rate decreased to 28.7% in 2011. Gisha, *supra* note 56. Yet, "new job opportunities are mainly in low pay jobs, meaning that more people are finding work but earning less than during the pre-blockade period." UNRWA, WFP & PCBS, *supra* note 72.

As a result, the majority has continued to suffer from food insecurity⁹² and remained critically dependent on food assistance.⁹³

All this notwithstanding, the harsh effect of the prevention of the entry of goods into Gaza should not obscure the equally detrimental effect that the restrictions on exports have had on the economic situation and, therefore, food security. The easing of restrictions on importing goods into Gaza in the aftermath of the flotilla events created the false impression that the closure had been lifted. In some respects, this had been indirectly facilitated by the Gaza aid flotilla. Although the proclaimed goal of the flotilla organizers had been to bring about the termination of the closure on the Gaza Strip altogether, its emphasis on imports detracted attention from the restrictions on exports to and commerce with the West Bank. This is the deeper issue in terms of development and self-sufficiency. By focusing on the entry and availability of food per se, the flotilla drew attention away from the bigger story of food security, which remained at issue even after restrictions on certain food imports were lifted.

It is clear that no major food crisis arose in Gaza throughout the years of the closure despite Israel's policy, not because of it.⁹⁴ Between 2007 and 2010, this policy, as articulated in the Red Lines Document, allowed living conditions and human life in the Gaza Strip to deteriorate to the minimum that is deemed necessary for subsistence.⁹⁵ As the Document implied, malnutrition would have

92. The levels of food insecurity dropped only slightly, to 65% of the residents, who were either food insecure (52%) or vulnerable to food insecurity (13%). This slight reduction relative to 2009 has been attributed to the partial rehabilitation of Gaza after Operation Cast Lead through massive support from international aid agencies. However, as a comprehensive food security survey conducted in 2010 showed, the proportion of the population that is food secure fell from 24% to 19% percent in the space of one year (between 2009 and 2010), suggesting a possible exhausting of the coping mechanisms for those who were better off. Although the level of food insecurity in the Gaza Strip decreased again in 2011, it was still high, at a level of 44%, compared to 17% in the West Bank. Moreover, the level of food security more or less stabilized between 2009 and 2011, leveling off at about 23%. This means that despite certain improvements in livelihood conditions, the majority of people in Gaza still do not meet the food-security threshold. URWA, WFP & PCBS, *supra* note 72.

93. *See id.* Dependency on aid remains high to this day. In January 2013, it was reported that more than seventy percent of the population are still dependent on humanitarian aid. Gisha, *supra* note 56. As the Director of UNRWA Gaza Operations, Christer Nordahl, stated in an interview: It would be so easy to reduce the number of aid recipients. It would just be a matter of lifting the blockade and so many jobs would crop up! For example in the construction sector: there are thousands of projects on hold, and people waiting for work in construction. The day the blockade is lifted the food aid dependency will fall down immediately. . . .

EL-HADDAD & SCHMITT, *supra* note 1, at 26.

94. PHR-ISRAEL, "HUMANITARIAN MINIMUM": ISRAEL'S ROLE IN CREATING FOOD AND WATER INSECURITY IN THE GAZA STRIP (Dec. 2010), *available at* http://www.phr.org.il/uploaded/Humanitarian%20Minimum_eng_webver_H.pdf.

95. Yotam Feldman, *Kavim Adumim [Red Lines]*, 22 MITA'AM 132 (2010) (Isr.).

been rampant without the international humanitarian aid efforts: “[t]he stability of the humanitarian effort is critical to prevent the development of malnutrition.”⁹⁶

Thus, as Adi Ophir has poignantly framed it, Israel has been keeping the Occupied Palestinian Territory, in particular the Gaza Strip, on “‘the verge’ of a humanitarian catastrophe,”⁹⁷ a term first used by the UN Special Rapporteur on the Right to Food in the context of the Occupied Territories.⁹⁸ At the same time, Israel has asserted that it will do its utmost, if required, to avoid crossing the threshold of such catastrophe. And indeed, even prior to the closure of Gaza, consistent Israeli policy kept the Palestinian population just at the threshold of famine.⁹⁹ “The idea is to put the Palestinians on a diet, but not to make them die of hunger,” Dov Weisglass, Advisor to the Israeli Prime Minister, reportedly stated.¹⁰⁰ This point is crucial for understanding the conditions in the Occupied Palestinian Territory in general but more significantly, during the post-disengagement Gaza period. Throughout the years of the closure, particularly from 2007 to 2010, the reassuring mantra that there is no hunger in Gaza has been emphatically repeated by Israeli authorities and, as we will discuss in Part III, echoed by the Turkel Commission.

Although the observation is correct, we maintain that the tacit implication—that the situation is legitimate and tolerable—is wrong. This framing of the conditions in Gaza pacified both internal and international criticism and pressure regarding the closure policy, which would have significantly intensified if the threshold of “starvation” or “humanitarian crisis” had been crossed or if the hungry people “look[ed] the part.”¹⁰¹ Unfortunately, the binarism of catastrophe/starvation on the one hand, and acceptable policy on the other, misses the more subtle elements of control and subordination. This may be just as catastrophic for the local population. Thus, although Israel has used its power to cripple Gaza’s economy, bring its residents to the edge of catastrophe, and create soaring poverty rates and extreme levels of food

96. An unofficial English translation of the Red Lines Document is available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

97. Ophir, *The Politics of Catastrophization*, *supra* note 14.

98. Special Rapporteur on the Right to Food, *Addendum*, *supra* note 75, ¶ 8.

99. Ophir, *The Politics of Catastrophization*, *supra* note 14, at 77–82. *See also* AZOULAY & OPHIR, *supra* note 14, at 170–79.

100. Conal Urquhart, *Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite*, GUARDIAN, Apr. 15, 2006, <http://www.guardian.co.uk/world/2006/apr/16/israel>. Weisglass later denied saying this, Ronny Sofer, *Hamas Sworn In—Israel to Cut off Funds*, YNET NEWS (Feb. 15, 2006), <http://www.ynetnews.com/articles/0,7340,L-3216790,00.html>.

101. MICHAEL CAROLAN, RECLAIMING FOOD SECURITY 4 (2013).

insecurity, it could continue to insist that its policy meets humanitarian law standards.¹⁰²

This claim was put to the test in the framework of the Turkel Commission, appointed by the Israeli government as the “Public Commission to Examine the Maritime Incident of 31 May 2010.”¹⁰³ Although the Commission determined in its inquiry that the requirements of international law were satisfied since there was no starvation in Gaza, it left the question of food security open. Since the Turkel Commission’s report is the central legal analysis of the closure conducted by an Israeli quasi-judicial forum to date, its findings and determinations merit closer scrutiny.¹⁰⁴

III.

THE TURKEL COMMISSION AND THE HUMANITARIAN MINIMUM

A. *Findings and Legal Analysis*

The Turkel Commission was appointed to investigate, amongst other things, whether Israel’s naval blockade on Gaza, imposed in January 2009, conformed to international-law standards. In its analysis of the Gaza aid flotilla incident of 2010 and the broader context of the blockade, the Commission relied on the San Remo Manual on International Law Applicable to Armed Conflict at Sea (San Remo Manual),¹⁰⁵ a 1994 codification of customary law on the matter.

102. Ophir, *supra* note 14; Feldman, *supra* note 95. For humanitarianism’s use of the same language as the military, see DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* ch. 8 (2005).

103. Government Resolution No. 1796 (June 14, 2010) (Isr.), available at <http://www.turkel-committee.com/content-50.html>.

104. Concurrent to the Turkel Commission of Inquiry, a Turkish National Commission of Inquiry was also appointed, which published its own report in February 2011, Turkish Nat’l Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza* 1, 8 (Feb. 12, 2011), available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>. Two reports were also published by UN bodies. See Human Rights Council, 15th Sess., *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010) [hereinafter HRC Report], available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf; *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident* (Sept. 2011) (by Geoffrey Palmer, Alvaro Uribe, Joseph Ciechanover Itzhar & Süleyman Özdem Sanberk) [hereinafter Palmer Report], available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

105. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (International Institute of Humanitarian Law June 12, 1994) [hereinafter SAN REMO MANUAL], available at <https://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5B310CC97F166BE3C12563F6005E3E09/FULLTEXT/IHL-89-EN.pdf>.

The Commission cited the requirements in the Manual that prohibit a naval blockade if its sole purpose is the starvation of the civilian population¹⁰⁶ and if a proportionality requirement is not met; that is, the damage to civilians should not be disproportionate to the concrete and direct *military advantage* expected from the blockade.¹⁰⁷ Accordingly, the party imposing the blockade must, subject to certain conditions, allow for the free passage of food and other essential goods if the civilian population does not have proper supplies of these items.¹⁰⁸ The Turkel Commission acknowledged the dual purpose of the Israeli naval blockade, noting that although its underlying justification was military needs, it was also an element of Israel's political strategy against the Hamas in Gaza.¹⁰⁹ Yet the Commission found that the naval blockade met the conditions stipulated by international law, even though the Israeli government had not followed the San Remo Manual's requirement that the blockade have an end date.¹¹⁰

The San Remo Manual also addresses humanitarian requirements relating to food. The Turkel Commission noted the difficulty of distinguishing the humanitarian effect of the blockade from the effect of Israeli restrictions on land passage into Gaza,¹¹¹ and it therefore examined the humanitarian ramifications of the closure policy in its entirety. In this context, the Commission noted that the Israeli policy on the entry of goods into Gaza was aimed at two goals: the direct security objective of preventing the entry of weapons and military supplies and the broader strategic goal of "indirect economic warfare."¹¹² The Commission examined the closure policy as implemented at the time of the flotilla events, prior to the overall easing of restrictions.¹¹³

The Turkel Commission also noted that the information it was provided with by Israeli government officials and civil society representatives seemed to, at times, describe two very different realities. The situation depicted by the human rights and humanitarian groups was a genuine humanitarian crisis, whereas the government representatives denied such a crisis. The Commission cited UN data according to which 60.5% of Gaza households suffered from food

106. THE TURKEL COMMISSION, TURKEL REPORT—COMM'N, THE PUB. COMM'N TO EXAMINE THE MAR. INCIDENT OF 31 MAY 2010, PART ONE, ¶ 36, (Jan. 2011), [hereinafter TURKEL REPORT], available at <http://www.turkel-committee.gov.il/files/worddocs/8808report-eng.pdf> (citing Rule 102(a)).

107. *Id.* ¶ 36 (citing Rule 102(b)).

108. *Id.* ¶ 36 (citing Rule 103).

109. *Id.* ¶¶ 48, 50.

110. *Id.* ¶¶ 59–60.

111. *Id.* ¶ 62.

112. *Id.* ¶ 67.

113. *Id.* ¶¶ 66–68.

insecurity,¹¹⁴ defined as a state in which “people lack sustainable physical or economic access to adequate safe, nutritious and socially accepted food to maintain a healthy and productive life.”¹¹⁵ Civil society organizations, stated the Commission, attributed this situation to inflation in food prices, poverty, diminished income sources, and “erosion of coping mechanisms, leading to increased difficulties of households to afford sufficient quantities of quality food.”¹¹⁶

The Commission more generally cited data according to which more than one million Gazans existed on humanitarian assistance. It also noted the assessment made by human rights and humanitarian groups that Israel’s prohibition on exports from Gaza alongside the strict restrictions on imports had paralyzed its private sector. Thus, the Commission concluded that the collapse of Gaza’s economy was a result of both the naval blockade and Israel’s land passage policy.¹¹⁷ In relation to its land closure policy, Israel presented its decisions on the entry of goods into Gaza as guided by the security and political considerations underlying the closure policy on the one hand, and the survival needs of the Palestinian population in Gaza on the other.¹¹⁸ They argued that these decisions were made on a periodic basis, with the items allowed into Gaza detailed in lists of so-called humanitarian goods.¹¹⁹

In response to the claim of a lack of food security in Gaza, the Israeli authorities argued that the requests submitted by the Palestinian Authority usually matched the Israeli determinations regarding the needs of the

114. *Id.* ¶ 72 (citing U.N. Office for the Coordination of Humanitarian Aff., *Consolidated Appeal: Occupied Palestinian Territory*, 2, 23 (Nov. 30, 2009) [hereinafter U.N. Consolidated Appeal], available at http://www.ochaopt.org/documents/ocha_opt_consolidated_appeal_process_2010_english.pdf. See also WFP & FAO, *supra* note 73, at 7.

115. TURKEL REPORT, *supra* note 106, ¶ 72. The definition is taken from OCHA, *supra* note 35, at 9, and is compatible with the FAO definition we invoked at the outset of the Article:

Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life. . . . Food insecurity exists when people do not have adequate physical, social or economic access to food as defined above.

Rome Declaration, *supra* note 4.

