

## FARAWAY, SO CLOSE: THE LEGAL STATUS OF GAZA AFTER ISRAEL'S DISENGAGEMENT<sup>1</sup>

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### 1. INTRODUCTION

On 12 September 2005, at around 7 a.m., the last group of Israeli soldiers left the Gaza Strip, thereby ending 38 years of continued Israeli military presence in the area. In a short ceremony at one of the exit gates, IDF Brigadier-General Aviv Kochavi, the departing Gaza Region Commander, stated: 'the responsibility for whatever takes place inside befalls upon the [Palestinian] Authority.'<sup>3</sup> On that same night, the IDF Chief of Southern Command, Major-General Dan Harel, promulgated an official decree proclaiming the end of military rule in the Gaza Strip and formally nullifying the decree issued on 6 June 1967, which instituted military rule in the region.<sup>4</sup> So came to end Israel's prolonged occupation of Gaza – or did it?

Palestinians were quick to assert that, legally speaking, the status of the Gaza Strip remains unchanged, i.e., that of an occupied territory. A fact sheet prepared by the Palestinian Negotiation Affairs Department summarises the legal position underlying the Palestinian 'continued occupation' claim in the following terms:

'Under the "Disengagement" Plan, Gazans will still be subjected to the effective control of the Israeli military. Although Israel will supposedly remove its *permanent* military presence, Israeli forces will retain the ability and right to enter the Gaza Strip at will. Further, Israel will retain control over Gaza's airspace, sea shore, and borders. Under the Plan, Israel will unilaterally control whether or not Gaza opens a seaport or an airport. Additionally, Israel will control all border crossings, including Gaza's border with Egypt. And Israel will "continue its military activity along the Gaza Strip's coastline". Taken together, these powers mean that all goods and people entering or

1. © Y. Shany, 2006.

2. Hersch Lauterpacht Chair in Public International Law, Hebrew University of Jerusalem. I thank Dr. Amichai Cohen and Dr. Tal Becker for their comments to an earlier draft. The responsibility for the positions taken in this paper and any errors in fact or law remain my own.

3. IDF Spokesperson Office, 'Mission completed', 12 September 2005 <[www1.idf.il/DOVER/site/mainpage.asp?sl=HE&id=7&docid=45389&Pos=12&last=0&bScope=False](http://www1.idf.il/DOVER/site/mainpage.asp?sl=HE&id=7&docid=45389&Pos=12&last=0&bScope=False)> (in Hebrew).

4. IDF Spokesperson Office, 'Declaration regarding end of military rule in Gaza Strip', 12 September 2005 <[www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=45427&Pos=1&last=0&bScope=False](http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=45427&Pos=1&last=0&bScope=False)>.

the OPT.<sup>49</sup> On 11 April 2005, W. Bush, calling on him 'to settlements in the occupied territories'.<sup>50</sup> 'The players will heed this call. The construction of its wall in the West Bank, and the role

to bring down the law on settlements', 11

leaving Gaza will be subject to Israeli control. Finally, Israel will prevent Gazans from engaging in international relations. Accordingly, if it enacts the "Disengagement" Plan as envisaged, Israel will effectively control Gaza – administratively and militarily. Therefore, Israel will remain the Occupying Power of the Gaza Strip.<sup>5</sup>

The present note seeks to analyse, in brief, the conflicting positions on the legal status of the Gaza Strip in the aftermath of the withdrawal of the IDF in 2005. In doing so, I will strive to identify the relevant legal conditions governing the beginning and end of occupation and to apply them to the situation in Gaza. I shall argue that the three-pronged test for the existence of occupation set out in the 1948 *Hosotages* case (which was reaffirmed, *inter alia*, by the Israeli Supreme Court in the 1983 *Tsemel* case) should be applied – actual presence of hostile forces in the territory; their potential to exercise effective powers of government in the area; and the inability of the legitimate government of the area to exercise its sovereign authority over the territory. I will also argue, in this regard, that the recent decision of the International Court of Justice (hereinafter, ICJ) in *Armed Activities in Congo*<sup>6</sup> represents a regrettable departure from the traditional understanding of the conditions of occupation, which has undesirable policy implications.

Application of the three aforementioned tests to the situation in Gaza might produce mixed results: although Israeli forces have left Gaza, some legal theories might downplay the significance of their lack of physical presence on the ground (e.g., substituting ground presence with presence in the air and maritime spaces, presence in other parts of the Occupied Territories and government by proxy); in addition, it seems that Israel still exercises some control over Gaza in parallel with the Palestinian Authority (hereinafter, PA). Hence, I argue that in order to identify the ultimate power of government in Gaza one should engage in a comparative analysis of the degree of effective control exercised by the two competing sources of authority.

Discussion of these issues will proceed as follows. Part two briefly describes the history of the Gaza occupation and the disengagement plan (including the main post-disengagement developments). Part three lays out the general conditions for the beginning and end of occupation under international law and discusses the implications of the recent ICJ decision on Congo for the interpretation of these conditions. Part four introduces the conflicting positions on the status of the Gaza Strip in light of the relevant legal standards discussed in Part two. Part five concludes.

