

THE STATUS OF GAZA AS OCCUPIED TERRITORY UNDER  
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**Abstract** The traditional effective control test for determining the existence of a belligerent occupation requires boots on the ground. However, the evolution of the international law of occupation and the emergence of complex situations, particularly of a technological nature, necessitate a functional approach that protects the rights of occupied populations. The political, historical and geographical conditions of Gaza allow Israel to exert effective remote control. Despite the disengagement of Israel from Gaza in 2005 and the assumption of military and political authority by Hamas, this article argues that Israel nonetheless continues to be in effective occupation of the Gaza Strip on the basis of the following grounds: (1) the relatively small size of Gaza in connection with the technological superiority of the Israeli air force allows Israeli boots to be present in Gaza within a reasonable response time; (2) Hamas's authority and armed resistance do not impede the status of occupation; (3) the long pre-disengagement occupation and close proximity between Israel and Gaza (geography) allow for the remote exercise of effective control; and (4) all imports, exports in and out of Gaza, and any movement of persons are fully controlled and regulated by Israel.

**Keywords:** public international law, international humanitarian law, human rights, belligerent occupation, Palestine.

## I. INTRODUCTION

The events of May 2023 in which Israeli Defence Forces targeted senior leaders of Islamic Jihad (the second largest militant group in Gaza after Hamas) and the renewal of attacks on Gaza<sup>1</sup> demonstrated Israel's military control over the Gaza Strip and reignited discussions about its status as occupied territory. The Gaza Strip situation has received considerable critical discussion since

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<sup>1</sup> B McKernan, 'Israel Bombs Gaza Strip, Killing Three Islamic Jihad Leaders and Nine Civilians' (*The Guardian*, 9 May 2023) <<https://www.theguardian.com/world/2023/may/09/israel-bombs-gaza-strip-killing-three-islamic-jihad-leaders>>.

2005,<sup>2</sup> coinciding with the Israeli decision to withdraw unilaterally from this Palestinian territory, which it had occupied since 1967.

In addition to the Gaza Strip, the Israeli disengagement encompassed also Northern Samaria in the West Bank. The disengagement plan was a remarkable historical moment for the Palestinian–Israeli conflict.<sup>3</sup> The plan, announced in April 2004, stipulated that Israel intended to evacuate from Gazan settlements and that no Israeli military or civilian settlers would subsequently remain in Gaza.<sup>4</sup> The official justification for the plan was that ‘there is currently no reliable Palestinian partner with which Israel can make progress in a bilateral peace process’ and with whom they could collaborate to reduce the fractions of Palestinians residing in Gaza.<sup>5</sup> In September 2005, on the eve of the disengagement, Israeli military forces departed from Gaza, abandoning in the process 21 settlements in Gaza and four in the West Bank.<sup>6</sup>

Following the withdrawal, Israel asserted that there was no longer any military presence in Gaza and, by extension, that it no longer (if ever) occupied the Strip nor was it responsible for the Gazan population in the manner that an occupier would be.<sup>7</sup> One crucial aspect of the disengagement was that the Israeli military redeployed outside of Gaza, while maintaining troops on its external land border and reserving exclusive control over Gaza’s airspace and territorial waters.<sup>8</sup> The situation became more complicated when Israel declared Gaza a ‘hostile territory’ in 2007 and imposed a blockade on it after the Islamic group, Hamas, seized control of the Gaza Strip.<sup>9</sup> Since then Israel has partially closed the borders and restricted the flow of supplies into Gaza, and conducted four major military operations in 2008, 2012, 2014 and, most recently, 2021, which have led to a humanitarian crisis.<sup>10</sup> Gaza has

<sup>2</sup> M Luft, ‘Living in a Legal Vacuum: The Case of Israel’s Legal Position and Policy towards Gaza Residents’ (2018) 51(2) IsLR 193.

<sup>3</sup> Ministry of Foreign Affairs, ‘Gaza Disengagement Plan: Text of the Sharon Plan’ (April 2004). Translation available at: <<https://www.jewishvirtuallibrary.org/text-of-the-gaza-disengagement-plan>>.

<sup>4</sup> *ibid.* <sup>5</sup> *ibid.* <sup>6</sup> J Rynhold and D Waxman, ‘Ideological Change and Israel’s Disengagement from Gaza’ (2008) 123 PolSciQ 11.

<sup>7</sup> Israeli Foreign Ministry, ‘Gaza Disengagement Plan: Cabinet Resolution Regarding the Disengagement Plan’ (6 June 2004) (Revised Disengagement Plan). Translation available at: <<https://www.jewishvirtuallibrary.org/cabinet-resolution-regarding-the-disengagement-plan-june-2004>>; *Jaber Al-Bassiouni Ahmed and others v Prime Minister and Minister of Defence* [2008] H CJ 9132/07, para 12. Translation available at: <<https://casebook.icrc.org/case-study/israel-power-cuts-gaza>>.

<sup>8</sup> Ministry of Foreign Affairs (n 3); Revised Disengagement Plan *ibid.* <sup>9</sup> L Bhungalia, ‘A Liminal Territory: Gaza, Executive Discretion, and Sanctions Turned Humanitarian’ (2010) 75(4) GeoJournal 347.

<sup>10</sup> The Euro-Mediterranean Human Rights Monitor, *Suffocation and Isolation: 15 Years of Israeli Blockade on Gaza* (2021) <<https://reliefweb.int/report/occupied-palestinian-territory/suffocation-and-isolation-15-years-israeli-blockade-gaza-enar>>; United Nations Country Team, *Gaza in 2020: A Liveable Place?* (Office of the United Nations Special Coordinator for the Middle East Peace Process 2012) <[https://unsco.unmissions.org/sites/default/files/gaza\\_in\\_2020\\_a\\_liveable\\_place\\_english.pdf](https://unsco.unmissions.org/sites/default/files/gaza_in_2020_a_liveable_place_english.pdf)>.

become the world's largest open-air prison,<sup>11</sup> with more than two million people, most of them refugees, effectively imprisoned there.<sup>12</sup>

An important issue persists, namely whether, despite its military and political disengagement from Gaza, Israel still nonetheless continues to occupy the Strip. Opinions about how to characterize the situation in Gaza for the purposes of applying international humanitarian law (IHL), in particular the international law of occupation, diverge.<sup>13</sup> A key issue is whether the degree of control exercised by Israel over the Strip amounts to effective control, since no Israeli boots or political authority exist on the ground in Gaza, with Hamas exercising political authority and military control.