116. TURKEL REPORT, *supra* note 106, ¶ 72 (citing U.N. 2010 Consolidated Appeal, *supra* note 114, at 2, 23).

117. *Id.* ¶ 72.

118. This was based on formulas described in length at *supra* notes 43–46 and accompanying text.

119. Transcript of session no. 7, Testimony by Maj. Gen. Eitan Dangot, Coordinator of Government Activities in the Territories, before the Turkel Committee (Aug. 31, 2010), at 27–28 [hereinafter Dangot Testimony], available at <http://www.turkel-committee.gov.il/files/wordocs/6656cgat-eng.doc>.

population.¹²⁰ They further asserted that there were discrepancies between the positions expressed by humanitarian groups in working meetings with Israeli authorities and the public statements that they made. The Israeli government emphasized that the Gazan population did not suffer from starvation.¹²¹

In assessing the official Israeli position and the assertions of the civil society groups, the Turkel Commission relied on both the San Remo Manual rules as well as Article 54(1) of the first Additional Protocol to the Geneva Conventions of 1949 (Additional Protocol I), which prohibits the starvation of civilians as a means of warfare.¹²² The Commission determined that nothing in the materials it had examined indicated that Israel was attempting to deny the Gazan population food or annihilate or weaken the Gazan population through starvation. It emphasized that even the humanitarian and human rights groups described the situation in Gaza as one of food insecurity, in the sense of a lack of physical and economic access to food sources, as opposed to starvation.¹²³ The Commission stated that Israeli policy was in fact designed to prevent starvation, and it noted that a lack of food security differed from hunger or starvation.¹²⁴ As to the duty set forth in the San Remo Manual to provide the means necessary for the survival of the civilian population, which, under Additional Protocol I, includes food, the Commission was persuaded that Israel allowed the entry of such necessary means.¹²⁵ This determination was crucial to the Commission's conclusion that the naval blockade did not violate the proportionality principal. The Commission explained that the suffering it caused the civilian population must be assessed primarily in reference to the prohibition on starvation. Thus, the absence of starvation in Gaza was determinative in measuring proportionality.

The Commission did note, however, that the restrictions on food were “especially worrying” not only because of the unequivocal prohibition on starvation, but also because of the potential widespread effect on the civilian population. It noted that this raised questions of the legitimacy of restricting access to food products even when it did not lead to starvation; the Commission was also concerned about the unspecified duration of the naval blockade.¹²⁶

120. This disregards the chilling effect the closure had on Palestinian merchants, who gradually adapted their orders to Israel's restrictions, *see supra* note 23.

121. TURKEL REPORT, *supra* note 106, ¶ 73.

122. *Id.* ¶ 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts International Armed Conflicts (Protocol I) art. 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

123. *Id.* ¶ 77.

124. *Id.* ¶ 78.

125. *Id.* ¶ 80.

126. *Id.* ¶ 91.

Nonetheless, the Commission stated that, given the Israeli monitoring procedures for determining the types and quantities of goods allowed into Gaza, there was no violation of international-law standards.¹²⁷

The Commission's failure to delve into the problematic issue of restricting access to food and the use of the "humanitarian minimum" as a benchmark also emerged in its proceedings. During testimony given by one of the authors (Tamar Feldman) on behalf of the Israeli NGO *Gisha* (Legal Center for Freedom of Movement),¹²⁸ one of the Commission members, Professor Miguel Deutsch, asked how food security is defined and measured. To explain his query, Commissioner Deutsch referred to the presentation Major-General Dangot, the head of COGAT, had made, recalling that the latter had spoken about a scale of calories: "1700 calories per day, or something of that order." Another member of the Commission, Ambassador Merhav, interrupted, "No, no. He didn't talk about that. We didn't want to hear the word calories from him." Professor Deutsch insisted that the Commission members might wish they had not heard it, but they had.¹²⁹ There were no references to calories or details regarding the humanitarian-minimum standard in the protocols of Dangot's public testimony, but these issues may have arisen behind closed doors in the confidential part of his testimony, or these issues may have appeared in the documents he later submitted. In any event, the Commission did not return to the issue of calories, nor was any mention of this made in its final report.

It is noteworthy that the Commission chose not to examine the legality of the naval blockade from the perspective of human rights law, holding that the rules of international humanitarian law, particularly those pertaining to naval blockades, apply as *lex specialis*. It asserted, moreover, that the two legal regimes "share a common 'core' of fundamental standards which are applicable at all times."¹³⁰ We now critique this position and consider its significance.

B. Critique

The Turkel Commission's legal analysis of the naval blockade was grounded on three premises. First, that there was an ongoing armed conflict between Israel and Hamas that was of an international nature. Second, that Israel's "effective control" of the Gaza Strip ended with the disengagement and

127. *Id.* ¶¶ 94–97.

128. Transcript of session no. 12, Testimony of Gisha Representatives (Tamar Feldman & Sari Beshi) (Oct. 13, 2010), at 140, available at <http://www.turkel-committee.com/files/wordocs/634909823-yp-09736-en.doc>.

129. *Id.* at 140–41.

130. TURKEL REPORT, *supra* note 106, ¶ 100 (citing *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 149 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (Celebici Case)).

that Israel henceforth ceased to bear the duties of an occupying power towards the residents of the Gaza Strip. The third premise was that the international law on human rights was not applicable because the law of armed conflict, particularly the law on naval blockades during armed conflict, was the applicable *lex specialis*.¹³¹ The first premise implicates the applicability of the law of naval blockades as codified in the San Remo Manual,¹³² whereas the second and third premises imply the (non)applicability of other potentially relevant normative frameworks. While we do not dispute that the armed conflict between Israel and Hamas should be classified as international, we reject the second and third premises. The application of the law of belligerent occupation and international human rights law concurrently with the law of armed conflict would significantly alter the legal analysis of the Gaza closure, on which we elaborate in Part IV. But before proceeding to our analysis of the closure, we will first critique the legal analysis in the Turkel Commission report (Turkel Report), by its own parameters, and pinpoint some of its flaws.

1. *Assessing the Turkel Report's Legal Analysis from Its Own Perspective*

If we assume the law of armed conflict at sea to, indeed, be the sole relevant normative framework for assessing the lawfulness of the naval blockade on Gaza, with the San Remo Manual as the predominant set of applicable rules, then the prime difficulty with the Turkel analysis is its evaluation of proportionality. Under Article 102(b) of the Manual, “The declaration or establishment of a blockade is prohibited if: . . . (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”¹³³

Yet as Shany and Cohen have observed,¹³⁴ the Turkel Commission failed to explain how the use of the blockade as “economic warfare” against Hamas

131. TURKEL REPORT, *supra* note 106, ¶ 100.

132. Since the laws of naval blockades were developed within the framework of international armed conflict (IAC), this classification allowed for the straightforward application of the San Remo rules. However, the Commission noted that given the level of the Hamas' de-facto control of the Gaza Strip and the security risks this poses for Israel, the laws of naval blockade would be applicable even if the conflict were classified a non-international armed conflict (NIAC). See TURKEL REPORT, *supra* note 106, ¶ 44. Cf. Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRIT. Y.B. INT'L L. 171 (2011). Guilfoyle argues that the laws of naval blockades are applicable only to international armed conflicts and are therefore not applicable to the conflict between Israel and Hamas, which should be classified a NIAC. See also Kevin Jon Heller, *Why Is Israel's Blockade of Gaza Legal? (Updated)*, OPINIO JURIS (June 2, 2010, 7:36 AM), <http://opiniojuris.org/2010/06/02/why-is-israels-blockade-of-gaza-legal/>.

133. SAN REMO MANUAL, *supra* note 105, 102(b).

134. Amichai Cohen & Yuval Shany, *The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks*, EJIL: TALK! (Jan. 28, 2011), <http://www.ejiltalk.org/the-turkel->

meets the requirement of “concrete and direct military advantage” specified in this provision. Although Shany and Cohen restrict their criticism to the context of the naval blockade, they connect it to the land-imposed closure: “while Israel may impose (proportional) economic sanctions against Hamas-controlled Gaza on the land, its ability to utilize a sea blockade to support such sanctions is limited to those restrictions which are needed to achieve a concrete and direct military advantage.”¹³⁵ Therefore, they conclude, “to the extent that the naval blockade was applied in a manner that exceeded strict military requirements in order to support such broader economic restrictions, its proportionality is questionable.”¹³⁶

The Turkel Report also fell short in its assessment of proportionality in terms of the damage caused to the civilian population, as set forth in Article 102(b) of the San Remo Manual. The Commission noted that the San Remo Manual does not provide criteria for determining whether this damage is excessive and so deduced from the Commentary to the Manual that the notion of damage is linked to starvation.¹³⁷ The Commentary states that “whenever the blockade has starvation as one of its effects, the starvation effectively triggers

commissions-flotilla-report-part-one-some-critical-remarks/.

135. *Id.*

136. *Id.* Cohen & Shany note,

It rather appears to us that parts of the economic warfare introduced by Israel – in particular, the restriction on the importation of “non-essential” food items, can only be understood as directed against the civilian population of Gaza (in the hope that the population’s support of the Hamas will be eroded consequently). . . So if indeed the maritime blockade and the land restrictions are interlinked, the latter’s collective harm features could affect the legality of the former – again, to the extent that the application of the blockade exceeded the requirements of strict military necessity in order to support the more problematic aspects of the land restrictions. *Id.*

In the discussion of collective punishment they argue that because of the effect on the civilian population, any distinction in this context between economic warfare and collective punishment collapses. The Turkel Commission’s incoherent approach to the connection between the land closure and naval blockade also shapes its discussion of the claims of collective punishment that have been made by various civil society organizations, most notably the ICRC. The Commission rejected these claims for two reasons. The first is that because a naval blockade is permitted, it cannot be considered prohibited collective punishment unless intended to starve the population. The second is that there has to be an element of “punishment,” whereas in this case, it determined that “[t]here is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest [sic] that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.” TURKEL REPORT, *supra* note 106, ¶106. *But see* George Bishrat, Carey James & Rose Mishann, *Freedom Thwarted: Israel’s Illegal Attack on the Gaza Flotilla*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 85 (2011) (arguing that the naval blockade was illegal for a variety of reasons, for example, because it furthered the political purpose of pressuring Hamas, rather than a military goal, and that even if it were legal, it violated the principle of proportionality, amounted to prohibited collective punishment, and violated Israel’s duties as occupier).

137. *See* TURKEL REPORT, *supra* note 106, ¶ 90.

the obligation, subject to certain limitations, to allow relief shipments to gain access to the coasts of the blockaded belligerent.”¹³⁸ As expressed in Article 103 of the Manual, “If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies.”¹³⁹ It appears, therefore, that starvation is not the only trigger for a duty to allow passage of humanitarian consignments. The scope of this obligation is contingent on how the terms “essential” and “inadequate” are interpreted, but regardless, the damage to the civilian population could well be considered excessive under Article 102(b) even if it does not amount to starvation, especially when weighed against a less-than-clear-cut military advantage.

Furthermore, although the Turkel Commission, in assessing proportionality, took count of the overall humanitarian costs of Israel’s economic warfare against the Hamas, including the policy to restrict the land-crossings between Gaza and Israel,¹⁴⁰ it ultimately determined that given Israel’s supervision and monitoring mechanisms¹⁴¹ there was no disproportional damage to the civilian population in Gaza.¹⁴² Thus, the Commission essentially adopted the approach espoused by COGAT.¹⁴³ However, it seems to have confused the *mens rea* referred to in Article 102(a) of the San Remo Manual with the *actus reus* required in Article 102(b). Whereas Article 102(a) prohibits a blockade that is *intended* to starve the population even if it has not achieved that goal, Article 102(b) deals with the *outcomes alone*, regardless of the intended purpose of the blockading party: “a blockade is prohibited if . . . the damage is, or may be expected to be, excessive.”¹⁴⁴ Accordingly, the fact that Israel took measures to limit the suffering of the civilian population does not mean that it *actually* prevented it or limited its proportions, and the latter is the relevant point to be analyzed and assessed.

Clearly, then, the Turkel Commission’s analysis of the proportionality requirement reflects the minimum-obligations approach, as we have discussed

138. SAN REMO MANUAL, *supra* note 105, art. 102 cmt 102.3.

139. *Id.* art. 103. See also INT’L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL LAW, VOLUME 1: RULES 186 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2009), available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

140. See TURKEL REPORT, *supra* note 106, ¶ 91.

141. *Id.* ¶ 96.

142. *Id.* ¶ 97.

