

NOTE

Otherwise Occupied: The Legal Status of the Gaza Strip 50 Years after the Six-Day War

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Fifty years after Israel's occupation of the Palestinian territories began, and a dozen years after its disengagement from Gaza, the legal status of the Gaza Strip has been regarded as settled. Although no single conclusion has achieved consensus, two distinct camps have formed and dug in their heels over whether control of Gaza's periphery—its airspace, waters, and borders—can amount to an occupation. This Note seeks to turn the conventional wisdom of these two camps on its head by arguing that while control of Gaza's periphery cannot amount to an occupation, the Israeli military's ability to exercise its authority in the Gaza Strip within a reasonable time can. By taking a dynamic approach to assessing the legal status of Gaza, this Note reveals a trend whereby the Israeli military was able to exercise its authority in the Gaza Strip more rapidly with each armed conflict after the disengagement. It concludes that although Israel no longer occupied the territory as of its disengagement in 2005, it re-occupied nearly all of Gaza by Operation Protective Edge in 2014. As a consequence, this Note determines that the armed conflict between Israel and Hamas is of an international character and persists to this day. The legal and policy implications for Israel, Palestine, and the international community are profound; the most striking is that the Prosecutor of the International Criminal Court would have at her disposal certain war crimes that are only available in international armed conflict, which renders it more likely that she will initiate an investigation into the situation in Palestine.

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I. INTRODUCTION

On December 18, 2003, Israeli Prime Minister Ariel Sharon addressed the Fourth Herzliya Conference, the country's premier forum for presenting national security and foreign policy strategy. Sharon, renowned as one of Israel's greatest military tacticians, was about to reveal a bombshell. "If in a few months the Palestinians still continue to disregard their part in implementing the Roadmap [for Peace]"—Sharon paused—"then Israel will initiate the unilateral security step of disengagement from the Palestinians."¹

Several months later, on April 14, 2004, the Prime Minister elaborated upon the disengagement plan in a letter to President Bush, and received unequivocal support in response.² Sharon proceeded to present an outline of the plan to his party, the Likud. The plan read:

Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip...[such that] there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of [the] Gaza Strip.³

Notably, the document concluded that as a result of the unilateral withdrawal, "there will be no basis for claiming that the Gaza Strip is occupied territory."⁴ However, Sharon was unable to convince his party to support the initiative, and the Likud soon voted it down.⁵ Undeterred, Prime Minister Sharon convinced the Israeli cabinet to approve a revised version of the plan. The new disengagement plan, amended to require a separate vote to dismantle each of the 25 settlements in Gaza, omitted the reference to terminating Israel's occupation in favor of more cryptic rhetoric: "[t]he completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip."⁶

¹ Ariel Sharon, Prime Minister of Israel, Address at the Fourth Herzliya Conference (Dec. 18, 2003).

² Letter from Ariel Sharon, Prime Minister of Israel, to George Bush, President of the United States (Apr. 14, 2004); Letter from George Bush, President of the United States, to Ariel Sharon, Prime Minister of Israel (Apr. 14, 2004), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/exchange%20of%20letters%20sharon-bush%2014-apr-2004.aspx>.

³ Israel Ministry of Foreign Affairs, THE DISENGAGEMENT PLAN—GENERAL OUTLINE (2004), <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm>.

⁴ *Id.*

⁵ Ron Dermer, *Why the Likud Voted No to Sharon's Disengagement Plan*, JERUSALEM ISSUE BRIEF (May 3, 2004), <http://www.jcpa.org/brief/brief3-23.htm>.

⁶ The Cabinet Resolution Regarding the Disengagement Plan, Office of the Prime Minister of Israel, June 6, 2004, Article 1(6).

On September 11, 2005, the Israeli cabinet adopted a resolution withdrawing all Israel Defense Forces (“IDF”) personnel from the final area of Gaza under its control, the Philadelphi Corridor along the Egyptian border.⁷ At 7:00 am the following day, after all civilian settlements were evacuated and the IDF commander of the Gaza Strip proclaimed an end to its administration in the territory, the last Israeli soldier left Gaza.⁸

This Note will begin by addressing whether, on the morning of September 12, 2005, Israel remained the occupying power of the Gaza Strip. It will then assess whether the legal status of the Gaza Strip has changed as a result of the volatile events the region has seen from the moment of disengagement until the present day. By taking a dynamic approach to assessing the legal status of Gaza, this Note will reveal a trend whereby the Israeli military was able to exercise its authority in the Gaza Strip more rapidly with each armed conflict after the disengagement. It concludes that although Israel no longer occupied the territory as of its disengagement in 2005, it re-occupied nearly all of Gaza by Operation Protective Edge in 2014. As a consequence, this Note argues that the armed conflict between Israel and Hamas after the disengagement is of an international character and persists to this day. This Note will close by addressing the major legal and policy implications of Israel’s renewed occupation and international armed conflict in Gaza.