5. PLO Negotiation Affairs Department, 'The Israel "disengagement" plan: Gaza still occupied' (September 2005) <[www.nad-plo.org/inner.php?view=disengagement\\_Fact\\_GAZA%20STILL%20OCCUPIED](http://www.nad-plo.org/inner.php?view=disengagement_Fact_GAZA%20STILL%20OCCUPIED)>.

6. *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. (2005) p. 168.

## 2. HISTORY OF THE ISRAELI OCCUPATION OF THE GAZA STRIP

The Gaza Strip is a narrow strip of land encompassing a total landmass of 360 km<sup>2</sup> situated alongside the Mediterranean Sea between the coasts of Israel and the Egyptian Sinai Peninsula. It is now home to a population of some 1.5 million Palestinians, rendering the area one of the most densely populated in the world.

As part of the Palestine Mandate, the Gaza Strip was controlled by Great Britain until the termination of the Mandate in 1948. In the regional war that erupted after the withdrawal of British forces, the Gaza Strip was overrun by Egyptian forces, who held it under military occupation until the 1967 war. Notably, the 1948-49 war also resulted in significant changes in the demography of Gaza: many thousands of Palestinians residing in areas overtaken by the nascent state of Israel took refuge in the Gaza Strip – a demographic development which entailed severe socio-economic implications for the living conditions in Gaza. It may be noted that the only Jewish settlement which existed in the Gaza Strip before 1948 (Kfar Darom) was destroyed in the 1948-49 war.

In the 1967 'Six-Days War', Israel occupied the Gaza Strip, as well as the entire Sinai Peninsula. The latter piece of territory was eventually returned to Egypt under the terms of the 1979 Egyptian-Israeli Treaty of Peace. Still, Gaza remained in Israeli hands and was administered since 1967 by the IDF under the laws of belligerent occupation derived from the 1907 Hague Regulations.<sup>7</sup> Although Israel contested the formal application of the Fourth Geneva Convention to the occupation of Gaza, on the basis of Egypt's lack of sovereignty over the area (it has made similar arguments with relation to the legal status of the West Bank captured from Jordan in the 1967 war),<sup>8</sup> it nevertheless undertook to comply with the humanitarian provisions of this convention in its relations with the local inhabitants.<sup>9</sup>

Since the late 1960s, the government of Israel permitted and at times actually encouraged the construction of Jewish settlements in the Gaza Strip. These settlements, mostly located in proximity to the northern and southern edges of the Gaza Strip became over the years a constant source of friction between Israel and Palestinians and generated harsh international criticism against Israel.<sup>10</sup>

Following the first *intifada* (1987-1991), an Israeli-Palestinian peace process was launched. The negotiations eventually produced the Oslo Accords – a series of political agreements between Israel and the PLO, which included a commitment

7. Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (hereinafter, Hague Regulations). For relevant decisions of the Israeli Supreme Court confirming the applicability of the laws of belligerent occupation, see, e.g., *Hitu v. Government of Israel*, HCJ 302/72, 27(2) PD 169; H.C.J. 1661/05 *Regional Council Gaza Coast v. Knesset of Israel*, HCJ 1661/05, 2005 (14) Pador 505.

8. See, e.g., Y. Blum, 'The missing reversioner: reflections on the status of Judea and Samaria', 3 *Israel LR* (1968) p. 279.

9. M. Shamgar, 'The observance of international law in the administered territories', 1 *Israel YB HR* (1971) p. 262.

10. See, e.g., SC Res. 465, UN SCOR, 35th Sess., S/RES/465 (1980).

to a comprehensive settlement of the Israeli-Palestinian conflict through peaceful negotiations and interim self-government arrangements under which the PA was created and authorised to exercise powers of government over parts of the Occupied Territories. Whereas the West Bank was divided into three areas – Areas A, B and C (denoting a spectrum of division of powers between the parties, ranging from almost full self-rule by the Palestinians to continued administration by Israel), the Gaza Strip was only divided into two areas: the PA was granted nearly full powers of government over the Palestinian towns while Israel retained all powers of government over Israeli settlements, the Strip's major roads, its borders with Israel and Egypt, its territorial waters and airspace. Significantly, Israel retained overall security authority over the entire Gaza Strip.