143. See Dangot Testimony, *supra* note 119.

144. SAN REMO MANUAL, *supra* note 105, art. 102(b) (emphasis added).

above.¹⁴⁵ More fundamentally, however, the analysis exposes some of the inherent limitations of the law of armed conflict as it relates to “economic warfare.”¹⁴⁶ It particularly exposes its inability to integrate complex elements of control and dependency, like those present in the conflict between Israel and Hamas. Indeed, the Israel Supreme Court’s position in *Al-Bassiouni* was that the law of armed conflict is not the only source of Israel’s obligations in relation to its Gaza closure policy, and that Israel also bears positive obligations due to its actual control over the land crossings and Gaza’s dependency on Israel due to the occupation.¹⁴⁷ And while, as Yuval Shany has noted, the Court did not specify on which legal sources it based these latter obligations, it did make clear that the law of armed conflict is not a sufficient legal framework in this context.¹⁴⁸

2. *Reevaluating the Legal Framework*

It is important to recall that, as conceded in the Turkel Report, Israel has controlled Gaza’s land borders, territorial waters, and airspace since the occupation began in 1967.¹⁴⁹ Its official declaration in January 2009 that it was imposing a “naval blockade” on Gaza does not alter the fact that Israel has actually been enforcing such a blockade consistently and continuously since 1967. This was able to continue even after the 2005 “disengagement” due to the provisions of the 1993 Oslo Accords that gave control of Gaza’s territorial waters to the IDF.¹⁵⁰ The Turkel Report noted that from the IDF’s perspective, following the disengagement, its actions were no longer subject to the law of

145. See *supra* notes 13–22 and accompanying text.

146. This is most evident in the Report’s discussion of collective punishment, which had been claimed by various civil society organizations, most notably the ICRC. The Commission rejected these claims, stating, “There is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest [sic] that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.” TURKEL REPORT, *supra* note 106, ¶ 106 (emphasis in original). But as Cohen & Shany observe, *supra* note 134, “parts of the economic warfare introduced by Israel—in particular, the restriction on the importation of ‘non-essential’ food items, can only be understood as directed against the civilian population of Gaza (in the hope that the population’s support of the Hamas will be eroded consequently).” Indeed, this is the inherent difficulty with the legal concept of “economic warfare,” which, by definition, clashes with the basic international humanitarian law distinction between civilians and combatants and strict prohibition on collective punishment. For a general discussion of the problematic nature of this concept, see Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 ISR. L. REV. 117 (2009), describing IHL’s limitations in this regard and suggesting that economic sanctions be further regulated according to some guiding principles.

147. HCJ 9132/07 *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) ¶ 12 (Isr.).

148. Shany, *supra* note 21, ¶ 101.

149. *Id.* ¶ 25.

150. See Turkel Report, *supra* note 106, ¶ 20.

belligerent occupation. It claimed that instead, given the “armed conflict” with the Hamas regime in Gaza, the law of naval warfare now applied.¹⁵¹ In August 2008, the IDF took the further step of declaring the maritime zone near the coast of Gaza a “combat zone.”¹⁵² Then, later on in January 2009, during the Cast Lead Operation, the IDF imposed the naval blockade, thereby prohibiting the entry of any vessel into these waters.¹⁵³ Despite the culmination of the military operation in Gaza, the naval blockade declaration remained in force.¹⁵⁴

Israel’s control of Gaza’s territorial waters has thus been unbroken since 1967, albeit taking different forms. With only a few isolated exceptions, Israel has never allowed any vessel to enter or leave these waters¹⁵⁵ and has imposed significant restrictions on fishing activities along the Gaza coast.¹⁵⁶ The alleged context of the most recent legal form—a naval blockade as part of an armed conflict—camouflages the fact that this is simply a continuation of Israeli control of Gaza’s waters. This is yet another manifestation of Israel’s ongoing exercise of its power over Gaza even post-disengagement.

Delving into the full details of the debate over the legal status of Gaza post-disengagement, the main issue being whether it is occupied or not,¹⁵⁷ is beyond the scope of this paper. But we nonetheless contend that Israel is bound by the law of belligerent occupation, at least where it continues to exercise control. Support for this “functional approach,” as framed by Gross,¹⁵⁸ can be found in the *Al-Bassiouni* judgment, in which the Israel Supreme Court indicated the possibility of duties arising even in situations of “reduced” occupation or post-occupation. Moreover, the Court implied that given the degree of control Israel continues to wield over Gazans post-disengagement, Israel did, and still does, bear duties in relation to the economic conditions in Gaza, including with regard

151. *Id.* ¶ 21.

152. *Id.* ¶ 23.

153. *Id.* ¶ 26.

154. *Id.* ¶ 27.

155. *Id.* ¶ 53.

156. See discussion in *supra* notes 55–57 and accompanying text.

157. For the position that Gaza is still occupied, see, for example, Iain Scobbie, *An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC & MIDDLE E. L. 3, 4–7 (2004–2005). For a similar position, see Shane Darcy & John Reynolds, “*Otherwise Occupied*”: *The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SECURITY L. 211 (2010); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 277–80 (2009). For the position that Gaza is no longer occupied, see Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L HUMANITARIAN L. 369 (2007).

158. Aeyal Gross, *Rethinking Occupation: The Functional Approach*, OPINIO JURIS (Apr. 23, 2012), <http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach>; AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (forthcoming 2016) [hereinafter GROSS, *WRITING ON THE WALL*].

to the impact of its actions on food security. Other sources also support the notion of duties deriving from occupation not as a matter of “all or nothing” but, rather, contingent on the extent to which control is exercised. One such source is the decision by the Ethiopia-Eritrea Claims Commission in the *Aerial Bombardment Case*. Addressing the Ethiopian military presence on the conflict’s western front—a presence it described as “more transitory”—the Commission determined that while not *all* of the obligations under the Fourth Geneva Convention relating to occupied territories can be reasonably applied to an armed force anticipating combat and present in an area for only a few days, some obligations could apply, presumably based on the *capacity* and *power* exercised by the occupying power.¹⁵⁹ Developing such a nuanced understanding is critical, especially given the shift by Israel to a form of occupation, which involves less direct friction between its army and the local population.¹⁶⁰

Accordingly, we claim that the analysis of the legality of Israel’s naval blockade on the Gaza Strip cannot be based solely on the law of armed conflict, but rather, the obligations deriving from the law of occupation as well as human rights law must also be examined.¹⁶¹ Restricting the legal evaluation to the framework of the San Remo Manual provisions creates a misguided, artificial differentiation between a land closure and maritime closure, and confines Israel’s obligations towards the Gaza civilian population in a way that is inconsistent with the reality of its power and control over that population.¹⁶² Since the land closure and naval blockade are closely interconnected, as the Commission rightly determined, they should both be scrutinized in light of Israel’s ongoing obligations deriving from its ongoing control. Accordingly, there is room to consider the requirement under Article 59 of the Fourth Geneva

159. EECC Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25, 26, ¶ 27 (Dec. 19, 2005) [hereinafter EECC Partial Award (Western Front)]. For a detailed discussion, see GROSS, WRITING ON THE WALL, *supra* note 158.

160. See GROSS, WRITING ON THE WALL, *supra* note 158.

161. In Part IV we argue that the analysis should take into account these three bodies of law, and limiting it to any one of them is not sufficient. The Turkish National Commission of Inquiry Report as well as the HRC Report rely almost entirely on the law of occupation while ignoring the law of armed conflict and were justly criticized for doing so. See Yuval Shany’s critique of the HRC Report in Yuval Shany, *Know Your Rights! The Flotilla Report and International Law Governing Naval Blockades*, EJIL: TALK! (Oct. 12, 2010).

<http://www.ejiltalk.org/know-your-rights-the-flotilla-report-and-international-law-governing-naval-blockades>. See also Daniel Benoliel, *Israel, Turkey and the Gaza Blockade*, 33 U. PA. J. INT’L L. 615 (2011).

162. Tamar Feldman, *A Tale of Two Closures: Comments on the Palmer Report Concerning the May 2010 Flotilla Incident*, EJIL: TALK! (Sept. 20, 2011), <http://www.ejiltalk.org/a-tale-of-two-closures-comments-on-the-palmer-report-concerning-the-may-2010-flotilla-incident/>. See also Russel Buchan, *The Palmer Report and the Legality of Israel’s Naval Blockade of Gaza*, 61 ICLQ 264 (2012).

Convention, which explains that an occupying power allows and facilitates consignments “[i]f the whole or part of the population of an occupied territory is *inadequately* supplied.”¹⁶³ This obligation is unconditional, i.e., “consignments to occupied territories must be permitted to cross even a blockade line.”¹⁶⁴ Yet as Dinstein notes, “[u]nfortunately, no similar obligation exists outside of occupied territories.”¹⁶⁵ Indeed, Article 59 sets the bar higher than the “humanitarian-minimum” standard for measuring whether a belligerent has fulfilled its duties under the law of armed conflict, and it more closely resembles the human rights standard of ensuring adequate food and living conditions. Similarly, Article 55 of the Convention prescribes that an “Occupying Power” has a duty to ensure the supply of food to the civilian population and, in particular, must bring in the necessary foodstuffs if the resources of the occupied territory are inadequate.¹⁶⁶

In the next Part, we will discuss at length Israel’s duties in the context of food security in Gaza that derive from international human rights law. We will show that they are applicable in this case irrespective of the exact classification of the form of control Israeli exercises over Gaza.¹⁶⁷ It is interesting to note that the Turkel Report did not incorporate human rights law into its analysis because it deemed the provisions of the San Remo Manual the *lex specialis*, which supersedes the *lex generalis*, namely the applicable human rights law.¹⁶⁸ This reliance on the Manual not only created the illusion that one part of the closure policy can be legally analyzed independently from the other, but also constricted the applicability of the law of occupation and international human rights law, thereby lowering the legal bar to the bare minimum in assessing Israel’s obligations towards the Gazan population.

C. The Palmer Committee Report

The analytical path taken by the “Panel of Inquiry on the 31 May 2010 Flotilla Incident,” commissioned by the UN Secretary-General and known as the Palmer Committee,¹⁶⁹ was not only similar to the approach of the Turkel Commission in analyzing the legality of the naval blockade, but took the further

163. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

164. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 226 (2d ed. 2010).

165. *Id.* (emphasis added). See also Darcy & Reynolds, *supra* note 157, at 17–18 (discussing in relation to Gaza).

166. Fourth Geneva Convention, *supra* note 163, art. 55.

167. See *infra* notes 181–203 and accompanying text.

168. See TURKEL REPORT, *supra* note 106, ¶¶ 98–100.

169. Palmer Report, *supra* note 104.

step of explicitly distinguishing between the land closure and naval blockade.¹⁷⁰ The Palmer Committee's Final Report (Palmer Report), which was published after both the Israeli and Turkish official national inquiries had been completed, also relied on the San Remo Manual. Accordingly, it determined that (1) the blockade was not intended to starve or collectively punish the civilian population in Gaza but, rather, was imposed for military objectives (in contrast to the Turkel Report, which recognized a dual purpose); and (2) that it was proportionate in the circumstances.¹⁷¹ The Palmer Report concluded, therefore, that "the naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law."¹⁷² Nonetheless, the Committee recommended that Israel conduct a regular annual review of the naval blockade, to assess whether it remained necessary and proportionate.¹⁷³

The land closure and humanitarian conditions in the Gaza Strip were discussed separately, in the last chapter of the Palmer Report, entitled "How to Avoid Similar Incidents in the Future."¹⁷⁴ It was noted that indeed, "the situation in Gaza, including the humanitarian and human rights situation of the civilian population, was unsustainable, unacceptable and not in the interests of any of those concerned."¹⁷⁵ The Report linked this dire state directly to the Israeli closure policy: "It is clear that the restrictions Israel has placed on goods and persons entering and leaving Gaza via the land crossings continue to be a significant cause of that situation."¹⁷⁶ Nevertheless, the Report refrained from passing judgment on the legality of the land closure. Instead, it commended the steps Israel had taken to ease the closure following the flotilla incident and encouraged it to continue its efforts to ease its restrictions on the movement of goods and people with a view to lifting the closure altogether.¹⁷⁷

The Palmer Committee also expressed its opinion that the land closure and the accompanying effect on humanitarian conditions in Gaza should not be a part of the proportionality calculations with regard to the naval blockade. The Report noted that the specific impact of the naval blockade on the civilian population in Gaza is difficult to gauge due to the overall closure on Gaza, but considered the absence of a commercial seaport in Gaza to be a determining factor in establishing that the naval blockade itself had a marginal impact, if any,

170. *Id.* ¶ 70.

171. *Id.* ¶¶ 77–78.

172. *Id.* ¶ 82.

173. *Id.* ¶ 150.

174. *Id.* ch. 6, at 97.

175. *Id.* ¶ 151.