The article does not attempt to analyse the obligations of occupants under international law, as this field of inquiry has received significant scholarly attention and need not be replicated here.<sup>14</sup> However, the debate over the legal status of Gaza is not a theoretical discussion but rather a factual assessment that affects the rights of the Gazan people. If the situation in Gaza calls for the application of the law of occupation, Israel's obligations as an occupant would subsequently be extended under the Fourth Geneva Convention. The occupying power's task under the Geneva regulations suggests a humanitarian agenda, protecting the occupied population and working for the welfare of occupied civilians.<sup>15</sup>

For example, when supplying food and medicine, the occupant is obliged to provide the maximum supply to the occupied population.<sup>16</sup> This obligation is greater than the duty regarding the free passage of humanitarian relief under the law of armed conflict.<sup>17</sup> The occupying power also has the obligation to ensure the maintenance of public health services (Article 56) and children's health care and education institutions (Article 50).<sup>18</sup> In addition, the possible application of international human rights in occupied territories would

<sup>11</sup> The term 'open-air prison' was used by Professor Norman Finkelstein who borrowed it from the former British Prime Minister, David Cameron. See the Preface in NG Finkelstein, *Gaza: An Inquest into Its Martyrdom* (University of California Press 2018) xi.

<sup>12</sup> State of Palestine, Palestinian Central Bureau of Statistics, *Palestine in Figures 2021* (Palestinian Central Bureau of Statistics 2022) <<https://pcbs.gov.ps/Downloads/book2604.pdf>>.

<sup>13</sup> E Liebllich and E Benvenisti, *Occupation in International Law* (OUP 2022); M Luft, '10 Years 10, Judgments: How Israel's Courts Sanctioned the Closure of Gaza' (Gisha – Legal Center for Freedom of Movement 2017) <[https://www.gisha.org/UserFiles/File/LegalDocuments/10\\_Years\\_10\\_Judgments\\_EN\\_Web.pdf](https://www.gisha.org/UserFiles/File/LegalDocuments/10_Years_10_Judgments_EN_Web.pdf)>; 'Gaza Up Close' (Gisha – Legal Center for Freedom of Movement 2021), <<https://features.gisha.org/gaza-up-close/>>.

<sup>14</sup> P Spoerri, 'The Law of Occupation' in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014); GP Noone and LR Blank, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (Kluwer 2013).

<sup>15</sup> A Carcano, *The Transformation of Occupied Territory in International Law* (Brill 2015) 68–9.

<sup>16</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 55 (Fourth Geneva Convention).

<sup>17</sup> H Cuyckens, *Revisiting the Law of Occupation* (Brill 2018) 34.

<sup>18</sup> Fourth Geneva Convention (n 16) arts 50, 56.

protect the civil and political rights of Gazan civilians more extensively and fill any gaps in the international law of occupation.<sup>19</sup> Thus, the burden of the occupant's obligations under the law of occupation has made occupants deny its application over the years.

This article has two parts. The first begins by outlining the theoretical foundations of the law of occupation in order to examine how case law and scholarship define the effective control test under Article 42 of the Hague Regulations of 1907. The second explores Israel's position and the stance of the Israeli Courts in cases concerning Gaza after the 2005 withdrawal. It concludes by analysing the status of Gaza as an occupied territory.

## II. THE NOTION OF EFFECTIVE CONTROL UNDER INTERNATIONAL JURISPRUDENCE

International courts have established that the existence of occupation is a question of fact.<sup>20</sup> As stated in Article 42 of the Hague Regulations:

Territory is considered occupied when it is placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and, in a position, to assert itself.<sup>21</sup>

Despite the ambiguity of Article 42 of the Regulations, it remains the primary basis for determining whether a situation constitutes an occupation under IHL or not.<sup>22</sup> The two components of this provision, namely the establishment of authority by the occupant and the capacity to exercise such authority, are commonly referred to as 'effective control'.<sup>23</sup> Although the test of effective control is not mentioned in the Hague or Geneva law, jurisprudence and scholars confirm its customary nature in determining the fundamental elements of occupation as a matter of fact.

<sup>19</sup> For more discussion on the relationship between human rights law and occupation law, see M Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011); O Ben-Naftali and Y Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' 37 *IsLR* 17; M Milanovic, 'Extraterritorial Derogations From Human Rights Treaties in Armed Conflicts', in N Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016); D Campanelli, 'The Law of Military Occupation Put to the Test of Human Rights Law' (2008) 90 *IRRC* 653; A Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

<sup>20</sup> *Prosecutor v Mladen Naletilić and Vinko Martinović* (Trial Judgment) ICTY, IT-98-34-T (31 March 2003) para 211 (*Naletilić*); *Armed Activities on the Territory of the Congo (the Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Rep 168, 230: 'there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question'.

<sup>21</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277, art 42 (Hague Regulations 1907). <sup>22</sup> Spoerri (n 14) 188.

<sup>23</sup> Noone and Blank (n 14) 171.

There are three cumulative and constitutive elements for determining the existence of occupation: the presence of foreign military forces over a territory, the exercise or ability to exercise authority in place of the ousted government, and the unwillingness of the local government to consent to such presence.<sup>24</sup> In determining whether German forces occupied Greece and Yugoslavia in accordance with Article 42 of the Hague Regulations, the Nuremberg Military Tribunal held that:

Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>25</sup>

The level of control required to establish occupation is greater than the level or intensity of control inherent in an invasion. Unlike invasions, occupation requires effective and not merely overall control by the occupant.<sup>26</sup>

As regards the first component of the effective control test, namely, the presence of foreign military forces over the territory, numerous experts have viewed the presence of an enemy army, also known as 'boots on the ground', as a precondition for a factual occupation. The exercise of power over the airspace or outside the borders of the territory concerned is insufficient to satisfy the test of 'effective control'. This does not imply that armed troops must be present in every square centimetre of the contested territory; it suffices if they are present in strategic locations allowing the army to dispatch troops 'fairly quickly' to the occupied territory.<sup>27</sup>

Nonetheless, scholars are divided regarding the existence of occupation by means of remote control over territory. According to Ferraro, the physical presence of military forces is a prerequisite for establishing effective control. Reducing the threshold of such control could have an effect on the applicability of the law of occupation and prevent the occupant from meeting their obligations. Rather than identifying the effect of the military presence, a more apt question by which to test effective control is to ascertain 'which of the belligerents has the military capability, by its presence in a given area, to impose its authority therein and prevent its opponent from doing so, and, as a result of this, be in effective control of that area'.<sup>28</sup> It is true that physical military

<sup>24</sup> Spoerri (n 14) 188.

<sup>25</sup> *USA v Wilhelm List and Others* (1947) 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 [1947] Case No 47, 55–6 (*Hostages*) <<https://www.legal-tools.org/doc/b62664/pdf>>. <sup>26</sup> Naletilić (n 20) para 214.

<sup>27</sup> International Committee of the Red Cross (ICRC), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (ICRC 2012) 17–18.