This functional division of responsibilities between Israel and the PA created considerable uncertainty as to the legal status of areas subject to Palestinian autonomous rule. As early as 1994, Eyal Benvenisti, a leading commentator on the law of occupation, expressed the view that the occupation of most of the Gaza Strip had terminated following the establishment of the PA.<sup>11</sup> Still, other commentators, such as Ardi Imscis, have taken the opposite position, maintaining that while the nature of the control exercised by Israel changed from direct to indirect control, the area remained under belligerent occupation.<sup>12</sup>

The collapse of the peace process in late 2000 resulted in renewed hostilities between Israelis and Palestinians and numerous incursions by the IDF into parts of the Gaza Strip subject to Palestinian rule under the Oslo Accords. However, Israel refrained from establishing any long-term presence in Palestinian areas and from sending its troops into the most heavily populated neighbourhoods in Gaza. Furthermore, throughout the summer of 2005, the IDF implemented a governmental decision to disengage from Gaza – i.e., to withdraw all Israeli troops and citizens from the entire Gaza Strip<sup>13</sup> – a process that was completed on 12 September 2005. On 15 November 2005 Israel and the PA reached two agreements designed to facilitate the operation of the border crossings to Israel and Egypt at the southern end of the Gaza Strip (Kerem Shalom) and on access from and to the Gaza Strip.<sup>14</sup>

11. E. Benvenisti, 'Responsibility for the protection of human rights under the Interim Israeli-Palestinian Agreements', 28 *Israel LR* (1994) pp. 297 at 312. For support, see G.R. Watson, *The Oslo Accord: International Law and the Israeli-Palestinian Peace Agreements* (New York, Oxford University Press 2000) p. 176.

12. See, e.g., A. Imscis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: critical reflections on the international humanitarian law aspects of the ICJ Wall Advisory Opinion', 99 *AJIL* (2005) pp. 102 at n. 21. For a discussion of the conflicting positions, see P. Malanczuk, 'Some basic aspects of the agreements between Israel and the PLO from the perspective of international law', 7 *Eur. JIL* (1996) pp. 481 at 494-498.

13. Government of Israel, Decision of 6 June 2004 on the Revised Disengagement Plan <[www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6+June+2004.htm](http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6+June+2004.htm)> (hereinafter, Disengagement Plan).

14. Agreed Documents on Movement and Access from and to Gaza, 15 November 2005 <[www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm](http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm)>.

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It is important to note that, despite the withdrawal of its troops and citizens from Gaza and the formal abrogation of military rule, Israel continues to exercise considerable influence over life in the Gaza Strip: the IDF controls the airspace and territorial waters of Gaza, it governs the passage of persons and goods into Gaza from Israel (and the West Bank) and indirectly monitors passage in the Rafah crossing between Gaza and Egypt. In addition, Israel has not yet surrendered to the PA the Strip's population registration records and has not yet agreed to the opening of Gaza's seaport and airport.<sup>15</sup> Finally, in June 2006, in response to an attack committed by Palestinian militants on an IDF post inside Israel (an attack which resulted in the killing of two IDF soldiers and the kidnapping of an IDF corporal), and the continued firing of 'Kassam' rockets from Gaza into Israel, the IDF renewed its policy of short-term incursions into the PA-controlled areas in the Gaza Strip.

The uncertainty attendant in the pre-disengagement legal situation, the contin- ued leverage available to Israel *vis-à-vis* the population of Gaza, and the potential link between the situation in Gaza and the situation in the West Bank (which remains by and large under Israeli occupation)<sup>16</sup> raise difficult questions as to the post-disengagement status of Gaza. I will address one central question: the contin- ued applicability of the laws of belligerent occupation for Israel with respect to Gaza. I will not delve here into other interesting and important questions, such as the special nature of the obligations of a long-term occupier in areas over which it exercises limited actual control;<sup>17</sup> the applicability of human rights treaties in lim- ited-control areas;<sup>18</sup> and the potential independence of Gaza.<sup>19</sup>

15. According to the Revised Disengagement Plan, *supra* n. 13, para. 6(3), Israel 'will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel'.

16. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Rep.* (2004) p. 167, para. 78 (the West Bank remains occupied territory).

17. See, e.g., Art. 6 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter, GC IV); A. Roberts, 'Prolonged military occupation: the Israeli-Occupied Territories since 1967', 84 *AJIL* (1990) p. 44. See also M. Mari, 'The Israeli disengagement from the Gaza Strip: an end of the occupation', in this volume, p. 356.

18. Cf., *R. (on application of Al-Skeini et al) v. Minister of Defence*, [2005] *EWCA Civ 1609* (Cl. of Appeals).

19. The traditional conditions of independent statehood have been enunciated in the 1933 Monte- video Convention on the Rights and Duties of States, 26 December 1933, 165 *UNTS* p. 19 (herein- after, Montevideo Convention).

### 3. APPLICABILITY OF THE LAWS OF OCCUPATION

#### 3.1 The expansive reading of Article 42

The traditional criteria for application of the laws of belligerent occupation can be found in Article 42 of the 1907 Hague Regulations.<sup>20</sup> The article provides 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.' Several writers have already commen- ted upon the ambiguous nature of the text, which fuses the actual exercise of authority ('actually placed under the authority'; 'such authority has been estab- lished')<sup>21</sup> with the potential exercise of such authority ('can be exercised').<sup>22</sup> Still, a few notable court cases, as well as some influential military manuals, offered a more or less coherent approach towards the tests for the beginning of occupation, emphasising the actual nature of the presence in the occupied territory and the potential for application of exclusive and effective governmental powers.

