

IS THE GAZA STRIP OCCUPIED BY ISRAEL?¹

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FACTUAL BACKGROUND²

Following World War I, the Gaza Strip was part of the British Mandate of Palestine until the dissolution of this Mandate in May 1948. The Gaza Strip was then controlled by Egypt until 1967. Egypt did not purport to annex this area but rather imposed there a military government. In June 1967, the Gaza Strip came under Israel Defense Forces (IDF) control and immediately thereafter a military administration was established in the region.³

Following negotiations between the state of Israel and the Palestinian Liberation Organization (PLO), as the representative of the Palestinian people, the Declaration of Principles on Interim Self-Government Arrangements was signed on September 13, 1993 (hereinafter *the DOP*),⁴ setting a framework for a phased settlement of the Israeli-Palestinian dispute. Within this framework the parties signed on May 4, 1994, the Agreement on the Gaza Strip and Jericho Area (hereinafter *the Cairo Agreement*).⁵ In accordance with this agreement, the IDF withdrew from most of the Gaza Strip, except for the Israeli settlements and main access routes thereto (“lateral roads”), and the military-installations area along the southern border of the Strip with Egypt (known as the Philadelphi Route). Additionally, most of the powers and responsibilities were transferred from the military government to the autonomous governing entity established by virtue of the Cairo Agreement – the Palestinian Authority (PA).⁶ On September 28, 1995, the parties signed the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (hereinafter *the Interim Agreement*),⁷ which incorporated and superseded the Cairo Agreement.⁸

Based on these agreements, the PA held the powers and responsibilities over all civil affairs and over internal security in the Gaza Strip, except in the abovementioned areas from which Israel did not withdraw (the settlements and the military installations). Israel retained control over external security, the airspace, and the electromagnetic sphere. Israel also controlled all the internal crossings between the Gaza Strip and Israel and the international passage between the Gaza Strip and Egypt located in Rafah. The maritime zone was transferred to PA authority, though under certain conditions and limitations.

Following these agreements, the parties held negotiations aimed at achieving a permanent resolution of the conflict; unfortunately, though, such a resolution has not yet been achieved. Instead violence erupted in the West Bank and the Gaza Strip, including in the form of suicide attacks, and mortar and rocket attacks using steep-trajectory weapons. Such weapons were fired especially from the Gaza Strip toward Israeli settlements in the Strip, at southern communities in Israel situated in proximity to Gaza, at various IDF bases, as well as at the crossing points between Israel and the Strip.⁹

Israel responded forcefully, including some large-scale military operations. Israel, however, did not regain permanent control over the areas under Palestinian control in the Gaza Strip and all operations were limited in scope and in time.

In 2004, against the background of the violent situation on the one hand and lack of progress in the diplomatic process on the other, Israel decided to unilaterally evacuate its troops and citizens from the Gaza Strip – a move which was named the Disengagement Plan.¹⁰ The actual implementation of the Disengagement Plan began on August 17, 2005, and lasted about three weeks. On September 12, 2005, the last of the IDF troops left the Gaza Strip and the IDF commander of the Southern Command signed a proclamation terminating the military government in the area.¹¹

The government of Israel and the PA signed on November 15, 2005, the Agreement on Movement and Access (AMA), regarding the movement of people and goods between Israel and the Gaza Strip through the internal crossings. The agreement included in its Annex arrangements for the operation of the Rafah and Kerem Shalom crossing points, through which the movement of people and goods between the Gaza Strip and Egypt, under the supervision of a third party, was supposed to have been enabled.¹²

According to Israeli public statements, the disengagement, namely the evacuation of Israeli citizens and IDF forces from the Gaza Strip, was aimed to reduce friction with the Palestinian population and improve the Palestinian economy and living conditions. The hope was that “the Palestinians will take advantage of the opportunity created by the disengagement in order to break out of the cycle of violence and to reengage in a process of dialogue.” It was also intended to “serve to dispel claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.”¹³

Unfortunately, despite the aforesaid, the political and security situation in the Gaza Strip continued to deteriorate. In January 2006 the Hamas organization won the elections for the Palestinian Legislative Council, and was invited by Fatah to join a coalition government headed by the latter.¹⁴ In June 2007 Hamas took over the Gaza Strip in a violent campaign, involving the murder and assault



Rocket attacks in Israel from the Gaza Strip lead to Operation Cast Lead. (AP Photo/Hatem Moussa)

of dozens of Fatah officials. Following this coup Hamas gained control over all the government apparatus in the Strip.¹⁵

In response to attacks from the Gaza Strip toward Israel and in light of the takeover by the hostile Hamas, Israel imposed limitations on the transfer of goods and on the passage of people between Israel and the Strip. Israel also engaged in several counterstrikes and operations, the largest of which was Operation Cast Lead in December 2008.¹⁶

Based on this factual background the question raised is what is the present status of the Gaza Strip and, more concretely, whether it should be considered as occupied by Israel.

