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Rafah Crossing: Who holds the keys?

Summary

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Introduction

The Gaza Strip has been sealed almost hermetically for nearly two years, isolating its 1.5 million residents and violating their right to freedom of movement. Israel closed the Gaza Strip in a gradual process over a period of years, which included instituting an exit regime based on permits, building a fence, imposing an increasingly tight closure on the land crossings and preventing travel by air or sea.

As a result, Rafah Crossing between Gaza and Egypt has become a vital window for Gaza residents seeking to enter or leave and a crossing point connecting the Gaza Strip not only with Egypt but with the outside world in general, and even with the West Bank. During the times that regular traffic through Rafah Crossing was possible, tens of thousands of people traveled through it in both directions every month.

However, in the year between the capture of Israeli soldier Gilad Shalit (June 2006) and the Hamas takeover of the internal government in Gaza (June 2007), Israel kept Rafah Crossing closed 85% of the time; since June 2007, Rafah Crossing has been closed permanently, except for random and limited openings by Egypt, which meet only 3% of the needs of the residents of the Gaza Strip to enter and leave.

The closure of Rafah has severe implications for the residents of the Gaza Strip, including preventing access to health care services that are not available in Gaza, preventing access to opportunities for academic studies or employment abroad or in the West Bank, forcing long separations of family members on either side of the border, causing fatal damage to commerce and business, and creating a growing feeling among residents of the Gaza Strip that they are enclosed, isolated and trapped. The closure, of course, means a real inability to leave the Gaza Strip, even under circumstances of mortal danger.

It is the closure of Rafah Crossing that is causing these severe violations of the rights of residents of the Gaza Strip, and therefore those responsible for closing it bear responsibility for those violations. Since Israel withdrew from the Gaza Strip in 2005, including from the Gaza-Egypt border, it is hard to point to a single party

that is exclusively responsible for the closure of Rafah Crossing. Several parties are involved in control of the crossing to various extents: Israel, Egypt, the Hamas regime in the Gaza Strip and the Palestinian Authority (PA). Each one of those parties is shirking its responsibility and pointing an accusatory finger at the others for closing the crossing. The result is that 1.5 million residents of the Gaza Strip are denied access to the outside world, apparently without anyone bearing responsibility.

The purpose of this report is to dispel the haze and lack of transparency, and to answer the question: who is closing Rafah Crossing, and who is therefore responsible for the resulting violation of the rights of the residents of the Gaza Strip?

In order to answer that question, the report begins with a factual section, including a comprehensive review of the policy regarding Rafah Crossing and the other Gaza Strip crossings over the years, the various arrangements under which Rafah Crossing operated, data on the passengers who crossed through it until the end of December 2008, and then the heart of the matter – the severe implications of the closure of Rafah for the residents of the Gaza Strip, and primarily their access to adequate health care services. In this respect, the spotlight is aimed primarily at the implications of the restrictions on the freedom of movement of people, but to a certain degree it also sheds light on the grave impact of the restrictions on the passage of goods into the Gaza Strip. Likewise, the report presents a detailed description of the positions of the various parties regarding Rafah Crossing, the extent to which the various parties control the crossing, the merging of interests behind its closure and the political conflicts that are undermining attempts to re-open it. The report is based on field research, information from Israeli authorities, including information presented to the Israeli Supreme Court, information from Palestinian and international organizations, and meetings and correspondence with relevant officials in Israel, Egypt, Gaza and the West Bank.

On the basis of the facts, presented as is and without interpretation, we offer an analysis of the legal responsibility of the various parties. The analysis is based on the obligations of each party under international law and on the principle that the extent of control exerted by each party dictates the extent of its responsibility for the crossing and for the implications of its closure.

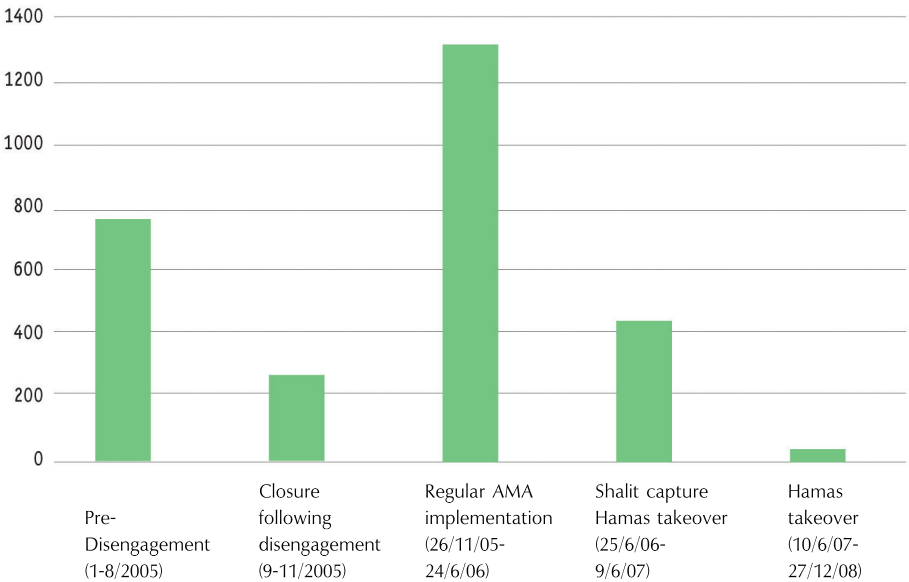
The analysis focuses mainly on Israel's responsibility for the freedom of movement of the residents of Gaza, for two reasons: first, control of Rafah Crossing must be