II. WHY DOES IT MATTER?

To begin, it is imperative to explain why the legal status of the Gaza Strip has contemporary significance fifty years after the beginning of Israel’s occupation of the territory and a dozen years after Israel’s disengagement. The question of the legal status of Gaza has predominantly preoccupied scholars in the immediate aftermath of the disengagement⁹ and five years thereafter.¹⁰ The issue has since been regarded as settled, which is not to say that a single conclusion achieved consensus but that two distinct camps have formed and dug in their heels.

⁷ Israeli Cabinet Decision No. 4235, Sept. 11, 2005, <http://www.israel.org/mfa/pressroom/2005/pages/cabinet%20communique%2011-sep-2005.aspx>.

⁸ Press Release, IDF Spokesman, Exit of IDF Forces from the Gaza Strip Completed (Sept. 12, 2005).

⁹ Compare Iain Scobbie, *An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC & MIDDLE E. L. 14 (2005) (arguing that Gaza remains occupied) with Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L HUMANITARIAN L. 68 (2006) (arguing that Gaza is no longer occupied).

¹⁰ Compare Shane Darcy and John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SEC. L. 242 (2010) (arguing that Gaza remains occupied) with Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AMER. UNIV. INT’L L. REV. (2010) (arguing that Gaza is no longer occupied).

The first camp believes that—despite the disengagement—Israel has maintained a *sui generis* occupation of the Gaza Strip as a result of its “functional” control over the territory’s periphery—its airspace, waters, and borders.¹¹ Meanwhile, the second camp remains unconvinced and regards the concept of a *sui generis* occupation based on functional control of Gaza’s periphery rather than actual control of its territory by ground forces as having no precedent and no basis in *lex lata* (“the law as it is”).¹² This Note seeks to turn the conventional wisdom of these two camps on its head by arguing that while control of Gaza’s periphery does not amount to occupation, much of the Gaza Strip has been re-occupied after the disengagement as a result of the persistent armed conflicts in the territory. This conclusion has profound implications for Israel, Palestine, and the international community engaging with the conflict in the region.

Most fundamentally, the legal status of Gaza is significant because if Israel is the occupying power of the territory, then it is subject to the rights and obligations applicable in instances of occupation under international humanitarian law (“IHL”) and international human rights law (“IHRL”). Although a full explication of these obligations is beyond the scope of this Note, suffice it to say that there are few—if any—facets of armed conflict more regulated than the occupation of territory.¹³ The most important obligation, regarded as the “mini-constitution” of occupation law,¹⁴ is embodied in Article 43 of the Hague Regulations. This article provides that the occupying power “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.”¹⁵ The dual obligation to ensure public order and safety while respecting the status quo prior to hostilities “permeate[s] any prescriptive measure or other acts taken by the occupant.”¹⁶ In addition, a State’s human rights obligations apply extraterritorially to areas under its effective control, including occupied territory.¹⁷ An occupying power could thus even be responsible

¹¹ See, e.g., Sari Bashi and Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza*, GISHA (Jan. 2007), <http://gisha.org/publication/1649>.

¹² See, e.g., Avi Bell and Dov Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISRAEL AFF. 268 (2010).

¹³ See, e.g., Hague Regulations (IV) Respecting the Laws and Customs of War on Land arts. 43–56, Oct. 18, 1907, 36 Stat. 2295 [hereinafter Hague Regulations (1907)]; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War arts. 27–135, Aug. 12, 1949. [hereinafter G.C. (IV)].

¹⁴ See Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 9 (2012).

¹⁵ See Hague Regulations (1907), *supra* note 13, at art. 43.

¹⁶ See Benvenisti, *supra* note 14, at 69 (2012).

¹⁷ See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶ 106, (July 9); *Al Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (20 bvs11), ¶¶ 138–140.

for failing to protect the local population from human rights abuses committed by others, such as non-state armed groups.¹⁸

Nevertheless, the Israeli government maintains that Israel was no longer the occupying power in the Gaza Strip as of its disengagement in 2005.¹⁹ The Israeli Supreme Court has likewise refused to regard the Gaza Strip as occupied²⁰ and instead recognized a set of residual humanitarian obligations that continue to apply with respect to persons living in the territory.²¹ Although Israeli authorities are unlikely to reconsider their assessment barring a significant change of circumstances, the issue may receive renewed scrutiny in light of recent events involving international bodies—such as the International Criminal Court (“ICC”)—which may come to a different conclusion.