176. *Id.*

177. *Id.* ¶¶ 154–56.

on humanitarian conditions there.¹⁷⁸ By dissociating the two means of closure, the Palmer Report avoided all discussion of the application of the law of occupation and its interrelation with the law of armed conflict in this situation. In this respect, the UN Security Council, which adopted the Report, did little to clarify the law on the ambiguous issue of economic warfare.¹⁷⁹

Both the Turkel Report and Palmer Report, then, emerged as accepting the position of the Israeli authorities that harm to the civilian population in the Gaza Strip is legitimate so long as it is proportional and that the blockade did not violate international law as there was no deliberate starvation of the population or hunger in Gaza. Neither report made any determination regarding food security, noting only that claims of food insecurity had been made and that Israeli authorities had made a general statement denying such conditions.¹⁸⁰ The reports' evaluation of the naval blockade in detachment from the general closure, using the legal framework applicable to armed conflicts at sea, regrettably shifted the focus of analysis from a standard of "adequacy" to "minimum," and from "food insecurity" to "starvation." The reports thereby lowered the threshold for assessing the lawfulness of the closure and the blockade in a way that, to a large extent, replicated Israel's "humanitarian minimum" approach.

IV.

FOOD SECURITY, FOOD POWER, AND FOOD SOVEREIGNTY

A. *Food Security and the Right to Food*

In this section, we move to a deeper consideration of food security, the missing piece of the legal analysis and a part of a broader human rights framework applicable in this case. We will consider *food security* in conjunction with the *right to food*, taking the position that the protection of food security is an element of the right to food or a corollary thereto.¹⁸¹ Then, after revisiting

178. *Id.* ¶ 78.

179. Noura Eraka, *It's Not Wrong, It's Illegal: Situating the Gaza Blockade Between International Law and the UN Response*, 11 UCLA J. ISLAMIC & NEAR E. L. 37 (2012).

180. See TURKEL REPORT, *supra* note 106, ¶ 73; PALMER REPORT, *supra* note 104 ¶ 47.

181. The UN Special Rapporteur on the Right to Food noted that food security is the corollary of the right to food. Special Rapporteur on the Right to Food, *Submitted in Accordance with Commission on Human Rights Resolution 2000/10*, U.N. Doc. E/CN.4/2001/53 (Feb. 7, 2001), available at <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200153.pdf> (by Jean Ziegler). For a discussion of the connection between the right to food and food security and the respective development of the concepts, see Wench Barth Eide, *From Food Security to the Right to Food*, in 1 FOOD AND HUMAN RIGHTS IN DEVELOPMENT 67 (Wench Barth Eide & Uwe Kracht eds., 2005). See also Isabella Rae, Julian Thomas & Margret Vidar, *The Right to Food as a Fundamental Human Right: FAO's Experience*, in FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS

the relevant provisions of international humanitarian law (IHL), we will introduce the concepts of *food power* and *food sovereignty*, which, although in need of revision, can be complementary to the right to food and food security or even integrated into the scope of the right to food.

International law recognizes the right to food¹⁸² as part of the right to an adequate standard of living and the health and well-being to which all are entitled, as set forth in Article 25 of the Universal Declaration of Human Rights and in the International Covenant on Economic, Social, and Cultural Rights (ICESR). As explicitly stated in Article 11(1) of the ICESR,

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.¹⁸³

Moreover, Article 11(2) states,

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by

FAILURE 266 (Basudeb Guha-Khasnobis, Shabd S. Acharya & Benjamin Davis eds., 2007).

182. For a comprehensive discussion of the right to food, see Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131 (2006); Flavio Luiz Schieck Valente & Ana Maria Suarez Franco, *Human Rights and the Struggle Against Hunger: Laws, Institutions, and Instruments in the Fight to Realize the Right to Adequate Food*, 13 YALE HUM. RTS. & DEV. L.J. 435 (2010); GEORGE KENT, FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD 45–59 (2005); Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. INT'L L. 691 (2006). On the development of the right to food, see Madeleine Fairbairn, *Framing Resistance: International Food Regimes and the Roots of Food Sovereignty*, in FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY 19 (Hannah Wittman, Anette Aurelie Desmarais & Nettie Wiebe eds., 2010); Bart Wernaart, *The Plural Wells of the Right to Food*, in GOVERNING FOOD SECURITY: LAW, POLITICS AND THE RIGHT TO FOOD 43 (Otto Hospes & Irene Hadiprayitno eds., 2010) [hereinafter GOVERNING FOOD SECURITY]; Bernd van der Meulen, *The Freedom to Feed Oneself: Food in the Struggle for Paradigms in Human Rights Law*, in GOVERNING FOOD SECURITY, *supra*, at 81; Asbjorn Eide, *State Obligations for Human Rights: The Case of the Right to Food*, in GOVERNING FOOD SECURITY, *supra*, at 105; JEAN ZIGLER, CHRISTOPHE GOLAY, CHALIRE MAHON & SALLY-ANNE WAY, THE FIGHT FOR THE RIGHT TO FOOD: LESSONS LEARNED (2011); Wench Barth Eide & Uwe Kracht, *The Right to Adequate Food in Human Rights Instruments: Legal Norms and Interpretations*, in 1 FOOD AND HUMAN RIGHTS IN DEVELOPMENT, *supra* note 181, at 99. For a discussion on the right to food and ways of realizing it, see Susan Randolph & Shareen Hertel, *The Right to Food: A Global Perspective*, in THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 21 (Lanse Minkler ed., 2013). On recognition at the state level, see LIDIA KNUTH & MARGRET VIDAR, FAO, CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD (2011), available at <http://www.fao.org/docrep/016/ap554e/ap554e.pdf>.

183. International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹⁸⁴

As stated in Article 11(1), the right to food recognized in international human rights law is not confined to freedom from hunger (Article 11(2)) and encompasses a broader entitlement to “adequate food.”¹⁸⁵ It is important to recall that crisis situations often attract more attention than do widespread and persistent vulnerabilities that effect food security.¹⁸⁶ Whereas extremely malnourished people “look the part,” Carolan points out, people whose diets are lacking in certain essential micronutrients do not. But the results of malnutrition—reduced well-being and a shortened life-span—are no less detrimental.¹⁸⁷ The words of the Director of UNRWA Gaza Operations are more telling:

Here you don't see kids with blown up bellies. . . . [H]ere they are not starving. But if you do a little research on the medical side you will find that there is malnutrition and a very high prevalence of anemia which has to do with the diet. . . . [T]hose who are keeping a very good household economy are eating, perhaps, one meal a day. Many families are eating every two days. But nobody is starving. Everybody is hungry, nobody is starving.¹⁸⁸

From this perspective, we can see how, for a population “on the verge of humanitarian disaster,” as discussed in the previous Part, the part is not played because their harms are not visible, and the spectators, be they the courts of law or the courts of public opinion, are not as alert to the harm as they would be if those who suffered “looked” their part. Thus, the deliberation of whether or not “hunger” exists in Gaza that was conducted, for example, by the Turkel Commission missed the “hidden hunger.” Hidden hunger exists even when people are not starving and perhaps not even experiencing hunger, yet their diets are typified by micronutrient deficiencies.¹⁸⁹ Eyal Weizman writes,

[T]he tragedy of Gaza cannot be wholly evaluated from the number of recorded deaths from violent reasons or from causes related to hunger. Rather it needs to factor a slower, more cumulative process in which deaths that might have been averted were actively not prevented. . . . [A]nother, rather more subtle form of killing has become

184. *Id.* art. 11(2).

185. On the relationship between the two parts of Article 11 to the ICESCR and on the limits of the part dealing with the concept of freedom from hunger, see Fairbairn, *supra* note 182, at 20.

186. See BRYAN McDONALD, *FOOD SECURITY* 26 (2010).

187. CAROLAN, *supra* note 101.

188. EL-HADDAD & SCHMITT, *supra* note 1, at 26.

189. Patrick Webb & Andrew Thorne-Lyman, *Entitlement Failure from a Food Quality Perspective: The Life and Death Role of Vitamins and Minerals in Humanitarian Crises*, in *FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS FAILURE*, *supra* note 181, at 243.

commonplace: one that is undertaken through degrading environmental conditions to affect the quality of water, hygiene, nutrition and healthcare.¹⁹⁰

It is important to note that it is commonly accepted in international law that human rights standards apply extraterritorially; that is to say, a State is bound by these standards not only within its own territory but also when it acts outside its boundaries.¹⁹¹ Accordingly, the right to food has been specifically interpreted to include State obligations towards third countries in respect to the right to adequate food, based on a concept of shared responsibility.¹⁹² While the notion of international cooperation appears in the ICESCR as a general duty,¹⁹³ the right to food is the only specific right to which a duty of “international co-operation” is attached.¹⁹⁴ However, the source of the international-law duties (under both international humanitarian law and human rights laws) borne by Israel towards the Gazan population is far more specific than the general duty of international cooperation owed to a third country; that is because Israel’s duties derive instead from Israel’s control of significant aspects of life in Gaza.¹⁹⁵ This is supported by the growing international jurisprudence on the human rights duties of States occupying territory beyond their borders or otherwise exercising extraterritorial control. Because the context of our discussion is an armed conflict and occupation, human rights norms co-apply alongside international humanitarian

190. WEIZMAN, *supra* note 44, at 86.

191. See Wenonah Hauter, *The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization Under the Doha Round Negotiation*, 40 VAND. J. TRANSNAT’L L. 1071, 1092–96 (2007) for the extraterritorial application of the right to food. See also Narula, *supra* note 182, at 727–37; MARCO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011); GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford et al. eds., 2012); Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) [hereinafter Maastricht Principles], available at [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUId\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUId]=23) (addressing the extraterritorial application of human rights and, specifically, social rights).

192. See Loreto Ferrer Moreu, *Food Aid: How It Should Be Done*, in ACCOUNTING FOR HUNGER: THE RIGHT TO FOOD IN THE ERA OF GLOBALIZATION 239, 241–42, 246–47 (Olivier de Schutter & Katilin Y. Cordes eds., 2011). Moreu discusses the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2005) [hereinafter FAO Voluntary Guidelines], available at <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>, which include the duty to take positive action through international assistance to realize the right to food elsewhere. On these duties, see Hauter, *supra* note 191; Narula, *supra* note 181.

193. ICESCR, *supra* note 183, art. 2(1).

194. *Id.* art. 11.

195. See discussion in *supra* notes 151–159 and accompanying text; HCJ 9132/07 Al-Bassiouni v. Prime Minister (Jan. 30, 2008) (unpublished) (Isr.); Gross, *supra* note 158; Gisha, *Disengaged Occupiers*, *supra* note 9; Gisha, *Scale of Control*, *supra* note 9; Al-Skeini and Others v. United Kingdom, App. no. 55721/07, Eur. Ct. H. R. (2011).

law.¹⁹⁶ While the relationship between the sets of duties is a complex one, it is clear that obligations stemming from the right to food are applicable in this situation given the degree and duration of the control exercised by Israel over the Gaza population.

As previously explained,¹⁹⁷ Israel's ongoing control over many aspects of life in Gaza and its exercise of this power calls for the continued application of law of occupation, alongside the applicable human rights norms. In regard to the latter norms, questions certainly arise as to the scope of the duties borne by a belligerent or occupying power that derive from social and economic rights. This might include, for example, whether a belligerent or short-term occupier can be considered as lacking the practical (and hence legal) capacity to develop an extensive healthcare or welfare system in the external territory under its control.¹⁹⁸ But these issues are not relevant to the duties we discuss here in the context of international human rights law. While there can generally be differences between the duties a State bears domestically in relation to social and economic rights and those it bears extraterritorially (and the scope of the latter can vary with the circumstances), in the Gaza context, the duration and

196. This position has been taken by the International Court of Justice concerning armed conflict in general, *see, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8), and specifically concerning occupation, *see* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 102–14 (July 9); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J., ¶ 178 (Dec. 19). The same position has been taken by the European Court of Human Rights in a few of its judgments, notably in *Al-Skeini and Others v. United Kingdom*, App. 35765/97 Eur. Ct. H.R., ¶¶ 90–91, 131–38 (July 7, 2011), and by the Israel Supreme Court in some of its cases, such as *H CJ 769/02 Public Committee Against Torture in Israel v. Gov't of Israel*, ¶ 18 (December 14, 2006) (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm. A similar view was expressed by the UN Treaty Bodies, *see* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *ISR. L. REV.* 17 (2004); Noam Lubell, *Human Rights in Military Occupations*, 94 *IRRC* 317 (2012); YUTAKA ARAI-TAKAHSHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW* 399–547 (2009); Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 *EUR. J. INT'L L.* 1 (2007). The literature on this topic is extensive, and these are only a few examples.

