

Corporate Accountability to Human Rights: The Case of the Gaza Strip

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INTRODUCTION: OVERVIEW OF THE PROBLEM

This article discusses the human rights obligations of corporations that operate in bilateral zones of conflict. It analyzes the commercial activity of Israeli corporations in the Palestinian Gaza Strip¹ from within the framework of the evolving jurisprudence on the human rights obligations of corporations.

In recent years, greater attention has been paid to the role of commercial entities in violent contexts whose activities may, directly or indirectly, implicate issues of human rights or international humanitarian law.² Interna-

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1. A Mediterranean coastline territory 41km in length and between 6 and 12km wide, the Gaza Strip had been part of British Mandatory Palestine until 1948. Held by Egypt until 1967, the legal status of the Gaza Strip has since been widely debated. See, e.g., ILANA FELDMAN, GOVERNING GAZA: BUREAUCRACY, AUTHORITY, AND THE WORK OF RULE: 1917-1967 1-10 (2008). The Gaza Strip is home to approximately 1.5 million people, the overwhelming majority among them refugees (or descendants of refugees) from other parts of what is today the State of Israel. See U.N. RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST, WEST BANK AND GAZA STRIP POPULATION CENSUS OF 2007 2 (2010), available at <http://www.unrwa.org/userfiles/2010012035949.pdf>.

2. See, e.g., INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), available at http://www.ichrp.org/files/reports/7/107_report_en.pdf; JESSICA BANFIELD ET AL., TRANS-NATIONAL CORPORATIONS IN CONFLICT-PRONE ZONES: PUBLIC POLICY RESPONSES AND A FRAMEWORK FOR ACTION (2003), available at http://www.international-alert.org/pdfs/TNCs_in_conflict_prone_zones.pdf; JULIETTE BENNETT, INTERNATIONAL PEACE FORUM, BUSINESS IN ZONES OF CONFLICT - THE ROLE OF THE MULTINATIONALS IN PROMOTING REGIONAL STABILITY (2001), available at http://www.unglobalcompact.org/issues/conflict_prevention/meetings_and_workshops/Reg_stability.html [hereinafter BENNETT (2001)]; Juliette Bennett, *Multinational Corporations, Social Responsibility and Conflict*, 55 J. INT'L AFF. 393 (2002) [hereinafter Bennett (2002)]; Gilles Carbonnier, *Corporate Responsibility and Humanitarian Action — What Relations Between the Business and Humanitarian Worlds?*, 83 INT'L REV. RED CROSS 947 (2001); Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 IRRC 863 (2006); Georgette Gagnon et al., *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones — Implications for Human Rights and Canadian Public Policy* 12-13 (U. Toronto Pub. L. Research Paper No. 04-07, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557002; Virginia Haufler, *Foreign Investors in Conflict Zones: New Expectations* (Ridgway Center Working Paper 2006-13, 2006), available at <http://www.ridgway.pitt.edu/LinkClick.aspx?fileticket=5%2fNc9TWHq8%3d&tabid=233>; Terek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a*

tional human rights law establishes a set of norms and obligations that are mainly enforced in relations among states or between states and their citizens.³

Unlike states, private commercial corporations are generally not treated as bearing direct human rights obligations under international law;⁴ human rights law applies only in a limited way to these corporations.⁵ Similarly, international humanitarian law, although increasingly applied to non-state actors, has yet to be applied directly to privately-owned companies.⁶

At the domestic level, most countries do not have national legislation establishing the extra-territorial duties of corporations with respect to human rights.⁷ Domestic laws that apply to corporations in their home states do not ordinarily regulate corporate activities in host states.⁸ At the

Human Rights Impact Assessment, 40 CORNELL INT'L L.J. 135 (2007); Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT'L REV. RED CROSS 665 (2006); JANE NELSON, THE BUSINESS OF PEACE: THE PRIVATE SECTOR AS A PARTNER IN CONFLICT PREVENTION AND RESOLUTION (Int'l Alert, Council on Econ. Priorities and Int'l Bus. Leaders Forum, 2000); Lothar Rieth & Melanie Zimmer, *Transnational Corporations and Conflict Prevention: The Impact of Norms on Private Actors* (Tübingen Working Paper, No. 43, 2004); Matthew F. Smith & Naing Htoo, *Energy Security: Security for Whom?* 11 YALE HUM. RTS. & DEV. L.J. 217 (2008); JASON SWITZER & HALINA WARD, INT'L INST. FOR SUSTAINABLE DEV. & INT'L INST. FOR ENVIR. DEV., ENABLING CORPORATE INVESTMENT IN PEACE: AN ASSESSMENT OF VOLUNTARY INITIATIVES ADDRESSING BUSINESS AND VIOLENT CONFLICT, AND A FRAMEWORK FOR POLICY DECISION-MAKING (2004), available at http://www.iisd.org/pdf/2004/envsec_corp_investment.pdf.

3. See *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 96 (2006); Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 295 (1999); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 932–33 (2005).

4. See Vazquez, *supra* note 3, at 927; Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 222 (2008); John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008).

5. See, e.g., *Kiobel*, 621 F.3d at 131–45; see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 934–35 (2004); Vazquez, *supra* note 3, at 947 (“Even courts and commentators sympathetic to the project of direct application of international law to private corporations recognize that very few human rights norms apply directly to non-state actors under international law as it exists today.”).

6. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); see also CLAPHAM, *supra* note 3, at 271–73; Nils Rosemann, *The Privatization of Human Rights Violations — Business Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq*, 5 NON-ST. ACTORS & INT'L L. 77, 89 (2005); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 519 (2005). See also Mongelard, *supra* note 2 (asserting that, in theory, domestic law provides the possibility of enforcing corporate liability for violations of international humanitarian law but that judges have not been very open to the idea).

7. On abortive legislative attempts in Australia, the U.S., and the U.K., see Kinley & Tadaki, *supra* note 5, at 939; Peter Muchilinski, *Corporate Social Responsibility and International Law: the Case of Human Rights and Multinational Enterprises*, in THE NEW CORPORATE ACCOUNTABILITY 431, 449–50 (Doreen McBarnet et al. eds., 2007).

8. The term “home state” here refers to the country where the corporation is incorporated, whereas “host state” refers to any other country where the corporation operates. The commercial activities of corporations beyond the boundaries of their home-states raise the issue of the extraterritorial application of human rights treaties. See generally Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995). For an analysis of states’ human rights responsibilities incurred as a result of extraterritorial violations by corporations, see Robert McCorquodale & Penelope Simons, *Responsibility*

same time, human rights norms in host countries, especially in developing ones, “may be heavily compromised by the economic considerations of the host state’s unbalanced relationships with [transnational corporations].”⁹ As a result, there is a relative legal vacuum concerning corporate human rights obligations in host countries in general and in zones of violent conflicts in particular. This vacuum and potential ways of addressing it have been at the heart of the recently proliferating literature on the human rights obligations of corporations.¹⁰

In general, the legal accountability of corporations for human rights violations in zones of conflict typically arises in situations of alleged corporate complicity with state action. Efforts to establish corporate accountability may take several forms: enforcing criminal international law on corporations through the imposition of liability on corporate executives as individual subjects;¹¹ establishing the liability of corporations as accomplices in international crimes or human rights violations committed by states or their organs¹² — for example, under the Alien Tort Claims Act (ATCA) in the U.S.;¹³ and applying human rights responsibilities to corporations

Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law, 70 MOD. L. REV. 598 (2007).

9. Kinley & Tadaki, *supra* note 5, at 933.

10. See, e.g., Duruigbo, *supra* note 4, at 228; David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 55 (2005); Kinley & Tadaki, *supra* note 5, at 935; see also Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COL. J. TRANSNAT'L L. 521 (2004).

11. See *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950). For further discussion on this legal method see CLAPHAM, *supra* note 3, at 304; Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 306–17 (2008).

12. See generally CLAPHAM, *supra* note 3, at 265; Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001). See also Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. J. INT'L HUM. RTS. 327 (2008).

13. 28 U.S.C. § 1350 (2006). For litigation concerning corporate liability under the ATCA, see, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *vacated on reh'g*, 499 F.3d 923 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131 (D.D.C. 2009); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). However, the U.S. Court of Appeals for the Second Circuit held in a recent decision that corporations cannot be held liable for violations of international customary law under the ATCA because “the concept of corporate liability for violations of customary international law has not achieved universal recognition.” *Kiobel*, 621 F.3d at 149. For further discussion on ATCA litigation regarding corporate human rights violations pre-*Kiobel*, see Doreen McBarnet & Patrick Schmidt, *Corporate Accountability through Creative Enforcement: Human Rights, the Alien Tort Claims Act and the Limits of Legal Impunity*, in *THE NEW CORPORATE ACCOUNTABILITY* 148 (McBarnet et al. eds., 2007); Cassel, *supra* note 11; Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC'Y REV. 271 (2009); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004). But see Rebecca M. Bratspies, “Organs of Society:” A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities, 13 MICH. ST. J. INT'L L. 9, 28–32 (2005); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 273 (2009).

through incorporation of human rights liability in domestic law.¹⁴ Regardless of the substantive differences among these approaches, they all rely on establishing corporate accountability for human rights violations on the basis of the relationship between the corporations and state organs, which are perceived as the prime perpetrators of violations and/or duty-holders.¹⁵ Accordingly, one theory supporting corporate accountability for human rights violations involves situations whereby corporations allegedly benefit from state violations of human rights, either directly or indirectly.¹⁶ Another theory involves situations whereby, knowingly or not, corporate resources (e.g. equipment, infrastructure, personnel, etc.) are put at the service of state or quasi-state forces engaged in activities that may violate international human rights law.¹⁷ Another recently identified theory emanates from the occupation of Iraq by American forces and their allies and involve cases whereby private security firms are fulfilling state functions and may violate human rights.¹⁸ In sum, the scenario which is typically presumed by the emergent jurisprudence on corporate human rights responsibility is of a multinational corporation¹⁹ which (1) operates in an impoverished host

14. See, e.g., SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 153 (2004); Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 507 (2004) [hereinafter Deva (2004)]; Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability*, in THE NEW CORPORATE ACCOUNTABILITY 9 (McBarnet et al. eds., 2007); Muchilinski, *supra* note 7; Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 392 (2005).

15. See, e.g., *Kiobel*, 621 F.3d at 123; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), *aff'd without opinion sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 533 U.S. 1028 (2008); see also *Sarei*, 487 F.3d at 1202-03; *Exxon Mobil Corp.*, 658 F. Supp. 2d at 132-33; *Exxon Mobil Corp.*, 393 F. Supp. 2d at 26-27; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 324; *Wiwa*, 226 F.3d at 92; *Vazquez*, *supra* note 3, at 930 ("Even scholars who argue that international law places significant obligations on private corporations appear to be referring to indirect obligations . . ."); Ramsey, *supra* note 13, at 272. For a more expansive approach that seeks to establish the standing of corporations as direct subjects of international law, see *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2045-47 (2001); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 449 (2001); Bratspies, *supra* note 13, at 34; Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 2 (2003); Duruigbo, *supra* note 4, at 226. See also U. N. ECON. & SOC. COUNCIL, COMM. ON HUMAN RIGHTS, NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter *The Norms*]; Deva (2004), *supra* note 14, at 494; *Vazquez*, *supra* note 3, at 929 (on *The Norms'* direct applicability to corporations). But see CLAPHAM, *supra* note 3, at 59-74; Knox, *supra* note 4, at 2 (arguing that corporations do not have to be subjects under international law in order to hold duties under it).

