Israel-Hamas 2025 Symposium – Reoccupied? The Israel Supreme Court's Judgment in Gisha v Government of Israel

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by Ori Pomson | Apr 11, 2025

On March 27, 2025, the Supreme Court of Israel, sitting as High Court of Justice (HCJ), published its judgment (in Hebrew) in *Gisha v Government of Israel*. The judgment concerns the passage of relief to the Gaza Strip during the war which began on October 7, 2023. It touches upon several public international law issues including the applicability of the law of belligerent occupation to Gaza, Israel's obligations regarding humanitarian relief, and the relatively recent advisory opinion of the International Court of Justice (ICJ) concerning the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.

The purpose of this post is to address a few main aspects of the judgment, as well as to highlight their implications moving forward. However, before doing so, I shall provide a summary of the judgment itself.

Summary of the Judgment

The judgment is currently only available in Hebrew. However, given that in their post on *Just Security*, Yuval Shany and Amichai Cohen already provide a thorough summary of all aspects of the judgment, I shall suffice here by summarising its main aspects and recalling the HCJ's main findings.

On March 18, 2024, several Israeli non-governmental organizations submitted the petition which formed the subject of the judgment against the Israeli Government, Prime Minister, Defence Minister, and the Coordinator of Government Activities in the Territories (COGAT; collectively the Respondents). The petition concerned Israel's policies and practices regarding the entry of relief supplies and workers into the Gaza Strip, as well as the distribution of relief therein, since the beginning of the war. The President of the Israel Supreme Court, Yitzhak Amit, who wrote the HCJ's main opinion, emphasized that it was written prior to the Israeli Government's decision at the beginning of March 2025 to halt the entry of relief into Gaza. He noted that this decision constitutes a significant change in the circumstances to which the petitions related and would therefore be better addressed in separate proceedings.

At the outset, President Amit noted that the Respondents recognized that Article 23 of the Fourth Geneva Convention and the "core" of Article 70 to the First Additional Protocol to the Geneva Conventions reflect customary international law. In this regard, Amit observed that both sides to the case agreed that in terms of Israel's baseline obligations under international humanitarian law (IHL), Israel must allow and facilitate the passage of humanitarian relief for Gaza's civilian population. They further agreed that the duty is subject to Israel's right to prescribe technical arrangements necessary for supervising the entry of supplies, as well as the need to prevent diversion of relief to terrorist organizations.

Seemingly the main legal point of contention between the parties was whether the law of belligerent occupation applies to the Gaza Strip, which would in turn require Israel itself to provide humanitarian relief to Gaza's civilian population, including responsibility for its distribution. In answering this question, Amit began by recalling the three cumulative auxiliary tests for determining the existence of belligerent occupation upon which the sides focused their arguments: (a) physical presence of the hostile force in the territory concerned; (b) the ability of the hostile force to exercise governmental authority in the territory; and (c) the previous government's inability to exercise governmental authority in the territory.

Amit primarily focused on the latter two tests. Before examining each auxiliary test against the situation in Gaza, Amit noted that large parts of his opinion were based on confidential information presented by the Respondents *ex parte*. Describing this as an "unavoidable necessity" in the security context of the case, Amit noted that confidentiality also restricted his ability to explain all the reasons which led him to his conclusions

As for the second test, President Amit recalled the HCJ's prior jurisprudence, such as the *Tzemel* case of 1983 concerning Israeli presence in southern Lebanon. He noted that this test does not require the actual exercise of governmental authority but rather capacity to do so. Amit considered it apt to address the question of capacity in light of what the law of occupation would require the occupying power to uphold, highlighting Article 43 of the Hague Convention IV Regulations, which obligates the occupying power "to restore, and ensure, as far as possible, public order and safety [*sic*.]" (note that in its *Christian Society for the Holy Sites* judgment (HCJ 337/71), the HCJ correctly observed that the term "safety" is a mistranslation from the authentic French text, which should be translated as "life").

In this light, President Amit considered that Israel does not have the capacity to exercise such governmental authority. For one, the Israel Defence Forces' (IDF) mode of operations in the Gaza Strip did not involve prolonged presence in areas of the Gaza Strip. Rather, IDF forces would enter specific areas and once they achieved the concrete mission for which they were sent they would withdraw, often needing to repeat such operations in light of the adversary's military reinforcements. Only in the Netzarim and Philadelphi Corridors—the former a strip of land cutting through the north of the Gaza Strip running perpendicular to the Mediterranean Sea and the eastern border with Israel, the latter straddling the Gaza side of the border with Egypt—has the IDF maintained a prolonged presence with substantial quantities of forces, and even in these areas there have been fierce hostilities with armed groups.