On January 16, 2015, ICC Prosecutor Fatou Bensouda opened a preliminary examination into the situation in Palestine.²² Since then, the Office of the Prosecutor (“OTP”) has identified alleged crimes that have been committed by both Palestinian armed groups and the IDF within the jurisdiction of the ICC, including during the 2014 Gaza conflict.²³ It remains to be seen whether an investigation into these alleged crimes will be opened either by the Prosecutor *proprio motu* (“on her own impulse”) or upon a referral from Palestine as a State Party.²⁴

The legal status of the Gaza Strip will likely prove to be a key issue in whether the Prosecutor decides to initiate such an investigation. According to both the Rome Statute and OTP Policy, the Prosecutor will only pursue an investigation if she has a reasonable basis to believe that crimes were committed within the jurisdiction of the Court.²⁵ The list of possible

¹⁸ See *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 2005 I.C.J. 116, ¶¶ 178–180 (Dec. 19) [hereinafter *Armed Activities Case*] (“The Court, having concluded that Uganda was an occupying power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.”).

¹⁹ See Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict: Factual and Legal Aspects*, para. 45, n. 42 (2015) (“Since August 2005, Israel has not exercised effective control of the Gaza Strip, and for the past eight years Hamas has acted in the Gaza Strip as an embedded, de-facto authority, controlling most aspects of life in the Gaza Strip.”).

²⁰ See *Jaber Al-Bassiouni Ahmed v. Prime Minister*, HCJ 9132/07 (2008), para. 12 (Isr.).

²¹ *Id.* at paras. 12–15. See also Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel*, 42 *ISR. L. REV.* 101, 109–115 (2009).

²² See International Criminal Court, Press Release: The Prosecutor of the International Criminal Court, Fatou Bensouda, (Jan. 16, 2015).

²³ See Rome Statute of the International Criminal Court, art. 53, July 17, 1998, 2187 U.N.T.S. [hereinafter *Rome Statute*]; Office of the Prosecutor, Report on Preliminary Examination Activities, paras. 119–34 (Nov. 2016).

²⁴ See *Rome Statute*, *supra* note 23, at art. 13 (1998).

²⁵ See *id.* at art. 53. See also Office of the Prosecutor, Policy Paper on Preliminary Examinations (Nov. 2013), paras. 36–41.

crimes that are applicable to the 2014 Gaza conflict depends, however, on whether it is characterized as an international or non-international armed conflict. Since the Rome Statute defines war crimes according to the armed conflict in which they occur, it “oblige[s] the ICC to classify the nature of the armed conflict, before formulating a specific charge against the suspect.”²⁶ As will be discussed later in this Note,²⁷ determining whether the Gaza Strip is occupied is critical to establishing the character of the armed conflict.

Notably, three crimes alleged to have been committed during the Gaza conflict may only be perpetrated during international armed conflict (“IAC”)—attacking civilian objects,²⁸ disproportionate attacks,²⁹ and using protected persons as shields.³⁰ Taken together, these crimes would encompass a significant portion of the abuses alleged to have occurred during the conflict and are thus critical to any criminal investigation. Both Israel and Hamas have been condemned for attacking civilian objects,³¹ additionally, the IDF has faced allegations of disproportionate attacks,³² while Hamas stands accused of using civilians as human shields.³³ As such, the Prosecutor would have these crimes at her disposal if the Gaza Strip is occupied and subject to IAC law.

In its 2014 report providing the reasoning for not proceeding with an investigation into alleged crimes committed on the *Mavi Marmara* along Gaza’s coast in 2010, the OTP took the position that there is a “reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement.”³⁴ It thus

²⁶ See Paola Gaeta, *War Crimes and Other International ‘Core’ Crimes*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 747 (Paola Gaeta and Andre Clapham, eds., 2015). See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶ 1175 (Mar. 7, 2014).

²⁷ See *infra* Section V(b).

²⁸ See Rome Statute, *supra* note 23, at art. 8(2)(b)(ii).

²⁹ See *id.* at art. 8(2)(b)(iv).

³⁰ See *id.* at art. 8(2)(b)(xxiii).