16. See e.g., *Doe v. Unocal Corp.*, 395 F.3d 932, 960 (9th Cir. 2002); *Exxon Mobil Corp.*, 393 F. Supp. 2d at 26-27; *Wiwa*, 226 F.3d at 92-93; Kaeb, *supra* note 12, at 340.

17. See, e.g., *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 324; *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d at 1023 (W.D. Wash. 2005); *Wiwa*, 226 F.3d at 92-93; Kaeb, *supra* note 12, at 342.

18. See, e.g., *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14-15 n.3 (D.D.C. 2005). See generally AMNESTY INTERNATIONAL, FACT SHEET: OUTSOURCING ABUSES IN THE "GLOBAL WAR ON TERROR," www.amnestyusa.org/business/pdf/pmscsfactsheet3-08.pdf.

19. Multinational corporations are defined here as any firm which "owns (in whole or part), controls, and manages income generating assets in more than one country." PETER MUCHLINSKI, MULTINA-

country whose government is either unable or unwilling to enforce a viable human rights regime, and (2) is alleged to be complicit with human rights violations by the host state or quasi-state organs in the context of a civil war or other violent conflicts within the host country.²⁰

These current legal theories rely on situations where it is possible and realistic to draw a distinction between a corporation's activities in its home state and its activities in host states. Furthermore, legal theories focus exclusively on the relationship between the corporation and a host government without considering the relationship between the governments of the home and host countries. In contrast, a violent conflict between a home state such as Israel and a host state such as the Palestinian Authority provides a highly relevant setting for the analysis of corporate accountability that we seek to offer here.²¹ In this context, the question of the relationship between the home state and the corporations, currently unexplored by legal approaches focused on the relationship between host countries and corporations, is paramount.

The cases analyzed in this article involve contract-based trade relations between Israeli corporations and Palestinian bodies that have been suspended or terminated by the Israeli corporations in the context of deteriorating relations and violent clashes between Israel and the Hamas-governed Gaza Strip. The first case concerns an Israeli corporation that entered into a contract with the Palestinian Energy Authority for the supply of fuel. The second case concerns Israeli banks that entered into financial servicing contracts with non-Israeli banks that operate in the West Bank and the Gaza Strip.

Neither case involves any complicity with human rights violations of a host government. Rather, both cases concern situations in which human rights accountability may stem from the decision of the corporations — operating from within their own home state — to suspend, sever, or change the terms of their commercial ties. In both cases, potential human rights violations arise from the full or partial withdrawal of contracts and services, without any legal obligation for this action imposed by the home state government. In both cases, the trade in question — supply of fuel or finan-

TIONAL ENTERPRISES AND THE LAW 12 (1995); see also CLAPHAM, *supra* note 3, at 200–201; Muchilinski, *supra* note 7, at 442–43.

20. See, e.g., JOSEPH, *supra* note 14, at chapter 1; BENNETT (2001), *supra* note 2; Duruigbo, *supra* note 4, 248–49; Kaeb, *supra* note 12; David Kinley & Justine Nolan, *Trading and Aiding Human Rights: Corporations in the Global Economy*, 25 NORDIC J. HUM. RTS L. 353 (2007); David Kinley & Sarah Joseph, *Multinational Corporations and Human Rights: Questions About Their Relationship*, 27 ALT. L. J. 7 (2002); Maassarani et al., *supra* note 2; Ratner, *supra* note 15, at 461; Rieth & Zimmer, *supra* note 2; David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008).

21. This article considers the Israel-Palestine conflict to be a bilateral conflict between the state of Israel and the Palestinian Authority [hereinafter P.A.], although the P.A. is not officially recognized as a State. Israel's High Court of Justice consistently rules that the conflict between Israel and the Palestinians is an international armed conflict, which is regulated by international humanitarian law. See, e.g., HCJ 201/09 Physicians for Human Rights v. Prime Minister of Israel [2009] IsrLR 1, ¶14.

cial services — does not directly concern instruments of violence, as is more likely the case in situations where corporations provide resources that are subsequently used to violate human rights. Instead, they concern the supply of goods and services whose absence, under certain conditions, may amount to a violation of the human rights of the affected population. Finally, the goods and services in question are at the core business of the contracted corporations, rather than an add-on to their commercial operations within the conflict zone.

Corporations that enter into commercial relations whose maintenance directly bears on human rights should be held accountable for violations that occur as a result of their unilateral termination or substantive disruption of said relations. Based on the case of Israeli corporations operating in the Gaza Strip, the article develops an empirical conceptual framework that identifies the factual and jurisprudential conditions which must be met in order to establish this accountability. The first part of the article offers in-depth analyses of the two cases and their human rights ramifications. Both the fuel and financial services cases require an analysis of (1) the tripartite relationship among the State of Israel, the Palestinian Authority, and the supplying corporation; (2) the relationship between private contracts and state regulation; and (3) local relevant litigation in respect to these issues. The first part of the article concludes with a short summary concerning the lack of attention to the potential liabilities of said corporations by both Israeli courts and human rights organizations.

The second part of the article relies on the case studies in order to identify the conditions under which the corporations in question may or should be held liable under the emergent jurisprudence on the human rights obligations of corporations. The discussion focuses on three related issues: (1) the particular problem of determining human rights obligations in the context of a conflict which is also subjected to the rules of international humanitarian law (the laws of war),²² (2) the interaction between commercial contractual relations and human rights, and (3) the interaction between corporate practices and state action.

22. The terms humanitarian law, the laws of war and the laws of armed conflict are used here interchangeably. On the meaning of re-naming the laws of war as humanitarian law see Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 8 (2009); Mark Antaki, *The Transformation of the Laws of War into Humanitarian Law* (Fonds Québécois de la Recherche sur la Société et la Culture, Working Paper), available at <http://ssrn.com/abstract=1527059>. On the humanization of the laws of war, see Dale Stephens, *Human Rights and Armed Conflict — The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L.J. 1 (2001).

I. TWO CASE STUDIES: COMMERCIAL SUPPLY OF FUEL & FINANCIAL SERVICES

A. Dor Alon and the Supply of Fuel to the Gaza Strip

1. Background

The supply of fuel and gas to the Gaza Strip is exclusively governed by a 1994 commercial agreement between the Israeli-registered Dor Alon Energy corporation and the Palestinian Energy Authority (PEA).²³ According to the agreement, the Palestinians cannot rely on alternative sources of fuel supply. At the same time, one of the practical implications of the agreement is that the PEA is Dor Alon's biggest and most profitable customer.²⁴

The 1995 interim agreements between Israel and the PLO stated that "pending the establishment of an independent Palestinian electricity supply system or other supply sources, the Israeli Electricity Company (IEC) shall continue to supply the electricity in order to meet existing and further demand in the West Bank."²⁵ In regard to "Gas, Fuel and Petroleum," the agreements stated only that "the Israeli side shall cooperate with the Palestinian side with regard to the establishment by the Palestinian side of 3-4 storage facilities for gas and petroleum, including facilitating, *inter alia*, location, land and technical assistance in order to secure the purchasing needs of the Palestinians from the Israeli market."²⁶ In 2005, upon parliamentary approval, the Israeli government resolved to unilaterally "disengage" from the Gaza Strip. As part of the self-declared disengagement plan the government announced that "Israel will continue, for full price, to supply electricity, water, gas and petrol to the Palestinians, in accordance with

23. The agreement should be understood in light of a general context: the Palestinians in Gaza are almost totally dependent on Israel for the delivery of goods and services. This dependency is further accentuated by Israel's effective refusal to allow the Palestinians to operate international airports and seaports and by Israel's and Egypt's exclusive control of the border crossings to the Gaza Strip. See SARI BASHI & KENNETH MANN, GISHA: LEGAL CENTER FOR FREEDOM OF MOVEMENT, DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA (2007) available at <http://www.gisha.org/UserFiles/File/Reportx%20for%20the%20website.pdf>. For a detailed discussion of the circumstances leading up to the signing of the agreement, see RONEN BERGMAN, VE HARASHUT NETUNA [AUTHORITY GIVEN], 124-41 (Yediot Aharonot: Sifre Hemed, 2002).

24. Dor Alon had also been the sole supplier of fuel to the Palestinians in the West Bank until 2007, when it was replaced by another Israeli energy corporation (Paz Inc.). See DOR-ALON ENERGIA BE ISRAEL (1988) BAAM ("HAHEVRA") [DOR-ALON ENERGY IN ISRAEL (1988) LTD] (Dec. 28, 2006), available at http://maya.tase.co.il/bursa/report.asp?report_cd=234044 (Immediate report of Dor Alon to the ISA and the TASE); DOR-ALON ENERGIA BE ISRAEL (1988) BAAM ("HAHEVRA") [DOR-ALON ENERGY IN ISRAEL (1988) LTD] (Dec. 31, 2006), available at http://maya.tase.co.il/bursa/report.asp?report_cd=234571 (same).

25. Israel-Palestinian Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Annex III: Protocol Concerning Civil Affairs, app. 1, art. 10(3), Sept. 28, 1995, 36 I.L.M. 551. Other references to the supply of fuel in the interim agreements concern future exploration and production, safety measures, and taxation issues, including purchase of fuel from Israel. *Id.* at Annex III: Protocol Concerning Civil Affairs, app. 1, art. 15. See also *id.* at Annex V: Protocol on Economic Relations, art. 3(12).

26. *Id.* at Annex III: Protocol Concerning Civil Affairs, app. 1, art. 15(6).

current arrangements.”²⁷ The Israeli Parliament endorsed this governmental resolution by vote but did not enact it into law.²⁸ However, on principle Israel does not deny its obligation to facilitate the supply of fuel and gas to the Gaza Strip so as to guarantee basic humanitarian standards.²⁹

In 2008 Israel’s High Court of Justice (HCJ) also established the obligation of Israel to provide the Gaza Strip with basic supplies such as electricity and fuel at levels that would maintain basic humanitarian needs.³⁰ In

27. See Israel, *Revised Disengagement Plan — Continued Discussion, Annex A: “Revised Disengagement Plan — Main Principles”*, 30th Government Res. No. 1996, at 8 (June 6, 2004).

28. The parts of the disengagement plan that had been enacted as Israeli law mainly concerned the evacuation of Jewish settlers from the Gaza strip. See Law for the Implementation of the Disengagement Plan 5765–2005 (1982), LSI (142) (2/18/2005) (Isr.).

29. See Resp’ts Prelim. Answer to the Pet. and Req. for Inj. (filed Nov. 1, 2007), HCJ 9132/07 Al-Bassiouni v. Prime Minister [2008] (Isr.) (unpublished). The question of Israel’s duties toward the Gaza population has been complicated after Israel implemented a unilateral disengagement plan from the Gaza Strip. See Susan Power, *War, Invasion, Occupation?: A Problem of Status in the Gaza Strip*, 12 TRINITY C.L. REV. 25, 36–37 (2009). The case of *Al-Bassiouni* held: “[T]he State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law.” HCJ 9132/07 Al-Bassiouni [2008] (Isr.), ¶ 12. In a later decision, during military operations in January 2009, the court ruled that Israel’s duties are “dynamic and variable” left the issue undecided because respondents submitted to compliance with humanitarian law. See HCJ 201/09 Physicians for Human Rights [2009] (Isr.), ¶¶ 11–13, available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.htm. A later decision reiterated and affirmed *Al-Bassiouni*. See HCJ 5268/08 Enbar v. GOC Southern Commander [2009] (Isr.) (unpublished). For the position that the Gaza Strip is still under Israel’s occupation, see, e.g., BASHI & MANN, *supra* note 23; Nicholas Stephanopoulos, *Israel’s Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT’L L. 524 (2006); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End to the Occupation?*, 8 YEARBOOK INT’L HUMAN. L. 356 (2005). But see Yuval Shany, *Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement*, 8 YEARBOOK INT’L HUMAN. L. 369 (2005); Benjamin Rubín, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42 ISR. L. REV. 528 (2010); Ariel Zemach, *What Are Israel’s Legal Obligations Towards the Gaza Population?*, 12 MISHPAT U’MIMSHAL 83 (2009). Most scholars agree that Israel owes humanitarian obligations to the Gaza population regardless of the debate above. See, e.g., Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, (Tel Aviv U. Legal Working Paper Series, Working Paper No. 93, 2008), available at <http://law.bepress.com/taulwps/fp/art93>; Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister*, 42 ISR. L. REV. 101 (2009) [hereinafter Shany (2009)]. On post-occupation duties that may be higher than “basic humanitarian needs,” see Rubín, *supra* at 548–60. For an overview of duties under the law of occupation, see David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 847 n.24 (2003).