seen in the context of Israel's control of all the other crossing points of the Gaza Strip – land, air and sea – which make Gaza a "land-locked" territory, dependent on Rafah Crossing for contact with the outside world. That control has significant implications for Israel's responsibility for Rafah Crossing. Gisha – Legal Center for Freedom of Movement (Gisha) and Physician for Human Rights-Israel (PHR-Israel) take the position that Israel continues to constitute an occupying power in the Gaza Strip, because it controls significant aspects of life in Gaza, including its borders, the Palestinian population registry, the tax system and the funding of public services; therefore, we ascribe to it increased responsibility for the freedom of movement of the residents of the Gaza Strip. Second, as Israeli organizations, we see it as our primary responsibility to make recommendations and demands of the authorities of the state in which we are acting and to whose institutions we have access. Simultaneously, we analyze the responsibility of the other parties – mainly Egypt, the Palestinian Authority (PA) and Hamas – for blocking access of Gaza residents to the outside world, and we make demands on them accordingly. We invite readers of the report to offer their own analysis and conclusions, on the basis of the facts detailed in the report, and, on the basis of their conclusions, to address the appropriate authorities with their own recommendations and demands. To that end, we present our analysis separately from the historic and factual background (chapters 1 and 2), and the presentation of the parties' positions (chapter 5). A copy of this report was sent to the relevant authorities. A response from the Palestinian Authority is included as Appendix 2 to this report. The other parties chose not to send a response for purposes of publication in this report.

Israeli authorities and other parties tend to treat the closure of Gaza as a political issue; Gisha and PHR-Israel stress that the right of the residents of the Gaza Strip to leave and enter the territory in which they live is not a political issue but a basic right, which the parties who exert control over Rafah Crossing are obligated to respect and safeguard. The various parties – mainly Israel, Egypt, the PA and Hamas – should be held accountable for the violation of the rights of the residents of the Gaza Strip and are asked to take concrete action to bring about the opening of the crossing, placing the rights of the residents of the Gaza Strip at the top of their priorities and transcending the political interests or conflicts that are presently perpetuating the closure of the crossing. They may choose the arrangements under which they discharge their obligation to allow traffic between Gaza and the outside world, but the very obligation to do so is not subject to political discretion.

This report focuses on Rafah, in order to clarify and shed light on the complicated and unique circumstances of the control over that crossing, in contrast with the other Gaza Strip crossings, which are directly and exclusively controlled by Israel. However, our main concern in issuing this report is the freedom of movement of the residents of the Gaza Strip and their access to and from the outside world. Those rights can be realized through Rafah Crossing, but they can and should also be realized through the other Gaza Strip crossings, including via the sea and air space and the land crossings with Israel.

In that spirit the report also addresses local and foreign policymakers as they set out to make future arrangements for Rafah Crossing and the other Gaza Strip crossings: the previous arrangements allowed the frequent closure of Rafah Crossing and led to an ongoing violation of the rights of the residents of the Gaza Strip, and therefore – they should not be reinstated. Any future arrangement must first and foremost ensure respect for the rights of the residents of Gaza, including the right to freedom of movement, and give residents regular, easy and convenient access to other countries and to the West Bank.



**Average daily traffic of people through Rafah Crossing
in both directions, 2005-2008**

Source: OCHA, UN Office for the Coordination of Humanitarian Affairs

Summary of Analysis and Recommendations

Israel

Even though Israeli forces are not stationed on the Egypt-Gaza border permanently, Israel continues to exert substantial and indirect control over the possibility of opening Rafah Crossing and uses that control to exert pressure on the residents of Gaza, as part of a policy of collective punishment. Israel controls all the other Gaza Strip crossings and closes them, thereby creating dependence upon Rafah Crossing as the only channel between the Gaza Strip and the outside world.