<sup>28</sup> T Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *IRRC* 133, 147.

presence is paramount in establishing effective control; nevertheless, technical advancements that permit remote control have made it possible to establish effective control without a physical military presence.<sup>29</sup>

The existence and achievement of effective control when military troops remain outside the contested territory are well established by international courts.<sup>30</sup> The Military Tribunal at Nuremberg ruled that Germany was an occupant of Greece and Yugoslavia since ‘the Germans could at any time they desired assume physical control of any part of the country. The control of resistance forces was temporary only and not such as would deprive the German Armed Forces of its status as an occupant.’<sup>31</sup> Furthermore, the hostile army’s ability to send troops to the territory in a reasonable amount of time to maintain the occupant’s authority and ‘to make the authority of the occupying power felt’ is sufficient to satisfy effective control.<sup>32</sup> In *Tsemel v Minister of Defence*, the Israeli Supreme Court held, when determining the existence of the Israeli occupation of Southern Lebanon, that occupation exists if the foreign authority has the capacity to be dominant in the territory at any time, even when not physically present in the area.<sup>33</sup>

The second component of the effective control test concerns the authority exercised over the occupied territory. In the *Armed Activities* case, the International Court of Justice (ICJ) observed that the occupant authority must be ‘in fact established’ and replace the local authority.<sup>34</sup> This narrow interpretation could permit the occupant to evade its obligations by refusing to establish its authority in the occupied territory, despite retaining ultimate responsibility and sole control. Scholars criticized the ICJ’s stance and proposed that the criterion include the capacity to exert authority or even shared authority with the local government.<sup>35</sup> On the rare occasion of shared authority, the occupant must allow for a vertical share of authority while preserving its security and military operations in the occupied area.<sup>36</sup> Cooperation between the occupying power and the national government is required in numerous provisions of the Fourth Geneva Convention.<sup>37</sup> More importantly, the Convention stipulates that any institutional change enacted by the occupant cannot affect the rights of protected individuals.<sup>38</sup>

<sup>29</sup> Cuyckens (n 17) 31.

<sup>30</sup> Y Shany, ‘The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*’ (2009) 42(1) IsLR 101, 106.

<sup>31</sup> *Hostages* (n 25) 56.

<sup>32</sup> *Naletilić* (n 20) para 217.

<sup>33</sup> S Solomon, ‘Occupied or Not: The Question of Gaza’s Legal Status after the Israeli Disengagement’ (2011) 19 *Cardozo Intl&CompL* 33, 73, citing HCJ 102/82 *Tsemel v Minister of Defence* 37(3) PD 365 [1983] (Isr.).

<sup>34</sup> *Armed Activities on the Territory of the Congo* (n 20) para 173.

<sup>35</sup> ICRC (n 27) 19.

<sup>36</sup> *ibid* 20.

<sup>37</sup> See, for example, Fourth Geneva Convention (n 16) art 50 for the cooperation concerning the care and education of children and art 56 concerning the cooperation in supplying health care and hygiene to the occupied population.

<sup>38</sup> Hague Regulations 1907 (n 21) art 47.

The International Criminal Tribunal for the former Yugoslavia's (ICTY) guidelines for determining the establishment of occupying authority in a territory acknowledge the significance of the resistance of the local population. The ICTY propounded in the *Naletilić* case that one of the criteria for determining an occupation is whether: 'the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation.'<sup>39</sup> When interpreting the Hague Regulations in order to determine the existence of an occupation, one should be mindful of the drafting conferences for the Hague Regulations and its predecessor regulations, such as the Brussels Declaration of 1874. The Belgian delegate to the Brussels conference argued that resistance against occupation might not cease totally and ultimately be prolonged. Similarly, the Russian delegate to the Hague conference insisted that uprisings do not affect the situation of occupation and that the occupier should adapt to uprisings of the occupied population.<sup>40</sup>

The third component of the effective control test concerns the refusal by the sovereign to permit the presence of foreign military on its territory. The refusal of the local sovereign differentiates between pacific and belligerent occupation; therefore, consent precludes the application of the law of occupation. Such consent should be valid, genuine and explicit.<sup>41</sup>

### III. THE LEGAL STATUS OF THE GAZA STRIP

Having set out the general contours of the effective control test, this section seeks to apply that test to the case of Gaza. Scholars, international organizations, and even Israel itself are divided regarding the legal status of Gaza. As Michal Luft describes, Gaza exists in a legal vacuum.<sup>42</sup> During its administration of the Gaza Strip (1948–1967), the Egyptian government did not assert sovereignty over it. Following the Israeli occupation of the West Bank and Gaza Strip in 1967, these territories were recognized as occupied territories by the international community. Israel, however, denied the applicability of the international law of occupation thereto. Later in 2005, the unilateral withdrawal of Israeli forces from Gaza created a legal dilemma and challenged the conventional definition of occupation. The central question ultimately centres on whether the siege and measures adopted by Israeli authorities constitute effective control over Gaza or not.

The conventional test for effective control may not result in the Gaza Strip qualifying as an occupied territory since it sets a high threshold for the

<sup>39</sup> *Naletilić* (n 20) para 217 (emphasis added).

<sup>40</sup> S Darcy and J Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15(2) *JC&SL* 211, 217–18.

<sup>41</sup> ICRC (n 27) 21.

<sup>42</sup> Luft (n 2).

existence of boots on the ground. Nonetheless, a functional and contextual approach to occupation could resolve this issue and render the law of occupation more adaptable and resilient, with a view to encompassing the Israeli occupation of the Gaza Strip. To address this, the following section will provide a brief analysis of the Israeli courts' position which denies the occupied status of Gaza in the aftermath of the Israeli withdrawal.<sup>43</sup> Then, the article's central argument is twofold: (1) to demonstrate that the situation in Gaza has reached the threshold of effective control in accordance with the functional definition of occupation, and (2) that the prolonged occupation and geographical proximity between the territory of Gaza and Israel permit effective control by Israel from a distance, which consequently renders Israel an occupant under international law.

#### A. *The Israeli Position in the Gaza Strip: No Effective Control*

The Israeli occupation of Gaza has been called 'the most legalized occupation in the history of the world'.<sup>44</sup> Military lawyers are in complete synergy with military decision-making authorities.<sup>45</sup> Since the 1967 war, Israel has referred to the Occupied Palestinian Territories—the West Bank, Gaza and East Jerusalem—as 'disputed territories' rather than occupied territories.<sup>46</sup> Israel restricted the applicability of the Hague Regulations and the Fourth Geneva Convention to territories of contracting parties to the conventions (ie States).<sup>47</sup> The Israeli government denied the *de jure* applicability of the Fourth Geneva Convention by citing the so-called 'missing reversioner theory';<sup>48</sup> the lack of sovereignty over these territories by Jordan, Egypt or any previous sovereign power. As a result, it is claimed that these territories fail to meet the requirements of being territories 'of a High Contracting Party' under Article 2 of the Fourth Geneva Convention.<sup>49</sup> Officially, the Israeli government has never acknowledged the *de jure* applicability of the

<sup>43</sup> A large part of occupation-related case law derives from Israeli courts, since the Israeli occupation is one of the rare occupants in history to admit its *de facto* control over territory, further reinforced by the fact that the Israeli HCJ has extended its jurisdiction to acts in occupied territories; Lieblich and Benvenisti (n 13) 2.