197. See discussion in *supra* notes 151–159 and accompanying text.

198. See Lubell, *supra* note 196. Lubell points to how in the context of occupation, practical and legal impossibilities may play a part in an occupier's limited ability to implement human rights obligations in the same manner it does so domestically. He suggests that although the starting point is the presupposition of a need to meet the entire range of obligations, the contextual circumstances should be taken into account in determining which obligations apply in each individual case. Territorial control, including occupation, does trigger the applicability of the full range of human rights obligations the State must uphold. However, the substantive elements of the obligation and the assessment of whether a violation has occurred must be determined in light of the factual and legal contexts, including issues of logistical ability to act or restrictions on the occupying power in the occupation regime. *Id.* at 322.

extent of the control are such that Israel is, *at a minimum*, obligated to *respect* the right to adequate food; that is to say, it is duty-bound *not* to take any measures that infringe on this right. Thus, even if, in the context of a State's extraterritorial obligations questions arise as to its positive obligations to *fulfill* the right, there is no doubt that it bears obligations of the former type ("to respect" the right), the violation of which we are addressing in this Article. Still, we go further and suggest that the length and degree of Israel's control generates obligations of the latter kind ("to fulfill" the rights).¹⁹⁹

The formulation of the norms relating to the right to food in General Comment No. 12, issued by the UN Committee on Economic, Social and Cultural Rights (CESCR), as an interpretation of the right to adequate food under ICESCR Article 11,²⁰⁰ is instructive as to what duty this right gives rise to:

The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.²⁰¹

The accepted international law understanding of the right to food thus rejects the "minimum standard" approach manifested in the Israeli Red Lines Document and inherent to the Turkel Commission's position on the matter, namely that Israel has met its duty towards the population in Gaza if conditions of starvation have not arisen.

As a corollary to the concept of food security, the right to adequate food, in its core contents entails that food be available in quantities and quality sufficient to meet the dietary needs of individuals, free from adverse substances and acceptable within the given culture, and that the access to this food be sustainable in a way that does not interfere with the enjoyment of other human rights.²⁰² As elaborated by the CESCR, the notion of sustainability is intrinsically linked to the ideas of adequate food or food *security*, implying the

199. For a discussion of the typology of obligations, see *infra* notes 247–249 and accompanying text. See also the Maastricht Principles, *supra* note 191, which address the "obligation to avoid causing harm" (Principle 13), but also the obligation of occupying States or States that otherwise exercise effective control over territory outside their territories to respect, protect, and fulfill the economic, social, and cultural rights of persons within that territory (Principle 18).

200. U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (art. 11 of the Covenant), U.N. Doc. No. E/C.12/1999/5 (May 12, 1999) [hereinafter CESCR General Comment No. 12].

201. *Id.* ¶ 6.

202. *Id.* ¶ 8.

notion of long-term availability and accessibility of food, for both present and future generations.²⁰³

Food security is defined in the FAO's Rome Declaration on World Food Security (Rome Declaration), adopted at the 1996 World Food Summit²⁰⁴ as existing "when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preference for an active and healthy life."²⁰⁵ This definition was readopted at the 2009 World Food Summit with the addition of the four pillars of food security: availability, access, utilization, and stability.²⁰⁶ The inclusion of the nutritional aspect of a population's diet is therefore integral to the concept of food security.²⁰⁷ Moreover, food insecurity—the absence of food security²⁰⁸—can occur when a person has sufficient food to survive, but no more than that; it can occur when he is dependent upon donations for his food; and it can exist when he is denied the ability to choose food in accordance with his preferences, which is very much in line with the situation in Gaza.

Using food security as the framework frees us not only from the narrow discussion of whether hunger or starvation exists in Gaza, but also from a perspective that assesses the situation as a matter of the availability of food in Gaza. As we discussed in Part II, food insecurity in Gaza is the result of broader Israeli policy and the economic pressure generated through this policy rather than on specific restrictions on certain types of foods. This understanding of the story of Gaza corresponds with Sen's observation that food insecurity is fundamentally an issue of *buying power* and not a mere matter of production or

203. *Id.* ¶ 7.

204. Rome Declaration, *supra* note 4.

205. *Id.* On the history of the term and previous definitions, see FAO, *Food Security: Changing Policy Concepts of Food Security*, at 1 (Policy Brief, June 2006), available at ftp://ftp.fao.org/es/ESA/policybriefs/pb_02.pdf; Simon Maxwell, *Food Security: A Post-Modern Perspective*, 21 FOOD POL'Y 155 (1996); Edward Carr, *Postmodern Conceptualizations, Modernist Applications: Rethinking the Role of Society in Food Security*, 31 FOOD POL'Y 14 (2006); JOHAN POTTIER, *THE ANTHROPOLOGY OF FOOD: THE SOCIAL DYNAMICS OF FOOD SECURITY* 11–40 (1999). For comprehensive analysis and the history of the concept, see MCDONALD, *supra* note 186. For a critique of the directions the term took and suggestions to "reclaim" it, see CAROLAN, *supra* note 101. For discussion of other definitions of food security, drawing on the World Bank's definition, see Daniel Maxwell & Keith Wiebe, *Land Tenure and Food Security: A Review of Concepts, Evidence, and Methods* 7–8 (University of Wisconsin-Madison Land Tenure Center Research Paper No. 129, Jan. 1998).

206. This amended definition was reiterated in the FAO Voluntary Guidelines, *supra* note 192. Guideline 15 provides that food aid should be supplied with a clear exit strategy and the creation of dependency should be avoided.

207. Declaration of the World Summit on Food Security, World Summit on Food Security (Nov. 2009), available at <ftp://ftp.fao.org/docrep/fao/Meeting/018/k6050e.pdf>.

208. MCDONALD, *supra* note 186, at 3.

total supply of food; food-insecure people in a state of poverty cannot afford to purchase available food. Sen's observations were made in the context of starvation but are very relevant to food security as well.²⁰⁹ "Starvation," he noted, "is the characteristic of some people not *having* enough food to eat" rather than there not "*being*" enough food to eat; it is about people's relationship to food rather than about the food itself.²¹⁰ Thus, starvation is a function of entitlements, not of food availability per se.²¹¹ Food supply is only one factor among many in the realm of entitlements that govern whether a person has the ability to acquire enough food to avoid starvation: income and purchasing power are the most relevant factors in most cases. But as Sen pointed out, to begin and end the story as a tale of a shortage of income and purchasing power is to leave it half-told, for we must also consider how people came to lack the necessary income.²¹² The Israeli occupation and closure of Gaza clearly have played a central role in reducing people's income and, more generally, their entitlements, thereby affecting their food security no less—and likely more—than the actual availability of food. Famines, noted Sen (and, we contend, food insecurity as well) should be regarded as *economic* disasters and not just as *food* crises.²¹³ Sen's "entitlement approach," as he calls it, therefore serves as a better framework for analyzing food security than an approach that considers only food availability, which, he has observed, has led to disastrous policy failures.²¹⁴

Accordingly, as scholars have argued, to successfully combat hunger, there is a need to focus not only on improving supply but, first and foremost, identifying the obstacles faced by the victims of hunger, with hunger construed

209. On food insecurity stemming from unevenness in access to food because of poverty or other social and political barriers, such as war or ethnic conflict, rather than created by insufficient amounts of food in the global food system, see McDONALD, *supra* note 186, at 88. According to this approach, malnutrition generally results not from a lack of food in the community but from a skewed distribution of available food, resulting from the fact that some people are too poor or too powerless to make an adequate claim on the food that is available. KENT, *supra* note 182, at 21.

210. AMARTYA SEN, *POVERTY AND FAMINES; AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 4 (1981). Sen points to the way a person's ability to avoid starvation depends on both his ownership and the exchange entitlement mapping that he faces.

211. *Id.* at 7.

212. *Id.* at 155–56.

213. *Id.* at 162.

214. *Id.* For a discussion of Sen's position and of the work of scholars who support his approach, see David Castle, Keith Culver & William Hannah, *Scenarios for Food Security*, in *THE PHILOSOPHY OF FOOD* 250, 254–56 (David M. Kaplan ed., 2012). As the authors of *The Gaza Kitchen* cookbook point out, "[w]ell-intentioned activists' representations of Gaza as starving and tattered because goods do not enter are false. Which is not to say that a large part of Gaza is not tattered and suffering malnutrition, but this is a question of poverty and distribution." EL-HADDAD & SCHMITT, *supra* note 1, at 95.

as primarily a problem of a lack of access to productive sources or of insufficient safety nets.²¹⁵ The same analysis, we claim, should be applied to food insecurity. Gazan economist Omar Shaban has argued that it is not so much the absence of products that is the problem, but people's inability to buy them: "It doesn't matter how many varieties of sodas there are. What matters is people can't buy them."²¹⁶ More generally, as the Gaza case exemplifies, a proper understanding of food security must focus not on food per se but on economic, social, political, and other types of interwoven relations.²¹⁷ As in many contexts, the issue of food security in Gaza is often approached as a matter of supply. This is manifested in the Israeli assertion and calculations of a sufficient supply of goods in Gaza and symbolized by the aid flotilla's goal of bringing goods into Gaza. At the same time, however, it leaves largely untouched issues of demand, namely the need to improve income levels and employment opportunities.²¹⁸ Food security, Michael Carolan has expressed, is about more than just food; it is not something you can simply "have,"²¹⁹ but rather a process that makes people (and the planet) better off.²²⁰ In the Gaza case, this highlights the need to address people's ability to exercise demand rather than look solely to supply.

The food security perspective exposes another problematic aspect of the Israeli position: there is no "hunger" in Gaza, as expressed in the Red Lines Document and accepted by the Turkel Commission. Food security has been described as entailing the *adequacy* of the food supply, in terms of nutritional requirements, food safety and quality, and cultural acceptability, along with the *stability* of the food supply and access, in terms of environmental and social sustainability.²²¹ Adequacy, cultural acceptability (which relates to the notion of food preferences), and stability are of particular relevance to food security in Gaza. In the sense of adequacy of the food supply, Carolan opposes what he calls the "calorization" of food security, meaning its reduction to a mere matter of number of calories and the treatment of food purely in terms of quantity at the expense of culture, preferences, and local socio-ecological conditions, amongst other things.²²² Food security, Carolan claims, must be examined through what

215. See Olivier de Schutter & Katilin Y. Cordes, *Accounting for Hunger: An Introduction to the Issues*, in ACCOUNTING FOR HUNGER, *supra* note 192, at 1, 6–7.

216. EL-HADDAD & SCHMITT, *supra* note 1, at 95.

217. See POTTIER, *supra* note 205, at 27.

218. On the suggested solution to food security problems as tackling supply while neglecting demand, see CAROLAN, *supra* note 101, at 44.

219. *Id.* at 155.

220. *Id.* at 142.

221. Robert S. Lawrence, Iris Chan & Emily Goodman, *Poverty, Food Security, and the Right to Health*, 15 GEO. J. ON POVERTY L. & POL'Y 583 (2008). See also Eide, *supra* note 181.

222. CAROLAN, *supra* note 101, at 13.

he calls the “*through* food” lens, where human well-being is the end measured and not calories per capita.²²³ These aspects of food security are lost if we only count calories and assess whether hunger categorically exists or not.

Moreover, a diet sufficient in energy and protein does not mean that the consumption of vitamins and minerals in the recommended quantities is assured, so that some calorically sufficient diets may not meet minimum daily-nutrient requirements.²²⁴ As we detailed in Part II, Gazan households have been forced to dramatically cut their consumption of fruits, sweets, and meat products, and general consumption patterns have shifted towards cheaper food commodities and an overall reduction in quantities of food purchases. Webb and Thorne-Lyman observe how in states of crisis, food prices typically rise, and poor households not only allocate a relatively higher share of their total expenditures to food, but also shift their consumption to “less desired” staple foods. As a result, people eat less on micronutrient-rich “quality” foods and decrease their overall consumption of food.²²⁵ The transition from traditional grains to white flour in Gaza due to the dependence on humanitarian aid is illustrative of this process in the form of a localized “nutritional transition,” whereby the food insecurity that is created is manifested in cultural and nutritional changes. This supports Webb and Thorne-Lyman’s point about the intersection of entitlement theory and humanitarian operations in times of crisis,²²⁶ which suggests a need to consider that the story of food insecurity in Gaza is driven by both purchasing power and availability of the food.²²⁷

Food security in Gaza has also been impaired in terms of cultural adequacy of the food supply, due to the population’s dependency on aid organizations for food, which has led to dietary changes. As noted, since these organizations tend to distribute white flour rather than the traditional nutritive grains, the latter have almost completely disappeared from the Gazan diet.²²⁸ This has been a combined cultural and nutritional change, and only a food security analysis—as opposed to the humanitarian minimum standard model—captures this impact, as a food security analysis considers issues of food preferences and the cultural

223. *Id.* at 4. For a discussion of the situation in Gaza through the prism of food security and of different strategies used by Gaza residents, see RAMI ZURAYK, ANNE GOUGH, AHMAD SOURANI & MARIAM AL JAAJAA, *FOOD SECURITY CHALLENGES AND INNOVATIONS: THE CASE OF GAZA, FOOD INSECURITY IN PROTRACTED CRISES – HIGH-LEVEL EXPERT FORUM* (Sept. 13–14, 2012), *available at* http://www.fao.org/fileadmin/templates/cfs_high_level_forum/documents/FS_Challenges_Innovation_Gaza_Arab_Group.pdf; ZURAYK & GOUGH, *supra* note 82.