Before turning to the analysis of this question, one preliminary remark is required. It should be noted that already in 1994, following the Israeli withdrawal from most of the Gaza Strip and the transfer of powers and responsibilities of the military government to the PA in accordance with the Cairo Agreement, the question of whether the Gaza Strip should still be considered occupied by Israel arose. Some found that the territories from which the IDF redeployed and for which it handed over authority to the PA were no longer under effective IDF control and as such, no longer under belligerent occupation by Israel.¹⁷ Others contended that Israel continued to control these territories. They relied, inter alia, on the fact that the agreements concluded between Israel and the PLO left the residual authority in Israel's hands, as well as the overall responsibility for

security. According to the latter approach, the PA received limited jurisdiction for self-rule in these territories without compromising the existence of the military government there.¹⁸ The government of Israel refrained from making a clear official determination in this regard.

This short chapter will not analyze whether the Cairo Agreement and Interim Agreement changed the status of the Gaza Strip. It will be assumed, for the sake of the argument, that the Gaza Strip remained under Israeli occupation following these agreements and the focus will only be on the question of whether occupation has ended following the disengagement.

DEFINING OCCUPATION

The basic formulation for when a territory is considered to be subject to belligerent occupation is found in Article 42 of the Hague Regulations Respecting the Laws and Customs of War on Land of 1907, which states that:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

It is commonly agreed that, at its core, territory will be considered occupied when it is under the “effective control” of the foreign army.¹⁹

There are different views and understandings of what constitutes “effective control.” We will first try to chart the different positions and then briefly analyze their application to the situation in the Gaza Strip.

One rather narrow interpretation was given recently by the International Court of Justice (ICJ), which determined that in order for a belligerent occupation to exist the occupying army must actually exercise its authority in the territory, and thereby supplant the authority of the sovereign government of that area.²⁰

This formulation by the ICJ has been subject to criticism as being too narrow,²¹ especially since it enables a state which has in fact gained effective control over a certain territory to evade its responsibilities toward the residents of this territory by not actively exercising its powers.

A more flexible approach to the test of “effective control” focuses on the potential ability of the occupying army to maintain its authority over the area and the inability of the sovereign government to exercise its authority.²²

Focusing on the potential ability does not mean that any military presence in or near the territory is enough to be considered an occupation. In order for effective control to exist, the foreign army must be able to impose its will on the local population whenever it so chooses while the sovereign government is unable to exercise its authority in the territory due to the effective control of the

foreign army. This approach is based on the judgment of the International Military Tribunal in Nuremberg²³ and was adopted also in a ruling of the Israeli Supreme Court.²⁴

Even according to this more flexible approach, fulfilling “effective control” usually requires the occupier to have forces present on the ground²⁵ or at least to have the ability to send, within a reasonable time, forces into the area to exercise the authority therein.²⁶

Shany concludes his analysis of the relevant authorities on occupation by identifying three cumulative conditions which must be satisfied in order to consider an area occupied: “a) hostile troops are physically located in the area; b) these troops are capable of exercising effective powers of government; and c) the legitimate government is incapable of exercising effective powers of government.”²⁷

As for the question of when does the occupation end, although the Law of Belligerent Occupation does not provide an explicit answer, the accepted approach is that of a “mirror image” of the conditions for its inception, namely, when the occupying army no longer maintains effective control in the territory and in its place there is a new regime having such control.²⁸ Occupation can end by way of an agreement or when the occupier is forced out, but also by a unilateral act of the occupying power to depart.²⁹

We shall now apply this legal framework to the situation in the Gaza Strip. We shall first examine whether Israel has effective control over the Gaza Strip and then consider whether there is no other legitimate government capable of exercising governmental powers in this area.

DOES ISRAEL HAVE “EFFECTIVE CONTROL” OVER THE GAZA STRIP?

As explained above, in order to determine that the Gaza Strip is under Israeli occupation one must determine that Israel has effective control over this area.

If one applies to the situation in the Gaza Strip the formulation of the ICJ in *Congo v. Uganda*, namely that occupation means actually exercising authority over the territory, Israel is clearly not an occupier of the Gaza Strip. Israel has fully withdrawn from this area, has officially terminated the military government, and refrains from carrying out governmental authority vis-à-vis the population in this area.

If we focus as a basis for defining occupation on the potential ability to maintain its authority in the area, the result seems the same, since Israel has not retained forces on the ground in the Gaza Strip. As mentioned above, “boots on the ground” seem to be a necessary component of having effective control even for those who apply the “potential control” formula.

Moreover, even if instead of an actual presence it is enough to have the ability to reenter the area and make one’s authority felt therein as a condition for “effective control,” Israel does not have this capacity either. The cases in which Israel has entered the Gaza Strip since the disengagement were complex,

dangerous military operations aimed at stopping attacks from the Gaza Strip against Israel, and during such operations there was no attempt to apply Israeli authority toward the civilian population.

In light of the above, the Supreme Court of Israel, in response to several petitions pertaining to the provision of fuel and electricity to the Gaza Strip in the aftermath of the Disengagement Plan, concluded that:

In this context we note that since September 2005, Israel no longer has effective control over events in the Gaza Strip. The military government imposed in the territory in the past has been terminated by virtue of a government resolution, and Israeli soldiers are no longer permanently present in the area and do not manage affairs there. In these circumstances, Israel is under no general obligation to provide for the welfare of the residents of the Gaza Strip and to preserve the public order there according to the body of laws pertaining to belligerent occupation in international law. Israel also has no effective capability in its current situation to impose order and to manage civilian life in the Gaza Strip.³⁰

This conclusion seems well founded on the factual situation when analyzed in accordance with the prevailing law on occupation.