Israel's control of the Gaza border crossings, in addition to its control of other significant aspects of life in the Gaza Strip, makes Israel responsible for allowing freedom of movement in and out of Gaza. According to Gisha and PHR-Israel, that control rises to the level of effective control. Therefore, Israel owes obligations under the laws of occupation. However, even for those who believe that Israel's control of Gaza is not an occupation, its control – in the past and in the present – subjects Israel to obligations towards the residents of the Gaza Strip under human rights law; because of the right of transfer for residents of a land-locked area; and as a consequence of the laws of "post-occupation." That responsibility requires Israel to allow the regular operation of Rafah Crossing or alternatively, to allow passage through the other crossings, by sea, air or land.

Israel owes a special responsibility for the health care system in Gaza, including the access of patients to medical treatment that is not available in the Gaza Strip, for a number of reasons, including because of its closure of Gaza, which prevents the health care system there from developing.

Gisha and PHR-Israel call on Israel:

- To immediately implement an arrangement to allow the free movement of residents of the Gaza Strip to other countries and to allow them to return home as they choose.
- If the right of the residents of the Gaza Strip to freedom of movement out of their territory cannot be realized through Rafah Crossing, for one reason or another, Israel must allow them such passage through the other crossings – whether by land through the Kerem Shalom or Erez crossings, or by air or sea from the Gaza Strip to the outside world.
- To allow the passage of patients into Israel for medical treatment, whether they are to receive treatment in Israeli hospitals or to pass through Israeli territory to the West Bank, east Jerusalem or Jordan.
- To allow the development of an independent and advanced health care system in Gaza, by allowing the passage of medical teams so that they can have contact with the Palestinian medical community in the West Bank and east Jerusalem and the international medical community, and by allowing in medical equipment and medications, according to the accepted standards of a developed health care system.

Egypt

Egypt, which has the physical capacity to open Rafah Crossing, closes it as the result of pressure exerted on it by Israel and other parties and in order to promote its own interests, not to recognize the Hamas government in the Gaza Strip and not to allow a connection between it and Egyptian entities that oppose the government. The closure of the Gaza Strip and the suffering of its residents create pressure on Egypt to open the crossing, and it does so for humanitarian purposes, sporadically and ad hoc, informing Israel of these openings. Those openings satisfy the travel needs of only a fraction of the residents of Gaza.

Meanwhile, Egypt is mediating between the parties in order to reach agreement on opening the crossing. Even in the absence of an agreement between the other parties, Egypt is obligated to open Rafah Crossing; that obligation derives from the actions of Israel, which is closing the other crossings to and from the Gaza Strip

and uses Rafah Crossing to implement a policy of collective punishment. The Israeli closure of the Gaza Strip creates an obligation for Egypt to open Rafah by virtue of its obligation to respect the right of transfer of the residents of the blocked Gaza Strip, and by virtue of its obligation to act against the violation of the Fourth Geneva Convention by Israel. Likewise, Egypt is obligated to allow the passage of humanitarian aid from its territory into the Gaza Strip.

Gisha and PHR-Israel call on Egypt to open Rafah Crossing regularly for the passage of residents of the Gaza Strip through Egypt and to allow the sufficient passage of humanitarian provisions from its territory into the Gaza Strip.

The Hamas Regime in Gaza

In contrast to the other parties – Israel, Egypt, and the PA – Hamas is the only party that wants Rafah Crossing to open immediately and fully. However, Hamas' objection to Israeli involvement in operating the Gaza Strip border crossings constitutes an obstacle to their opening. In addition, Hamas' control of the Palestinian side of Rafah Crossing prevents the Presidential Guard from operating there, causing the other parties to keep the crossing closed. Rafah Crossing is therefore an arena for the political struggle between Hamas, the PA and Israel, with the victims being the residents of the Gaza Strip, who are under direct Hamas control and for whose rights it is responsible.

Gisha and PHR-Israel call on Hamas to make the rights of Gaza residents its top priority and not to allow disputes and power struggles over control of the crossing and arrangements for opening it to violate the right of the residents of the Gaza Strip to freedom of movement.

The Palestinian Authority

The Palestinian Authority continues to exercise a certain amount of control over the residents of the Gaza Strip, and therefore also continues to bear responsibility for their rights. The power struggle between the PA and Hamas leads to the PA

objecting to opening Rafah Crossing until the Presidential Guard resumes control over the Palestinian side of the crossing, which may be dependent on the reinstatement of PA control over the Gaza Strip. The refusal of the PA to compromise with Hamas over control of Rafah Crossing contributes to the perpetuation of its closed status, and thereby the PA is violating its commitment to guarantee the rights of the residents of the Gaza Strip.

Gisha and PHR-Israel call on the PA to take part in all initiatives to operate the Palestinian side of Rafah Crossing, in coordination with any relevant party, including Hamas, while making the rights of the residents of the Gaza Strip its top priority.