224. Webb & Thorne-Lyman, *supra* note 189, at 246.

225. *Id.* at 247.

226. *Id.*

227. *Id.* at 246.

228. EL-HADDAD & SCHMITT, *supra* note 1, at 56.

aspects of food.²²⁹ Moreover, this cultural and nutritional sense of food insecurity is missed also by an approach that limits its analysis to buying power alone and its effects on the availability of certain products.²³⁰

Since food security requires stability, the analysis also takes into account the conditions that guarantee the stability of the food supply and access. The issue of stability is also a point neglected under the humanitarian-minimum approach. George Kent has pointed to the need to distinguish between “status” and “security” in the context of food and nutrition: *security* means freedom from fear or harm and refers to anticipated conditions, whereas *status* refers to current conditions.²³¹ This distinction, Kent claims, is particularly useful for assessing different kinds of intervention strategies for addressing nutrition problems. Feeding programs, for example, could be effective in improving people’s current nutrition status but do nothing to improve their nutrition security, as the feeding programs respond to the symptoms rather than underlying sources of the problem. By sustaining the problems rather than resolving them, these programs may therefore actually undermine nutrition security if people become dependent on them. Accordingly, improving nutrition security requires a change in institutional arrangements of long-term effect.²³²

This distinction provides insight into the role of humanitarian aid in Gaza. The humanitarian intervention unquestionably keeps Gaza from crossing over the “verge of disaster” in the form of starvation, which would warrant

229. See *supra* note 38 and accompanying text.

230. It is not only the availability of food itself that affects what is on the table. Electricity cuts make refrigeration in Gaza unreliable, leading to the proliferation of outdated preservation techniques, and the lack of gas for cooking stoves has led to the revived use of clay ovens. Laila El-Haddad & Maggie Schmitt describe these processes as creating “forced self-reliance.” EL-HADDAD & SCHMITT, *supra* note 1, at 24. On the cooking gas shortage, see *Israeli Imposed Restrictions Punish the People of Gaza*, PNN (June 27, 2013), <http://newsoftheworldnews.wordpress.com/2013/06/27/israeli-imposed-restrictions-punish-the-people-of-gaza/>.

231. Kent thus prefers the term “food *inadequacy*” over the term “food *insecurity*” to describe the conditions of inadequate food supplies when assessing current conditions at a given point in time, rather than conditions anticipated. KENT, *supra* note 182, at 21–23. He also points to food status as being only one factor, albeit a major one, for determining nutrition status. Kent suggests addressing “nutrition security,” which has been defined as “the appropriate quantity and combinations of inputs such as food, nutrition and health services, and caretaker’s time needed to ensure an active and healthy life at all times for all people,” with food security a necessary but not sufficient condition for achieving nutrition security. See also Lawrence Haddad, Eileen Kennedy & Joan Sullivan, *Choice of Indicators for Food Security and Nutrition Monitoring*, 19 FOOD POL’Y 329, 329–30 (1994). For a discussion of the significance of nutrition security, see KENT, *supra* note 182, at 21–22. For a comprehensive discussion of food security and nutrition security and human rights, see Arne Oshaug, Wenche Barth Eide & Asbjorn Eide, *Human Rights: A Normative Basis of Food and Nutrition-Relevant Policies*, 19 FOOD POL’Y 491 (1994).

232. KENT, *supra* note 182, at 21–23.

international attention and action. The intervention thus addresses food and nutrition *status* but not food and nutrition *security*. The dependency on aid, as well as the arbitrary nature of Israeli policy on what foodstuffs can enter Gaza²³³ and the very fact of Israel's sustained power to make these decisions, all attest to the *lack* of food and nutrition *security* (food insecurity) even for those individuals whose food and nutrition *status* at a given point in time may seem adequate. Since a comprehensive discussion of the topic of the humanitarian aid to Gaza is beyond the scope of this paper, we will simply highlight one point, which was well articulated in the Rome Declaration: food aid cannot serve as a substitute for long-term strategies for achieving food security and must be directed at rehabilitation, development, and cultivating the capacities to satisfy future needs.²³⁴ As stated in the FAO's 2005 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, food aid should be provided with a clear exit strategy and avoid the creation of dependency.²³⁵ Unfortunately Gaza seems to be a case in which the aid has taken the form of relief and been eschewed as a means of addressing the root causes of the food insecurity and advancing sustainable development.²³⁶ As Adi Ophir notes, organizations providing aid in this context have positioned themselves as a buffer between Israel's policies and the onslaught of "catastrophe,"²³⁷ whereby the aid serves as a mechanism that sustains, rather than transforms, the situation.²³⁸

B. *The Duty to Ensure Adequate Food in International Humanitarian Law*

We have seen, thus far, the preference for using food security and the right to food as a legal framework as opposed to the deficient measures that check only for the existence of hunger, consider supply rather than demand, and count

233. For the non-transparency of the regime governing the movement of people and goods into and out of Gaza, see Bashi, *supra* note 8, at 267–68.

234. Rome Declaration, *supra* note 4. For a discussion of this element, see Moreu, *supra* note 192, at 245. For a discussion of the limit of food rations given as aid in the Gaza context, see EL-HADDAD & SCHMITT, *supra* note 1, at 34.

235. FAO Voluntary Guidelines, *supra* note 192. For a discussion of this element, see Moreu, *supra* note 192, at 246–47.

236. For a discussion of this use of food aid, see Moreu, *supra* note 192, at 249–50.

237. Ophir, *The Politics of Catastrophization*, *supra* note 14, at 81. See also Ariella Azoulay, *Hunger in Palestine: The Event That Never Was*, in TERRITORIES: ISLANDS, CAMPS AND OTHER STATES OF UTOPIA (Anselm Franke & Eyal Weizman eds., 2003); THE FOOD CHAIN (Amit Goren Productions 2004) (Azoulay's film), available at <http://www.youtube.com/watch?v=iGpfq6COz38> and http://www.youtube.com/watch?v=_u7FEG8pJRU.

238. For a discussion of the need for humanitarian intervention that not only saves lives but also enhances the efficacy of individuals' demands for access to nutrition and not just food, see Webb & Thorne-Lyman, *supra* note 189, at 259–60.

calories. The current approach may attend to status but it neglects the “security” in food security, which is undermined when food supply is contingent on aid. A focus on international human rights law, we maintain, should complement the international humanitarian law perspective, including, as discussed above, the norms of the law of occupation. Of particular relevance in this respect is Article 55 of the Fourth Geneva Convention, which provides: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”²³⁹

Thus, similar to Article 12 of the ICESCR, Article 55—which applies to conditions of occupation—uses the standard of “adequacy” rather than a humanitarian-minimum standard. This is supplemented by Article 59 of the Convention (mentioned in Part III), which provides that if all or part of the population of an occupied territory is “inadequately supplied,” the occupying power is obligated to agree to relief schemes on behalf of that population and facilitate them with all means at its disposal.²⁴⁰ Therefore, under international humanitarian law, an occupier has a duty to guarantee the food supply of the occupied civilian population.²⁴¹ In addition to understanding food security as a corollary to human rights, we argue that a correlative duty to ensure “adequate food” exists within international humanitarian law in the context of occupation. Since, as we discussed above, we regard the law of occupation to be applicable

239. Fourth Geneva Convention, *supra* note 163, art. 55.

240. *See id.* art. 59, para. 1. For a discussion of the relevant IHL provisions, see Jelena Pejic, *The Right to Food in Situations of Armed Conflict: The Legal Framework*, 83 IRRC 1097, 1104–05 (2001). Another IHL provision relevant to food is Article 23 of the Fourth Geneva Convention, *supra* note 163, which concerns the duty of States to allow for the free passage and consignment of essential foodstuffs, clothing, and tonics intended for children under age fifteen, expectant mothers, and maternity cases. *See Pejic, supra*, at 1102–03. This narrow provision is not specific to situations of occupation where the broader provisions of Articles 55 and 59 would apply. Other provisions relevant to relief action to meet a population’s basic needs in occupied territories are Articles 68–71 of the Additional Protocol to the Geneva Conventions from June 8, 1977, *supra* note 122, to which Israel is not a party. *See Pejic, supra* note 240, at 1103–04. There are parallel provisions in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 18, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Protocol II*], which is applicable in non-international armed conflicts and to which Israel is also not a party. For an overview of the provisions relating to the right to food in international humanitarian law and international human rights law, see KENT, *supra* note 182. For detailed discussion of the humanitarian law provisions, see Pejic, *supra* note 240; *see also* Narula, *supra* note 182, at 782–84.

241. The international humanitarian laws duties, which include the occupier’s duty to guarantee the food supplies of the occupied civilian population, were moreover reiterated in the FAO Voluntary Guidelines, *supra* note 192, at 184 (Guidelines 16.2 and 16.3).

to Gaza, this provision complements the relevant norms of international human rights law.

Finally, some claim that international humanitarian law is more robust than human rights law with regard to the right to food, most notably in its specific and detailed rules governing the parties to armed conflict, which are subject to immediate implementation (unlike the “progressive realization” framework under the ICESCR) and cannot be derogated from.²⁴² Yet although the IHL provisions set forth concrete duties, in certain respects, as we detailed above, the human-rights and food-security framework might be broader. This is particularly so in the context of the relevant IHL clauses that deal with the prohibition on using starvation of individuals as a means of warfare.²⁴³ Even if, as Pejic notes,²⁴⁴ these provisions apply not only to starvation leading to death but also to any situation of hunger created by the deprivation of food sources or supply, they may still shift the discussion to a more minimal framework than that of human rights and food security.²⁴⁵ Indeed, it is only in the context of occupation, applicable in the Gaza context, that the standard is one of adequacy, as in human rights law.

C. *Food Power*

Another concept we propose introducing into the discussion is *food power*, namely, an examination of how Israeli policy, in terms of its impact on food security in the Gaza Strip, is a troubling exercise of food power. This term has traditionally been used to describe situations in which one State seeks a coercive advantage over a target country by manipulating the volume and timing of its own food exports, for example by placing a selective embargo on food exports, with the aim of punishing the target country or forcing it to change its policy.²⁴⁶ We contend that food power is also applicable to the context of the Israeli closure on Gaza. Israel’s restrictions on food imports into Gaza (not only from Israel) as part of its general closure policy, were intended, according to Israel, as

242. See Pejic, *supra* note 240, at 1097–98.

243. Additional Protocol I, *supra* note 122, art. 54(1); Additional Protocol II, *supra* note 240, art. 14 (discussed by Pejic, *supra* note 240, at 1099).

244. Pejic, *supra* note 240, at 1099.

245. For the argument that the application of human rights law in situations of occupation alongside international humanitarian law indicates that an occupier’s obligations vis-à-vis the right to food are not limited to the minimum set by IHL and must be considered from the perspective of the complementary contribution of human rights law, see Sylvian Vite, *The Interrelation of the Law of Occupation and Economic Social and Cultural Rights: The Examples of Food, Health and Property*, 90 IRRC 629, 642 (2008). On the relationship between human rights and IHL and a discussion of how human rights can in fact at times undermine IHL protections, see Gross, *supra* note 196.

246. ROBERT PAARLBERG, *FOOD POLITICS: WHAT EVERYONE NEEDS TO KNOW* 77–80 (2010).

a means of punishing the population and coercing the Hamas regime into ceasing rocket fire into Israel and releasing the captured Israeli soldier Gilad Shalit.

This type of exercise of food power is in fact prohibited under international law as a violation of the right to adequate food, as interpreted by the CESCR in Article 11 of General Comment No. 12:

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfill*. . . . The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfill (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill (provide)* that right directly.²⁴⁷

The obligation to respect existing access to adequate food is especially prominent in the provision in Paragraph 37 of the Comment, obligating “States parties” to “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.”²⁴⁸ This mandate is further reinforced in the provision prescribing that “States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”²⁴⁹

While currently prohibited by human rights norms, food power is regarded by many as outdated and unsuccessful. Robert Paarlberg argues that governments seldom manipulate food exports in pursuit of a coercive advantage. This is because markets for food tend to offer little coercive leverage for exporters, since food is a renewable resource that most countries can and do produce for themselves or can begin to produce.²⁵⁰ In her own discussion of food power, Margaret Doxey similarly argued that agricultural products do not meet the necessary conditions for effective embargoes, as the variety in existing staples means that any one can be substituted for another, and most countries have some food growing capacity.²⁵¹ However, unlike in the typical case of the

247. CESCR General Comment No. 12, *supra* note 200, ¶ 15.

248. *Id.* ¶ 37. Additionally, the General Comments provides, “State should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.” *Id.* ¶ 36.