However, this conclusion has not been accepted by quite a few commentators and NGOs nor by the PLO, who claim that the Gaza Strip should still be considered as occupied by Israel. We will therefore examine the arguments brought in support of this position and try to evaluate their legal validity.

ARGUMENTS THAT THE GAZA STRIP IS OCCUPIED BY ISRAEL

The different arguments made in support of the claim that Israel is still the occupier of the Gaza Strip are based on several factors, which, it is claimed, lead to Israel still remaining in effective control of the area notwithstanding its withdrawal. Different writers have pointed to different factors. The following is an attempt to compile a list of the relevant factors mentioned.³¹

- ▶ First, Israel retains control over the external perimeter of the Gaza Strip since it controls the airspace and maritime zone, as well as the land border and the crossing points between Israel and the Gaza Strip. The border with Egypt remains sealed by Egypt.³² This enables Israel to set policy on matters pertaining to the flow of people and goods to and from the territory.
- ▶ Second, Israel retains the right to reenter its forces into the Gaza Strip for security reasons, carries out military incursions in the areas near the border, and has also carried out wider military operations in this area, such as Operation Cast Lead. In addition, Israel enforces “no-go” zones within the Strip (i.e., areas into which Palestinians are prohibited from entering and might be shot at by the IDF upon entry).

- ▶ Third, the Gaza Strip remains dependent on Israel in many ways, such as with regard to the supply of water and electricity.
- ▶ Fourth, Israel retains, in accordance with the Interim Agreement, overriding powers, such as with regard to external security, final decisions concerning the population registry and other authorities, including the residual authority, namely all powers not explicitly delegated to the PA. The agreements also forbid the PA from engaging in foreign relations.
- ▶ Fifth, the West Bank and the Gaza Strip are a single territorial unit and therefore even after the withdrawal from the Gaza Strip, Israel is still an occupier of this unified entity through its control of the West Bank.
- ▶ The question is, therefore, if these factors in themselves, or perhaps their cumulative effect, create such Israeli control over the Gaza Strip which might be considered as a sufficient substitute for the physical presence on the ground in a way that creates Israeli “effective control.”

We will now analyze each factor separately and then refer to their cumulative effect.

1. Control over the External Perimeter

As for the control over the airspace and the sea, this in itself cannot satisfy the requirement for control over the area.³³ Indeed, IDF activity in Gaza’s airspace does not involve the exercise of any governmental authority vis-à-vis Gaza’s population and is not carried out by virtue of the security legislation which governed such matters during the era of the military government.³⁴ Likewise, the activity of IDF naval forces in the maritime space of the Gaza Strip does not establish effective control over the Gaza Strip.³⁵

As for the control over the land border between Israel and the Gaza Strip, this cannot serve as an indication of control over the area itself. Israeli control over the Israeli side of the crossing points between Israel and the Gaza Strip is a natural reflection of Israel’s sovereignty within Israel, which includes the prerogative to set policy for movement of people and goods from and to its territory, and therefore cannot be regarded as proof of control over the Gaza Strip. This is similar to the control any state has over its border crossings.

As for the border between the Gaza Strip and Egypt and the Rafah crossing point located therein, these are not under Israeli control, but rather are under Palestinian and Egyptian control. Until recently, the border with Egypt had been kept relatively closed due to the Egyptian policy.³⁶ This meant that once the Egyptians changed their policy, the Gaza Strip would have an open external border without any Israeli control. This has indeed happened. Following the dramatic developments in Egypt, the new Egyptian authorities have reopened the Rafah crossing. This was coordinated directly between Egypt and Hamas without any Israeli involvement.³⁷ Therefore today there is no doubt that Israel does not in fact possess control over the external borders of the Strip. The opening of the Rafah crossing also means that Israel does not control the flow of people and goods to and from the Gaza Strip.

2. Military Incursions into the Area

As for the contention that Israel continues to occupy the Gaza Strip due to the fact that it retained the right to reenter the area, in light of its continued performance of military incursions into this area, and since it established “no-go” zones on the Gazan side of its border, let us examine each of these claims.

As Bell and Shefi correctly point out, Israel never stated that it retains the *right* to reenter the Gaza Strip at will.³⁸ Israel does, however, consider itself in the midst of an ongoing armed conflict with the Hamas government and in this context has the right to engage in military operations, which sometimes take place in the Gaza Strip. However, this right is not derived from a sense of continued control of this area. The situation resembles that of Lebanon, from where Israel withdrew its forces in 2000, but has since retained the right to fight back against attempted attacks, even if that means reentering the country as it did in the Second Lebanon War of 2006.³⁹

As for the instances in which Israel did enter the area and carry out military incursions therein, these have been military operations against forces of Hamas and other armed groups operating in this area aimed at stopping attacks from the Gaza Strip against the territory of Israel. These operations have not intended nor succeeded in “making the authority of Israel felt” within the Gaza Strip, to use the words of the U.S. Army Field Manual.⁴⁰ The fact that notwithstanding these incursions, Israel continues to be under constant attacks from the Gaza Strip is a further indication of the lack of any practical effective control.⁴¹

The “no-go” zones refer to vacant areas near the border with Israel where Palestinians are warned not to approach.⁴² It is doubtful whether this amounts to effective control, but even if it does then, at best, one might say that these areas remain occupied, but this cannot suffice to conclude that the whole of Gaza is under occupation.