<sup>44</sup> O Ben-Naftali, 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies' in Ben-Naftali (ed) (n 19) 130.

<sup>45</sup> M Geva, 'Military Lawyers Making Law: Israel's Governance of the West Bank and Gaza' (2019) 44 *L&SocInquiry* 704, 716. This expansion of the lawyers' participation in the military decision-making process has been significant since the 1987 *Intifada*.

<sup>46</sup> International Commission of Jurists, *The Road to Annexation: Israel's Maneuvers to Change the Status of the Occupied Palestinian Territory: A Briefing Paper* (International Commission of Jurists 2019) 7 <<https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf>>.

<sup>47</sup> E Samson, 'Is Gaza Occupied? Redefining the Status of Gaza Under International Law' (2010) 25 *AmUIntlLRev* 915, 931.

<sup>48</sup> For more discussion about the theory, see YZ Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *IsLR* 279.

<sup>49</sup> International Commission of Jurists (n 46) 8.



law of occupation to the Occupied Territories. Israel has only recognized the *de facto* customary rules of the Hague Regulations in the Occupied Territories. Simultaneously, Israel asserts that the Fourth Geneva Convention is inapplicable in occupied Palestinian territories and has acknowledged only the humanitarian articles of the Convention, without, however, defining these.<sup>50</sup>

Nonetheless, this position has been rejected by the international community,<sup>51</sup> primarily through Resolution 242 of the United Nations Security Council (UNSC), which recognized the Gaza Strip and the West Bank as occupied territories.<sup>52</sup> In its advisory opinion in the *Wall* Case, the ICJ reached the conclusion that Palestinian territories are considered occupied under customary international law.<sup>53</sup> In addition, the Court stated that the main objective of the Fourth Geneva Convention, regardless of the status of the occupied areas, is to safeguard protected persons. Therefore, Article 2 of the Fourth Geneva Convention did not confine the treaty's application to territory under the sovereignty of a contracting State.<sup>54</sup> The ICJ concluded that the Fourth Geneva Convention applies in the occupied Palestinian territories.<sup>55</sup> In addition, the assertion that the Palestinian territories were not subject to any sovereign when Israel seized them is based on the conventional principle of sovereignty whereby only States as such possess sovereignty. Palestinian self-determination is further reinforced by the conferral of this collective right to *peoples*, as opposed to States as such, irrespective of the existence of formal statehood at any time in their history.<sup>56</sup>

Following the Oslo Accords and the transfer of authority in Gaza to the Palestinian Authority, it was argued that Israel was no longer an occupying power in the Gaza Strip. Comparing the 'potential' control of the Israeli forces and the Palestinian Authority, the Palestinian Authority could be viewed as having authority over the Gaza Strip after the Israeli withdrawal in 2005, despite the fact that 'actual' Palestinian control was inadequate.<sup>57</sup> Furthermore, it was argued that if the Oslo Accords were still in effect, the Gaza Strip and the West Bank would be regarded as a single territorial entity. Thus, despite their withdrawal from Gaza, Israeli forces continue to occupy a proportion of the occupied territories, as they are still occupying the West Bank. This partial occupation of crucial areas under the official control of the Palestinian Authority impedes the latter's operations in the Gaza Strip.<sup>58</sup> The

<sup>50</sup> Ben-Naftali (n 44) 164–5; E Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 206; A Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 AJIL 44, 62; International Commission of Jurists *ibid*.

<sup>51</sup> Samson (n 47) 932.

<sup>52</sup> UNSC Res 242 (22 November 1967) UN Doc S/RES/242(1967), para 1(i). The Resolution called for the 'withdrawal of Israel armed forces from territories occupied in the recent conflict'.

<sup>53</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 70–79.

<sup>54</sup> *ibid*, paras 95–101.

<sup>55</sup> Ben-Naftali (n 44) 134.

<sup>56</sup> Y Shany, 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement' (2005) 8 YIntHL 369, 383.

<sup>57</sup> *ibid* 397.

ruling of the Israeli High Court of Justice (HCJ) in *Ajuri v the Commander of the IDF* confirms that Gaza and the West Bank are considered a single entity. In this case, the Israeli High Court examined the legality of the military orders issued by the Army Commander of Judea and Samaria (the West Bank) to assign the residency of two petitioners living in the West Bank to the Gaza Strip.<sup>59</sup> The Court ruled that, despite having different military commanders, the Gaza Region was connected to Judea and Samaria, which are effectively one territory.<sup>60</sup>

The status of Gaza became more complicated in 2005 following the aforementioned unilateral withdrawal plan, with Israel declaring that it had no further military presence in the Gaza Strip; by extension, it could no longer be viewed as occupied territory.<sup>61</sup> In 2007, Israel designated Gaza as a 'hostile entity' and imposed a blockade against it.<sup>62</sup> The Israeli HCJ has had to deal with the question of the legal status of Gaza in the post-disengagement era in several cases. In the *Asmma Mahmoud Hamdan* case, one of the first before Israeli courts after the disengagement, the Court determined that the status of Gaza was fluid and unique and that the law may fall short of determining its situation; consequently, 'practical and innovative solutions' would have to be employed to mitigate the effects of the disengagement. The Court approved the Israeli authorities' blanket ban on ten Gazan students from studying in the West Bank.<sup>63</sup> The situation in Gaza could be seen as one of the grey, 'in-between' areas of international law, since it is not fully occupied nor fully independent.<sup>64</sup> It has been suggested that Gaza should be labelled as a '*sui generis* territory' until it attains a permanent status since the situation fails to meet the effective control test and is neither a State nor a part of a State.<sup>65</sup>

In the 2008 case of *Jaber Al-Bassiouni Ahmed and others v Prime Minister and Minister of Defence*, the position of several Gazan residents was examined in greater detail. The petitioners challenged the Israeli decision to reduce the electricity and fuel supply to the Strip and argued that such a reduction harmed vital living areas, particularly hospitals. The Court determined the following regarding the situation in Gaza and the relationship between Gaza and Israel:

In this context, we should point out that since September 2005, Israel no longer has effective control over what happens in the Gaza Strip. ... In these

<sup>59</sup> M Sassoli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Ben-Naftali (ed) (n 19) 164–7.

<sup>60</sup> *Ajuri v the Commander of the IDF Forces in Judea and Samaria* [2002] HCJ 7015/02, paras 44–51, unofficial translation available at: <[https://hamoked.org/items/490\\_eng.pdf](https://hamoked.org/items/490_eng.pdf)>.