249. *Id.* ¶ 36.

250. PAARLBERG, *supra* note 246, at 80.

251. Margaret Doxey, *Oil and Food as International Sanctions*, 36 INT’L J. 311, 326 (1981).

exercise of food power by an exporting country, where it withholds the export of a certain type of foodstuff (e.g., the partial embargo the U.S. placed on grain exports to the Soviet Union following the invasion of Afghanistan),²⁵² in the case of Israel and Gaza, the coercive power is far stronger due to Israel's control of the passage of most goods into and out of Gaza, and Gaza's limited capacity for producing all of its required food. The extent of this coercion was illustrated by Israeli Army officials, who decided in weekly meetings whether certain foodstuffs, such as bananas or apples, are essential and should be allowed into Gaza, and others, such as apricots or grapes, should not.²⁵³ The Gaza context thus brings to light the limits of the current discourse on food power and the need to develop an understanding of the term that incorporates such situations into the analysis.

Peter Wallensteen has addressed food power and food as an economic commodity that is used as a weapon. According to Wallensteen, since economic commodities are essential to maintaining life and giving it material form, they can be disastrous to human life if “effectively used” as military weapons; such a use of food is particularly potent in this respect. Economic commodities can also be exploited to effectively achieve other goals of weapons, such as punishing enemies and rewarding friends. “The siege of a city is far less dramatic,” posits Wallensteen, “than an attack on it,” since economic means in fact may have more long-term and indirect effects.²⁵⁴ Food is not merely an economic commodity, not only because of its essentiality to life, but also because of its significance to human existence: our cultural experiences, our family and communal lives, our pleasures, and our bodies. In line with Wallensteen's theory, we contend that the notion of food power should be redefined. From its traditional limited understanding as “the manipulation of international food

However, Doxey notes that food can be used as a “weapon” also through an embargo on the purchase of exports of primary produce from targets of pressure with the objective of reducing foreign-exchange earnings and producing economic hardship. Food or food products are not selected as objects of embargo based on their intrinsic nature; instead, they are selected due to their importance in the foreign trade of the target. *Id.* at 328. While Israel did not block the export of food in general, or specific foodstuffs from Gaza, it was, as we discuss in the text, the general blockade and economic hardship that it created that impacted food security more than the exclusion of any particular supply-side item.

252. See PAARLBERG, *supra* note 246, at 78–79.

253. Feldman, *supra* note 95, at 133.

254. Peter Wallensteen, *Scarce Goods as Political Weapons: The Case of Food*, 13 J. PEACE RES. 277 (1976). Wallensteen points to four factors that set the structural conditions for applying economic commodities as a means of influence: scarcity, supply concentration, demand dispersion, and action independence. While he articulates and analyzes these factors from the perspective of export restrictions rather than food power used in other contexts such as warfare, they can be applied, *mutatis mutandis*, to situations such as Gaza. On the use of food power as a weapon, see Robert Paarlberg, *Food as an Instrument of Foreign Policy*, 34 FOOD POL'Y & FARM PROGRAMS 25 (1982).

transfers in the effective pursuit of discrete diplomatic goals,”²⁵⁵ it should be expanded to also encompass the manipulation of food transfers as a means of warfare, punishment, and humiliation of civilian populations.

Echoing our approach, the Rome Declaration on World Food Security unequivocally states that “[f]ood should not be used as an instrument for political and economic pressure” and reaffirms “the necessity of refraining from unilateral measures not in accordance with the international law and the Charter of the United Nations and that endanger food security.”²⁵⁶ In Gaza, Israel’s restrictions on the movement of food into the Strip, which were also part of the broader violation of Gazans’ food security, violated food power principles. In fact, the analysis of Israel’s exercise of its food power over Gaza reveals a transformation (rather than cessation) of Israeli control post-disengagement: its food power enabled Israel to make arbitrary determinations about the foodstuffs entering and exiting Gaza and to control the lives and bodies of its residents.²⁵⁷ Thus, the food power analysis points to new forms of post-disengagement control exercised by Israel in Gaza, which are aimed at releasing Israel from its duty to ensure food security there and reducing its obligations to the bare minimum, as asserted by the Israeli government and affirmed by the Turkel Commission and Israel Supreme Court.²⁵⁸ But whether taken from a Foucauldian perspective of the exercise of “bio-power”²⁵⁹ over the population or, following Agamben, as part of the abandonment of the Palestinian population to “bare life,”²⁶⁰ this exercise of food power must be rejected as illegitimate under international law.

255. Robert Paarlberg, *The Failure of Food Power*, 6 POL’Y STUD. J. 537 (1978).

256. Rome Declaration, *supra* note 4. Philip Alston also discussed the use of food sanctions as something frowned upon. He noted that to the duty to cooperate as well as specific provisions in Article 11 of the ICESCR support the view that there is a general duty not to use food as an international sanction. Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9, 45–46 (Philip Alston & Katarina Tomasevski eds., 1984). Alston’s observations preceded the existing, more specific prohibitions on such measures in the General Comment and the FAO documents cited above in this section.

257. For a discussion of the ways in which control over the external borders affords Israel control over the lives of those living inside Gaza, see Bashi, *supra* note 8.

258. In the context of fuel, see H CJ 9132/07 Al-Bassiouni v. Prime Minister (Jan. 30, 2008) (unpublished) (Isr.).

259. MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 135–45 (1990). For an examination from a perspective of the exercise of “bio-power” over the population, see Feldman, *supra* note 95.

260. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998).

D. Food Sovereignty

The third and final framework we incorporate into the discussion is food sovereignty, which collides with the exercise of food power by others. Indeed, Israel's food policies prevented the residents of Gaza from enjoying their right to food sovereignty.

The notion of food sovereignty emerged in the framework of globalization, when the La Via Campesina alliance proposed it as a policy paradigm that takes as its point of departure the concept of the right to food, but goes one step further by claiming a corollary right to land and a right to produce for rural peoples. The term entered the discourse by way of the 1996 Via Campesina Declaration on Food Sovereignty, which stated that the right to food can only be realized in a system where food sovereignty is guaranteed. It defined food sovereignty as “the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity,” including the right to “produce our own food in our own territory,” and, moreover, declared food sovereignty to be “a precondition to food security.”²⁶¹

261. THE RIGHT TO PRODUCE AND ACCESS TO LAND, VIA CAMPESINA DECLARATION ON FOOD SOVEREIGNTY (Rome, Nov. 11–17, 1996), available at <http://www.connexions.org/CxLibrary/CX8459.htm>. The United Nations Special Rapporteur on the Right to Food noted the development of the strategy of food sovereignty as “an alternative vision that puts food security first.” Special Rapporteur on the Right to Food, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/5 ¶¶ 71–75 (Jan. 10, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/98/PDF/G0810098.pdf?OpenElement> (by Jean Ziegler); Special Rapporteur on the Right to Food, *Report Submitted in Accordance with Commission on Human Rights Resolution 2003/25*, U.N. Doc. E/CN.4/2004/10 ¶¶ 24–34 (Feb. 9, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/107/77/PDF/G0410777.pdf?OpenElement> (by Jean Ziegler). For a discussion of food sovereignty as a condition for the full realization of the right to food by the Special Rapporteur, see Special Rapporteur on the Right to Food, *Final Report: The Transformative Potential of the Right to Food*, U.N. Doc. A/HRC/25/57 (Jan. 24, 2014), available at http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf (by Olivier de Schutter). For a further discussion of food sovereignty, see Grain, *Food Sovereignty: Turning the Global Food System Upside Down*, SEEDING (Apr. 29, 2005), <http://www.grain.org/article/entries/491-food-sovereignty-turning-the-global-food-system-upside-down>. On the idea of food sovereignty and its development, see WAYNE ROBERTS, THE NONSENSE GUIDE TO WORLD FOOD 52–58 (2008). For a discussion of the relationship between the right to food, food security, and food sovereignty, see Maggie Ellinger-Locke, *Food Sovereignty Is a Gendered Issue*, 18 BUFF. ENV'T'L L.J. 157, 175–84 (2011). Ellinger-Locke cites Raj Patel, who argues that food sovereignty adds the dimension of control and power lacking in the idea of food security. DIG IN! RAJ PATEL ON FOOD SOVEREIGNTY AND WOMEN RIGHTS, available at http://www.youtube.com/watch?v=cI_F9n_c4yY. On the connection between all three, see James Thuo Gathii, *Food Sovereignty for Poor Countries in the Global Trading System*, 57 LOY. L. REV. 509, 529–36 (2011). See also Hauter, *supra* note 191; Fairbairn, *supra* note 182, at 15–32; Raj Patel, *What Does Food Sovereignty Look Like?*, in FOOD SOVEREIGNTY: RECONNECTING FOOD, *supra* note 182, at 19–21, 186–96; WILLIAM SCHANBACHER, THE POLITICS OF FOOD: THE GLOBAL CONFLICT BETWEEN FOOD SECURITY AND FOOD SOVEREIGNTY (2010). While Schanbacher views food

A few countries actually recognize a right to food sovereignty at the constitutional level.²⁶²

The notion of food sovereignty has been described as both a reaction to and the intellectual offspring of earlier concepts of the right to food and food security.²⁶³ Madeleine Fairbairn has noted that the idea emerged out of a grassroots movement that rejected the way the concept of “food security” was being framed by the global political elite within the neoliberal paradigm and not as a challenge to it.²⁶⁴ We suggest, however, that the concept of food sovereignty is useful only if we see it as complementing, rather than contradicting, food security and with the potential to constitute, in a revised form, an additional layer of analysis necessary for achieving food security.

While there have been amended and expanded definitions of the notion of food sovereignty,²⁶⁵ it is important to note, for our purposes, that the central claim has been that feeding a nation’s people is a matter of sovereignty: it is about the right of nations and peoples to control their own food systems, including their own markets, production modes, food cultures, and food

security and food sovereignty as a state of antagonism in how they conceive hunger and malnutrition, *id.* at ix, as we discussed previously, we consider the two frameworks to be potentially complementary rather than in conflict. For a genealogy of the term tracing its origins to the 1980s, see Marc Edelman, *Food Sovereignty: Forgotten Genealogies and Future Regulatory Challenges* (Conference Paper No. 72, Yale University Food Sovereignty: A Critical Dialogue, Sept. 14–15, 2013). See also Philip McMichael, *Historicizing Food Sovereignty* (Conference Paper No. 13, Yale University Food Sovereignty: A Critical Dialogue, Sept. 14–15, 2013).

262. See Priscilla Claeys, *From Food Sovereignty to Peasants’ Rights: An Overview of Via Campesina’s Struggle for New Human Rights*, in LA VIA CAMPENSITA’S OPEN BOOK: CELEBRATING 20 YEARS OF STRUGGLE AND HOPE 4 (May 15, 2013), available at <http://viacampesina.org/en/index.php/publications-mainmenu-30/1409-la-via-campesina-s-open-book-celebrating-20-years-of-struggle-and-hope>.

263. Fairbairn, *supra* note 182, at 15.

264. *Id.* at 26–31.

265. See MICHAEL WINDFUHR & JENNIE JONSEN, FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS 11–17 (2005), available at http://www.ukabc.org/foodsovereignty_itdg_fian_print.pdf; Raj Patel, *What Does Food Sovereignty Look Like*, 36 J. PEASANT STUD. 663 (2009). Patel notes that the term is so over-defined that it is hard to know what it means. The Declaration of Nyéléni defined “food sovereignty” as “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.” Declaration of Nyéléni, adopted by the Forum for Food Sovereignty in Sélingué, Mali, Feb. 27, 2007 [hereinafter Declaration of Nyéléni], available at <http://www.nyeleni.org/spip.php?article290>. For our purposes, this definition may be too narrow as it does not put strong enough emphasis on the freedom from the use of food as a weapon and food power but, at the same, also too broad in stressing ecologically sound and sustainable methods, which, as important as they are, may not be of primary concern in situations such as in Gaza, where the essential condition for food sovereignty is the more basic need to allow the Palestinian population to take control of its food system. However, as discussed in the text, the Declaration did mention a need to fight against occupations and economic blockades—a very relevant notion in the Gaza context.

environments.²⁶⁶ Throughout this Article, we have shown that this right was denied to the residents of Gaza by Israel's restrictions on the import of foodstuffs and access to land for agriculture and water for fishing. This was compounded by other processes, as elaborated in Part II, that diminished Gazans' self-sufficiency and intensified their dependence on imported, primarily Israeli, products.