30. See HCJ 9132/07 Al-Bassiouni [2008] (Isr.), ¶ 12 (holding that Israel must act in accordance with international law providing for basic humanitarian needs in the Palestinian conflict). Israel’s HCJ is a unique first and last instance. Private and public petitioners (e.g., human rights organizations) may directly ask the court to issue injunctions against a state organ on grounds of violating constitutional and administrative law, as well as international law. The HCJ also accepts petitions concerning Israel’s actions in the West Bank and the Gaza Strip. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 21 (2002); MOSHE NEGBI, KEVALIM SHEL TSEDEK: BET HA-MISHPAT HA-GAVOHA LE-TSEDEK MUL HA-MEMSHAL HA-YISRE’ELI BA-SHETAHIM [JUSTICE UNDER OCCUPATION: THE ISRAELI SUPREME COURT VERSUS THE MILITARY ADMINISTRATION IN THE OCCUPIED TERRITORIES] 9–27 (1981). Israel’s conduct in the OPT is also regulated by international institutions. See, e.g., U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter The Goldstone Report]; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (finding the separation wall constructed by Israel in the West Bank illegal and delineating the legal consequences).

practice, and as aforementioned, the obligations of Israel as far as fuel is concerned are undertaken by Dor Alon through its commercial contract with the PEA.³¹

In 2006, the militant organization Hamas won the elections to the governing bodies of the Palestinian Authority.³² In 2007, following a constitutional impasse that resulted from said elections, Hamas forcefully took over the administrative and the security apparatuses of the Palestinian Authority in the Gaza Strip.³³ In response, Israel declared that it would treat the Gaza Strip as a “hostile territory” (a definition with no known meaning in Israeli and/or international law)³⁴ and restricted the provision of goods and services to Gaza.³⁵ On the ground, hostilities between Hamas and Israel severely intensified, with Hamas orchestrating the launching of rockets into Israeli civilian areas and Israel retaliating by targeting the Gaza Strip. In 2008, Israel launched a full-scale military operation in the Gaza Strip, causing heavy damages to infrastructure and bringing about thousands of civilian casualties on the Palestinian side.³⁶

In 2007, Israel’s Ministry of Defense asked Dor Alon to limit its fuel supply to Gaza as part of Israel’s sanctions against Hamas. Dor Alon com-

31. See e.g., Rubin, *supra* note 29 (discussing Israel’s obligation to supply electricity to the Gaza strip). But see Zemach, *supra* note 29, at 113–15.

32. See Scott Wilson, *Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast*, WASH. POST, Jan. 27, 2006, at A01; Steven Erlanger, *Victory Ends 40 Years of Political Domination by Arafat’s Party*, N.Y. TIMES, Jan. 26, 2006.

33. See Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June 14, 2007; Conal Urquart, Ian Black & Mark Tran, *Hamas takes control of Gaza*, GUARDIAN, June 14, 2007.

34. 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, 240 (2010) (explaining that the term “hostile territory” does not appear in any of the treaties of international humanitarian law and does not carry any legal significance from the perspective of international humanitarian law). The term “hostile territory” is mentioned in the title of chapter III to the Final Act of the Peace conference at The Hague, 1899, but the Hague Convention of 1907 only refers to a “hostile state.” Compare Convention Respecting the Law and Customs of War on Land, July 29, 1899, Final Act, 32 Stat. 1803, 1 Bevans 247, with Hague Convention Respecting the Laws and Customs of War on Land, § III, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. Israeli law only refers to the term “enemy state,” such as in the Trading with the Enemy Ordinance, which bans Israelis from trading with citizens and corporations of an “enemy state.” Trading with the Enemy Ordinance, 1939, Palestine Gazette No. 923, Supp. No. 1, 95. Article 2 of the Ordinance defines an “enemy” as a sovereign state which is at a state of war with Israel and excludes territories that are occupied by Israel. *Id.* There is no Israeli case law that addresses the meaning and legal status of a “hostile territory.” For a critical view on Israel’s use of the Trade with the Enemy Ordinance, see generally Haneen Naamnih, *Prohibiting Contact with Enemy Aliens: The Case of the Palestinians in Israel*, ADALAH’S NEWSL. (Nov. 2009), available at <http://www.adalah.org/newsletter/eng/nov09/Haneen%20enemy%20English%20final.pdf>.

35. See ISRAELI MINISTRY OF FOREIGN AFFAIRS, SECURITY CABINET DECLARES GAZA HOSTILE TERRITORY (Sept. 19, 2009), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm> (“Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. . . . Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. . . . The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.”).

36. See The Goldstone Report, *supra* note 30.

plied with the request and reduced the quantity of fuel transferred to the PEA in Gaza.³⁷ Subsequent reports from Gaza indicated that the reduction of supply caused significant hardships to the civilian population, counting instances such as the demobilization of emergency vehicles, hospital equipment and water pumps.³⁸

2. *Private Contracts & State Regulation*

As with any other civil contract, the State of Israel does not officially regulate the prices, delivery dates and quantities of supplies that are established in the commercial contract between Dor Alon and the PEA.³⁹ Furthermore, the ruling of Israel's High Court of Justice concerning the humanitarian obligations of Israel to facilitate the supply of fuel (however reduced) to the Gaza Strip is not binding upon Dor Alon because the ruling applies to state obligations alone.⁴⁰ As a matter of practice, Dor Alon transfers the fuel to Gaza by means of a privately owned terminal which it built on the border between Israel and the Gaza Strip.⁴¹ The PEA, sometimes with the financial backing of the European Union, directly pays Dor Alon for the fuel it receives.⁴²

As mentioned, Israel decided to limit the amount of fuel supplies to the Gaza Strip in 2007 as part of its overall economic sanctions against Hamas.⁴³ Acting upon this decision, the legal advisor of the Ministry of Defense wrote a letter to the CEO of Dor Alon requesting a reduction of fuel supplies to Gaza. The letter specified the amount of fuel supplies to be maintained on a weekly basis, asked the company to coordinate the times of supply with the Israeli army, and thanked the CEO for his cooperation.⁴⁴

37. The contract between Dor Alon and the PEA is not publicly available. Dor Alon's representatives refused several requests to meet with the writers and/or provide relevant documentation. The Ministry of Defense's legal advisor claimed that the ministry does not hold a copy of the contract. Dor Alon described some of the contract's provisions in its Public Shares Issue Prospectus. See DOR ALON ENERGY IN ISRAEL (1998) LTD, TASHKIF HAZA'AT MEHER LA'ZIBOOR [PROSPECTUS OFFER FOR SALE AND SHARES ISSUE FOR THE PUBLIC 2005] [hereinafter Dor Prospectus], available at http://maya.tase.co.il/bursa/report.asp?report_cd=139967.

38. See, e.g., U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFF., GAZA HUMANITARIAN SITUATION REPORT: GAZA FUEL CRISIS AS OF 17 APRIL 2008 (2008), available at [http://reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDOCUnidFilename/EDIS-7DTLMY-full_report.pdf/\\$File/full_report.pdf](http://reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDOCUnidFilename/EDIS-7DTLMY-full_report.pdf/$File/full_report.pdf).

39. As mentioned *supra*, note 37, the contract is not available to the authors. However, the authors are not aware of any Israeli legislation that gives an Israeli organ the authority to regulate this contract.

40. See *supra* note 30.

41. See DOR PROSPECTUS, *supra* note 37, at f-72.

42. The EU has financed fuel deliveries to Gaza's power plant since 2007 as part of its humanitarian aid to the Palestinians. See QUARTET STATEMENT S163/06 Washington (June 17, 2006), at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/90137.pdf; EUROPEAN COMMISSION, TEMPORARY INTERNATIONAL MECHANISM – TIM: OVERALL IMPLEMENTATION PROGRESS (Jan. 18, 2008), http://eeas.europa.eu/occupied_palestinian_territory/tim/implement_progress_en.pdf.

43. See ISRAELI MINISTRY OF FOREIGN AFFAIRS, *supra* note 35.

44. Letter from Ahaz Ben-Ari, Legal Advisor to the Ministry of Def., to Israel Yaniv, CEO of Dor Alon (Nov. 1, 2007) (on file with author). Ben-Ari approached Dor Alon with a request for cooperation

Dor Alon deliberated the request. The company asked the Ministry of Defense's Legal Advisor for an opinion on the legality of the request, emphasizing its concerns that such a move could expose the company to allegations of human rights violations under international law.⁴⁵ Once assured about the legality of the economic sanctions imposed by Israel on the Gaza Strip, the company decided to comply with the request.⁴⁶

3. *Litigation, Humanitarian Law and the Transparent Corporation*

Relying on international humanitarian and human rights law, human rights organizations petitioned Israel's High Court of Justice to rule upon the legality of the governmental decision to restrict the supply of fuel to the Gaza Strip.⁴⁷ In what became known as the *Al-Bassiouni* case,⁴⁸ Petitioners claimed that "[t]he respondents' decision to reduce the supply of electricity and fuel to Gaza contravenes their duty to actively care for the needs of the civilian population in Gaza and to facilitate the functioning of its civilian institutions."⁴⁹ Petitioners asked the HCJ to issue an *order nisi* directed at the Respondents — Israel's Prime Minister and the Minister of Defense — requiring them to justify *inter alia* why they should not refrain from reducing, restricting, or disrupting the supply of electricity and fuel to Gaza.⁵⁰

and not with a binding regulative order. Interview with Ahaz Ben-Ari, Legal Advisor to the Ministry of Def, in Tel-Aviv, Israel. (Nov. 24, 2008).

45. Interview with Ahaz Ben-Ari, *supra* note 46.

46. A Dor Alon senior executive explains that Israel has "an allocation policy which changes from time to time [W]e supply when the army approves. We do not act against the instructions of the army or the government." Interview with Uri Hemo, Chief Economist, Dor Alon, Inc. (Dec. 1, 2008).