As for the third test—involving the previous government's inability to exercise governmental authority—President Amit highlighted that this test requires more than simply determining if Hamas's ability to exercise governmental authority has been weakened or that certain infrastructure or facilities are no longer properly functioning. Rather, recalling in particular the HCJ's *Abu Aita* judgment of 1983, Amit considered this a requirement that the prior government has been removed from the territory, noting that the International Criminal Tribunal for the former Yugoslavia made a similar observation in its *Naletilić* case.

Amit observed that Hamas continues to exercise substantial governmental authority in the Gaza Strip. Moreover, despite the manifest damage Israel inflicted on Hamas's military capabilities, Hamas still maintains military presence in areas where the IDF operated throughout the Strip, so that Hamas as a governing entity has not been removed from the territory. Responding to a claim of the Petitioners, Amit emphasized that Hamas is far from simply holding out in "pockets" of territory. Indeed, Hamas continues to operate security agencies in Gaza, which, *inter alia*, enforce public order, including taking control of relief entering the Strip.

In addition to their arguments on the abovementioned auxiliary tests for determining belligerent occupation, the Petitioners raised arguments based on the ICJ's advisory opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*. President Amit noted that the ICJ considered

"Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip" following its disengagement in 2005 and that "[t]his is even more so since 7 October 2023." On this basis, the ICJ concluded that "Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip."

President Amit quoted the HCJ's *Mara'abe* judgment on the security barrier rendered after the ICJ's *Construction of a Wall* advisory opinion—the latter, in turn, rendered nine days after the HCJ's *Beit Sourik* judgment, which too concerned the security barrier—in which then-President Aharon Barak stated, "the Supreme Court of Israel shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion."

However, Amit highlighted that the facts available to the ICJ in its *Policies and Practices* opinion were limited for several reasons including: Israel did not fully participate in the ICJ proceedings; in the present HCJ proceedings, the State shared with the Supreme Court a substantial amount of classified evidence; and the ICJ was generally not concerned with developments following October 7, 2023. In this regard, Amit emphasized that the existence of a belligerent occupation is a question of fact, with the factual matrix available thereby colouring one's conclusions. Indeed, the difference in the factual matrix was key to the HCJ's divergences in the *Mara'abe* judgement from the ICJ's *Construction of a Wall* opinion.

Accordingly, despite the apparent difference between his conclusions on the (non-) existence of a belligerent occupation and the ICJ's analysis in the *Policies and Practices* advisory opinion, Amit did not consider that the ICJ's opinion should change his own conclusions. Yet, in a twist of sorts, Amit referred to the HCJ's *Al-Bassiouni* judgment of 2008, where then-President Dorit Beinisch stated that Israel's obligations towards Gaza,

> also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.

Significantly, Amit stated that these obligations derive from Israeli *domestic* law.

On this basis, Amit considered that, in terms of practical implications, there was much in common between the ICJ's and his own approach. Nevertheless, Amit also emphasized that the State in its policies is nevertheless permitted to consider the risks of terrorist organizations being able to reinforce themselves from the passage of goods, as well as Israel's obligations to protect its own nationals and soldiers. Despite the Respondents' argument that the *Al-Bassiouni* precedent has decreased in importance due to changes over

time since the disengagement—namely, that with the passage of time and Hamas's long-term control of the Strip, Israel's past control as a source of humanitarian obligation towards Gazans no longer holds—Amit stated that he did not consider it necessary to decide on this point. Finally, also seemingly under Israeli domestic law, Amit held that the Respondents have an obligation to continue to monitor the humanitarian situation in Gaza.

In light of his analysis, President Amit considered that Israel's obligations in terms of humanitarian relief include the obligation to allow and facilitate the passage of relief required for meeting the Gazan civilian population's essential needs. President Amit then considered the pertinent facts to determine whether the Respondents had met their obligations. Amit underlined that the humanitarian situation in the Gaza Strip is not simple, to say the least, but that the civilian population's distress does not as such testify to a violation of a legal obligation, particularly given that the distribution of relief inside Gaza is not within the Respondents' control.