In the *Hostages* case, a US Military Tribunal in Nuremberg held that:

'The term invasion implies a military operation while an occupation indicates the exer- cise of governmental authority to the exclusion of the established government. This pre- supposes the destruction of organised resistance and the establishment of an administra- tion 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>23</sup>

Significantly, however, the tribunal rejected the contention that parts of Greece and Yugoslavia were effectively under the control of Partisan forces, and thus, alleg- edly not occupied. Instead, it emphasised the importance of the very *ability* of the occupier to effectively apply its power of authority in specific areas which it did not actively administer:

'While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was

20. Arts. 2, 4 and 6 GC IV, *supra* n. 17, do not provide a substantive definition of situations of occupation. Hence, the definition found in the Hague Regulations regulates the scope of application of the Fourth Geneva Convention as well. See *Prosecutor v. Naletilic*, ICTY Case No. IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para. 215.

21. See also Art. 43 Hague Regulations ('The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country') [emphasis added].

22. See, e.g., E. Benvenisti, *The International Law of Occupation* (1993) pp. 4-5.

23. *U.S. v. List (Hostages case)*, VIII *Law Reports of Trials of Major War Criminals* (1949) pp. 38 at 55-56 (hereinafter, *Hostages case*).

temporary only and not such as would deprive the German Armed Forces of its status of an occupant.<sup>24</sup>

This combination of *actual* and *potential* authority requirements was codified in the 1956 US Army Field Manual 27-10.<sup>25</sup> Section 355 of the manual provides that occupation consists of three conditions: a) an invasion; b) the former government's inability to exercise its powers in the area; and c) the effective substitution of the powers of the legitimate government by those of the invading army:

'Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.'

Yet, section 356 emphasises the potential, not actual, nature of the control which the occupier exercises over all of the occupied territory: '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.' In the same vein, section 360, which regulates in effect the termination of the state of occupation, provides that:

'In case the occupant evacuates the district or is driven out by the enemy, the occupation ceases. It does not cease, however, if the occupant, after establishing its authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district. Nor does the existence of a rebellion or the activity of guerrilla or para-military units of itself cause the occupation to cease, provided the occupant could at any time it desired assume physical control of any part of the territory. If, however, the power of the occupant is effectively displaced for any length of time, its position towards the inhabitants is the same as before occupation.'

The view that occupation requires both actual presence and potential powers of government over all of the occupied territory has also been incorporated into other influential military manuals<sup>26</sup> and treaties on international humanitarian law.<sup>27</sup> It was also adopted by the ICTY in *Naletilić*,<sup>28</sup> and, significantly for our purposes, by the Israeli Supreme Court in the *Tsemel* case.<sup>29</sup> After citing with approval the two

24. *Ibid.*, p. 56.

25. Department of the Army, Field Manual 27-10: The Law of Land Warfare, 18 July 1956 (revised 15 July 1976) (hereinafter, FM 27-10).

26. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) ch. 11 (hereinafter, UK Defence Manual); Office of Judge Advocate General (Canada), Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Level (2001), paras. 1202-1203 (requiring, *inter alia*, the presence of a 'sufficient force' in the foreign territory).

27. See, e.g., Benvenisti, *supra* n. 22, pp. 4-5; A. Roberts, 'What is a military occupation?', 55 *BYIL* (1984) pp. 249 at 255-260.

28. *Naletilić*, *supra* n. 20, para. 217.

29. *Tsemel v. Minister of Defence*, HCJ 102/82, 7(3) PD 365.

principal tests introduced by the British Manual (the legitimate government's inability to publicly exercise its authority and the ability of the invader to substitute its own authority for that of the legitimate government),<sup>30</sup> the court held that Israel was at the time the occupying force in southern Lebanon notwithstanding its omission to exercise most functions of government in the area:

'The application of Part III of the Hague Regulations and the application of the parallel provisions in the Fourth [Geneva] Convention do not depend on the establishment of a particular organizational framework in the form of military administration. The duties and authorities of the military force are established and derived from the mere military control of the area...

... Furthermore, the military force may determine to what degree it exercises its powers of civil administration through its direct delegates, and which areas it leaves in the hand of the former government, whether local or central government officials [cites omitted]. Permitting the activities of such governmental authorities does it, *per se*, detract from the factual existence of effective military control over the area and the consequences that ensue therefrom under the laws of war.' [unofficial translation]<sup>31</sup>

In sum, the aforementioned authorities support the proposition that three cumulative conditions 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. Whereas examining whether the first condition has been satisfied requires a rather straightforward factual inquiry, assessing compliance with the other two is less conclusive, involving an estimate of time (i.e., resumption of control over the area within 'reasonable time' or displacement for 'any length of time') and anticipated effectiveness (i.e., the 'successful' substitution of governmental authority or the 'effective' displacement).