47. Israel's Common Law legal system distinguishes between customary international law and treaty-based law. Customary international law is automatically considered part of domestic Israeli law without further enacting endorsement. *See, e.g.*, CA 24/48 Shimson Palestine Portland Cement Factory v. Attorney General 4 PD 143 [1951] (Isr.). As a result, it is binding unless it is in conflict with an existing domestic statute. *See* Eyal Benvenisti, *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 207, 207–08 (Benedetto Conforti & Francesco Francioni eds., 1997). Conversely, an international treaty must be incorporated by a domestic law in order to become binding unless it is a declaratory treaty that codifies an already recognized principle of customary law. *See* Ruth Lapidot, *International Law Within the Israeli Legal System*, 24 ISR. L. REV. 451 (1990). For this reason the 1907 Hague regulations, interpreted by the Israeli court as an embodiment of customary international law, are recognized as part of Israel's legal system, whereas the Fourth Geneva Convention 1949 is considered a constitutive one, and therefore not legally binding. Benvenisti, *supra* note 47, at 208. Israel has ratified a number of primary human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both signed in 1966, but has not passed domestic legislation to incorporate them into Israeli law. Only the provisions of these treaties that are considered as customary international law are enforceable in Israeli courts. *Id.* at 211.

48. Ten Israeli and Palestinian human rights organizations, together with two Gaza residents, petitioned the HCJ for an immediate injunction against the government's plan to disrupt the electricity and fuel supply to Gaza. *See* Pet. for an Order Nisi and an Urgent Req. for an Inj. (filed Oct. 28, 2007), *Al-Bassiouni* HCJ 9132/07 [2008] (Isr.) (unpublished), *available at* http://www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/english_docs/ElectricityPetition9132-07_English.pdf.

49. *Id.* ¶ 58.

50. *Id.* ¶¶ a–b.

The petitioners also asked the court to issue an injunction preventing respondents from reducing the supply until a final judicial decision was reached in the matter. Respondents argued that the imposition of economic sanctions was permissible under international law and that the government had legitimate "discretion to decide with whom to enter into or maintain economic relations."⁵¹

The court held that Israel was allowed to reduce basic supplies to Gaza, but Israel was also obliged to maintain basic humanitarian standards:

The State of Israel has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products are in practice being used by terrorist organizations in order to attack Israeli civilians. . . . The respondents are required to discharge their duties under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population.⁵²

On the merits, the court ruled that the reduction in the supply of fuel did not breach Israel's humanitarian duties.⁵³ The court did not rule, nor did any party ask the court to rule, on the legality of the State's request that Dor Alon restrict the supply of fuel. In fact, the petitioners had not included Dor Alon as a respondent required to justify its actions or as a respondent against whom an injunction was requested.⁵⁴

It may be argued that the reason for not including Dor Alon in the petition has to do with a norm that grants the High Court of Justice substantive jurisdiction only over state entities or their agents thereof.⁵⁵ Yet the HCJ has long maintained its power to review the practices of non-state

51. Resp'ts' Prelim. Answer (filed Nov. 1, 2007), ¶¶ 3, 23–24, HCJ 9132/07 Al-Bassiouni [2008] (Isr.); see also Pet'rs' Resp. to Resp'ts' Prelim. Resp. (filed Nov. 6, 2007), ¶¶ 42–43, 46, HCJ 9132/07 Al-Bassiouni [2008] (Isr.). Note that *both* petitioners and respondents argued over the nature of relationship between Israel and the Gaza Strip without considering the plain fact that the supply of fuel is governed by a commercial contract between the P.A. and a private Israeli corporation.

52. HCJ 9132/07 Al-Bassiouni ¶ 11 [2008] (Isr.). The court further held that "the main duties of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas . . . [,] 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." *Id.* ¶ 12.

53. *Id.* ¶ 22.

54. The petition incidentally mentioned Dor Alon in the course of describing the process whereby "fuel is transferred to the Gaza Strip through pipes located at the Nahal Oz passage. A private Israeli company sells the fuel to the Palestinian Authority, and receives payment partially from the Palestinian Authority's budget." *Id.* ¶ 20. None of the scholars that have addressed the *Al-Bassiouni* ruling regarding Israel's obligation to supply fuel to Gaza have discussed Dor Alon's potential obligations. See Benvenisti (2009), *supra* note 29; Shany (2009), *supra* note 29, n.20 (mentioning that Dor Alon delivers the fuel and "[i]t is thus debatable whether Israel 'supplies' fuel to Gaza"); Zemach, *supra* note 29, at 85, 113–16 (discussing Israel's duty to *allow* Dor Alon to supply fuel to Gaza).

55. See Basic Law: the Judiciary § 15(d), 5744–1984, SH No. II 10 p. 78 (Isr.).

entities under its doctrine of “dual substance,” subjecting privately-owned firms to review when such entities fulfill public functions.⁵⁶ Had the petitioners chosen to include Dor Alon as a respondent, such a claim concerning the dual status of the company would have paved the way, at least in principle, to a substantive discussion concerning the relationship between Dor Alon and Israel with respect to (1) the possible duties imposed on Dor Alon under international humanitarian law, and (2) the legality of Israel’s request for Dor Alon to alter and/or breach its contract with the Palestinians. In the absence of Dor Alon as a respondent, the legal issues pertaining to the standing and the possible obligations of a private corporation under international humanitarian and human rights laws were left outside the scope of deliberation.⁵⁷

B. Financial Services to the Gaza Strip

1. General Background

Two major Israeli banks, Bank Hapoalim Ltd. and Discount Bank Ltd., exclusively provide financial or “correspondence” services to banks operating in areas under the (partial) jurisdiction of the Palestinian Authority in the West Bank and Gaza Strip. The correspondence services enable the banking sector in the West Bank and Gaza Strip to handle financial transactions conducted in shekels, the Israeli currency.⁵⁸ Given the almost total dependency of the Palestinian civil population on economic relations with Israel, these services are essential: in their absence, banks that operate in the West Bank and Gaza Strip cannot perform monetary transactions in shekels. This limitation impedes the ability of the banks to clear checks and other amounts owed to clients: both individuals and organs of the Palestinian Authority, from Israeli employers, buyers, and state agencies and

56. See HCJ 731/86 *Micro Daf v. Israel Electricity Co. Ltd.* [1987] 41(2) PD 449; Daphne Barak-Erez, *Israeli Administrative Law at the Crossroads: Between the English and the American Model*, 40 *ISR. L. REV.* 56, 69 (2007).

57. A similar petition was submitted to the HCJ in 2008 following the closure of Dor Alon’s fuel terminal on the border between Israel and the Gaza Strip. The Israeli army closed the terminal after two truck drivers employed by Dor Alon were killed in an attack on the terminal. Dor Alon was left out of that petition as well. See HCJ 4258/08 *Gisha – Legal Center for Freedom of Movement v. Minister of Def.* [2008] (unpublished); see also GISHA – LEGAL CNTR. FOR FREEDOM OF MOVEMENT, *GAZA FUEL RESTRICTIONS: WALKING TOWARD CRISIS* (2008) available at [http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Fuel%20Info%20Sheet%20-%20ENG\(2\).pdf](http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Fuel%20Info%20Sheet%20-%20ENG(2).pdf). (calling on the Israeli government to reopen the fuel terminal and stop the restrictions on the transfer of fuel into the Gaza Strip).

58. Hapoalim and Discount represent their Palestinian Authority counterpart banks in the Central Bank of Israel (“BOI”) and the Bank Clearing House (“BCH”). Hapoalim and Discount are the only Israeli banks to do that. They charge correspondence fees for their services and the Palestinian banks are required to deposit funds at the Israeli correspondent banks in order to secure the transactions exercised on their behalf. Interview with Haim Darshan, Acting BCH chair (Dec. 28, 2008).

even the Palestinian Authority itself, which pays its salaried employees in shekels.⁵⁹

Due to the necessity of these services, Israeli banks had entered into commercial correspondence agreements with Banks operating in the West Bank and Gaza Strip since occupation began in 1967.⁶⁰ The interim agreements, signed between Israel and the PLO in 1994–1995, reaffirmed that “the New Israeli Sheqel (NIS) will be one of the circulating currencies in the Areas and will legally serve there as means of payment for all purposes including official transactions.”⁶¹ The agreements also stipulated that “both sides will allow correspondential relations between each others’ banks.”⁶² These interim agreements are not legally binding on Israel unless specifically entered into Israeli law.⁶³ Nevertheless, Israel traditionally facilitated and respected these monetary arrangements.⁶⁴

The formal position of Israel is that allowing cash transfers to the Gaza Strip is consistent with its political and economic interests and in line with the Cairo agreements.⁶⁵ The HCJ has recently held that Israel has a “humanitarian obligation” to deliver Israeli currency into Gaza, taking into account the Palestinian dependency on the local currency.⁶⁶ The fulfillment of Israel’s monetary obligations is also subjected to international pressure

59. The salaries of the P.A.’s employees are paid in shekels, and so are most allowances, pensions and financial aid given by local, international and Israeli bodies. At times of need, the BOI transfers Israeli shekels to the P.A. to ensure payments and liquidity. From time to time Israel allows cash transfers from banks in the West Bank to their branches in Gaza. See Resp’ts’ Answer, HCJ 10517/08 Legal Forum for Eretz-Israel v. Minister of Defense [2008] (Isr.) (unpublished); HCJ 1169/09 Legal Forum for Eretz-Israel v. Prime Minister [2009] (Isr.) (unpublished).

60. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 126 (1993); RANA BAHU ET AL., *BANKING LAW REFORM IN THE PALESTINIAN TERRITORIES: IPCRI LAW & DEVELOPMENT PROGRAM, COMMERCIAL LAW SERIES* 3, 7–13 (1995).

61. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine, annex V, art. IV (10a), Sep. 22, 1995, 36 I.L.M. 551.

62. *Id.* at 552. For additional background on the Palestinian banking system see BAHU ET AL., *supra* note 60. See also Thilo Maraun, *Financing Autonomy through Financial Autonomy? Fiscal and Monetary Aspects of the Israeli-Palestinian Agreements from a Public International Law Perspective*, in *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY* 291, 291–319 (Amos Shapira & Mala Tabory eds., 1999).

63. See Law for the Implementation of the Interim Agreement regarding the West Bank and the Gaza Strip (Judicial Jurisdiction and other Provisions) (Amendment of legislation) 5756-1996, (1556), LSI (34) (1.17.1996) (Isr.); HCJ 2717/96 *Wafa v. Minister of Defense* 50(2) PD 848, 852 [1996] (Isr.); CC (Jer) 2538/00 Noritz v. Palestinian Authority 5762(2) PD 776 [1993] (Isr.).

64. See Isr. 30th Gov’t Res. no. 1996, *supra* note 27 (“In general, the economic arrangements currently in operation between the State of Israel and the Palestinians shall remain in force” including “[t]he monetary regime.”).

65. See HCJ 10517/08 Legal Forum for Eretz-Israel [2008] (Isr.). (arguing that the shekels transferred to Gaza are designated for the salaries of Salam Fayyad’s government officials, and stating “The State of Israel has a clear political interest to help the P.A. in this matter.”); HCJ 1169/09 Legal Forum for Eretz-Israel [2009] (Isr.). (where the state argued “the currency transfers from banks in Ramallah to branches in the Gaza strip . . . is made under the agreements between Israel and the P.A.”).

66. See HCJ 1169/09 Legal Forum for Eretz-Israel [2009] (Isr.).

— *inter alia* by the World Bank⁶⁷ and by the European Commission,⁶⁸ which have both urged Israel not to restrict currency transfers into Gaza.

2. State Regulation

Similar to the case regarding the supply of fuel, the monetary relations between Israel and the Palestinians rely on commercial institutions.⁶⁹ However in contrast to the supply of fuel, the banking sector is also regulated by the Israeli Prohibition on Terror Financing Law 5765-2005 (The Anti-Terror Law) and by the regulations of the BOI.⁷⁰ These legal interventions are further explored in the following section.