³¹ See, e.g., *Amnesty: Israeli Strikes on Gaza Buildings ‘War Crimes,’* BBC NEWS (Dec. 9, 2014); Yaakov Lappin, *LAF Destroys Homes of All Hamas Commanders, Kills Senior Members*, THE JERUSALEM POST (July 9, 2014); Ilana Curiel, Matan Tzuri, *Rocket Hits Kindergarten Playground, No One Hurt*, YNET NEWS (Aug. 26, 2014); Reuters, *Hamas Militants to Airlines: We’re Targeting Ben-Gurion Airport* (July 11, 2014); AMNESTY INTERNATIONAL, UNLAWFUL AND DEADLY: ROCKET AND MORTAR ATTACKS BY PALESTINIAN ARMED GROUPS DURING THE 2014 GAZA/ISRAEL CONFLICT 17 n.29 (2015), <https://www.amnesty.org/download/Documents/MDE2111782015ENGLISH.PDF>.

³² See, e.g., Harriet Sherwood, Peter Beaumont, and Ian Black, *More than 20 Members of One Family Killed in Gaza Strike*, THE GUARDIAN (July 21, 2014), <https://www.theguardian.com/world/2014/jul/21/gaza-hospital-shelling-air-strike-israel-idf>.

³³ See, e.g., Anne Barnard and Jodi Rudoren, *Israel Says That Hamas Uses Civilian Shields, Reviving Debate*, N.Y. TIMES (July 23, 2014), <https://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html>.

³⁴ See ICC Office of the Prosecutor, Article 53(1) Report: Situation on Registered Vessels of

grounded its analysis on the presumption that the law of IAC governed the conflict in Gaza.³⁵ Although it has not yet made the same determination with regard to the situation in Palestine, the OTP has recognized that “[t]he classification of the 2014 Gaza conflict has an impact on the Office’s analysis of particular crimes allegedly committed during the...conflict.”³⁶ It also cited to the 2014 report in its 2016 publication on the status of its preliminary examination into alleged crimes in Palestine.³⁷ This suggests that the OTP could be considering crimes only available in IAC—including attacking civilian objects, disproportionate attacks, and using protected persons as shields—to be applicable in a forthcoming investigation in Palestine. Whether the ICC Chambers will agree is another matter. As such, the legal status of the Gaza Strip ought to interest all international actors to be affected by the Prosecutor’s decision—Israel and Palestine most of all.

III. HISTORICAL BACKGROUND

Prior to 1948, the Ottoman Empire was sovereign over the territory now called the Gaza Strip.³⁸ Great Britain came to administer the territory following World War I under the terms of the British Mandate and maintained control of Gaza until the United Nations Partition Plan for Palestine³⁹ enabled the State of Israel to emerge.⁴⁰ Following the Israeli-Arab War of 1948, Israel signed an armistice agreement with Egypt that established truce lines, which form the borders of the Gaza Strip to the present day. Between 1949 and 1967, Egypt occupied the Gaza Strip without claiming sovereignty over the territory.⁴¹ During the Six-Day War of 1967, Israel took control of the Gaza Strip and other territories, including the West Bank, Sinai Peninsula, and Golan Heights, and promulgated military orders recognizing their occupation.⁴² Upon

Comoros, Greece and Cambodia, para. 29 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

³⁵ *Id.*

³⁶ See ICC Office of the Prosecutor, Report on Preliminary Examination Activities, para. 70 (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

³⁷ See ICC Office of the Prosecutor, Report on Preliminary Examination Activities, para. 112, n. 16 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

³⁸ See generally Bob Labes, *The Law of Belligerent Occupation and the Legal Status of the Gaza Strip*, 9 MICH. Y.B. INT’L LEGAL STUD. 383 (1988).

³⁹ G.C. Res. 181(II), UN Doc. A/Res/181(II) (Nov. 29 1947).

⁴⁰ Labes, *supra* note 38.

⁴¹ Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 204 (2012).

⁴² Security Provisions Order (West Bank), 1967, art. 35, *in* 1 PROCLAMATIONS, ORDERS AND APPOINTMENTS OF WEST BANK COMMAND 5.

reflection after the war, Israel amended these orders⁴³ and “adopted the position that the status of the West Bank and Gaza was unclear.”⁴⁴

This about-face was justified by the “missing reversioner” theory,⁴⁵ which holds that the Geneva Conventions are not applicable to Israeli control of the West Bank and Gaza Strip because there is no sovereign High Contracting Party whose territory Israel occupied in 1967.⁴⁶ After all, Egypt never presumed to gain sovereign title over the Gaza Strip and there was no State of Palestine at the time. Israel nonetheless agreed to comply with the “humanitarian provisions” of the Geneva Conventions as a policy matter.⁴⁷ However, the International Court of Justice (“ICJ”),⁴⁸ the United Nations (“UN”),⁴⁹ the International Committee of the Red Cross (“ICRC”),⁵⁰ and even the Israeli Supreme Court⁵¹ have refuted the missing reversioner theory.

