GAS-LESS IN GAZA[1]

What are the practical consequences of considering Gaza to be under occupation, and what are the practical consequences of considering it to be free of such occupation?

These two questions are modified by the term "practical" for a practical reason, as I shall try to show: if Gaza is under occupation, then, theoretically speaking, the Geneva Convention relating to the duties of the occupying power should apply. Gaza should not be prevented by that Power –defined in the relevant legal literature (Article 42 of the Hague Regulations) as the party "in effective control"- from having access to basic needs, including fuel and electricity. If it is not under occupation, then that Power (not being "in effective control") would not be in a position in the first place to apply any such restrictions. Either way, Palestinians in Gaza would have free access to fuel and electricity, as well as to other basic needs.

But as of the date of this writing, Gaza's access to fuel and electricity (and other basic needs) is not free but restricted by Israel -whose control of Gaza's theoretical borders is absolute[2]- to levels falling far beneath the area's normal requirements. Therefore, going by the logic of the argument of the above paragraph, Gaza is neither occupied nor is it not occupied. You may ask: How is this illogical conclusion reached? The answer, simply, is that it is reached by prefixing the word "practical" to the term "consequences". Replace "practical" by "theoretical", and the Gordon knot is immediately disentangled: what in the theory of law or logic is deducible does not in reality exist. Gaza, in other words, is *in limbo*, neither here nor there!

The Israeli human rights organization *Gisha* approached the Israeli Supreme Court on more than one occasion (earlier, in December 2005, singly, on the matter of allowing Gaza students to attend their university in the West Bank city of Bethlehem; and later, in October 2007, together with nine other human rights organizations, on the matter at hand to challenge the restrictions on the supply of fuel and electricity), seeking to repeal the Israeli Government's decisions, appealing in both cases to the provisions of international

[1] Presentation made at the "Human Rights and Intercultural Dialogue In The Mediterranean" conference organized by the Law Faculty, University of Teramo, Italy, March 27-29 2008. I was inspired to write up this presentation by the work of Sari Bashi and Kenneth Mann in their defense of human rights as this affects Israel's treatment of Palestinians (Kenneth Mann and Sari Bashi "Human Rights Litigation as an Instrument of Moral Dissent", paper presented at the Yale Law School Middle East Legal Studies Seminar, Istanbul, January 11-13, 2008). I would also like to acknowledge the extensive comments and corrections provided me by Sari Bashi on this text. In the larger context, I would like to register my gratitude to Sylvie Delacroix for making me appreciate the fascination of law-making to philosophers

[2] This term is not being used "technically". A more precise description (provided by Sari Bashi) might be "substantial or nearly absolute", which would then account for Egypt's very limited maneuvering capability on the Rafah crossing. Egypt's limitation is partly set by the 2005 Rafah Crossing agreement between Israel and the Palestinian Authority, partly by potential disruption of relations with Israel and the U.S. through any move it might undertake unilaterally and partly by the fact that the Rafah crossing is only for persons to the exclusion of everything else. Otherwise, Israel exercises absolute control over the air and sea.

law, as well as to Israeli domestic law. The argument in the case of Israeli domestic law had to do with whether security interests justified blanket restrictions to the movement of individuals wishing to pursue their studies, and whether broad restrictive measures, not justified by an immediate security need, could be taken against Gaza residents, as in the case of civilians and civilian institutions seeking supplies of fuel and electricity.[3] The arguments in the case of international law had to do with Gaza's status as an occupied territory, and what Israel's obligations in that context were. There was enough ground, according to the petitioners, whether on international or domestic law, to warrant a positive ruling by Israel's Supreme Court on both matters.

Interestingly, in a critical briefing issued by *Gisha* commenting on the Supreme Court's rejection of the petition presented by the group of human rights organizations, which also reflects conclusions expressed in an earlier paper by Sari Bashi and Kenneth Mann, *Gisha's* directors, on the petition concerning students from Bethlehem University, the Court's negative ruling is described as having been based on avoiding altogether "any legal discussion of the relevant international framework" for analyzing the fuel and electricity cuts. Instead, as the petitioners' briefing explains, the Court chose in its ruling to invoke what it called a "minimum humanitarian standard" to determine what the Israeli Government was obliged, and what it was not obliged to do in Gaza. Indeed, the Court goes as far as stating, in Paragraph 12 of its decision, that "since September 2005 Israel has no effective control over what takes place within the territory of the Gaza Strip", so that the State of Israel bears no general obligation to concern itself with the welfare of the residents of Gaza under the international law of occupation.