This three-pronged test, emphasising the potential for effective control over actual control, is further supported by a host of policy considerations. Most importantly, by de-linking the existence of occupation from the actual exercise of governmental authority by the military power *vis-à-vis* the local population, this approach discourages the occupier from shirking its obligation to govern the occupied territory. Arguably, the opposite test, which examines actual displays of authority, might encourage occupiers to refrain from maintaining law and order and providing governmental service in the occupied territory in order to evade assuming the duties introduced by the laws of belligerent occupation. This would leave the local population bereft of any governmental protection (as its own government is incapable of governing the area and the invader is unwilling to do so).

In the same vein, the potential effective control approach does not permit the occupier to evade its responsibilities through the creation of 'puppet regimes' – a

30. UK Defence Manual, *supra* n. 26, p. 275.

31. *Ibid.*, pp. 373-374.

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'government by proxy', which would exercise control, in effect, on its behalf.<sup>32</sup> The emphasis on the occupier's potential ability for assuming within a reasonable time effective control over the area operates to ensure that the invader – a recognised international person – and not the local authorities – who might lack international standing – would assume international responsibility for the welfare of the local population in the occupied territory. Indeed, similar policy considerations have led the European Court of Human Rights to develop increasingly flexible standards of control over foreign territory as prerequisites for the extraterritorial application of the European Convention of Human Rights.<sup>33</sup>

### 3.2 The Congo v. Uganda case

The recent judgement of the ICJ in *Armed Activities on the Territory of the Congo* seems to represent a significant change of course with regard to the interpretation and application of the tests governing situations of belligerent occupation. In that case, the Court considered the scope of the territory occupied by the invading Ugandan army, and adopted the following *dicta*:

'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.'<sup>34</sup>

Although this *dicta* is generally consistent with the traditional reading of Article 42 of the Hague Regulations, the implementation of these criteria by the Court clearly emphasises actual control over potential control: the Court found Uganda to be in control of the Ituri district in Congo, where it formed a military administration (i.e., effective authority was actually exercised). At the same time, it rejected claims by Congo that other areas of the country in which Ugandan forces were present and that remained outside the scope of authority of the central Congolese government should also be deemed occupied, noting that there was no evidence to show 'that authority was exercised by Ugandan armed forces in any areas other than in Ituri district'.<sup>35</sup> In the eyes of the Court, even Kisangani Airport, over which Uganda admitted exercising 'administrative control', did not qualify as occupied territory.<sup>36</sup>

32. This is in fact explicitly mandated by the language of Art. 47 of the Fourth Geneva Convention which provides that: '[P]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.'

33. See, e.g., *Loizidou v. Turkey*, Judgement of 18 December 1996, 23 EHRR (1997) para. 56; *Ilascu v. Moldova*, Judgement of 8 July 2004, paras. 314-319, 392.

34. *Armed Activities on the Territory of the Congo*, *supra* n. 6, para. 173.

35. *Ibid.*, para. 177.

36. *Ibid.*

The implicit rejection of the potential for the effective control test by the Court and its substitution with a more restrictive reading of Article 42 resulted in an awkward legal situation, according to which vast areas of the Congo, which were out of reach for the central government (i.e., effectively controlled by rebel groups), remained non-occupied despite the deployment of Ugandan troops in them. This meant that no international entity had legal responsibility over the human rights conditions and basic needs of the local population in these areas. To be clear, it may well have been the case that Uganda did not have the potential capacity to govern these vast areas (indeed, only relatively small numbers of Ugandan soldiers invaded Congo); however, the Court's reluctance to explore this possibility seems to indicate rejection on its part of the policy considerations underlying the expansive reading of Article 42. So, while the Court's emphasis upon actual displays of control may introduce greater certainty as to whether a certain area is occupied or not, it might facilitate the creation of more and more legal 'black holes', which remain beyond the scope of responsibility of any government.<sup>37</sup>

### 3.3 The end of occupation

The tests for determining the end of occupation represent a mirror image of the tests for determining its beginning: since the three tests are cumulative, the negation of any of the three conditions would terminate the occupation. The complete removal of hostile forces from the territory, or the conclusion of an agreement with the legitimate government of the territory which legalises the presence of the foreign forces, would negate the first condition for occupation, i.e., the invasion of a hostile force, and bring about the end of occupation. The reversal of the other conditions would be primarily relevant in cases of partial withdrawal: in such circumstances, the effective displacement of the power of the invader over the evacuated district with that of the legitimate government, or the invader's persistent inability or failure to exercise effective powers of government in the evacuated district (depending on whether one embraces a restrictive or expansive reading of Article 42), would also lead to the termination of the occupation over that specific area. In borderline cases, where the effectiveness of control exercised by both the invader and the legitimate government are contested (e.g., where both the invader and legitimate government exercise, in parallel, influence over the territory), the reaction of the international community might serve as a useful practical method of ascertaining the legal situation on the ground.<sup>38</sup>

37. Cf., *R. (on application of Abbasi) v. Secretary of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ 1598, para. 64 (UK Sup. Ct. Judicature, (C.A.)) (referring to the situation in Guantanamo Bay).