With this in mind, Amit then examined the Respondents' actions and efforts in improving the facilities and functioning of crossing points into Gaza, coordination and cooperation between Israeli authorities and humanitarian relief organizations, and the levels of specific categories of relief supplies which entered the Gaza Strip, specifically, food, water, sanitation and hygiene products, shelter equipment, communication equipment and petrol.

Albeit at times highlighting areas where there could be improvements, President Amit concluded there was insufficient reason to rule against the Respondents. Additionally, he considered that the Petitioners had failed to prove anywhere near a violation of the respective prohibitions on starvation as a method of warfare or collective punishments.

To Be Continued?

The HCJ's decision to deliver the judgment based on the facts prior to the Israeli government's decision to halt the entry of relief in March 2025 has raised some eyebrows. Certainly, President Amit all but invited the Petitioners to submit a new petition regarding the new factual circumstances.

Whether the Israeli government's March 2025 decision is incompatible with the present judgment, however, remains to be seen. At least for the purposes of international law, it seems that the March 2025 decision would not as such give rise to illegality. For one, President Amit emphasized that the international legal obligation only extends to meeting the Gazan civilian population's essential needs. In other words, if there are in fact necessary supplies for the civilian population's essential needs in the Gaza Strip—a factual question which would remain to be determined, especially in light of the large quantities of relief which entered the Gaza Strip during the two-month ceasefire at the beginning of 2025—it is doubtful an obligation to allow and facilitate arises.

Moreover, President Amit did appear to subject the international legal obligation to allow and facilitate the passage of humanitarian relief to the conditions in Article 23(2) of the Fourth Geneva Convention. This is similar to the express approaches of the New Zealand and United Kingdom law of armed conflict manuals and the implied approach of the Denmark manual (note that the U.S. Department of Defense *Law of War Manual*, consistent with the United States' position in other fora, does not recognize an obligation to allow and facilitate the passage of humanitarian aid beyond the obligation in the Fourth Geneva Convention, leading to the conclusion that only "children under fifteen, expectant mothers, and maternity cases" have a right to key relief items).

As I have previously argued on *Articles of War* and develop in a forthcoming article in Issue 63(1) of the *Military Law and Law of War Review*, the obligation—at least under customary international law—does not apply when there are serious reasons for fearing that the consignments will be diverted or misappropriated, or that their provision will otherwise provide a definite advantage to the military or economy of the adversary. While not a central aspect of the present judgment, Amit did accept that Hamas has seized and diverted relief. Taken to its logical conclusion, the implication of this finding is that an obligation to allow and facilitate the passage of relief under international law does not arise in the present instance.

Thus, from the present judgment, it seems that the most promising avenue for success of any future challenge to the March 2025 decision would be Israeli domestic law, rather than international law. Indeed, domestic law would seem to require a balancing act between security and humanitarian considerations, as opposed to IHL which would not prohibit halting passage of aid due to seizing and hoarding thereof by Hamas. Actually, a significant aspect of the present judgment is that it provides clarity, despite lingering claims to the contrary, that the source of Israel's active obligations towards the Gaza Strip listed in *Al-Bassiouni* is not international law but rather Israeli domestic law.

Moreover, it does not seem that there is an international legal obligation as such upon a party to an armed conflict to continuously monitor the humanitarian situation of the adversary's civilian population Here, too, under the present judgment, domestic law gives rise to further obligations on the Israeli government.

Judicial Dialogue with the ICJ: Part II

The present judgment serves as another instance of so-called judicial dialogue between the ICJ and the HCJ, following from the abovementioned *Mara'abe*. Indeed, despite Israel basically not participating in the ICJ's *Policies and Practices* proceedings, President Amit, too, while also emphasizing that an advisory opinion is just that, considered it apt and necessary to address the ICJ's opinion, insofar as it pertained to the subject-matter of the petition.

There is much to contrast between the ICJ's "bird's eye-view" assessment of Israel's purported control over Gazan affairs and President Amit's detailed assessment of the situation on the ground. However, it is possible to question whether President Amit comprehensively addressed the ICJ's observations pertaining to Gaza in its *Policies and Practices* advisory opinion. Indeed, while the ICJ did make certain general observations regarding Israel's purported control over Gazan affairs, the ICJ stopped short of defining Israel as an occupying power regarding the Gaza Strip. Rather, it appears one of the ICJ's key observations pertaining to Gaza related less to facts and more to its embrace of a so-called functional approach, concluding that "Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip." Amit does not address the ICJ's legal finding, even if he remarks that practically the ICJ's approach leads to a similar outcome to the HCJ's *Al-Bassiouni* approach.