The European Union

The European Union, the presence of whose forces as monitors allowed the opening of Rafah Crossing as part of the Agreement on Movement and Access (AMA), does not have the ability to open the crossing itself; however, the EU chooses to continue its involvement in the agreement and to support its renewed implementation, under the terms set by the other parties. The EU's involvement in Rafah Crossing obligates it, under the Geneva Convention, to do everything it can to prevent the violations of the convention involved in the closure of Rafah. If its efforts do not put an end to the violation, the EU must renounce its involvement in the AMA so that its actions do not constitute recognition, tacit approval or complicity in an act of collective punishment, in violation of the Geneva Convention.

Gisha and PHR-Israel call on the EU to do everything it can to bring about the renewed and regular opening of Rafah Crossing or to bring about an alternative way of ensuring the regular and free movement in and out of Gaza for all residents. If that is not within the capacity of the EU, it must withdraw its involvement in the arrangements regarding Rafah Crossing and act vis-à-vis the other involved parties to ensure respect for the Fourth Geneva Convention and the rights of the residents of the Gaza Strip.

The United States

The United States chose to be involved in what happens on the Gaza-Egypt border by having placed the AMA under its auspices without insisting on its implementation and by exerting pressure on Egypt to prevent smuggling into the Gaza Strip through tunnels. At the same time, it has not taken action against the human rights violations caused by the closure of Rafah nor acted to find alternatives to facilitate freedom of movement for Gaza Strip residents. Its involvement in the border arrangements obligates the United States to act to promote the opening of Rafah Crossing or another crossing in and out of the Gaza Strip, and as part of its duty not to be party to a violation of the Geneva Convention.

Gisha and PHR-Israel call on the United States to do everything it can to bring about the renewed and regular opening of Rafah Crossing or to bring about an alternative way of ensuring the regular and free movement in and out of Gaza for all residents. The United States must act to ensure that all involved parties respect the Fourth Geneva Convention and the rights of the residents of the Gaza Strip.

Conclusion

On December 27, 2008 Israel launched a military offensive against the Gaza Strip, whose declared goal was to stop the firing of rockets from the Gaza Strip at Israeli civilian towns. Israel attacked the Gaza Strip for three weeks, using bombardment from the air, sea and land. As a result of the attacks, 1,440 Palestinians were killed, including 431 children and 114 women, and 5,380 Palestinians were injured, including 1,872 children and 800 women. In Israel during that time three civilians and one soldier were killed and 182 civilians were injured, as a result of rocket fire by Palestinians from the Gaza Strip. As part of the offensive, ten Israeli soldiers were killed and 340 were wounded.

The Israeli assaults severely damaged civilian targets in the Gaza Strip: as a result of the bombardments, more than 4,000 homes were completely destroyed and 17,000 were partially destroyed, leaving tens of thousands of residents without shelter. Likewise, more than 50 UN facilities were hit, as were eight hospitals and 26 clinics, schools and universities, government offices, factories, workshops and commercial facilities, water, sewage and electricity facilities, agricultural fields and roads. The direct economic damage of the assaults is estimated at \$2 billion.

Beyond the grave loss of life, limb and property, the massive Israeli offensive against the Gaza Strip seriously damaged the civilian infrastructure in the Gaza Strip, which had already been on the brink of collapse.

The Israeli attack on the Gaza Strip was against an area with one of the highest population densities in the world, without shelters or alarm systems, and suffering from a prolonged closure. During the fighting, thousands of families received phone calls to their homes in which a recorded message from the Israeli army warned them they could be harmed if they stayed in their homes. Those people, and the other residents under attack, did not have a safe place to flee, because the fighting took place throughout the Gaza Strip, whose borders remained closed. In addition, Gaza residents could not receive sufficient aid, food or medical equipment during the attacks. This experience illustrated the desperate need of the residents of the Gaza Strip for open passage to the outside world and the urgency of finding a solution to the closed Rafah Crossing.

Talks are presently under way between the various parties to find a future solution for Rafah Crossing. Gisha and PHR-Israel call on all the involved parties to urgently find a solution to allow regular passage between the Gaza Strip and Egypt, to ensure the needs of the residents and respect their rights, including the right to freedom of movement. Those rights should be at the core of any arrangement made. In reaching an agreement, the parties should take past experience into account and establish mechanisms to prevent the frequent closure of Rafah Crossing, as occurred during the implementation of the AMA beginning in June 2006.

The reopening of Rafah Crossing and the rest of Gaza's crossings to permanent and regular traffic is vital to restore normal life to the residents of the Gaza Strip, rebuild and develop the economy, and build an open, educated and thriving society.