38. See, e.g., SC Res. 1546 (2004), UN Doc. S/RES/1546/2004 (declaring the end of occupation in Iraq).

4. IS GAZA OCCUPIED?

I will now return to examine the legal situation in Gaza in the light of the above discussion. At first glance, it would seem that Israel's withdrawal from Gaza reversed the first condition for occupation, i.e., the presence of a hostile force in the area, and thus rendered the territory not occupied. Yet, there are several factual and doctrinal complications which should make one hesitate before pronouncing decisively on the inapplicability of this first condition.

First, although military invasions traditionally involved presence of forces on the ground, one may argue that the cumulative effect of control by the IDF over the air space, maritime zones and most border-entry points into Gaza enables it to exercise a considerable degree of control over the area and to hinder the exercise of effective control by the local PA government. When this is combined with the military capability of the IDF to enter into the Gaza Strip, if needed, and to enforce law and order there, one can dispute the non-presence of the IDF in Gaza. In other words, it may be argued that, in this day and age, effective control can be exercised without the actual and continuing presence of troops on the ground.

Secondly, although controlled prior to 1967 by different political entities, the Palestinian self-determination movement has regarded the West Bank and Gaza as a single territorial unit. Importantly, this position has received the assent of Israel in Article 4 of the 1993 Declaration of Principles between Israel and the PLO.<sup>39</sup> Hence, one could allege that the status of Israel *vis-à-vis* Gaza should be addressed in the context of a partial evacuation paradigm and not complete withdrawal. This is because the IDF still maintains extensive control over the West Bank – a region intimately related to Gaza. Israel is therefore still present in parts of the Occupied Territories.<sup>40</sup> Furthermore, the control exerted by Israel over the 'central nervous system' of the PA in the West Bank arguably prevents the latter from extending its authority to the Gaza Strip.

Thirdly, the Oslo Accords have arguably created legal relations of dependency between Israel and the PA: Israel preserved under the Oslo Accords overriding powers of government in matters of public security over all of the Occupied Territories, including areas subjected to Palestinian rule.<sup>41</sup> In addition, the Oslo Accords

39. Declaration of Principles on Interim Self-Government Arrangements (Israel/PLO), 13 September 1993 <[www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm](http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm)> (hereinafter, DOP). See also Art XI(1) Interim Agreement on the West Bank and Gaza Strip (Israel/PLO), 28 September 1995, 36 *ILM* (1997) p. 551 (hereinafter, Interim Agreement). See also *Ajuri v. IDF West Bank Military Commander*, HCJ 7015/02, 56(6) *PD* 352 (West Bank and Gaza are one territorial unit).

40. See, e.g., *Imseis*, *supra* n. 12.

41. See Art. X(4) Interim Agreement, *supra* n. 39 ('Israel shall continue to carry the responsibility for external security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.'). See also, Art. VIII DOP, *supra* n. 39, Art. XII (1) Interim Agreement.

circumscribed the power of the PA to conduct free foreign relations,<sup>42</sup> and PA legislation became subject to review by Israel (albeit of a very loose nature).<sup>43</sup> Furthermore, the Oslo Accords entrusted Israel with residual powers, i.e., all powers not explicitly delegated to the PA.<sup>44</sup>

The restrictions upon the sovereignty of the PA implied by the Accords create doubts as to whether Israel's rule over areas transferred to the Palestinians has terminated in reality.<sup>45</sup> Instead, one could argue that the transfer of authority to the PA falls within the terms of Article 47 of the Fourth Geneva Convention, which provides that agreements with the authorities of the occupied territory would not release the occupier from its obligations under the laws of belligerent occupation. In addition, the commitment found in the Israel/PLO agreements to the preservation of the political *status quo* throughout the interim period can be read in a way which sustains the continuation of Israel's occupation over the area.<sup>46</sup>

Challenging as they might be, I believe that none of the arguments raised against the negation of the first condition of occupation (physical presence in the territory) is ultimately convincing. First, *lex lata* still seems to insist upon physical presence of hostile forces on the ground. This is not mere formalism, as it is hard to conceive of the manner in which an occupier with no ground presence could realistically be expected to execute its obligations under *jus in bello* (e.g., maintenance of law and order, provision of basic services, etc.). Thus, despite Israel's power to influence events in Gaza to some degree, its ability to enforce day-to-day law and order is minimal to non-existent (Israeli soldiers have not patrolled the streets of Gaza City since the mid 1990s).

Secondly, Gaza constitutes a separate geographical district, 'effectively cut off' from the West Bank,<sup>47</sup> which may form a viable political unit independent of the PA in the West Bank.<sup>48</sup> Hence, evacuation of Gaza could be deemed as complete withdrawal from a potentially self-governing district<sup>49</sup> and may be qualitatively

42. Annex II, art. 3(b) DOP, *supra* n. 39; Art. VI(2)(b) Agreement on the Gaza Strip and Jericho Area, 4 May 1994 <[www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm](http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm)> (hereinafter, Gaza and Jericho Agreement); Art. XVIII(1) (a) Interim Agreement, *supra* n. 39.