<sup>61</sup> 'Prime Minister Ariel Sharon's Four-Stage Disengagement Plan' (Revised) (28 May 2004), translation available at: <<https://www.un.org/unispal/document/auto-insert-194935/>>.

<sup>62</sup> Bhungalia (n 9) 347.

<sup>63</sup> *Asmma Mahmoud Hamdan et al v GOC Southern Command et al* [2007] HCJ 11120/05, unofficial translation available at: <[http://gisha.org/UserFiles/File/publications/10\\_years\\_10\\_judgments/Hamdan%201.pdf](http://gisha.org/UserFiles/File/publications/10_years_10_judgments/Hamdan%201.pdf)>.

<sup>65</sup> Samson (n 47) 963–6.

<sup>64</sup> Solomon (n 33) 81.

circumstances, the State of Israel does not have a general duty to ensure the welfare of the Gaza Strip residents or maintain public order in the Gaza Strip under all of the laws of a belligerent occupation under international law. Neither does Israel have any effective ability, in its present position, to enforce order and manage civilian life in the Gaza Strip. In the prevailing circumstances, 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 organization that controls the Gaza Strip; these duties also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.<sup>66</sup>

As this says, due to the hostility between Israel and Hamas, the Court determined that the only source of obligation for the Israeli government was the law of armed conflict. However, given Israel's position concerning the absence of an occupation in Gaza, Israel had unilaterally relinquished any obligations towards Gaza's residents, save for humanitarian obligations. The Court emphasized that Israel was incapable of not only exercising effective control but also of enforcing it. The Israeli State was found not to be a current occupant because the territory was governed by an effective Palestinian government that would resist any Israeli attempt to control the Gaza Strip and because Israel would have to reoccupy the territory in an expensive and time-consuming operation to maintain order. To evaluate whether the situation in Gaza met the requirements of occupation under Article 42 of the Hague Regulations, the Court examined whether Israel could fulfill the obligation under Article 43 of the Regulations in order to restore and maintain public life and civil order in Gaza.<sup>67</sup> Although the Court ruled that Israel must still fulfill its 'humanitarian obligations' to the Gazan population, it did not specify the source of these obligations, nor their content, scope, or the circumstances under which these must be implemented. It was unclear whether these obligations are grounded in occupation law, the more general armed conflict law, human rights law or post-occupation law.<sup>68</sup>

In the *Anbar* case, the Israeli High Court determined, based on the principle of sovereignty, that Israeli authorities possess broad discretion over the issuance of entry permits into its territory. Since Gazans are foreigners—in particular, foreigners with ties to a hostile entity—Israel is under no legal obligation to allow them into the country, even to visit family members in Israeli

<sup>66</sup> *Jaber Al-Bassiouni* (n 7) para 12.

<sup>67</sup> *Shany* (n 30) 106–8.

<sup>68</sup> *Luft* (n 13) 17–18.

prisons.<sup>69</sup> Intriguingly, a Gaza resident who enters Israel is not an ‘ordinary’ tourist. He/she is special, *sui generis*, and a foreign national.<sup>70</sup>

Regarding Gaza’s legal status, the High Court has adopted an ambiguous stance that affects the rights of civilians in the Strip.<sup>71</sup> The Court supported Israeli policies toward Gaza with minimal reference to international law, human rights and the law of occupation.<sup>72</sup> The policy of allowing Gazans to enter Israel ‘in exceptional cases and for humanitarian considerations’ was not challenged by the Court,<sup>73</sup> even though the actual policy may permit cases other than humanitarian, such as seminar participation or commercial permits.<sup>74</sup> It could be argued that the Israeli occupation deserves praise for accepting the de facto applicability of the law of occupation, in contrast to other modern occupations in the last four decades that have denied the applicability of occupation law.<sup>75</sup> However, this acceptance is contingent on picking and choosing pertinent provisions that align with Israeli policy. Consequently, this paradigm, that does not reject the application of the law of occupation in its entirety, alienates the law from its underlying objectives and manipulates it to justify military and security imperatives.<sup>76</sup>

### B. Functional Approach: Partial Effective Control?

The debate over the legal status of Gaza reveals significant shortcomings in IHL, and particularly the law of occupation when applied to non-classical conflicts involving non-State actors.<sup>77</sup> The test of effective control demonstrates the binary application of the law of occupation based on all-or-nothing protections, while failing to mitigate borderline situations. The disparity between legal reality and facts on the ground, between law and policy, and between *lex lata* and *lex ferenda* demonstrate that ‘triggering norms’ in the law of occupation are largely inappropriate for complex situations like Gaza. Shany proposes adopting a ‘more flexible and less binary triggering norm’ that could adjust to the complexities and ensure

<sup>69</sup> *Rami Anbar and Others v Commander of the Southern Command and Others* [2009] HCJ 5268/08, paras 5–8, unofficial translation available at: <[https://hamoked.org.il/items/110492\\_eng.pdf](https://hamoked.org.il/items/110492_eng.pdf)>.

<sup>70</sup> *Anonymous v Minister of Defense et al* [2011] HCJ 9329/10, unofficial translation available at: <[http://gisha.org/UserFiles/File/publications/10\\_years\\_10\\_judgments/Anonymous%205.pdf](http://gisha.org/UserFiles/File/publications/10_years_10_judgments/Anonymous%205.pdf)>.

<sup>71</sup> Luft (n 13) 6.

<sup>72</sup> *ibid* 8–9.

<sup>73</sup> *Umayma Qishawi v Minister of Interior* [2012] AAA 4620/11, para 2, unofficial translation available at: <[http://gisha.org/UserFiles/File/publications/10\\_years\\_10\\_judgments/Qishawi%207.pdf](http://gisha.org/UserFiles/File/publications/10_years_10_judgments/Qishawi%207.pdf)>.

<sup>74</sup> Luft (n 13) 31.

<sup>75</sup> Roberts (n 50) 64.

<sup>76</sup> A Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (CUP 2017) 36. The author gave the example of how the Israeli Supreme Court justifies the Jewish settlements in the occupied territories chiefly in the case of *Ayub v the Minister of Defence* (1979). Moreover, in the case of *Aruji*, the HCJ applied a dynamic interpretation of international law in order to expand the power of the military command rather than expanding the protection of civilians under the Geneva Conventions. For further discussion see Sassoli (n 59).

<sup>77</sup> Y Shany, ‘Binary Law Meets Complex Reality: The Occupation of Gaza Debate’ (2008) 41 *IsLR* 68, 77.

justice for all involved.<sup>78</sup> Felix Cohen suggests applying the functional approach to define legal concepts, assuming that:

legal criticism is empty without objective description of the causes and consequences of legal decisions. The legal description is blind without the guiding light of a theory of values.<sup>79</sup>

Based on Cohen's argument, Aeyal Gross proposed a functional definition of occupation, as opposed to the use of binary or traditional definitions in accordance with Article 42 of the Hague Regulations. The functional approach to determining the existence of occupation is based on its consequences and the attachment of the occupier's responsibilities and liabilities to particular acts. The purpose of such an approach is to take into consideration the ethical dimensions of the legal issues and ensure the accountability of those occupants who relinquish responsibility by transferring control.<sup>80</sup> Gross observed that the functional approach has been applied in some cases and is an emerging rule of international law.