3. The Dependency of the Gaza Strip on Israel

The next factor to be analyzed is the contention that the Gaza Strip is dependent on Israel in economic and other aspects in a way that entails effective control. Firstly, with the opening of the Rafah crossing mentioned above, the Gaza Strip is much less dependent on Israel than it was until recently. Moreover, having an effect on the population of an area cannot be considered in itself as rising to the level of exercising effective powers of government over this population. Many states are strongly affected by their neighbors and yet are not considered occupied by them.⁴³

This dependency does, however, in practice, affect the relationship between Israel and the Gaza Strip. Hence in its judgment in the fuel and electricity case of January 2008 the Supreme Court, based on the position presented by the Israeli authorities, found that while Israel is not bound by the laws of belligerent occupation, it still has certain obligations toward the Gaza population:

In the prevailing circumstances, the main obligations 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 obligations 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.⁴⁴

Dinstein finds this as another proof of the continued existence of occupation, since the laws of armed conflict do not contain any duty by a belligerent party to supply electricity and fuel to the enemy.⁴⁵ While I accept that the scope of the duty a belligerent has toward the civilian population of the enemy is much more limited than that of an occupier, I believe that the fact that both the Israeli government and the court did impose an obligation to safeguard the basic humanitarian needs of the civilian population in the Gaza Strip does not necessarily prove that the area is still occupied by Israel and subject to the entire law of occupation. Instead this is evidence of the complex situation in the Gaza Strip and of the sui generis nature of this area, as will be discussed below.

4. Authorities Retained by Israel in the Agreements

As for the factor based on the stipulations of the Interim Agreement, which provide Israel with authorities regarding the Gaza Strip, including the residual authority, and which impose restrictions on the Palestinian powers of government, this seems to be also of limited significance.⁴⁶ The facts on the ground, especially in the Gaza Strip, are dramatically different from those envisioned in the Interim Agreement. Therefore it is questionable to what extent the provisions of this agreement relating to the Gaza Strip still apply.⁴⁷ Moreover, since occupation is a factual situation and not a legal creation, the analysis must rely on the reality of the situation and not on legal obligations, even if they are assumed to still be valid.

The same goes with regard to the limitation on having foreign relations. The PA has disregarded this obligation altogether. Hamas also carries out foreign relations with those willing to engage with it, such as the Arab countries.⁴⁸ Israel has no ability to influence the foreign relations of the Palestinians and therefore this element is actually only further proof of the lack of control on its part.

As for the population registry, Hamas maintains its own population registry. Israel maintains a Palestinian registry that is used in order to make decisions at the crossing points. It is not clear how this can signify effective control.⁴⁹

5. Continued Control over the West Bank

As for the contention that since Israel still controls the West Bank, the Gaza Strip is also still occupied, this has no legal basis whatsoever. The fact that the West Bank and the Gaza Strip are considered one unit politically does not change the reality that they are separate geographical units. The fact that the Gaza Strip is in fact controlled by a separate government run by Hamas, which does not regard itself as subject to the authority of the PA government in the West Bank, further underlines the fact that these areas are administered independently.⁵⁰ In any event even if they

are regarded as one unified unit, the fact that the one part is still controlled by Israel does not create de facto control over the other. As already explained, the existence of an occupation is a factual determination based on the factual situation. Moreover, since occupation law recognizes the occupation of part of a state while other parts remain unoccupied, there is no reason not to accept that part of the Palestinian entity is considered occupied while another part is not.⁵¹

CUMULATIVE EFFECT OF ALL THE FACTORS

The above analysis shows that none of the factors mentioned is sufficient in itself to regard Israel as having “effective control” over the Gaza Strip. Does their cumulative effect change this result? The underlying question is whether Israel has in fact sufficient control over the Gaza Strip to deem it an occupier despite its physical absence from this area.

Our analysis shows that Israel does not really possess full control over the external perimeter and that it has no military ability to influence the situation in the Gaza Strip and make its authority felt therein. This means that it has no effective control over the area. None of the other factors mentioned, namely the economic dependency of the Gaza Strip on Israel, the provisions of the Interim Agreement, nor the continued occupation of the West Bank by Israel, change this analysis, since they are not relevant in concluding whether a factual situation of having effective control exists or not.

In light of the above, the reasonable conclusion is that, notwithstanding all these factors, Israel cannot be regarded as the occupier of the Gaza Strip.⁵²

Furthermore, as explained above, an additional cumulative condition for determining the existence of occupation is that the legitimate government is incapable of exercising such powers. We shall now turn to analyze this aspect.

IS THERE A LEGITIMATE GOVERNMENT CAPABLE OF EXERCISING AUTHORITY IN THE GAZA STRIP?

As mentioned above, the Gaza Strip is controlled by the Hamas government. The question is whether this government can be considered a legitimate one capable of exercising governmental powers in this area in a way that entails that Israel cannot be viewed as possessing effective control.

According to Article 47 of the Fourth Geneva Convention, agreements with the authorities of the occupied territory do not release the occupier from its obligations under the laws of occupation. Accordingly, transfer of authority to local authorities or the appointment of an administration in the occupied territory does not end the applicability of the laws of occupation. On the other hand, if there is a central government that can exercise its authority in the relinquished territory and is not subject to the occupier, this would seem to fall outside the scope of Article 47.⁵³

The first question is, therefore, whether the Hamas government can be regarded as an independent government of the territory.