The idea of food sovereignty was developed based on the notion that if "the next meal" of a country's population depends on the global economy or the goodwill of a superpower not to use food as a weapon or is subject to the unpredictability of, say, shipping, then that country is not secure in the sense of national security or food security. Accordingly, it has been asserted that food sovereignty extends beyond the idea of food security, which does not address where food comes from or how it should be produced.²⁶⁷ While the concept of food sovereignty was developed around the idea that people, rather than corporate monopolies, must make the decisions regarding their food,²⁶⁸ our study of conditions in the Gaza Strip highlights the gap in the current food sovereignty discourse. There is a need to expand this notion to incorporate the understanding that people must have sovereignty over their food decisions, without being subject to the goodwill of any controlling power, not just a super power, that can exercise food power and use food as a weapon. Thus, the Gaza case exposes that the food sovereignty discourse is flawed in its emphasis on the ability to produce food and the premise that this ability is sufficient for attaining food security.²⁶⁹ The story of the Gaza closure illustrates more broadly the risks created when an external power, rather than the relevant population, has control over food. It therefore demonstrates a need to protect food sovereignty, and consider it as encompassing Palestinians' right to control their food without being dependent on charity in the form of humanitarian aid. As the discussion shows, achieving this control cannot be limited to ensuring the ability to grow one's own food.

266. Hannah Wittman, Anette Aurelie Desmarais & Nettie Wiebe, *The Origins and Potential of Food Sovereignty*, in FOOD SOVEREIGNTY: RECONNECTING FOOD *supra* note 182, at 1.

267. FRED MAGDOFF & BRIAN TOKAR, AGRICULTURE AND FOOD IN CRISIS: CONFLICT, RESISTANCE, AND RENEWAL 191–92 (2010).

268. *Id.* at 212.

269. Kevin Danaher noted in another context that the idea of "food as a human right" does not primarily entail a right to charity hand-outs of food, but rather, implies the right to food-producing resources. Danaher, who addressed food power and whose work predated the food sovereignty movement, was concerned that most of the food-producing resources in the world are controlled by market forces, bought and sold as commodities. He therefore asserted a need to partially de-commodify food-producing resources, by shifting land, credit, and agricultural inputs away from market control, to be governed by guidelines that allow people willing and able to farm to do so. Kevin Danaher, *U.S. Food Power in the 1990s*, 30 RACE & CLASS 31, 44 (1989).

It has been argued that food security does not seek to identify where food comes from or the conditions under which it is produced and distributed. The argument is that food security targets are often met with food sources produced in environmentally destructive and exploitative conditions and supported by subsidies and policies that destroy local food producers and benefit agribusiness corporations. Food sovereignty, in contrast, stresses ecologically appropriate production, distribution, and consumption, socio-economic justice, and local food systems in the effort to combat hunger and poverty and guarantee sustainable food security for all. Furthermore, food sovereignty, the argument goes, advocates trade and investment that serve society's collective aspirations. It promotes community control of productive resources, agrarian reform and tenure security for small-scale producers, agro-ecology, biodiversity, local knowledge, the rights of peasants, women, indigenous peoples, and workers, social protection, and climate justice.²⁷⁰ Yet while these are all worthy causes in themselves, our study of Gaza reveals how focusing on issues like local food systems, community control, and agro-ecology may not suffice to ensure the "security" in food security. Rather, the concern with the conditions in which food is produced, as important as it is, must complement, and not supersede, attention to the *availability* of adequate food and *access* to food as a matter of security.

The landmark 2007 Nyeleni Declaration on food sovereignty explicitly noted that the struggle for food sovereignty should include a struggle against, inter alia, occupations and economic blockades,²⁷¹ which is certainly relevant to the context of Gaza. Our study, however, illustrates that a population's right to produce its own food in its own territory, on which the food sovereignty movement places much weight, might not necessarily be the only mode of exercising food sovereignty: in cases like Gaza, it could be more crucial to stress the right to exercise sovereignty regarding the importing of food alongside the growing of food.²⁷² In Gaza, there are restrictions on both the ability to grow

270. *Editorial: Food Sovereignty Now!*, NYELENI NEWSL., Mar. 2013, available at http://www.nyeleni.org/DOWNLOADS/newsletters/Nyeleni_Newsletter_Num_13_EN.pdf.

271. Declaration of Nyéléni, *supra* note 265. A statement by one of the delegations to the conference complements parts of our argument:

Food sovereignty is more than a right; in order to be able to apply policies that allow autonomy in food production it is necessary to have political conditions that exercise autonomy in all the territorial spaces: countries, regions, cities and rural communities. Food sovereignty is only possible if it takes place at the same time as political sovereignty of people.

Nyéleni 2007: Forum for Food Sovereignty 16, available at <http://www.foei.org/en/resources/publications/food-sovereignty/2000-2007/nyeleni-forum-for-food-sovereignty/view>.

272. For a critique of food sovereignty as being unable to address the food needs of nonfarmers because it discards important elements of political economy, see Henry Bernstein, *Food Sovereignty via the "Peasant Way": A Skeptical View* (Conference Paper No. 1, Yale University Food

food and the ability to import food. Both are elements of Israel's denial of sovereignty—food and otherwise—to the people of Gaza in its post-disengagement occupation.

It is in this sense that we propose putting the “sovereignty” back into food sovereignty.²⁷³ As we have explained, the ability to grow one's own food may not be sufficient to guarantee food security, especially, but not solely, when food power of the sort discussed here is exercised. Thus, to the extent that food sovereignty is a “much deeper concept than food security because it proposes not just guaranteed access to food, but democratic control over the food system”²⁷⁴ and relates to self-determination that includes the nutritional dimension,²⁷⁵ it exposes how Israel's exercise of food power prevents the residents of Gaza from enjoying sovereignty. Israel's obstruction of food sovereignty in Gaza undermines its claim that it has relinquished control over Gaza and its residents and no longer bears the obligations of an occupying power. From Israel's point of view, it no longer occupies Gaza, yet Gaza is still not permitted to exercise food sovereignty or any other form of sovereignty, by itself or as part of Palestine as a whole. Thus, the creation of food insecurity and withholding of food sovereignty is yet another layer of Israel's ongoing control of Gaza even after disengagement. Clearly, then, in stark contrast to the Turkel Commission's depiction of the Israeli closure of Gaza as within the framework of armed conflict between Israel and Hamas, this has actually been a persistent and consistent policy that began with the Occupation in 1967 and continues to this day.

Sovereignty: A Critical Dialogue, Sept. 14–15, 2013). Similarly, in our context, it seems that much of the food sovereignty discourse neglects the national politics that our case study brings to the forefront.

273. Edelman notes that the question of who is the sovereign in food sovereignty is of crucial importance but, like the meaning of “sovereignty” in our context, unclear. Edelman, *supra* note 261. For our purposes, we consider the sovereignty of Gazans as a collective to be denied in this regard.

274. MAGDOFF & TOKAR, *supra* note 267, at 212. For a comprehensive discussion of the ideas of “food security” and “food sovereignty” as well as of “food enterprise” and “food justice” and how they relate to each other, see Eric Holt-Gimenez & Annie Shattuck, *Food Crises, Food Regimes and Food Movements: Rumbblings of Reform or Tides of Transformation*, 38 J. PEASANT STUD. 109, 115–31 (2011); Eric Holt-Gimenez, *Food Security, Food Justice or Food Sovereignty?* FOOD FIRST BACKGROUNDERS, Winter 2010, available at http://dev.international.uiowa.edu/files/international.uiowa.edu/files/file_uploads/FoodMovementsWinter2010bckgrndr.pdf. For a discussion of the relationship of “food sovereignty” to the ideas of the “right to food” and “food security,” see WINDFUHR & JONSEN, *supra* note 265, at 19–24. See also Annie Shattuck & Eric Holt-Gimenez, *Moving from Food Crisis to Food Sovereignty*, 13 YALE HUM. RTS. & DEV. L.J. 421 (2010); Hans Morten Haugen, *Food Sovereignty—An Appropriate Approach to Ensure the Right to Food?*, 78 NORDIC J. INT'L L. 263 (2009); Jacqueline Mowbray, *The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the problem of World Hunger*, 20 LEIDEN J. INT'L L. 545 (2007).

275. See Peter Halewood, *Trade Liberalization and Obstacles to Food Security: Toward a Sustainable Food Sovereignty*, 43 U. MIAMI INTER-AM. L. REV. 115, 115–16, 134–36 (2011).

CONCLUSION

We have shown that assessing the Gaza closure in terms of the right to food and food security frees us from the “hunger” analysis engaged in by the Turkel Commission, from the minimal “Red Lines” approach, and from the limited proportionality-centered humanitarian analysis. We began by critiquing the Commission’s findings on its own terms and then demonstrated how the legal frameworks it omitted from its analysis could expose a need to hold Israel accountable for its infringement of Gaza’s food security, exercise of food power, and denial of food sovereignty. More broadly, we explained the new forms of post-disengagement control that Israel exercises in Gaza and showed how this transformation was aimed at releasing Israel from any responsibility to ensure food security in Gaza and reducing its obligations to the bare humanitarian minimum. We showed that creating food insecurity was an element of Israel’s ongoing control of the Gaza Strip and its residents even after its disengagement from the territory, and that this mode of control cannot be regarded as legitimate under international law.

Israel’s direct exercise of food power, it was explained, is only one element, amongst others, of power and control that impact food security and the economy in Gaza. The Israeli regulation of the entry of food into the Gaza Strip constitutes an exercise of food power that denies food sovereignty to the Palestinian residents in violation of the international law prohibition on using food as an instrument of political and economic pressure. Yet this is not the major cause of food insecurity in Gaza. Rather, our analysis crucially showed that it has been the closure’s effect on buying power that has had the most detrimental effect on food security, continuing even after the restrictions on the entry of foodstuffs into Gaza were lifted in June 2010, following the aid flotilla incident.

Incorporating the notions of food security, food power, and food sovereignty into the analysis allows us to abandon the restrictive approach that finds no violation of international law when starvation is not created. It also allows us to abandon the cost-efficient, means-ends tests, currently predominant in humanitarian law, that disregard power relations with their focus on proportionality, for determining the legality of actions.²⁷⁶ In contrast to the Turkel Commission’s finding that the naval blockade conforms with the principle of proportionality—to be measured, the Commission noted, mainly in

276. For such criticism, see KENNEDY, *supra* note 102, ch. 8. Kennedy points to the role played by humanitarianism in speaking the same language as the military. See also Aeyal Gross, *The Construction of a Wall Between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 26 LEIDEN J. INT’L L. 393 (2006); Ophir, *The Politics of Catastrophization*, *supra* note 14; AZOULAY & OPHIR, *supra* note 14; WEIZMAN, *supra* note 44.

reference to the prohibition on starving the population—we emphasize food security as part of human security,²⁷⁷ food power as part of power relations, and the denial of food sovereignty as part of the overall denial of sovereignty. This highlights the need, in this case, to put the “sovereignty” back into food sovereignty. The Gaza case clarifies all of these concepts, illustrating how policies can prevent food security using both arbitrary limitations on the entry of food and economic warfare. Our study of the Gaza case shows that the concept of food power, when extracted from the limited framework in which it was originally articulated, remains relevant and is echoed in the evolving human rights norms on the right to food. Finally, by underscoring the limits of the current food sovereignty concept, our analysis points to a new path for seriously tackling food security, especially when *sovereignty* in its most basic sense is being denied.

The impact of the Israeli closure of Gaza should not be measured solely based on which foodstuffs were allowed in or prohibited at any given time, but also from the perspective of buying power. We should, moreover, consider also how the arbitrary nature of the list of restricted foodstuffs reflects the absolutely arbitrary nature of the occupation and the deprivation of sovereignty to Gazans. This is a mechanism that lacks any comprehensible rationale and generates decisions devoid of any clear reasoning.²⁷⁸ The food insecurity in Gaza was not the result of a “natural disaster” but part of a deliberate policy or, to borrow a phrase used by Susan Marks, the outcome of “planned misery.”²⁷⁹ Thinking, in Carolan’s terms, “through food” allows us to see that food security should not only depend on the regulation of foods allowed in; rather, food is interwoven into the bigger story of food security. In order to understand the story of food, we must look beyond food itself—from this story of food, we learn much more than simply about food.

277. On food security as component of human security, see MCDONALD, *supra* note 186, at 27.

278. See Amir Paz-Fuchs’ examination of whether the legal regime applied by Israel in the Occupied Palestinian Territory is a legal system or, in Fuller’s terms, an arbitrary system of power. Based on Fuller’s criteria, Paz-Fuchs points to a few relevant elements, including publication, clarity, and lack of contradictions, which seem to be lacking in the regime in the Territories. The story of the regulation of foodstuffs into Gaza could fit this analysis. Amir Paz-Fuchs, *Ha-Birokratia Shel Hakibush [The Journey Towards Occupation]*, 13 MISHPAT VEMIMSHAL [HAIFA UNIV. L.J.] 7 (2011). See also Yael Berda, *THE BUREAUCRACY OF THE OCCUPATION* (2012).

279. Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).