In the partial award rendered in the *Aerial Bombardment* case, the Ethiopia–Eritrea Claims Commission, in determining whether the relatively short presence of Ethiopian forces in some of Eritrea's western border territories triggered the occupation provisions of the Fourth Geneva Convention, held:

The Commission agrees that the Ethiopian military presence was more transitory in most towns and villages on the Western Front than it was on the Central Front, where the Commission found Ethiopia to be an occupying power. *The Commission also recognizes that not all of the obligations of Section III of Part III of Geneva Convention IV (the section that deals with occupied territories) can reasonably be applied to an armed force anticipating combat and present in an area for only a few days.*<sup>81</sup>

The Commission's position illustrates that Ethiopia's obligations stem from its capacities and actual exercise of power, rather than the definition of occupation or sovereignty. The Commission's approach reflects the position that: 'the responsibility of an occupier is as great as its power'.<sup>82</sup> The Israeli High Court in the *Al-Bassiouni* case held that the Israeli government owes some humanitarian obligations to the Gazan population due to 'the degree of control exercised by the State of Israel over the border crossings between itself and the Gaza Strip'.<sup>83</sup>

<sup>78</sup> *ibid* 85.

<sup>79</sup> FS Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *ColumLRev* 809, 849.

<sup>80</sup> A Gross, 'Rethinking Occupation: The Functional Approach' (*Opinio Juris*, 23 April 2012) <<https://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach/>>.

<sup>81</sup> Western Front, *Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (The State of Eritrea v The Federal Democratic Republic of Ethiopia)*. Eritrea–Ethiopia Claims Commission (Partial Award) [2005] para 27 (emphasis added) <[https://legal.un.org/riaa/cases/vol\\_XXVI/291-349.pdf](https://legal.un.org/riaa/cases/vol_XXVI/291-349.pdf)>.

<sup>82</sup> Gross (n 80).

<sup>83</sup> *Jaber Al-Bassiouni* (n 7).

By applying the functional approach in Gaza, Israeli obligations would be derived from its authority and power over the Strip whilst considering the powers exercised by other parties (ie Hamas). For instance, in the sphere of education, Israel would not be responsible for the curriculum in Gaza schools run by Hamas or the Palestinian Authority but would be accountable for the movement of people (students) and goods (books) since Israel is an occupier maintaining effective control over the border crossings. The functional approach serves to restrict the occupant's responsibilities and accountability to those functions under its effective power.<sup>84</sup>

### *C. Israeli Effective Control in Gaza: Reaching the Threshold*

In contrast to the position of Israel and certain commentators, international organizations, non-governmental organizations (NGOs) and the majority of the scholarship continue to view Gaza as an occupied territory where Israel maintains effective control.<sup>85</sup> Since 1967, the UNSC,<sup>86</sup> International Committee of the Red Cross (ICRC),<sup>87</sup> Amnesty International<sup>88</sup> and Gisha<sup>89</sup> have considered Gaza to constitute occupied territory. The 2005 redeployment of Israeli forces did not affect Israel's continued effective control over the Gaza Strip.<sup>90</sup> The present authors' argument for establishing effective control over Gaza is based on the following premises: (1) the relatively small geographic area of Gaza, which in turn allows overall and extensive control over its territorial waters and borders, as well as the technological superiority of the Israeli air force, all of which effectively allow Israeli boots to be present in Gaza within a reasonable response time; (2) Hamas's authority and armed resistance do not impede the status of occupation; and (3) the long pre-disengagement occupation and close proximity between Israel and Gaza geographically allow for the remote exercise of effective control.

The absence of military forces on the ground is the primary argument used to reject Gaza's effective control and thus the applicability of occupation law. In arguing on the nature of effective control, the Israeli NGO Gisha compiled a

<sup>84</sup> Gross (n 80).

<sup>85</sup> Cuyckens (n 17) 38–9.

<sup>86</sup> UNSC Res 1860 (2009) (8 January 2009) UN Doc S/RES/1860(2009), 'Stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state' (emphasis in original).

<sup>87</sup> ICRC, 'Fifty Years of Occupation: Where Do We Go from Here?' (ICRC, 2 June 2017) <<https://www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here>>.

<sup>88</sup> Amnesty International, 'Israel/Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability' (19 January 2009) 7 <<https://www.amnesty.org/en/documents/mde15/007/2009/en/>>.

<sup>89</sup> 'Certainly, the physical disengagement from Gaza in 2005 and the tightening of the closure two years later did not lead to the removal of Israel's control over the Strip. On the contrary, the extent of Israel's control has only increased in recent years.' Luft (n 13) 9.

<sup>90</sup> Amnesty International (n 88) 7.

non-exhaustive list titled '50 Shades of Control'.<sup>91</sup> The Special Rapporteur on human rights in the occupied Palestinian territories, John Dugard, defined in his report the main factors constituting the occupation of the Strip by Israel. These are: the control of six crossing points, territorial waters and airspace, military incursions, the no-go area around Gaza, and the complete control of the Palestinian Population Registry which defines who is Palestinian and who is allowed to enter Gaza.<sup>92</sup> In addition, Israeli authorities collect taxes, and the Israeli currency, the Sheqel, is effective and dominant in Gaza.<sup>93</sup>

It is important to emphasize that the land area being discussed is only 365 km<sup>2</sup> in size, including a buffer zone, and an access restricted area (ARA). Israel's security policy suggests that Arabs are located behind a wall and the most effective way to secure the wall is by creating a buffer zone where Israeli soldiers can control wide areas and quickly respond to any infiltrators.<sup>94</sup> The buffer zone is a no-go military area encompassing an ARA located inside Gaza along with the entire land border and the adjacent sea. The buffer zone impedes Palestinian farmers and fishermen from accessing their agricultural lands and fishing areas.<sup>95</sup> Israeli military command announced that anyone entering the buffer zone would come under fire, in case of necessity, without hesitance.<sup>96</sup> Between 2018 and 2020, the Israeli military killed four farmers working on their lands and opened fire 1,150 times in the ARA.<sup>97</sup> Apart from employing remote monitoring and surveillance devices, Israeli soldiers carry out patrols and are physically present in the no-go area from time to time.<sup>98</sup> The width of the no-go zone around the Gaza fence extends from 100 to 300 metres. However, the zone's width is not settled and might vary without any clear explanation on some occasions. In the aftermath of the collapse of the cease-fire agreement between Hamas and Israel in 2008, the no-go zone had reached its maximum of 1,000 to 1,500 metres (tantamount to about 17 per cent of the entire Gazan territory).<sup>99</sup> Given their continued presence in the territorial waters of Gaza,

<sup>91</sup> '50 Shades of Control' (Gisha – Legal Center for Freedom of Movement 2017) <<https://gisha.org/project/50shades-en/>>.