43. Art. VII Gaza and Jericho Agreement, *supra* n. 42; Art. XVIII Interim Agreement, *supra* n. 39.

44. Art. XVII(1)(b) Interim Agreement, *supra* n. 39.

45. See R. Shehadeh, 'Can the Declaration of Principles bring about a "just and lasting peace"?' 4 *EJIL* (1993) p. 555.

46. See, e.g., I.R. Weiner, 'Hard facts meet soft law – The Israel-PLO Declaration of Principles and the prospects for peace: a response to Katherine W. Meighan', 35 *Virginia JIL* (1995) pp. 931 at 941.

47. See *Nalattic*, *supra* n. 20, para. 218 ('There is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning "are effective cut off from the rest of the occupied territory"').

48. One might allege that Gaza meets the traditional conditions of statehood: a more or less effective government, with designated borders and population with considerable independence from Israel. See Art. I Montevideo Convention, *supra* n. 19.

49. Cf. *FM 27-10*, *supra* n. 25, s. 360 ('In case the occupant evacuates the district or is driven out by the enemy, the occupation ceases ... If, however, the power of the occupant is effectively displaced for any length of time, its position towards the inhabitants is the same as before occupation.')

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different from the mid-1990s withdrawal from Areas A and B, which formed minuscule Palestinian enclaves whose capacity for independent existence was most doubtful. The pre-1967 separation of Gaza and the West Bank, and the existence of separate IDF military and civil administrations in Gaza and the West Bank until 2005, further underline the feasibility of the independent administration of Gaza, at least on a temporary basis (until the occupation in the West Bank terminates).

Thirdly, the validity of the Oslo Accords, and, in particular, of its defunct sovereignty-limiting provisions, is very much in doubt<sup>50</sup> as a result of the chronic non-implementation of some of the most central provisions of the Oslo Accords by both parties and the expiration of the time originally allocated for the conclusion of a permanent status agreement.<sup>51</sup> Hence, the shared competencies regime envisioned in Oslo was overtaken by events on the ground, which resulted in a *de facto* complete or almost complete transfer of governmental authorities to the PA over some areas of the Occupied Territories (including, now, the entire Gaza Strip)<sup>52</sup> and in the severance of any links of subordination which the Oslo Accords may have purported to create. In this context, it is perhaps important to observe that the Israeli disengagement from Gaza was not presented by Israel as a step toward the implementation of the Accords, but rather a unilateral reaction to the collapse of the peace process.<sup>53</sup>

Nevertheless, the not insignificant question marks over the legal implications of Israel's lack of physical presence in Gaza suggest that the other two conditions for identifying situations of occupation – effective control by the hostile army (i.e., the IDF) and inability of the legitimate government (arguably, the PA) to exercise effective power – should be examined as well. Since both Israel and the PA exercise some degree of influence and control over Gaza, it would seem that no absolute substitution of authority has taken place. In these circumstances, it would be sensible to try and identify the entity with the preponderance of authority, i.e., with the

50. But see G.R. Watson, 'The "Wall" decisions in legal and political context', 99 *AJIL* (2005) pp. 6 at 23.

51. See Art. 1 DOP, *supra* n. 39; Art. XXIII(3) Gaza-Jericho Agreement, *supra* n. 42; Preamble Interim Agreement, *supra* n. 39. Although the agreements did not explicitly regulate the status of the interim agreements, if the parties fail to reach a permanent status agreement within the designated time (five years, which were extended in 1999 to one additional year), a plausible argument could be made that the combined effect of the collapse of the permanent status negotiations in 2000 and the suspension of key obligations spelled out in the agreements as a result of the second *intifadah* has invalidated the agreement. Still, non of the parties has officially proclaimed the death of the Oslo Accords. Furthermore, the 'Road Map' published by the Quartet (United States, European Union, Russia and the UN), which the parties have accepted, arguably revives some provisions of the Oslo Accords. A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 April 2003 <[www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm](http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm)>.

52. Cf., E. Benvenisti, 'The present status of the Palestinian Authority', in E. Cotran and M. Shibli, eds., *The Arab-Israeli Accords: Legal Perspectives* (1996) p. 47.

53. Disengagement Plan, *supra* note 11, para. 1 ('The State of Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a two-sided peace process.').

more effective control, as the ultimate test of dependence. If Israel has the over-riding authority, then it might be deemed the occupier in Gaza even in this post-disengagement era, and vice versa.