The Anti-Terror Law broadly prohibits financial transactions that may enable the perpetration of acts of terrorism. The law requires banks to carry out wide reporting and supervision duties and theoretically exposes banks which trade with Palestinian or Arab banks to criminal liability.⁷¹ Shortly after the passage of the Anti-Terror Law, both Bank Hapoalim and Discount Bank announced their intention to terminate their correspondent relationships with Palestinian banks operating in the Gaza Strip, arguing that carrying on this financial activity was too risky, costly, and burdensome under the provisions of the Anti-Terror Law.

67. World Bank, World Bank Statement on Gaza Cash Crisis (Dec. 6, 2008), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,print:Y~isCURL:Y~contentMDK:22006277~pagePK:1497618~piPK:217854~theSitePK:294365,00.html?cid=3001>.

68. Press Release, Eur. Comm'n and Ministry of Soc. Affairs, Payment of PEGASE social allowances to over 47,000 Palestinian families facing hardship: Gaza recipients face delays due to Israel stopping the P.A.'s cash shipments to Gaza (Dec. 20, 2008), http://www.ochaopt.org/documents/ocha_opt_other_organizations_social_allowance_47000.pdf.

69. Israel has acknowledged this fact, stating that monetary relations depend on "the willingness of commercial banks to continue providing such services." See Resp'ts' Prelimin. Answer, ¶¶ 1–3, HCJ 10528/08 Shurat Hadin Israel Law Center v. Minister of Defense [2009] (Isr.) (unpublished).

70. Israeli Prohibition on Terror Financing Law, 5765-2005, (1973), LSI (76) (1/10/2005) (Isr.) [hereinafter Anti-Terror Law].

71. Sections 8 and 9 of the Anti-Terror Law determine criminal prohibitions on banks and bankers who, *inter alia*, "[carry] out a property transaction that is capable of enabling, furthering, or financing the perpetration of an act of terrorism . . ." or those who "[carry] out a transaction in terrorist property or property that is direct compensation or direct profit from terrorist property." See Anti-Terror Law, *supra* note 70. The Anti-Terror Law § 9(d)1 states, "The provisions of this section will not apply to types of property transactions or a particular transaction if permission to carry out the transaction has been granted in advance by the Minister of Finance in consultation with the Minister of Defense and the Minister of Public Security." *Id.* § 9(d)1. The Anti-Terror Law § 10 determines an obligation to report transactions in property, when there is "reasonable suspicion" concerning its nature. *Id.* at § 10. The sanction on failing to comply with this obligation is also criminal. See also Prohibition on Money Laundering (Banking Corporations' Requirement regarding Identification, Reporting, and Record-Keeping for the Prevention of Money Laundering and the Financing of Terrorism) Order, 5761-2001, (6080), KH (310), LSI, (1/25/2001) (Isr.); Supervisor of Banks, Notice H-2215-06, 2007 (Isr.) (regarding "[c]larifications and interpretation regarding prohibition of money laundering and terror financing") [hereinafter Notice on Terror Financing]; Supervisor of Banks, Proper Conduct of Banking Business Prevention of Money Laundering and Financing of Terror, and Customer Identification, (Jan. 2010) (Isr.), available at www.bankisrael.gov.il/deptdata/pikuah/nihul_takin/eng/411_et.pdf; Bank of Israel, Notice Regarding Regulation of Banking Relations Between Israeli Banks and Banks Which Operate in the Palestinian Authority (Feb. 10, 2008) (Isr.).

The correspondent relations of Israeli banks are also regulated by the Bank of Israel and specifically by its General Supervisor of Banks. The authority of the Bank of Israel to force a commercial bank to end or maintain correspondence ties with another bank is set forth in Bank regulations and Israeli laws.⁷² The regulations governing this issue stipulate that any request by a correspondent bank to terminate the representation of a respondent counterpart is subject to approval by the Bank of Israel.⁷³

It is noteworthy that the scope of authority of the Bank of Israel not to approve a decision of a commercial bank to terminate its correspondent relationship has not yet been adjudicated by Israeli courts. Absent a formal ruling to the contrary, and given the language of the legislation, the General Supervisor of Banks could instruct the commercial banks not to terminate their correspondence ties with banks in the Gaza Strip until an alternative solution could be arranged. Indeed, as the following analysis indicates, the General Supervisor of Banks tried to prevent Bank Hapoalim and Discount Bank from acting upon their declared intentions to terminate their correspondence services.⁷⁴

The position of Bank Hapoalim had been that it could not maintain its relations with banks in the Gaza Strip unless the government would use its authority and exempt it from its duty to comply with a number of binding clauses in the anti-terror law.⁷⁵ In response, the government seems to have embraced the position that it was necessary to continue the implementation of its policy “to maintain correspondence relations between Israeli and Palestinian banks due to the weighty political interests and the political and economic consequences that may be expected to follow from the severance of ties.”⁷⁶ The Bank of Israel directly asked both banks to reconsider their position until “a satisfactory legal and operational solution would be

72. See BANK OF ISRAEL, BCH REPORT ON ITS ACTIONS IN THE PERIOD THAT BEGAN ON OCT. 1 2007 AND ENDED ON DEC. 31, 2008, 3, Annex A (2009), available at www.bankisrael.gov.il/deptdata/hashav/mislaka/msrep0708.pdf. See also Bank of Israel, BCH regulations § 211.A.3 (June 2010) [hereinafter BCH Regulations]. The regulation states: “Determination of representation will be made only with the approval of the head of the BCH and from the date determined in the approval (which will be no later than 30 days from the date of the approval issue).” *Id.* This section can be read as giving the BOI powers to refuse requests to end correspondence relations. Other provisions in Israeli law can also be read as giving the BOI power to oversee the commercial banking activity in order to keep the public interest. See, e.g., Bank of Israel Law § 3, 5714-1954, 8 LSI 164 (1953-54) (Isr.); Banking (Licensing) Law § 6, 5741-1981, 35 LSI 279-80 (1980-81) (Isr.); Banking Ordinance § 5, 1941.

73. BCH Regulations, *supra* note 72, § 211.A.3.

74. BANK HAPOALIM B.M. AND ITS CONSOLIDATED SUBSIDIARIES, BOARD OF DIRECTORS’ REPORT FOR 2006, 154 (2007), available at www.bankhapoalim.com/wps/icmm/uploads/files/poalim_maazan_2006_eng.pdf [hereinafter Hapoalim Report 2006]; ISRAEL DISCOUNT BANK LIMITED AND ITS SUBSIDIARIES, ANNUAL REPORT 2006, 194 (2007), available at www.discountbank.co.il/images/New_Corporate_Group/pdf/report_2006_FYE.pdf [hereinafter Discount Report 2006].

75. See Letter from the CEO and Vice CEO of Bank Hapoalim to Mr. Ehud Olmert, then acting Prime Minister and Minister of Finance, and Ms. Tzipi Livni, then Minister of Foreign Affairs and Minister of Justice, ¶ 7 (Feb. 10, 2006), available at http://www.knesset.gov.il/committees/heb/material/data/H18-10-2006_10-21-57.pdf.

76. See Resp’ts’ Prelim. Answer, ¶¶ 1–3, HCJ 10528/08 Shurat Hadin Israel Law Center v. Minister of Defense [2009] (Isr.) [hereinafter *Shurat Hadin*].

found.”⁷⁷ The Minister of Finance asked the Israeli Parliament to ease the regulatory burden and to allow the issuance of a permit that would have exempted the Israeli banks from legal responsibility for actions that may be carried out by banks in the West Bank and Gaza Strip in violation of the anti-terror law.⁷⁸ Eventually, the necessary assurances were provided to the Israeli banks and they continued to provide correspondence services to the banks in the West Bank and Gaza Strip.⁷⁹

It took the banks another year to reconsider their decision and to announce once again their intention to sever their financial ties with Gaza.⁸⁰ The new decision was made shortly after Israel defined Gaza as a “hostile territory” in September 2007,⁸¹ and it seems to have been influenced by public pressure on the banks to suspend relations with the Hamas-governed Gaza Strip.⁸² Moreover the banks had also been exposed to some legal pressure in the United States where plaintiffs, representing Israeli victims of terror attacks, charged the Arab Bank with financing terror organizations and the bank, in turn, served third party notices to the Israeli Banks.⁸³

The Bank of Israel demanded that the banks postpone the severance of these ties.⁸⁴ Subsequently, the banks announced a new target date for their intended severance of ties (end of 2008).⁸⁵ Eventually, the Bank of Israel

77. Hapoalim Report 2006, *supra* note 74, at 154; *See also* Discount Report 2006, *supra* note 74, at 194.

78. *See* DK (2006) 53 (Isr.) (where the Committee head, Prof. Ben Sasson, explained that the commercial banks’ decision “was about to come into force, but at the request of the ministry of finance and the BOI, the banks agreed . . . to postpone the cut of ties to November”). *See also* Protocol No. 60 of the 17th Knesset Constitution, Law and Justice Committee (Oct. 25, 2006) (“The banks are saying — there is a limit to where we are willing to go . . . [W]e do not have to run this campaign, we do not have to hold these correspondence accounts.”).

79. The committee affirmed the new regulation and the amended order. *See* Notice on Terror Financing, *supra* note 71. The order partly exempts the banks from criminal liability set in the Anti-Terror Law and allows them to conduct property transactions through correspondent accounts of banks operating in the P.A. The amended order was followed by a permit to the correspondent banks’ operations. *See* Resp’ts’ Prelimin. Answer, ¶¶ 1–3, HCJ 10528/08 Shurat Hadin [2009]. *See also* Discount Report 2006, *supra* note 74, at 194.

80. BANK HAPOALIM B.M. AND ITS CONSOLIDATED SUBSIDIARIES, BOARD OF DIRECTORS’ REPORT ON THE FINANCIAL STATEMENTS AS AT SEPT. 30, 2008, 110 (2008), *available at* http://www.bankhapoalim.com/wps/icmm/uploads/files/Q3_2008_eng.pdf; ISRAEL DISCOUNT BANK AND ITS SUBSIDIARIES, ANNUAL REPORT 2007, 259–60 (2008), *available at* http://www.discountbank.co.il/images/New_Corporate_Group/pdf/report_2007_FYE.pdf [hereinafter Discount Report 2007] (announcing Bank Discount is considering cutting ties with all branches in the P.A., not only in Gaza).

81. *See* Wilson, *supra* note 34.

82. Pressure mounted after Palestinian militants captured an Israeli soldier. *See, e.g.*, Eli Levi, *Hama’avack Lema’an Shalit: Gam Habankim Al Hakavenet* [The Struggle for Shalit: The Banks Are also on the Target], NRG (Nov. 3, 2008), <http://www.nrg.co.il/online/1/ART1/806/409.html> (reporting that “activists for the kidnapped soldier are threatening to block the entrances to Bank Hapoalim and Bank Discount’s headquarters unless they stop channeling money from abroad to Hamas”).

83. *See* Letter from Tolchin, *infra* note 92.

84. Avi Shauli, *Bank Israel Doresh Mibank Hapoalim Lidebot Hanitook Me’aza* [BOI Demands Bank Hapoalim to Postpone the Cut-off from Gaza], YNET (Oct. 24, 2007), <http://www.ynet.co.il/articles/1,7340,L-3463695,00.html>.