<sup>92</sup> Human Rights Council, 'Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, John Dugard' (21 January 2008) UN Doc A/HRC/7/17, para 11.

<sup>93</sup> Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48, para 278.

<sup>94</sup> D Li, 'The Gaza Strip as Laboratory: Notes in the Wake of Disengagement' (2006) 35(2) JPalestStud 38, 45.

<sup>95</sup> Al-Haq, *Shifting Paradigms: Israel's Enforcement of the Buffer Zone in the Gaza Strip* (Al-Haq 2011) 7 <[https://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/publications/Shifting-Paradigms.pdf](https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Shifting-Paradigms.pdf)>.

<sup>96</sup> Quoted by Al-Haq *ibid* 7.

<sup>97</sup> Al Mezan Center for Human Rights, *Farming in a Buffer Zone: The Conditions Gaza Farmers Face under Closure* (Al Mezan Center for Human Rights 2020) 8.

<sup>98</sup> 'Closing In: Life and Death in Gaza's Access Restricted Areas' (Gisha – Legal Center for Freedom of Movement 2018) 8 <[https://gisha.org/UserFiles/File/publications/ARA\\_EN.pdf](https://gisha.org/UserFiles/File/publications/ARA_EN.pdf)>.

<sup>99</sup> *ibid* 5.

Israeli forces continue to limit control over a fishing zone of between three to nine nautical miles, but occasionally of up to 15 nautical miles.<sup>100</sup> No foreign government could have the power to create a buffer zone or alter the width of restricted zones inside the territory of another entity without exercising effective control.

Furthermore, international law establishes that physical presence in every square metre of a territory is not required for effective control.<sup>101</sup> The ability of Israel to deploy troops in a reasonable amount of time<sup>102</sup> and its presence in strategic locations around the territory of Gaza is sufficient to maintain its effective control. Up to the time of writing, Israel has launched four military operations against Gaza.<sup>103</sup> The Human Rights Council report added that Israel controls the airspace of Gaza through drones or unmanned aviation vehicles (UAVs) and aircraft.<sup>104</sup> Aircraft are an integral part of the Israeli control over the Gaza Strip, compensating for the absence of troops on the ground. The head of the Israeli military intelligence stated in 2004, after the announcement of the disengagement plan that:

Our vision of air control zeroes in on the notion of control. We're looking at how you control a city or a territory from the air when it's no longer legitimate to hold or occupy that territory on the ground.<sup>105</sup>

The Israeli Air Force (IAF) has become a leader in the innovative use of UAVs equipped with radars, sensors, lasers and sophisticated cameras that allow the accurate mapping of Gaza.<sup>106</sup> The increased use of UAVs by the Israeli military was notable following the quelling of the second *intifada* and the employment of new technologies by the IAF in each military operation in Gaza.<sup>107</sup> The use of aerial force in the Gaza Strip serves four main functions: surveillance, intimidation, assassinations, and tactical airpower. The most used is surveillance, whereby drones fly on a near-constant basis over the Strip.<sup>108</sup>

The employment of new technological developments in armed conflict has not only challenged but greatly influenced the application and interpretation of the current rules of the law of armed conflict.<sup>109</sup> The development of aerial force and the frequent use of drones over the Strip by Israel reflect an intensive degree of control without the need for boots on the ground. Limiting effective control through physical military presence allows occupants to evade their accountability while exercising ultimate power. Darryl Li describes Gaza as a

<sup>100</sup> Gisha – Legal Center for Freedom of Movement (n 13).

<sup>102</sup> *Naletilić* (n 20) para 217.

<sup>104</sup> Human Rights Council (n 93) para 278.

<sup>106</sup> T Libel and E Boulter, 'Unmanned Aerial Vehicles in the Israel Defense Forces: A Precursor to a Military Robotic Revolution?' (2015) 160(2) *RUSI J* 68.

<sup>108</sup> Li (n 94) 48.

<sup>109</sup> R McLaughlin and H Nasu, 'Introduction: Conundrum of New Technologies in the Law of Armed Conflict' in H Nasu and R McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (Asser Press 2014) 2.

<sup>101</sup> Campanelli (n 19).

<sup>103</sup> Darcy and Reynolds (n 40) 237.

<sup>105</sup> Li (n 94) 48.

<sup>107</sup> *ibid* 70–1.



management laboratory for Israel to find the best equilibrium between its having the ‘maximum control over a territory’ and the least responsibility.<sup>110</sup>

The second claim against the establishment of effective control is that Hamas’s authority weakens Israel’s ability to exercise authority over the Strip.<sup>111</sup> Israel has the capacity to exercise full authority but is unwilling to do so. It exercises extensive administrative functions in the Strip, controlling the movement of people, access of and to goods, food and electricity, and the collection of taxes.<sup>112</sup> International jurisprudence has established that neither the fixed physical presence nor formal administrative authority is required to exert effective control, but rather the ability to send military troops at short notice and the ability to prevent the local authority from fully functioning.<sup>113</sup>

Israeli control over the Strip prevents Palestinians from exercising full governmental functions. Thus, the fact that Israeli forces encountered resistance during their military operations does not alter the fact that the territory is occupied. It is not true that Israel was unable to ‘re-occupy’ Gaza during the most recent attacks and that a costly operation is required to do so. The primary objective of the Israeli military operations in Gaza was to weaken the military resistance in the Strip with a view to ending rocket attacks, not to re-establish a military presence there physically. As was stated clearly by the Israeli report on the Cast Lead Operation: ‘[t]he Gaza Operation did not aim to re-establish an Israeli presence in the Gaza Strip’.<sup>114</sup> Most Israeli attacks over the Strip were aerial in nature, with the invasion of land occurring at a later stage of operations. For example, in the first military operation, the first stage was confined to a week-long barrage of aerial bombardments, followed by an invasion by Israeli forces deep into the Strip to control rocket fire.<sup>115</sup> Using the terminology of a subsequent military tribunal (under Control Council Law No 10), Israel could ‘assume physical control’<sup>116</sup> of any portion of the Gaza Strip at any time. The control exercised by Hamas resistance forces could not deprive the Israeli Defence Forces of their occupant status.<sup>117</sup> The acts of resistance by Palestinian armed groups or the hostilities taking place do not affect the situation of occupation until the occupier is ousted and the local authority restores full control over all functions within the territory.<sup>118</sup> The ICTY has ruled that ‘sporadic local resistance, even successful, does not affect the reality of occupation’.<sup>119</sup>

<sup>110</sup> Li (n 94) 38–9.