The outcome of the comparative assessment of the respective authorities of Israel and the PA over Gaza might turn upon the question whether an expansive or restrictive approach is taken with regard to the conditions of occupation. Under the expansive approach, which focuses on the potential for control, one could argue that Israel can, in theory, through utilising its dominant military power re-enter Gaza in order to 'make its authority felt' at will, and substitute thereby the governmental authority exercised by the PA. A different conclusion, i.e., that Gaza is no longer occupied, would be reached *a fortiori* under the more restrictive formula applied by the ICJ in the *Congo v. Uganda* case. Under the holding of that case, the dismantling of all IDF infrastructure of military and civil government following the disengagement from Gaza would arguably negate the conditions for occupation.

Still, it would seem that a careful examination of the actual conditions on the ground in Gaza would cast serious doubt on the proposition that Israel remains the occupying power in Gaza even under the expansive approach, by reason of Israel's limited potential to exercise effective control over the area: retaking actual control over Gaza would require Israel to re-seize the major population centers – a task which might prove lengthy in duration and extremely costly in terms of human lives. This would seem to fall short of the requirement specified in the US Military Manual that the invader would be able, 'within a reasonable time', to 'send detachments of troops to make its authority felt within the occupied district'.<sup>54</sup> In fact, the ongoing failure of Israel to pacify the situation in Gaza, and its more than a decade-long policy of not sending troops into heavily populated areas in Gaza, is indicative of Israel's lack of effective control over Gaza, or at least of a very limited degree of such control.

So, although it is undeniable that Israel retains some powerful points of leverage over the lives of Palestinians in Gaza, it would seem difficult to maintain that such leverage enables Israel to effectively govern Gaza, i.e., to effectively control day-to-day life in the area. Furthermore, following the opening of the Rafah crossing between Gaza and Egypt (accompanied by a loose monitoring arrangement designed to alleviate some of Israel's security and trade-related concerns),<sup>55</sup> Israel lost its ultimate control over movement to and from Gaza. As a result, its power to influence events in Gaza through 'siege policies' has been significantly reduced.<sup>56</sup>

54. PM 27-10, *supra* n. 25, s. 356.

55. See Agreed Principles for Rafah Crossing (Israel/PA), 15 November 2005 <[www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm](http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm)>.

56. Cf., International Humanitarian Law Research Initiative, Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law (2004), <[www.ihlresearch.org/opt/feature.php?a=55](http://www.ihlresearch.org/opt/feature.php?a=55)> ('To successfully bring the occupation of the Gaza Strip to an end, one may argue that Israel will need at a minimum to withdraw the entirety of its troops and installations from the Gaza Strip, in

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At the same time, it should be noted that the PA employs tens of thousands of government officials and security personnel, who assume the daily functions of government in Gaza. While the PA's actual exercise of control might be unsatisfactory or even inefficient, it still is arguably in a much better position than Israel to exercise such authority, i.e., its potential for effective control is considerably greater. Hence, it is perhaps more reasonable to view the Gaza Strip even under the expansive approach as an area over which the preponderance of authority now rests with the PA.<sup>57</sup>

## 5. CONCLUSION

The Israeli disengagement from Gaza has led, in my view, to the transfer of effective control over the entire Gaza Strip from Israel to the PA. While it is hard to ascertain at which precise point in time the control exercised by the PA became more effective than that exercised by Israel, actually or potentially, I would argue that this moment has arrived, and that the preponderance of authority over Gaza is now invested with the PA. This conclusion enjoys support from a policy perspective: simply put, Israel is in no position to execute the obligations arising under the laws of occupation, to maintain law and order in Gaza and to provide for the basic services in the area. At the same time, the PA enjoys a certain international personality and may be required to uphold basic international standards *vis-à-vis* the local population.

Still, this does not mean that Israel is released from all of its international obligations *vis-à-vis* Gaza: IDF operations in and around Gaza are still subject to the laws of armed conflict. Furthermore, other measures applied by Israel in order to pressure the PA are subject to the general laws of state obligations and, arguably, to human rights law (which might have certain extra-territorial application).<sup>58</sup>

It is interesting to note, however, that Israel has refrained to date from actively seeking international support for the legal position that its occupation of Gaza has ended. To my mind, this is not necessarily reflective of the weakness of the Israeli legal position: since the position of third states might be influenced as much by political consideration as by legal ones, active solicitation of support for Israel's position might have backfired, leading to undesirable results from an Israeli perspective. Hence, it may be in Israel's best interest to leave, at this time, the debate over the status of Gaza to the lawyers and not the politicians.

particular from the "Philadelphi Road", transferring full and sovereign control of the border of the Gaza Strip with Egypt to the Palestinian Authority').

57. It may be noted, again, that some notable writers have argued that even under the Oslo Accords the preponderance of effective governmental authority over 'Area A' (areas over which almost all functions of government had been transferred to the PA) was vested with the PA. See, e.g., Benvenisti, *supra* n. 11, p. 308; Watson, *supra* n. 11, p. 176.

58. See, e.g., O. Ben-Naftali and Y. Shany, 'Living in denial: the application of human rights in the Occupied Territories', 37 *Israel LR* (2003-2004) pp. 17 at 64-65.