In the present case, with the IDF withdrawal and the termination of the military government, the PA – which had control over most of the Gaza Strip at the time of the Disengagement Plan – acted to impose its authority on the areas evacuated by the IDF.⁵⁴ Hamas took over, and very effectively exercises powers of government. This is neither a local government nor a subsidiary government appointed by Israel to carry out its duties.

The second question is whether Hamas can be viewed as a legitimate government.

Admittedly the legality of the Hamas government has been questioned, but it must be regarded as the de facto replacement of the PA government. The PA government was viewed by the international community (and by Israel) as the legitimate government in the West Bank and the Gaza Strip at the time of the disengagement. Consequently, if the latter is accepted as a genuine independent government which is not subject to Israel, so must the Hamas government be regarded, notwithstanding its brutal takeover and political unacceptability.

Admittedly, the PA and the Hamas government are not a replacement of the previous government that was in control of the territory on the eve of the belligerent occupation. However, in the unique case of the Gaza Strip (and the West Bank), which never belonged to another sovereign country, and in light of the widely recognized Palestinian right of self-determination (acknowledged also by Egypt and Jordan, the former occupiers of these areas), a Palestinian government seems to be the equivalent of the former sovereign government the laws of occupation refer to.⁵⁵

In viewing the impact the existence of an effective Hamas government in the Gaza Strip has on the definition of the Israeli status in this area, it is interesting to compare the situation with that in the Congo as described in the ICJ case of *Congo v. Uganda*.⁵⁶ There part of the territory of the Congo was transferred to the control of two of the rebel movements in the Lusaka Agreement. Judge Kooijmans, who viewed Uganda as occupier of these parts of the Congo since it possessed there effective control, determined that “After Lusaka, territorial authority could no longer be seen as vested exclusively in the central Government but as being shared with ‘armed opposition’ movements which had been recognized as part of the national authority.”⁵⁷ And consequently:

Only in those places where it remained in full and effective control, like Ituri district, did Uganda retain its status as occupying Power... Even if it retained its military grip on the airports and other strategic locations, it can, as a result of the arrangements made in the Lusaka Agreement, no longer be said to have substituted itself for or replaced the authority of the territorial government since under the terms of the Agreement that authority was also exercised by the rebel movements.⁵⁸

In other words, according to Judge Kooijmans, occupation ceased where the effective control of Uganda stopped being “full.” This was so even though the area was transferred to the control of rebel movements, and not to the Congolese government.

To sum up this point, there is a government in the Gaza Strip that is capable of exercising governmental powers, which took over from the legitimate government and is its substitute. Consequently, the second condition for deeming the Gaza Strip as occupied by Israel, namely that there is no other functioning government, is also not fulfilled.

CONCLUSION

In conclusion, our analysis shows that there is no valid legal basis to regard Israel as the occupying power of the Gaza Strip. This stems from the fact that Israel has no effective control over this area and that the Hamas government is capable of exercising effective powers of government therein. Consequently, the laws of occupation do not apply there as such.⁵⁹

On the other hand, admittedly there is a unique relationship between Israel and the Gaza Strip, based on the continuing links between them and the special circumstances of the situation, which leads to certain duties and responsibilities on the part of Israel. These do not stem from a defined body of legal norms, such as occupation law, but from a *sui generis* situation requiring suitable and flexible definitions.⁶⁰ The extent of these duties and responsibilities is influenced by the changing factual circumstances. Therefore, for example, the recent opening of the Rafah crossing calls for a further review in this regard. We, as lawyers, might feel more comfortable to have defined categories with clear-cut answers, but reality does not always grant us that privilege.⁶¹