The other historical period during which Gaza’s status could be in question prior to Israel’s disengagement was upon the signing of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as “Oslo II”) in 1995. Oslo II is, in effect, a transitional power-sharing agreement that explicitly fixes the status of Gaza while implementing interim steps toward Palestinian self-government.⁵² Israel maintains significant powers and responsibilities according to this arrangement, including shared police powers on the ground,⁵³ security against external threats,⁵⁴ control over the Rafah border crossing with Egypt,⁵⁵ control over Gaza’s airspace,⁵⁶ control over Gaza’s territorial

⁴³ Security Provisions Order (West Bank) (Amendment No. 9) (Order No. 144), Oct. 22, 1967, in 8 PROCLAMATIONS, ORDERS AND APPOINTMENTS OF WEST BANK COMMAND 303.

⁴⁴ David Kretzmer, *The law of belligerent occupation in the Supreme Court of Israel*, 94 INT’L R. OF THE RED CROSS 207, 210 (2012) (citing Meir Shamgar, *The Observance of International Law in the Administered Territories*, ISR. Y.B. ON HUM. RTS., Vol. 1, 1971, 262–277).

⁴⁵ See generally Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

⁴⁶ G.C. (I–IV), *supra* note 13, at art. 2 (“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”) (emphasis added).

⁴⁷ Kretzmer, *supra* note 44.

⁴⁸ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (Rep. No. missing), ¶¶ 90–95 (9 July 2004).

⁴⁹ See, e.g., G.A. Res. 3092A, A/9030 (Dec. 7, 1973); S.C. Res. 465, S/INF/36 (Mar. 1, 1980).

⁵⁰ See Resolution III (“Application of the Fourth Geneva Convention of 12 August 1949”) of the XXIVth International Conference of the Red Cross (1981), in 224 INT’L REV. OF THE RED CROSS 320, 321.

⁵¹ See *Al Affo v. Commander of the IDF Forces in the West Bank*, HCJ 785/87 (1988) (Isr.).

⁵² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, art. XXXI(5)–(8), Sept. 28, 1995 [hereinafter Oslo II].

⁵³ *Id.* at art. XII, XV; Oslo II, Annex I art. VI, XI(3), Sept. 28, 1995.

⁵⁴ Oslo II, *supra* note 53, at art. XII.

⁵⁵ Oslo II, Annex I art. VIII(2)(a)–(b), Sept. 28, 1995.

⁵⁶ *Id.* at art. XIII(4).

waters,⁵⁷ control over Palestinian foreign affairs,⁵⁸ and any residual powers not delegated to the Palestinian Authority.⁵⁹

Some scholars have since argued that by signing Oslo II, Israel lost effective control over Gaza and therefore ceased to be its occupying power.⁶⁰ Even setting aside the agreement's expression to the contrary,⁶¹ it is pertinent to note that the protection of the Geneva Conventions continues to apply "in any case or in any manner whatsoever" upon "any agreement concluded between the authorities of the occupied territories and the Occupying Power."⁶² This provision of the Geneva Conventions, combined with sustained refutation of such arguments by the international community⁶³ and the Israeli Supreme Court,⁶⁴ precludes any suggestion that Gaza lost its status as an occupied territory prior to 2005.

IV. IS GAZA OCCUPIED?

A. The Law of Occupation

The international law of occupation began as customs of war,⁶⁵ partially codified by the United States armed forces during the Civil War in the 1863 Lieber Code.⁶⁶ Portions of the Lieber Code were then incorporated into a draft International Declaration Concerning the Laws and Customs of War in 1874 ("Brussels Declaration"),⁶⁷ which served as the precursor to the Hague Regulations of 1899 and 1907 that codified the customary law of occupation at the time.⁶⁸ Following World War II, the

⁵⁷ *Id.* at art. XIV.

⁵⁸ Oslo II, *supra* note 53, at art. IX(5).

⁵⁹ *Id.* at art. I(1), XVII(4).