In the case of fuel and electricity, the plan as presented to the court was not to totally stop supplies of fuel and electricity but rather to set levels of supply that are much lower than what Gazans needed. The court pressured the state and indicated that it could not go below certain limits, citing the need to abide by the (minimalist) moral imperative to avoid a humanitarian crisis. In the case of the students, the Court upheld the Army's decision to impose a ban on student movement, in effect corroborating the State's argument that the "students as a group are a high risk population because many of them....could be compelled by militants in Gaza to act for them in the West Bank" (Mann and Bashi, 2008). But in spite of its ruling the Court chose to commend the petitioners for their moral position, as though to express itself, in spite of its ruling, as being also guided by moral principles. "...justices of the Supreme Court seem to be disengaging from the Court's judicial task of giving reasoned legal decisions, preferring to restrict themselves to moral discourse" Mann and Bashi state in their joint paper: "Not only does the Court seem to be pursuing a moral rather than a legal discourse, but it seems intent on establishing a minimal moral standard for reviewing the criticism raised against State authorities in cases related to state security and human rights. For this reason, we will call this new orientation of the Court *moral minimalism*."

[3]Public statements by Israeli leaders and the text of the September 2007 Cabinet decision in any case make it pretty clear that the purpose of the cuts was punitive – to make the civilian population suffer as a way of exercising pressure on the Hamas leadership and/or militants firing rockets on Israel. In this sense, many observers believe that the motivation was primarily political – to topple the Hamas government.

Thus, in what may seem from a philosophical perspective to be a glaring paradox, legal human rights activists in these cases decry the apparent inclination by Justices of the Supreme Court to draw upon moral arguments in their rulings, viewing this to be an attempt to shirk or escape from their obligation under the relevant law to enact justice (i.e. to interpret or apply the law fairly and accurately), rather than as being a logical extension or application of their role as law-makers (i.e., as setters of moral standards).

The human rights petitioners' main concern with what they described as "moral minimalism" is that it is coming to be used as a cover for not applying proper judicial procedures which, if diligently and meticulously applied, would automatically deliver justice -for example, reversing the decision on student applicants so that only, on a case by case basis, persons who do indeed pose a security threat would be barred from traveling through Israel to reach the West Bank; and so that, in the electricity and fuel case, supplies could be resumed to cater for the needs of the civilian population. By using moral rather than legal principles and procedures the Israeli Supreme Court was in effect abetting and aiding the State's illegal (as well as unjust) practices!

Given this assessment by Israeli human rights activists it therefore comes as a surprise to read the starkly different appraisal of recently retired Israeli Supreme Court Chief Justice Aharon Barak by Yale Professor Owen Fiss (Fiss 2007). In his appropriately-titled paper "Law Is Everywhere"[4] Fiss, in criticizing the American legal system for not containing provisions for the protection of basic human rights and democratic principles as evidenced in its failures in Guantanamo, commends Judge Barak precisely for searching beyond the confines of the law in situations of military conflict for those moral values that must be viewed as underlying the law- justifying the law's obliging force: "Barak's distinctive contribution has been to place limits on the deference due to the military. In his opinions, he drew a vital distinction between the assessment of military needs and the question of whether the military action is normatively justified, given its impact on fundamental values. He was prepared to defer to the government in its assessment of military needs, but saw it as the essence of his job to determine whether the pursuit of those needs unjustifiably interfered with the exercise of a protected liberty or a fundamental value". Fiss's assessment of Barak's practices is based on a number of rulings directly dealing with Palestinians, including the rulings on the degree of torture used during interrogations and on the building of the cement wall/fence around Palestinian population areas.

Fiss's commendation of Barak, as was said, draws on what he views as the total failure of the legal system in his own country, the United States, in upholding basic liberties and values in its pursuit of the "War On Terror". The Congressional resolution issued one week after 9/11 authorizing the use of military force against al-Qaedah's terrorism is in its nature open-ended, not anchored in place or time. This, and later, related congressional Acts affecting the prosecution of the War On Terror comprise, *inter-alia*, what Fiss calls a legal code and what we referred to in general as "the legal system", which, in the circumstances, has come to undermine the fundamental foundations of the Constitution.

[4] Fiss, Owen, "*Law Is Everywhere*", in **Yale Law Journal** 117 (2007), no.2,pp256-278

In effect, instead of acting as an independent monitor of the State's protection of basic values and liberties, the legal system is so constructed that, in matters relating to and under the guise of military conflict, it hands over its role to the political/military branch of Government. This, in contravention and in spite of the fact that "the governing assumption of American society is that these war measures will be undertaken within the terms of the constitution -that the allocation of powers among the branches set forth in the Constitution will be respected and basic liberties will be honored" (Fiss, p.259).