NOTES

- 1 The opinions and conclusions expressed in this article are those of the author and do not necessarily reflect the views of the IDF or the government of Israel. I would like to thank Nimrod Karin for his valuable comments.
- 2 See a good overview in the Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission) – Part one (hereinafter – Turkel Report – Part one), pp. 26 – 32 (paras. 14 – 19). See also the analysis in HCJ 1661/05, *The Gaza Coast Regional Council et al v. the Knesset et al*, P.D. 59(2) 481, paras. 1-3, 10 (2005) (hereinafter *The Gaza Coast Case*).
- 3 Several Israeli settlements were also established in the Gaza Strip. In 2003 the number of settlers was estimated at around eight thousand people – *The Gaza Coast Case*, *ibid.*, para. 12 and references therein.
- 4 Declaration of Principles regarding Interim Agreements of Self-Governance with PLO (signed in 1994) [hereinafter DOP], available at www.knesset.gov.il/process/docs/oslo.htm.
- 5 Agreement regarding Gaza Strip and Jericho Region (signed in 1994) [hereinafter Cairo Agreement], available at www.knesset.gov.il/process/docs/cairo_agreement.htm.
- 6 The Cairo Agreement provisions and division of authorities were incorporated into the domestic law of the area through the Proclamation concerning the Implementation of the Gaza Strip and Jericho Area Agreement (Gaza Strip Area) (No. 4), 5754-1994.
- 7 Israeli-Palestinian Interim Agreement regarding the West Bank and the Gaza Strip (signed in 1995) [hereinafter *The Interim Agreement*], available at www.knesset.gov.il/process/docs/heskemb1.htm.
- 8 Article 31(2) to the Interim Agreement. The Interim Agreement provisions and the updated division of authorities set out therein were incorporated into the domestic law of the area through the Proclamation concerning the Implementation of the Interim Agreement (Gaza Strip Area) (No. 5), 5756-1995.
- 9 In 2001, four Qassam rockets were fired from the Gaza Strip area (the first of these was fired at the end of October); in 2002 the number increased to thirty-five rockets; in 2003 – 135 rockets; in 2004 – 281 rockets. In each of these years, a total of 245, 257, 265, and 876 mortar shells were fired, respectively. Since mortars have a shorter range (up to 3 km) they were mainly directed at Israeli settlements then located in the Gaza Strip, and at IDF forces; while the rockets were fired at the communities of southern Israel located in proximity to the Strip. These figures are taken from a study conducted by the Meir Amit Intelligence and Terrorism Information Center headed by Dr. Reuven Erlich, entitled “The Rocket Threat from the Gaza Strip 2000-2007” (Hebrew), available at http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/rocket_threat.pdf.
- 10 “Israel will evacuate the Gaza Strip including all existing Israeli towns and villages, and will redeploy outside the Strip... Upon completion of this process, there shall be no permanent presence of Israeli security forces on the ground in the areas to be evacuated” (Section 2(a)(3.1) of Government Resolution No. 1996, dated June 6, 2004). Initially the plan was to leave an Israeli presence in the area of the border between the Gaza Strip and Egypt, but ultimately the GOI decided to withdraw completely, as stated in Government Resolution No. 4235 of 11.9.2005 (“...the IDF will withdraw its forces from the territory of the Gaza Strip, including from the area of the border between the Gaza Strip and Egypt (‘Philadelphi Route’).”
- 11 “As of the end of this day, the military government in the Gaza Strip area is terminated” (Section 1 of the Proclamation concerning the Termination of the Military Government (No. 6) (Gaza Strip Area), 5765-2005).
- 12 The agreement is available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm>.
- 13 Israel Ministry of Foreign Affairs, “The Disengagement Plan – General Outline,” April 18, 2004, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm>.
- 14 Hamas is an extreme organization which calls for an Islamic-law state in the whole of the territory of Mandatory Palestine, does not recognize the right of Israel to exist, and rejects reaching peaceful agreements with Israel – Turkel Report – Part one, 29, para. 18.
- 15 *Ibid.*, 29-30, para. 18. See also “Timeline: Hamas-Fatah Power Struggle,” *Haaretz*, May 20, 2009, available at <http://www.haaretz.com/news/timeline-hamas-fatah-power-struggle-1.276388>. Recently there have been attempts to reach a reconciliation between Hamas and Fatah, but many issues have yet to be settled between them – Joel Greenberg, “Palestinian factions Fatah and Hamas formally sign unity accord,” *Washington Post*, May 4, 2011, available at http://www.washingtonpost.com/world/palestinian-factions-formally-sign-unity-accord/2011/05/04/AFD89MmF_story.html?hpid=z6.
- 16 Turkel Report – Part one, 29-31, paras. 18-19.
- 17 E. Benvenisti, Responsibility for the protection of human rights under the Israeli-Palestinian Agreements, 28 *Israel LR* (1994) 297, 312; G. R. Watson, *The Oslo Accord: International Law and the Israeli-Palestinian Peace Agreements* (New York: Oxford University Press, 2000), 176.