85. BANK HAPOALIM B.M. AND ITS CONSOLIDATED SUBSIDIARIES, BOARD OF DIRECTORS’ REPORT FOR 2007, 171 (2008), *available at* www.bankhapoalim.com/wps/icmm/uploads/files/poalim_maazan_

officially confirmed that correspondence services between the Israeli banks and their Palestinian counterparts would be terminated on January 1 2009.⁸⁶

3. *Litigation*

A number of human rights organizations and Gaza residents challenged the termination of correspondence ties with banks in the Gaza Strip by petitioning Israel's High Court of Justice to that effect.⁸⁷ Similar to the case regarding the supply of fuel, the private Israeli banks that were involved on the ground had not been included as respondents in the petition, which was filed against the Bank of Israel, the Israeli government, the Ministry of Welfare, and the National Insurance Institute.⁸⁸ Petitioners claimed that the severance of financial ties blocked the transfer of highly needed allowances from Israel's Institute of National Insurance to hundreds of disabled (and legally entitled) recipients in Gaza.⁸⁹ The petition targeted only the Bank of Israel and focused specifically on the Bank's failure to accommodate an alternative that would have prevented the harms.⁹⁰

Prior to the final severance of ties discussed above, three different petitions to the High Court of Justice had targeted the legitimacy of the government's policy regarding monetary cooperation with the Palestinians on the grounds that this cooperation directly or indirectly facilitated terror operations. The court dismissed two of these petitions, affirming that Israel had a humanitarian obligation to allow currency transfers to the Gaza Strip as part of its duties towards the civil population.⁹¹

2007_eng.pdf; Discount Report 2007, *supra* note 80. Meanwhile, the BOI and Ministry of Finance asked the Israeli Postal Bank to undertake the representation instead of the two commercial banks. The postal bank, a state-owned enterprise, refused to assume representation without a letter of indemnity from the ministry of finance, protecting it from terror-finance lawsuits in the USA. See Interview with Merav Lapidot, Spokesperson for the Israel Postal Company (Jan. 7, 2009).

86. See Notice, BCH, M/911, 2008 (Isr.) (regarding end of representation of bank branches who operate in the Gaza Strip); Notice, BCH, M/912, 2008 (Isr.) (regarding end of representation of bank branches who operate in the Gaza Strip). See also Interview with Haim Darshan, acting chair, BCH (Jan. 7, 2009) (“[U]p until now [Hapoalim and Discount] were asked to continue, and now it was decided not to ask anymore.”). At the same day that the BCH approved the halt of financial ties with Gaza, Israel launched a military operation in the Gaza Strip.

87. Pet. for Inj., HCJ 6810/09 Al-Qumsan v. The Bank of Israel (Pet. For Inj. filed Aug. 27, 2009).

88. *Id.*

89. *Id.* ¶¶ 2, 17–22.

90. The petition was announced moot on Nov. 22, 2010 after the parties have informed the court that Israel and the P.A. jointly arranged to secure the transfer of allowances to Gazan recipients, and following the Respondents' announcement of Nov. 4, 2010 that “the National Insurance Institute has transferred funds to bank accounts that were opened in Judah and Samaria (West Bank, authors) for recipients from the Gaza Strip.” HCJ 6810/09 Al Qumsan v. The Bank of Israel [2010] (Isr.) (unpublished).

91. The Legal Forum for Eretz-Israel submitted the petitions, arguing only against the BOI permitting currency transfers to banks in Gaza. See Resp'ts' Answer, HCJ 10517/08 Legal Forum for Eretz-Israel v. Minister of Defense [2008] (Isr.) (unpublished); HCJ 1169/09 Legal Forum for Eretz-Israel v. Prime Minister [2009] (Isr.).

A third petition had been submitted against the Bank of Israel.⁹² Among other things, petitioners claimed that the efforts of the Bank of Israel to prevent Israeli commercial banks from severing their ties with the Gaza Strip had been *ultra vires* and ran contrary to the efforts to prevent finance to Palestinian terror organizations. The two Israeli banks involved were also added to the petition as formal respondents.⁹³ The commercial banks chose not to submit their own response to the petition whereas the response of the state, on behalf of the Bank of Israel, had been submitted to the court only after the Bank of Israel announced its approval of the severance of ties, thereby rendering the petition obsolete.⁹⁴

As mentioned previously, another relevant development had taken place in New York. Responding to an ATCA claim charging the Arab Bank with aiding the financing of terror organizations that violated the human rights of Israeli citizens, respondent filed third party notices against Bank Hapoalim and Discount Bank as its Israeli counterparts in any potentially harmful financial activity.⁹⁵

Bank Hapoalim and Bank Discount asked the New York court to dismiss the third party notice and two years later the court granted the dismissal.⁹⁶

92. Urgent Pet. for an Order Nisi and an Inj., HCJ 10528/08 Shurat Hadin Israel Law Center v. Minister of Defense [2009] (Isr.). The petitioner, the Shurat Hadin organization, previously threatened to sue Dor Alon for facilitating terrorist activities on the basis of the American Alien Tort Claims Act. In June 2008, a New York based lawyer (together with an Israeli lawyer) wrote the legal advisor of Dor Alon, threatening to sue Dor Alon on the basis of the Alien Tort Claims Act by alleging that Dor Alon was “knowingly aiding and abetting a terrorist organization and recklessly endangering the lives of countless Israelis and foreign citizens.” See Letter from Robert Tolchin, Jaroslawicz & Jaros LLC, & Nitzana Darshen-Leitner, Members of Shurat Hadin, to Ortal Klein, Legal Advisor to Dor Alon (June 4, 2008) (on file with author) [hereinafter Letter from Tolchin].

93. Formal respondents are allowed to answer the petition and take part at court hearings.

94. Resp’ts’ Prelim. Answer, ¶¶ 1–3, HCJ 10528/08 Shurat Hadin [2009] (Isr.).

95. See Discount Report 2006, *supra* note 76, at 206; BANK HAPAOALIM B.M. AND ITS CONSOLIDATED SUBSIDIARIES, IMMEDIATE REPORT TO THE SECURITIES AUTHORITY AND THE TEL AVIV STOCK EXCHANGE, (2007), available at maya.tase.co.il/bursa/report.asp?report_cd=257637; See also Israel Discount Bank, *Immediate Report to the Securities Authority and the Tel Aviv Stock Exchange*, (2007), available at maya.tase.co.il/bursa/report.asp?report_cd=257820. The Arab Bank is a multinational banking corporation headquartered in Jordan with 500 branches globally, including the P.A. Discount Bank has been its correspondent bank in Israel. Beginning in 2004, terror victims brought several civil actions against the Arab Bank, claiming it solicited, collected, transmitted, disbursed and provided the financial resources to terror organizations that acted against Israel. See, e.g., First Amended Compl. at 5, *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 05-0388), 2007 U.S. Dist. LEXIS 5826. The claims were brought on behalf of US nationals pursuant to the Antiterrorism Act of 1990, and on behalf of foreign nationals (mostly Israelis) pursuant to the Alien Tort Claims Act (ATCA). Under the ATCA, the plaintiffs argued that the Arab Bank was complicit in genocide, crimes against humanity, and the financing of terrorism. See *id.* See also First Amended Compl. in *Linde v. Arab Bank PLC*, WL 3937324 (E.D.N.Y. Oct. 5, 2010). In its third party complaint, the Arab Bank claimed that Hapoalim and Discount “initiated or participated in many of the very same acts and transactions complained of by plaintiffs,” and that they “had an equal if not greater opportunity than Arab Bank to know of the alleged wrongful nature” of such transactions. Third Party Compl. in *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 05-0388), 2007 U.S. Dist. LEXIS 5826.

96. Third Party Def.’s J. Memorandum of Law in Support of their Mot. to Dismiss or Sever the Third Party Compls., *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 05-0388), 2007 U.S. Dist. LEXIS 5826. See also Supplemental Memorandum of Law by Third Party Defs. Bank Hapoalim, Israel Discount Bank LTD, & Mercantile Discount Bank in Support of Their Mot. to Dis-

Still, officials at both the Bank of Israel and Discount Bank opined that the third party notice had a strong effect on the decision of the banks to end financial relations with Gaza.

C. *Israeli Corporations as Arms of the State?*

We conclude that the Israeli corporations have not been legally implicated in violating human rights, but have been subject to legal pressure due to their alleged violation of the human rights of Israeli citizens who have been victimized by terrorist attacks. Although there are extensive controversies concerning the human rights obligations of Israel towards the Palestinians, private corporations — such as the energy and banking corporations discussed in this article — have by and large been left out of such debates. Instead, such corporations are largely treated as merely fulfilling surrogate functions on behalf of the Israeli state, and notwithstanding their commercial interests, these corporations have effectively been turned transparent as far as human rights and international humanitarian law obligations are concerned.

This phenomenon is all the more striking given that awareness of the role that market entities might play in the protection or violation of human rights had been clearly displayed by Israeli groups seeking to defend what they conceived as the Israeli national interest in general and in protecting Jewish human rights specifically. Pressured by some Israeli groups to halt commercial operations in the Gaza Strip on the one hand,⁹⁷ and unthreatened by counter-claims by human rights groups in Israel and abroad on the other hand,⁹⁸ the Israeli corporations in question emphasized their alliance with Israeli national interests.⁹⁹ At the same time, the two cases

miss the Third Party Compls. for Forum Non Conveniens, *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 05-0388), 2007 U.S. Dist. LEXIS 5826; Memorandum of Israel Discount Bank LTD and Mercantile Discount Bank LTD in Support of Their Mot. to Dismiss for Lack of Jurisdiction, *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 05-0388), 2007 U.S. Dist. LEXIS 5826. See also BANK HAPOALIM B.M. AND ITS CONSOLIDATED SUBSIDIARIES, IMMEDIATE REPORT TO THE SECURITIES AUTHORITY AND THE TEL AVIV STOCK EXCHANGE LTD. (2009), available at http://maya.tase.co.il/bursa/report.asp?report_cd=436442; ISRAEL DISCOUNT BANK LTD., IMMEDIATE REPORT TO THE SECURITIES AUTHORITY AND THE TEL AVIV STOCK EXCHANGE LTD. (2009), available at http://maya.tase.co.il/bursa/report.asp?report_cd=436639.

97. See, e.g., Letter from Tolchin, *supra* note 92; DOR ALON ENERGY BOYCOTT, boycottdoralon.blogspot.com/2007/09/blog-post.html (last visited Nov. 15, 2010) (regarding calls to boycott Dor Alon for its commercial relations with the Palestinians).

98. The EU Presidency expressed its concern about the Israeli government's decision to cut fuel shipments to the Gaza Strip. Press Release, Brussels European Council, Declaration by the Presidency on Behalf of the EU on Fuel Shipment Cuts to Gaza Strip (Oct. 31, 2007). See also Press Release, Human Rights Watch, Israel: Threatened Sanctions on Gaza Violate Laws of War (Sept. 19, 2007), available at www.hrw.org/en/news/2007/09/19/israel-threatened-sanctions-gaza-violate-laws-war. europa.eu/rapid/pressReleasesAction.do?reference=PESC/07/96&format=HTML&aged=0&language=EN&guiLanguage=en. Dor Alon itself, however, was not a target for pressure or condemnation.