Fiss builds up his argument in steps by showing how cases in the context of the War on Terror that came to the attention of Congress and the Supreme Court were addressed, at each phase reflecting what we might sum up as a harmony of purposes and actions, and culminating in the "moral minimalism" of the Supreme Court which Fiss contrasts with Barak's practices. The cases in question include surveillance and wire-tapping, rendition, the Abu Ghraib torture practices, the incarceration of prisoners in Guantanamo, the American citizen picked up in Afghanistan and accused of being an "illegal" enemy combatant (Hamdi vs. Rumsfeld), and others. In one particular Guantanamo case (Hamdan versus Rumsfeld), reviewed in June 2006, soon after the Supreme Court (in what Fiss calls a "narrow statutory response") introduced certain restrictions on the trial procedures being employed, Congress enacted the Military Commissions Act of 2006, which in effect handed back to the military the right to continue conducting those trials as they had been conducted before. In all, Fiss concludes that the Supreme Court's very reserved and "minimalistic" inclination to invoke the basic principles comprising the Constitution in its rulings stand in sharp contrast to Barak's invocation of similar principles in a country that lacks the underlying support of a Constitution in the first place.

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We can conclude from the preceding comments that there is a moral minimalism to be decried for being minimalistic, and a minimalism to be decried for being there at all. It may be said that where it is decried for being too minimalistic is where the country in question is possessed of a Constitution whose basic constituents provide solid support for the defense of basic moral principles, such that the further use of those principles can be brought positively to bear on the protection of basic values and human rights. Where, on the other hand, moral minimalism is decried is precisely where no such Constitution or underlying value-system exists[5], and where, therefore, a detour from the working legal framework into the moral area can only result in frittering away the arguments "in hand" in exchange for the imaginary ones "in the bush".

But it is not quite that simple: for it is precisely in the same land and legal context that moralism is being both decried and commended. If the Israeli human rights lawyers suspect the moralism of the Israeli Supreme Court to be a cover for eluding the law,

[5] Sari Bashi would argue here that in Israel, while the underlying value-system does exist it is just applied exceptionally (i.e. it stops at national/religious borders).

Barak's eulogist commends moralism as a guide for what Justices in Supreme Courts should be practising. One presumes that both parties seek the same end: that basic human values be upheld, and that basic human rights be protected. However, one party considers that the path to achieve this is through sticking to legal principles, while the other considers such principles to be (especially in situations of conflict) in constant need of moral uplifting.

One should add, just in order to maintain one's perspective, that in explaining Barak's quest for moralism Fiss does not claim that Barak goes much beyond existing law, whether domestic and international.[6] Domestically, for example, the Basic Law enacted in Parliament in 1992 guaranteeing human dignity and freedom helped Barak make his ruling on the use of torture as well as on targeted killings. He viewed this Law as a further embodiment of "Israel's foundational aspiration, set forth in the Declaration of Independence, to be a free and democratic society"(p.271). In other cases he "drew on a variety of sources, including customary international law and various statutes", rooted in his "reflections on the requirements of democracy". In all, he held firm "in his attachment to law and the belief that law is the embodiment of reason in the service of humanity"(p.278).

At the end of the day, however, and this may be the human rights lawyers' point of view, moralizing in the context of a hegemonous polity or culture serves less the human beings whose rights are being deprived, as it serves to soothe the consciences of those on the side of that hegemonous polity or culture which is actively practicing the deprivation. For, it may be asked, what good is a ruling that allows a human crisis to be averted on humanitarian grounds (i.e. by allowing a minimal flow of fuel to reach Gaza) if a different ruling on legal grounds (e.g. by defining Gaza as an occupied territory whose residents' welfare and wellbeing Israel is obliged to provide for) can allow civilians and institutions to live normal lives? More generally, what good is any such humanitarian (or moralistic) ruling to the residents of Gaza if Israel continues to occupy it by force and against the will of its people for the 40th consecutive year?

Fiss views Israel's far more dangerous "geographical situation" in contrast with that of the U.S. as warranting a compounded commendation for the practices of its Supreme Court under the aegis of Justice Barak. But doesn't Israel's very "geographic" situation belie the underlying injustice of occupation on the surface of which these "moral rulings" were being issued- even accounting for the "softened" interpretations of torturing, target-killing, wall-building and land-confiscating? How is it possible rationally to comprehend a movement ostensibly directed towards moral human values that abruptly stops at national or religious borders? Isn't this what separates between theory and practice -what allows for the existence of the contradiction of being both under occupation and not under occupation, incredibly, and in defiance of all logical laws?

In a sense, the Israeli human rights lawyers, while seeming to be morally cynical in protesting the Supreme Court's moral minimalism and demanding that it stick to legal principles and procedures, are perhaps far better readers of the law's concretized intent -

[6] Indeed, Bashi would argue that he does not even make full use of these laws.

in this case not, as Barak would have it, as being the embodiment of reason for the service of humanity, but as being at the service of the hegemonous culture or polity. This does not leave them without faith in law's moral function -they would not be who they are if so. But it leaves them without faith in the law's masters.

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