- 18 Y. Dinstein, *The International Law of Belligerent Occupation* 274-275 (2009). P. Malanczuk, "Some Basic aspects of the agreements between Israel and the PLO from the perspective of international law" 7 *Eur. JIL* (1996) 481, 497.
- 19 Dinstein, 43.
- 20 *Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 ICJ Rep. 168, 173. Thus the court concluded that: "In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."
- 21 See, e.g., the separate legal opinion of Judge *Kooijmans* who criticizes the minimalist approach that has been adopted by the majority, paras.44-45, 49. See also Y. Shany, *Faraway, so close: The legal status of Gaza after Israel's Disengagement*, 8 *Y. B. Int'l. Hum. Law* 369 (2005), 378.
- 22 This approach was adopted, for example, by the U.S. Army Field Manual (Department of the Army, Field Manual No. 27-10: *The Law of the Land Warfare*, 18 July 1956 (revised 15 July 1976) paras. 355-356) and in the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), paras. 11.2, 11.3.
- 23 See *The Hostages Trial* (Trial of Wilhelm List and others), United States Military Tribunal, Nuremberg (Case no. 47), reprinted in *VIII Law Reports of Trials of War Criminals* (Selected and prepared by the United Nations War Crimes Commission, 1949) 34, 55-56.
- 24 See H CJ 102/82 *Tzemel v. Minister of Defense*, 37(3) PD 365, 373-376 (excerpt in English in *Israel Yearbook on HR* 360 (1983)) ("a military force can raid or invade an area in order to pass through it on its way to a destination that it set for itself, while leaving the area behind it without effective control. *But if the force took control over some area in a practical and effective manner, the temporary nature of the stay in the area or the intention to impose a non-permanent military control do not derogate from the fact that the factual conditions have been met for applying the laws of war that deal with the collateral implications of belligerent occupation.* This and more, the application of the third chapter of the Hague Convention and the application of the corresponding articles in the Fourth Geneva Convention are not contingent on the fact that a special organizational system be established in the form of a military rule. *The duties and authorities of the military force, which are derived from its effective occupation of some area, are established and created by the very fact that there is military control over the area, namely, even if the military force exercises control only by means of its regular combat units, without creating and dedicating a special military framework for military rule purposes* (emphasis added)). See also H CJ 201/09 *Physicians for Human Rights v. The Prime Minister, Takdin Elyon* 2009(1) 565, 571, para 14. ("The applicability of the laws of occupation of international humanitarian law is conditioned on the potential for exercising government authorities in the area following the invasion of military forces, and not necessarily on the actual exercise of those authorities de-facto.")
- 25 H. P. Gasser, "Protection of the civilian population," *The Handbook of Humanitarian Law in Armed Conflicts* 237, 274 (2nd. ed., D. Fleck ed., 2008); see also the first of the three cumulative conditions detailed by Yuval Shany in order to consider an area occupied, which are based on several judicial decisions from international and national courts and on several military manuals: "a) hostile troops are physically located in the area;..." Shany, 376, 380.
- 26 This is the formulation in the U.S. Army Field Manual – "It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district." And of the UK Manual, para. 11.3.2. See also Dinstein, 44.
- 27 Shany, 376. See also Benvenisti, who states that: "The law of occupation is applicable to regions in which foreign forces are present, and in which they can maintain control over the life of the local population and exercise the authority of the legitimate power. The test for effective control is not the military strength of the foreign army which is situated outside the borders that surround the foreign area. What matters is the extent of that power's effective control over civilian life within the occupied area; their ability, in the words of Article 43 of the Hague Regulations, to 'restore and ensure public order and civil life.'" Benvenisti, 308-309.
- 28 Thus, Greenspan states that: "Once an occupation has started, it must be maintained effectively if it is to be regarded as valid. If the occupant evacuated the territory, is driven out, or ceases to maintain effective control for any reason, and the legitimate government is able to resume its authority and functions, occupation ceases." M. Greenspan, *The Modern Law of Land Warfare* 223 (1959). See also L. C. Green, *The Contemporary Law of Armed Conflict* 258 (2nd ed., 2000) ("But if the [Occupying Power] evacuates or retreats from the territory and the legitimate government is able to reassert its authority, the occupation ceases."); UK Manual, 11.7; Shany, 378; Yutaka Arai-Takahashi, *The law of occupation* 16 (2009).
- 29 Dinstein, 272-273.
- 30 H CJ 9132/07, *Al-Bassiouni v. The Prime Minister, Takdin Elyon* 2008(1) 1213, 1217 (hereinafter: *The Al-Bassiouni Case*), available in English at <http://elyon1.court.gov.il/verdictssearch/EnglishVerdictsSearch.aspx>.
- 31 The list is based on a compilation of arguments from the following sources: PLO Negotiation Affairs Department, "The Israel Disengagement Plan: Gaza still occupied," available at <http://domino.un.org/unispal.nsf/0145a8233e14d2b585256cbf005af141/f7c5f26122c733598525707b006097a9?OpenDocument>; Dinstein, 276-280; J. Dugard, *Report of the Special Rapporteur*