99. See, e.g., Navit Zomer, *Eich Cavash Dudi Weissman Et Texas [How Dudi Weissman Took Over Texas]*, YNET (May 11, 2005, 1:44 PM), <http://www.ynet.co.il/articles/1,7340,L-3083770,00.html> (Interview with Dudi Weissman, CEO of Dor Alon: "Israel is the home. The success counts in the place where you

differed in that Dor Alon claimed to act as a mere arm of the state whereas the banks somewhat defied the preferred policy of the state. Nevertheless, in either case, the context of a violent conflict and the fact that the conflict was governed by the international laws of war, which generally do not apply to corporations,¹⁰⁰ has shielded corporations against legal scrutiny in terms of their potential obligations under *both* international humanitarian law and the universal regime of human rights. However, despite the legal immunity enjoyed by corporations involved in the provision of essential services in zones of conflict, the humanitarian and human rights obligations of corporations should be expanded. The discussion that follows builds on the legal architecture under which corporations may become liable for direct and indirect violations of human rights in zones of conflict.

II: HUMAN RIGHTS AND CORPORATIONS IN BILATERAL ZONES OF CONFLICT

A. *Human Rights and International Humanitarian Law*

One of the fundamental aspects that distinguishes the cases presented from the existing jurisprudence on corporate human rights responsibility concerns the applicability of the international laws of war to the Israeli-Palestinian conflict. The corporations in question traded with entities in a foreign “hostile” territory, in a context that was purportedly regulated by the laws of war and the humanitarian obligations it creates. The question of the direct applicability of humanitarian law to private actors has hardly been considered.¹⁰¹ Theoretically speaking, however, it may be argued that since humanitarian law applies primarily to states, any humanitarian obligation applied to corporations that act in accordance with a state action, cannot be expected to meet higher standards of responsibility than those

live, where you were born, and where you have roots. Israel is still in the course of the Zionist process. It is still a country under construction, it does not have definite borders yet. . . . My pride is that I have taken an Israeli company and turned it into an international company.”).

100. See sources cited *supra* note 6.

101. Some scholars suggest holding corporations accountable to standards of occupation law and to other war crimes through ATCA litigation. See, e.g., Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 Calif. L. Rev. 1459 (2009); Scheffer, *supra* note 31, at 858. However, the possibility of applying humanitarian law obligations *directly* on corporations in cases such as the ones described here has hardly been explored. *But cf.* Mongelard, *supra* note 2 (considering corporate civil liability for humanitarian law violations); Rosemann, *supra* note 7 (analyzing the accountability of PMCs for human rights abuses and torture in Iraq). Here we raise the possibility that under certain circumstances, humanitarian law—which ordinarily applies to states and warring parties alone—may be expanded to corporations. The typical cases brought to US courts to date have dealt with PMCs who were contractors for the US administration in Iraq and were accused of war crimes, torture, killing, inhuman treatment, and other internationally recognized grave crimes and infringements. See, e.g., *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). The authors are not aware of ATCA litigation accusing private entities of violations of humanitarian law other than specific war crimes — such as violations of the occupant power’s duties towards the occupied population.

expected of the acting state. Thus, to the extent that we accept — in line with the ruling of Israel’s HCJ — that in limiting the supply of fuel the State of Israel still maintained an acceptable humanitarian standard, the corporations that executed these functions on the ground also could not be held liable for a breach of humanitarian law.¹⁰²

The question of parallel application between the international laws of war and human rights is also relevant here.¹⁰³ Recent opinions by the International Court of Justice have clearly determined that both humanitarian law and human rights law apply to armed conflicts¹⁰⁴ and specifically to the Palestinian occupied territories.¹⁰⁵ Some Israeli scholars of international law also suggest that Israel’s obligation to supply fuel and electricity to the population in Gaza should stem from standards of occupation law (even after occupation is terminated) as well as from human rights law.¹⁰⁶

102. In *Al-Bassiouni*, the HCJ held that Israel is obligated “to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population.” See HCJ 9132/07 *Al-Bassiouni v. Prime Minister*, ¶ 11 [2008] (Isr.). On the ground, the supply of fuel, for instance, is exercised by a private corporation. *Id.* ¶ 4. Thus, there can be no doubt that from the perspective of international humanitarian law, as far as it targets state action alone, a decision by such private entity to suspend commercial ties with the needed population does not subtract from the duty of the state to meet its humanitarian duties as defined above through alternative venues (e.g. allowing essential supplies by other corporations or by the state itself).

103. See Ralph Wilde, *Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms*, 42 *Isr. L. Rev.* 80, 94 n.34 (2009) (offering a comprehensive review of the legal and academic debate over the relationship between human rights law and humanitarian law).

104. See Case Concerning Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 243 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). See also, e.g., Aeyal M. 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); Conor McCarthy, *Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW* 101 (Roberta Arnold & Noelle Quenivet eds., 2008); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, in *International Law and Armed Conflict: Exploring the Faultlines — Essays in Honour of Yoram Dinstein* 439 (Michael N. Schmitt & Jelena Pejic eds. 2007); Tom Ruys & Sten Verhoeven, *DRC v. Uganda: The Applicability of International Humanitarian Law and Human Rights Law in Occupied Territories*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW* 155 (Roberta Arnold & Noelle Quenivet eds., 2008); Scheffer, *supra* note 31; Stephens, *supra* note 22; Wilde, *supra* note 103, at 94 n.34.

105. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

106. See Benvenisti, *supra* note 29. See also Shany, *supra* note 29. *But cf.* Gross, *supra* note 104, at 35 (arguing against the simultaneous application of both bodies of law suggesting that a simultaneous approach would work to the detriment of the population under occupation, and stating that “a human rights analysis that considers all persons on a universal basis does not leave room for applying the norm that is most protective of the people living under occupation. . . . [T]he double-edged nature of rights in general, and the transplantation to the occupation context in particular, threaten such a project with the risk of constant frustration”). The HCJ opinion concerning the legitimacy of the separation wall between Israel and the West Bank also addresses this issue: “[W]e need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the *area*. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights However, we shall assume — without deciding the matter — that the international conventions on human rights apply in the *area*.” HCJ 7957/04 *Marabeh v. Prime Minister of Israel* 106(2) PD 201, 20–21 [2005] (Isr.).

Assuming that the application of international humanitarian law does not override obligations under international human rights law,¹⁰⁷ we consider the potential liability of corporations under the regime of human rights. The human rights obligations of corporations are conceptually independent of the human rights obligations of states, and therefore have to be evaluated on their own account.¹⁰⁸ In the next section we consider the conditions under which contractual commercial relations may create corporate accountability for human rights violations.

B. Human Rights and Commercial Ties

The case studies here present a scenario unaddressed by the emergent jurisprudence on the human rights obligations of corporations. As mentioned above,¹⁰⁹ one typical scenario which is presumed by this emergent jurisprudence concerns situations whereby corporations are complicit in human rights violations in their host state, and may abstain from violating human rights by simply suspending their operations.¹¹⁰ Yet in the Israeli-Palestinian cases, a corporation's decision to suspend, curtail, or substantively modify commercial relations may have human rights ramifications and thus should trigger duties under international human rights law.¹¹¹ The cases suggest that in certain circumstances corporations should be obligated to supply goods and services, at least when the affected population

107. See sources cited *supra* note 105, (determining that both humanitarian law and human rights law apply to armed conflicts). See also HCJ 7957/04 Marabeh 106(2) PD 201 [2005] (Isr.) (holding that the court will consider human rights treaties as applying in the occupied territories).

108. Corporate human rights responsibilities do not substitute for the human rights responsibilities of states. See The Norms, *supra* note 15, ¶ 1 ("States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights . . . including ensuring that transnational corporations and other business enterprises respect human rights.") See also Larry C. Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 101 (2006); Deva, *supra* note 14.

109. See *supra* pp. 6–7.

110. See, e.g., *Talisman pulls out of Sudan*, BBC NEWS, Mar. 10, 2003, <http://news.bbc.co.uk/2/hi/business/2835713.stm> (concerning the pressure on Canadian corporation Talisman Inc. to halt its operations in Sudan following allegations that it was complicit in severe human rights abuses by the Sudanese Military. Talisman pulled out of Sudan in 2003.).

111. While the provision of goods and services to one of the warring parties in an armed conflict may be considered a protection of human rights from one point of view, it may simultaneously be perceived as a violation of human rights from another point of view. Here, the Israeli corporations were confronted with public accusations and legal claims asserting that maintaining commercial ties with the Gaza Strip amounted to a violation of "Israeli human rights." See sources cited *supra* notes 82, 97. It is our view that such accusations, and more broadly the question of competing human rights standards in the context of a violent conflict, should be addressed as incidental to the settlement of a concrete legal dispute and should not inhibit the core inquiry of whether corporations should be held liable under a prevailing regime of human rights. Corporations which are charged with the violation of human rights may legitimately defend themselves on grounds that the alleged violations were necessary in order to avoid a greater harm or a more substantial violation of rights. On the legal practice of balancing between the human rights of different individuals see AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 166–81 (2005). See also AHARON BARAK, *THE JUDGE IN DEMOCRACY* 283–305 (2006).

has no recourse to alternative venues by which to obtain such services or commercial goods.¹¹²

This situation may occur when (1) a corporation enjoys a monopoly over the supply of a certain good, *inter alia*, due to the home state's exclusive control of trade with the host state (in the cases discussed in this article this monopoly is created through military and legal restrictions over trade with Gaza), or due to a specific corporation's exclusive right to supply an essential good (such as a patent-protected drug); or (2) when a corporation has control over crucial natural resources (e.g. water reserves) or essential infrastructure (e.g. a gas pipeline).

Kinley and Tadaki address the obligations of corporations to supply certain goods and services in their legal framework outlining the human rights obligations of transnational corporations (TNCs) under international law.¹¹³ Kinley and Tadaki agree with Ratner that governments are, and should remain, the prime bearers of human rights obligations.¹¹⁴ Yet they add that "TNCs not only can, but must, provide collateral and sometimes crucial collateral support to that end."¹¹⁵ Resting their case on the scenario of a multinational corporation which operates in a developing country, Kinley and Tadaki suggest that "TNCs in developing countries can be expected to help in the human rights training of state-based security personnel and to provide health care and even education for workers and their families where none is accessible or would otherwise not be provided by the state."¹¹⁶ It is noteworthy that in this literature, the provision of such goods and services by corporations is treated as an add-on which is not directly related to the core business of the corporation.¹¹⁷ The case studies analyzed present us with the situation where the services or goods in question are simultane-

112. This argument is in line with the HCJ judgment in *Al-Bassiouni*, where the court held that Israel's duties towards the Gaza residents derive, *inter alia*, "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." HCJ 9132/07 *Al-Bassiouni*, ¶ 11, [2008] (Isr.). The fact that such long-term relations created dependence that generates legal duties may substantiate the argument that corporations that have long supplied essential goods to the population in a way that creates dependency may be subjected to a higher standard of accountability.

113. See Kinley & Tadaki, *supra* note 5, at 933.

114. See Ratner, *supra* note 15, at 517–18. In 2001 Ratner observed that "the company's duties will typically be to avoid directly infringing upon the right . . . Other derivative duties might be appropriate where the nexus between the enterprise and the individual is particularly close. But to go further than this position would effectively ignore the functional differences between states and businesses; it would thereby ask too much of the corporation, especially at this stage of the international legal process, when the broad notion of business duties in the human rights area is just emerging." *Id.* at 517. It may be the case that the time is now ripe for such an extension.

115. See Kinley & Tadaki, *supra* note 5, at 966.

116. *Id.* In 2009, oil company Shell settled an ATCA case concerning its Nigerian operations. Shell agreed to pay \$15.5 million and allocated funds designated to better the life of the local population in the Niger delta. Ed Pilkington, *Shell Pays out \$15.5m over Saro-Wiwa Killing*, THE GUARDIAN, June 9 2009. See also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

117. See, e.g., Kinley & Tadaki, *supra* note 5, at 966. But cf. Ronen Shamir, *Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers*, in THE WORLD CAUSE

ously core to business activity and also instruments of human rights. To that effect, the duty of a corporation to maintain the provision of such goods or services may be even stronger than Kinley and Tadaki anticipate.