I personally find the ICJ's opinion on this point unpersuasive, given the paucity, if not absence, of State practice supporting a functional approach, at the very least beyond the context of Israel's post-disengagement obligations towards Gaza. Whether intentionally or not, Amit's approach regarding the (lack of) implications of the IDF's continued physical presence in specific but very limited areas of land in Gaza for the existence of a belligerent occupation actually seems to accord well with the ICJ's approach elsewhere; namely, in *Democratic Republic of the Congo v Uganda*, where the ICJ *inter alia* found that Uganda's "administrative control" of Kisangani Airport did not suffice to find the existence of a belligerent occupation there or in surrounding areas.

Judicial Dialogue with the ICJ: Part III?

Finally, but remaining on the topic of judicial dialogue, it is worth recalling the following criticism by the late Yoram Dinstein regarding the ICJ's *Construction of a Wall* opinion:

On 9 July 2004, a little more than a week after the delivery of the Supreme Court's Judgment in the *Beit Sourik* case (on 30 June 2004), the International Court of Justice rendered its own Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it found (14:1) that the construction of the 'wall' was contrary to international law. Surely, the writing of the Advisory Opinion had been completed before the release of the Supreme Court's Judgment. But, bearing in mind that Israel abstained from making submissions on the merits before the International Court (having challenged the jurisdiction and propriety of the proceedings), one might have hoped that the International Court would wish to peruse the Supreme Court's Judgment prior to coming out with the Advisory Opinion. Had the International Court done that, it might have realized that many facts and figures pertaining to the potential repercussions of the construction of the 'wall' – as stated in the Advisory Opinion on the basis of inaccurate information imparted to the Court by the UN – were grossly inflated (e.g., the false claim that almost 17 per cent of the West Bank would lie between the Green Line and the 'wall'…).

More recently, Judge Nolte, in his separate opinion appended to the *Policies and Practices* advisory opinion, criticized the ICJ, as it could

have better demonstrated that it has considered Israel's arguments to the extent that they are publicly available, including by drawing on decisions of the Supreme Court of Israel and the arguments put forward by the Israeli authorities in the respective proceedings, as well as Israel's submissions in other international for a.

Presently looming are the pending advisory proceedings on *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, which, *inter alia*, relates to the humanitarian situation and relief operations in the Gaza Strip.

To the extent the ICJ addresses facts pertaining to Gaza, it would be prudent to learn from previous experiences and consider the present HCJ Judgment in its own deliberations. Like in *Construction of a Wall* and *Policies and Practices*, the latest indications are that Israel will not be participating in the oral hearings of the latest advisory proceedings (Israel did submit a written statement but it remains to be seen whether this addresses—let alone in detail—matters pertaining to the merits). Meanwhile, the present judgment addresses many of the factual controversies pertaining to Gaza in considerable detail, even if certain aspects receive less attention because they were the subject of *ex parte* briefings on confidential information.

Moreover, one may even wonder whether the rendering of the present judgment at this point in time was in fact a lesson learnt from the short time the HCJ left in *Beit Sourik* for the ICJ to consider its *Wall* Advisory Opinion. Perhaps a telling sign in this regard would be whether the HCJ also disposes in the near future a pending petition regarding the Knesset law concerning cooperation with the UN Relief and Works Agency (UNRWA).

Of course, the practical implications of these latter observations depend on whether the ICJ decides to address the situation concerning Gaza at all. Indeed, given parallel contentious cases concerning the situation in Gaza, a strong argument can be made that the ICJ should exercise its discretion and decline to exercise its jurisdiction; at least in part, insofar as it is requested to address matters pertaining to Gaza. As the Inter-American Court of Human Rights observed regarding its own (asserted) discretion, "[c]ontentious proceedings provide, by definition, a venue where matters can be discussed and confronted in a much more direct way than in advisory proceedings."

Conclusion

Gisha v Government of Israel is significant because it involves a relatively detailed examination of Israel's policies and practices pertaining to the passage of relief into the Gaza Strip. However, perhaps its greatest, at least potential, significance lies moving forward. At the domestic level, it provides important indications to the Israeli government as to how the

HCJ may address the government's recent decision to halt the passage of relief into Gaza, arguably even a warning shot. Internationally, whether intentionally or not, the HCJ has all but invited the ICJ to consider its findings in its pending advisory proceedings, at least to the extent the ICJ decides to address matters pertaining to Gaza.

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