- on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, U.N. Doc. A/HRC/4/17 (2007), available at <http://unispal.un.org/UNISPAL.NSF/0/B59FE224D4A4587D8525728B00697DAA>; Amnesty International, *Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*, available at <http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4dd8f595-e64c-11dd-9917-ed717fa5078d/mde150072009en.pdf> (2009); Human Rights Watch, *Israel: "Disengagement" Will Not End Gaza Occupation*, available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation> (2007); Gisha, *Disengaged Occupiers: The Legal Status of Gaza*, available at <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf> (2007); B'Tselem, *Israel's Obligations According to International Law*, available at http://www.btselem.org/english/gaza_strip/israels_obligations.asp. For a detailed critical analysis of the different positions, see Bell and Shefi, "The mythical post-2005 Israeli occupation of the Gaza Strip" 16 *Israel Affairs* 268 (2010), who analyze each set of arguments separately in pp. 276-288. See also the analysis of Shany, 379-383.
- 32 The factual situation has changed in this regard and the Rafah crossing has recently been opened, as will be explained below. The reference here is to the arguments made by those claiming that Israel is the occupier of Gaza, and at the time these arguments were made the crossing was still closed.
- 33 See Schmitt's analysis regarding the no-fly zone imposed on the northern and southern parts of Iraq by the United States, the UK, and France following the First Gulf War: "... the concept of aerial occupation is not a legal one. In traditional humanitarian law, occupation is a term of art for physical control by one belligerent over land territory of another (or of a State occupied against its will, but without resistance). When an occupation occurs, rights and duties arise as between the occupying power and individuals located in the occupied area. An aerial occupation, by contrast, is simply a *de facto*, *vice de jure*, status in which limits are placed on a States' use of its own airspace," M. N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 *Loy. L.A. Int'l & Comp. L.J.* 727, 729, fn. 6 (1998). Dinstein states categorically that "Belligerent occupation cannot rest solely on either naval power or air power, however formidable that may be." Dinstein, 44.
- 34 See Shany, 380.
- 35 See Bell and Shefi, 282-283.
- 36 The term "relatively" is used since the Rafah Crossing has been opened several times, some of them in a forcible manner. In addition there is an expansive system of underground tunnels connecting the Gaza Strip and the Egyptian side, which serves the flow of goods, arms, funds, and operatives.
- 37 See, e.g., the report of Hansen Join, Agene France-Presser, "Egypt to throw open Rafah border crossing with Gaza: FM," *The Daily Newsegypt*, April 29, 2011, available at <http://www.thedailynewsegypt.com/egypt/egypt-to-throw-open-rafah-border-crossing-with-gaza-fm.html>. According to this report the Egyptian foreign minister, Nabil al-Araby, said on April 29, 2011, that Egypt will permanently open the Rafah border crossing to ease the blockade on Gaza.
- 38 Bell and Shefi, 277.
- 39 Sampson points out that reserving the right to reenter a territory because of security considerations is a common reservation made by a withdrawing occupying power. This was done by the Allied forces when they left West Germany after signing the treaty ending the occupation in 1955 – E. Samson, "Is Gaza occupied? Redefining the legal status of Gaza" 83 *Mideast Security and Policy Studies* at 31 (2010), available at <http://www.biu.ac.il/Besa/MSPS83.pdf>.
- 40 In para. 356.
- 41 Shany, 382. Curiously, Dinstein, at 279, finds that these incursions are enough to find that Israel has made its "authority felt" in the area, although it is quite clear from his analysis elsewhere (pp. 43-44) that the meaning of this term is actual authority in a manner supplanting the authority of the displaced sovereign. Dinstein also states (on p. 45) that occupation ends when the occupying power "loses its grip" over an occupied territory, in whole or in part. Israel clearly has no "grip" over the Gaza Strip nor the ability to "make its authority felt" therein, otherwise it would arguably have been more successful in stopping attacks against it stemming from this area.
- 42 Bell and Shefi, 283
- 43 See also Shany, 380.
- 44 The Al-Bassiouni Case, para. 12.
- 45 Dinstein, 279.
- 46 See Shany, 381.
- 47 See analysis in the Turkel Report – Part one, 27 fn. 36. See also Y. Shany, "Binary law meets complex reality: The occupation of Gaza debate" 41 *Isr. L. R.* 68, 79 (2008).
- 48 See, e.g., News Agencies, " Hamas appoints foreign minister for first time in cabinet reshuffle," *Haaretz*, March 10, 2011, available at <http://www.haaretz.com/news/diplomacy-defense/hamas-appoints-foreign-minister-for-first-time-in-cabinet-reshuffle-1.348342>. See also Bell and Shefi, 277.
- 49 Bell and Shefi, 283.

- 50 Hence, for example, even within the current attempts at reconciliation there is no agreement to subordinate the armed forces of Hamas in the Gaza Strip to the commanders of the PA forces in the West Bank – see, e.g., J. Greenberg, “Palestinian factions Fatah and Hamas formally sign unity accord,” *Washington Post*, May 4, 2011, available at http://www.washingtonpost.com/world/palestinian-factions-formally-sign-unity-accord/2011/05/04/AFD89MmF_story.html?hpid=z6.
- 51 Shany, 380-381. Dinstein bases his conclusion that the Gaza Strip is still occupied also on the unity between the Gaza Strip and the West Bank (p. 277), but in another part of his book (p. 45) explains that the territory subject to effective control of the occupying power may grow or shrink in size according to the circumstances and that occupation ends in the areas where the occupier loses its grip. In other words, this is a factual question that has nothing to do with the political unity of the occupied territory. The Congo-Uganda Case, *supra* note 19, is again a good example of partial occupation over certain parts of a country, which changes in scope according to the factual situation.
- 52 See also the analysis of Shany, 380, 382.
- 53 See M. Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Power*, 16 *Eur. J. Int'l L.* 661, 682 (2005) (“This raises the question of when the devolution of governmental authority to a national government is effective enough to end the applicability of IHL on belligerent occupation altogether... The decisive factor is, therefore, who effectively exercises governmental authority.”); Malanczuk, *supra* note 17, at 498.
- 54 On August 20, 2005, the chairman of the PA, Mahmoud Abbas (Abu Mazen) issued an edict transferring all territories vacated by Israel to the PA. The edict stipulates that the PA “will assert its immediate control over the areas from which Israeli forces will withdraw” and “will lay its hands on a temporary basis on all assets, movable or immovable, until their status will be determined by the law.” A committee of ministers was formed by the PA government in order to coordinate and oversee the preparations for assuming responsibility for these areas (see http://www.terrorism-info.org.il/malam_multimedia/html/final/sp/heb_n/d2laung_05.htm).
- 55 Compare Dinstein, 52.
- 56 *Supra* note 19.
- 57 Para. 53 of his opinion.
- 58 Para. 54.
- 59 Bell and Shefi (at 286) exemplify that even those claiming that occupation still exists do not expect nor desire Israel to implement all the rules of occupation, since this would require it to reenter the Gaza Strip and interfere in its internal affairs. See also the analysis of N. Rostow, *Gaza, Iraq, Lebanon: Three Occupations under International Law*, 37 *Isr. Yearbook Hum. Rts.* 205, 218-221 (2008).
- 60 This short chapter will not enter into an analysis of the legal consequences of this situation. These were the subject matter of *The Al-Bassiouni Case*.
- 61 Compare the conclusion of Shany – *Binary Law*, 83-86. See also Samson, 37-38.