Moreover, the corporations in question have willingly entered into contractual commercial relations — governed by private law — which have, over the years, yielded considerable profits. The question of whether the existence of such contracts may add another layer of responsibility for human rights has not been addressed by the evolving jurisprudence with which we are concerned here.¹¹⁸ In general, extant literature is already sensitive to potentially fruitful interactions between the universal regime of human rights in international and domestic law, the soft law instruments of corporate responsibility, and formally private-law instruments.¹¹⁹ McBarnert, for example, has begun to consider various legal constructions that would allow the use of private law mechanisms as effective means of enforcing the human rights obligations on corporations.¹²⁰

One example is the inclusion of social responsibility commitments in commercial contracts between corporations and their sub-contractors.¹²¹ Another example is the attempt to sue corporations that fail to comply with their own voluntary codes of conduct or public declarations concerning their social and environmental responsibilities.¹²²

It is possible to build on this emergent jurisprudence and to take it a step further: the existence of a valid binding contract should in and of itself be considered as setting a higher standard of human rights responsibility on

LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 37–62 (Austin Sarat and Stuart Scheingold eds., 2005).

118. Lam considers the contractual relations of Private Military Companies (PMCs) with the US government in Iraq as substantive grounds for establishing liability under ATCA. See Lam, *supra* note 101, at 1459. See also Scheffer, *supra* note 29, at 858–59. This example rests on the fact that the private company has contractual relations with the state (and specifically its home state) — which is the primary holder of duties under humanitarian law. In contrast, the Israeli corporations we examine maintain contractual relations with Palestinian parties and not with the duty holder (Israel). Also, we deal here with the human rights implications stemming from the suspension of such contractual relations.

119. See, e.g., Carola Glinski, *Corporate Codes of Conduct: Moral or Legal Obligation?* in THE NEW CORPORATE ACCOUNTABILITY 119, 122–29 (McBarnert et al. eds., 2007); Katherine E. Kenny, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation between Wal-Mart and the Employees of its Foreign Suppliers*, 27 NW. J. INT'L L. & BUS. 453 (2007); Christopher McCrudden, *Corporate Social Responsibility and Public Procurement*, in THE NEW CORPORATE ACCOUNTABILITY 93 (McBarnert et al. eds., 2007).

120. See McBarnert, *supra* note 14, at 37–43. See also Ratner, *supra* note 15 at 449 (suggesting to marry “principles of international law concerning foreign investment, as well as principles of corporate law more generally, with the theory and practice of human rights law”).

121. See McBarnert, *supra* note 15, at 42–43.

122. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002) (suing Nike for allegedly making false statements regarding the use of sweatshops by its suppliers). See also McBarnert, *supra* note 15, at 40–41; Glinski, *supra* note 119; Kenny, *supra* note 119. For detailed analysis of the sanctioning mechanisms available to corporations in such cases, see Richard Locke, Thomas Kochan, Monica Romis & Fei Qin, *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 INT'L LABOR REV. 21 (2007).

the contracting corporation.¹²³ Consequently, corporations that knowingly enter into supply contracts whose execution directly bears on the human rights of an affected population — under the conditions specified above (e.g., exclusivity) — should be held to a higher standard of accountability. This conclusion seems to sit well with and corroborate the idea that the human rights obligations of corporations should be determined, among other things, on the basis of establishing the strength (e.g. consistency, continuity, dependency, etc.) of the relationship that exists between the corporation and the affected population.¹²⁴ Steven Ratner argues that the scope of human rights obligations directly imposed on corporations “must be determined in light of the characteristics of corporate activity. In particular, business enterprises will have duties both insofar as they cooperate with those actors whom international law already sees as the prime sources of abuses — states — and insofar as their activities infringe upon the human dignity of those with whom they have special ties.”¹²⁵

Developing his concept of “special ties,”¹²⁶ Ratner outlines a model of concentric spheres of corporate influence “from employees to their families, to the citizens of a given locality . . . and eventually to an entire country.”¹²⁷ Conceptually, the burden of responsibility weakens in accordance to the enlargement of the social sphere to which it relates.¹²⁸ Although Ratner does not consider the potential weight of contractual relations within these spheres of influence and ties, such relations should be added to the model when we evaluate special ties and direct spheres of influence.

123. The attempts to subject corporations to a viable framework of legal accountability should also address issues such as the potential impact on the financial viability of these corporations and in general should aim at striking a balance between a check against violations of rights and providing incentives to maintain corporate activity in volatile countries and regions. These issues are typically raised in the context of deliberations concerning the human rights risks associated with operations in high risk countries, *See, e.g.,* Maassarani et al., *supra* note 2.

124. Attempts to determine the scope of corporate responsibility to human rights have shifted in recent years from reliance on the notion of the corporation’s “sphere of influence” in order to establish accountability (e.g. the United Nations Global Compact and The Norms) to a ‘Protect, Respect, Remedy’ framework which rests on three pillars:

State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.

Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Towards Operationalizing the ‘Protect, Respect, and Remedy’ Framework*, 3, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009). *See also* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’*, U.N. Doc. A/HRC/8/16 (May 15, 2008).

125. Ratner, *supra* note 15, at 449.

126. *See id.* at 450 (arguing that corporate human rights duties are a function of four elements: “the corporation’s ties with the government . . . the particular human right at issue, and the structure of the corporate entity.” The fourth element concerns the corporation’s “nexus to affected population.”)

127. *Id.* at 508.

128. *Id.*

Indeed, the obligations of the corporation toward contractual counterparts may also be drawn from pure private law principles. For instance, the humanitarian duty of a supplier not to breach or suspend a contract under circumstances as the ones specified here — where such infringement has human rights implications — may be construed under the general obligation to exercise contractual relations in good faith.¹²⁹ Consequently, it may be argued that a supplier that enters into a long-term supply contract must not cancel it without proper notice, or should use best efforts to avoid its curtailment by a third party.

Finally, another layer of direct corporate responsibility may stem from the specific nature of the contractual relations analyzed in this study. The ability of Dor Alon and the two banks to profit from their private-law-governed contracts had been considerably augmented by the fact that they enjoyed a monopoly over said services; a monopoly that has been facilitated by the state due to the latter's ability to create and maintain a "captured market" in the Palestinian territories under its effective control. In this respect, these seemingly private contracts cannot be conceptualized independently of the fact that commerce took place in a context which had also been governed by the public law (e.g., international law) aspects of the occupation and the conflict. In light of this latter consideration and the fact that the commerce in question is inherently related to human rights issues and obligations, it seems compelling to argue that corporations performing such commercial activities should be held directly responsible for these issues under international law.

C. *State Action and Corporate Action*

Having established that — under the circumstances described above — the commercial provision of goods and services may impose special duties of care for human rights on corporations, another step is to establish that these duties should be conceptualized independently of state action and state policies. In many actual and hypothetical cases, the obligations of corporations seem to be derived from their relations with the state, assuming that the state is both the prime bearer of human rights obligations and the main perpetrator in violating them.¹³⁰ Ratner argues that "where an enterprise has close ties to the government, it has *prima facie* a greater set of obligations in the area of human rights."¹³¹ As previously mentioned, it seems that this proposition relies on the assumption that the violation of human rights is incidental to the core business of the corporation or that it is an

129. The Contracts (General Part) Law, 1973, S.H. 694 ("An obligation or right arising out of a contract will be fulfilled or exercised in customary manner and in good faith.").

130. See Cassel, *supra* note 11; Clapham & Jerbi, *supra* note 13.

131. See Ratner, *supra* note 15, at 499–506 (considering three types of ties that government and corporations are most likely to have: corporations as government agents, corporations as complicit with government, and corporations as commanders).

illegitimate derivative of a course of corporate action that is otherwise unrelated to human rights.¹³²

The case studies analyzed in this article are somewhat different. On the one hand, we have seen that the Israeli corporations in question had very close ties with the government. Both Dor Alon and the banks retained regular informal and formal channels of communication with state officials and at least to some degree coordinated their activities in the Gaza Strip with the state. Moreover, we have seen that through their commercial activities, these corporations have fulfilled a vital service to the state, allowing it to withstand its obligations under international humanitarian law. In this sense, and following the formula of Ratner above, we may conclude that Dor Alon and the banks had “prima facie a greater set of obligations in the area of human rights.”¹³³

On the other hand, we have also seen that the corporations in question had not been legally compelled by the state to halt or amend their contractual relations with entities in the Gaza Strip. Dor Alon complied with a state “request” to reduce the supply of fuel after receiving reassurances as to the legality of such reduction from the legal adviser of the Ministry of Defense and the ruling of the HCS in the Al-Bassioni case. The banks displayed an ever-greater degree of un-coerced discretion and defied the interest of the state in maintaining uninterrupted correspondence services. In such cases, it seems that corporate accountability may be enhanced, rather than reduced, due to their relative autonomy from the state. Both Dor Alon and the banks — while maintaining “close ties” to the state (albeit no legal ties) — acted from within the framework of commercial contracts that had not been tailored to fit any public tender, license, or franchise.

In this respect, the corporations in question should be held accountable to the international regime of human rights on two only seemingly contradictory counts: they held close ties with the state (to the maximum extent of fulfilling the humanitarian obligations imposed on the state), and at the same time they were in a position to act upon their own discretion in deciding to terminate or alter commercial relations that had direct adverse effects on human rights. In other words, the fact that the corporations in question fulfilled public state functions and acted as an arm of the state constitute grounds for the imposition of a first layer of human rights obligations on corporations. That these corporations exercised discretion and knowingly executed a commercial policy that had human rights ramifications imposed yet a second layer of responsibility on them — not only as state agents or as accomplices of state actions — but independently, as primary actors.

132. See *supra* pp. 6–7.

133. See Ratner, *supra* note 15, at 497.

CONCLUSION

Corporations that enter into commercial relations whose maintenance directly bears on human rights should be held accountable for violations resulting from the substantive disruption of said relations. The article analyzed two cases of commercial relations between Israeli corporations and Palestinian entities in the Gaza strip. Both cases had significant human rights ramifications. The reduction in fuel supply significantly restricted the Gaza residents' use of electricity, water pumps, emergency vehicles, medical equipment and daily transportation. The termination of correspondence ties with banks in the Gaza strip left the Palestinian population with no access to the Israeli financial and monetary system. This situation prevented the Gaza residents from receiving social allowances, salaries, donations, and humanitarian aid from Israel and other countries.

The cases discussed in this article contribute to the evolving legal architecture concerning the human rights obligations of corporations. Corporate accountability in such cases rests on two interrelated sets of relations. The first concerns the type of relationship between the corporation and an affected civil population. We suggest that a situation of a captured market — in which the corporation enjoys privileges of contractual monopoly due to its home state's effective military control — imposes heightened duties of corporate responsibility to protect human rights.

The second set of relations concerns the ties between the corporation and its home state. Here, we find a double bind that also suggests heightened responsibility to human rights. On the one hand, the corporations act in a state-like capacity, fulfilling public functions that the state has an obligation to perform. On the other hand, the commercial "private law" character of their activity leaves them considerable autonomy from direct state control in fulfilling said functions, and therefore justifies a greater degree of diligence independently of state action. Ultimately, we find that this particular structure of triangular relationship embodies the conditions under which corporations should be held directly accountable for human rights violations.