<sup>111</sup> It should be noted that this argument does not discuss the legality of resistance against the occupation, but that resistance does not change the fact of occupation. For a general discussion on the legality of resistance, read A Roberts, ‘Resistance to Military Occupation’ (2017) 111 AJIL Unbound 45.

<sup>112</sup> Human Rights Council (n 93) para 278.

<sup>113</sup> Darcy and Reynolds (n 40) 236.

<sup>114</sup> Israeli Ministry of Foreign Affairs, ‘The Operation in Gaza, Factual and Legal Aspects’ (Israeli Ministry of Foreign Affairs, July 2009) para 83 <<https://casebook.icrc.org/case-study/israelgaza-operation-cast-lead>>.

<sup>115</sup> *ibid.*, paras 83–83.

<sup>117</sup> *ibid.*

<sup>116</sup> Borrowing the words of the *Hostages* case (n 25) 56.

<sup>118</sup> Darcy and Reynolds (n 40) 237.

<sup>119</sup> *Naletilić* (n 20) para 217.

Numerous experts argue that the criteria for determining the end of an occupation are the same as those for determining the beginning of the occupation in terms of effective control.<sup>120</sup> There are three scholarly positions that serve to define the end of occupation; a symmetrical test of effective control (leaning on physical presence and other effective control test requirements), an asymmetrical test (suggesting that effective control can wax and wane after the establishment of occupation) and a functional approach.<sup>121</sup>

The present authors contend that the requirements of the effective control test are rigorous standards for determining the end of prolonged occupations. Occupations come in several types, with prolonged occupations being just one. State practice and international law do not support a restrictive approach to the interpretation of the law of occupation and to limiting its application to only classic cases of belligerent occupation.<sup>122</sup> Establishing authority and achieving political, social and economic objectives in a newly occupied area naturally require that the occupant asserts greater powers and effective control.

Most recent positions on the Gaza situation (as a liminal case) recognize the non-binary test and the existence of occupation status. It is argued that following the disengagement, Israel cannot be considered to be free of obligations, since Gaza is still dependent on it.<sup>123</sup> The origin of Israeli occupancy obligations, as Benvenisti suggests, may equally be derived from that part of international law regulating sieges and blockades.<sup>124</sup> This suggestion renders the status of Gaza even more complex, adding another layer of uncertainty. The obligation owed to besieged populations is limited to the prevention of starvation and sieges as such are considered lawful under international law until the besieged population surrenders.<sup>125</sup> Even if one adopts a broader understanding of the law of siege from the perspective of proportionality, as Benvenisti suggests, this would leave the besieged population under the mercy of the besieging power, which would ultimately dictate whether the former would be allowed to lead a dignified existence. In this sense, occupation law is far more developed regarding the obligations of the occupant towards the occupied population. Furthermore, occupation is illegal in the case of Gaza since it prevents the population from exercising its right to self-determination.

The ICRC, without specifically mentioning Gaza, acknowledged that geographical proximity between combatant States could permit the remote exercise of effective control by stating the following:

It may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area. In such

<sup>120</sup> ICRC (n 27) 30. <sup>121</sup> Lieblich and Benvenisti (n 13). <sup>122</sup> Roberts (n 50) 51.

<sup>123</sup> Lieblich and Benvenisti (n 13).

<sup>124</sup> See E Benvenisti, 'The International Law of Prolonged Sieges and Blockades: Gaza as a Case Study' (2021) 97 *Int'l Stud* 969; Lieblich and Benvenisti *ibid* 165–6.

<sup>125</sup> Benvenisti *ibid* 979.

situations, it is important to take into account the extent of authority retained by the foreign forces rather than to focus exclusively on the means by which it is actually exercised. It should also be recognized that, in these circumstances, the geographical contiguity between belligerent States could facilitate the remote exercise of effective control. For instance, it may permit an occupying power that has relocated its troops outside the territory to reassert its full authority in a reasonably short period of time. The continued application of the relevant provisions of the law of occupation is all the more important in this scenario as these were specifically designed to regulate the sharing of authority – and the resulting assignment of responsibilities – between the belligerent States concerned.<sup>126</sup>

Israel and the Gaza Strip are close to each other geographically, which makes it easier to exercise effective remote control. ‘This is not disengagement; this is remote control.’<sup>127</sup> Furthermore, Gaza is not a sovereign State, but a four-decades-long occupied territory, with a long dependency on Israel, and continuous Israeli control.<sup>128</sup>

#### IV. CONCLUSION

The primary obstacle to the fulfilment of IHL is the refusal of States to apply it. In novel or complex situations, States prefer to assert that IHL is inapplicable and inadequate, necessitating the adaptation of current rules to new realities, thus creating a legal vacuum in contravention of the purposes and objectives of both regimes.<sup>129</sup> The key argument postulated here is that Gaza continues to be occupied by Israel despite the absence of an Israeli military presence on the ground. Israeli control over the Strip constitutes a species of effective control that triggers the application of the law of occupation. The boots-on-the-ground criterion does not require physical presence in each part of the occupied territory; given that Gaza is a relatively small place where Israeli forces are present in an undefined area of the buffer zone along Gaza’s land borders, territorial waters, and with advanced technological aerial equipment, Israeli boots can be present in Gaza within a reasonable amount of time if they so choose. The control exercised by Israeli authorities over the movement of people in and out of Gaza, the supply of goods and power, the collection of taxes, the exercise of absolute administrative control over the Palestinian registry, as well as complete monetary control exemplify the high degree of control exercised. This article suggests that the conditions for the continuation of occupation should be more flexible than the current test for effective control, given that a lengthy occupation allows for distant effective control without physical presence in the occupied territory.

<sup>126</sup> ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (8–10 December 2015) ICRC Doc 321C/15/11, 12.

<sup>127</sup> Gisha – Legal Center for Freedom of Movement (n 13).

<sup>128</sup> Darcy and Reynolds (n 40) 238.

<sup>129</sup> Sassoli (n 59) 48–9.

Moreover, the local government of Gaza cannot survive without the permission of Israeli authorities. If Israeli authorities decide to shut off Gaza's energy supply or basic foodstuffs, the local government of Gaza would be unable to function or provide alternatives for its people. Israel did not intend to re-establish its physical presence in Gaza during its military operations there; hence, it cannot be argued that Israel failed to reoccupy Gaza. In addition, Palestinian acts of resistance do not alter the reality of occupation. The existence of an occupation in Gaza would affect Israel's claims thereto (eg self-defence, security measures), as well as its obligations under international law as an occupant. The long-enduring occupation of Gaza, even if remote, cannot be in the interests of Israel, as the constant battles with Palestinian groups demonstrate. It is equally detrimental to the livelihood of the residents of Gaza. That the quintessentially transient nature of occupation has become an entrenched reality with acute repercussions for both Israelis and Palestinians should hasten efforts towards a lasting peace.