⁶⁰ See, e.g., Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297, 312 (1994); Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AMER. UNIV. INT'L L. REV. (2010).

⁶¹ Oslo II, *supra* note 53, at art. XXXI(6).

⁶² G.C. (IV), *supra* note 13, at art. 47.

⁶³ See, e.g., Conference of High Contracting Parties to the Fourth Geneva Convention: Statement (July 15, 1999) (103 participants); Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration (Dec. 5, 2001) (115 participants); G. A. Res. A/Res/ES-10/7 (Oct. 20, 2000); G.A. Res. 66/225, A/RES/66/225 (Mar. 29, 2012); S.C. Res. 1322, S/RES/1322 (Oct. 7, 2000); S.C. Res. 2334, S/RES/2334 (Dec. 23, 2016).

⁶⁴ *Ajuri v IDF Commander*, HCJ 7015/02 (2002), opinion of President Barak, para. 22 (Isr.).

⁶⁵ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 4 (2009).

⁶⁶ Instructions for the Government of Armies of the United States in the Field ("Lieber Code"), General Orders No. 100, Apr. 24, 1863.

⁶⁷ Brussels, Project of an International Declaration Concerning the Laws and Customs of War, 1874.

⁶⁸ Hague Convention (II) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Regulations (1899)]; Hague Regulations (1907), *supra* note 14.

Hague Regulations were supplemented by the Geneva Conventions,⁶⁹ which clarify provisions in the Hague Regulations and provide enhanced protection for persons in the hands of an occupying power.

These treaties, along with customary international law, determine when occupation begins and when it ends. Specifically, Article 42 of the Hague Regulations of 1907 establishes that “[t]erritory 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.”⁷⁰

Article 43 clarifies that whether an army has placed territory under its authority is a question of fact,⁷¹ although legal considerations influence the relevance of particular facts. For instance, the consent of a sovereign to the presence of foreign troops on its territory negates the hostility requirement in Article 42 such that an occupation will not arise when a foreign military operates in a State’s territory with its consent.⁷² Although the Geneva Conventions do not define “occupation,”⁷³ the ICRC’s official commentary suggests that the treaty embodies a slightly broader protection than in the Hague Regulations, which encapsulates both “the invasion phase and the inauguration of a stable regime of occupation.”⁷⁴

International law has converged on the doctrine of “effective control” as the touchstone for determining whether an army has placed territory under its authority such that an occupation is established. The centrality of effective control is confirmed by the case law of international tribunals,⁷⁵ a wide variety of military manuals,⁷⁶ the consensus of scholars,⁷⁷ and

⁶⁹ G.C. (IV), *supra* note 14, at art. 154.

⁷⁰ Hague Regulations (1907), *supra* note 14, at art. 42.

⁷¹ *Id.* at art. 43 (“The authority of the legitimate power having *in fact* passed into the hands of the occupant...”) (emphasis added).

⁷² Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISR. L. REV.* 68, 79–80 (2008).

⁷³ G.C. (IV), art. 2, 6.

⁷⁴ See Uhler et al., COMMENTARY: IV GENEVA CONVENTION, RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 60 (Jean S. Pictet ed., Int’l Committee of the Red Cross 1958).

⁷⁵ *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-A (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) and Democratic Republic of the Congo v. Uganda in the International Court of Justice).

⁷⁶ Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 *INT’L REV. OF THE RED CROSS* 133, 140 (2012) (citing the military field manuals of the US, UK, Italy, New Zealand, Canada, and Germany).

⁷⁷ See, e.g., T.J. Lawrence and Percy Winfield, *PRINCIPLES OF INTERNATIONAL LAW* 412 (1927); DORIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863–1914: A HISTORICAL SURVEY* (1949); Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 43–52 (2012); Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 *INT’L REV. OF THE RED CROSS* 133, 139 (2012); Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 43 (2009).

holdings of the Israeli Supreme Court.⁷⁸ The doctrine has roots in the negotiations regarding the Brussels Declaration of 1874, where it was argued that, “just as blockades are not recognized unless they are effective, the existence of occupations, too, must be decided on the basis of effective control.”⁷⁹ The difficulty, however, is in defining with precision the level of control required in order for the former sovereign to have been displaced such that the territory comes under occupation.⁸⁰

According to Yoram Dinstein, Article 42 of the Hague Regulations inaugurates “two cumulative conditions” for the existence of effective control: actual control (“has been established”) and capacity to control (“can be exercised”).⁸¹ There is a heated debate in the scholarly literature about whether the criteria Dinstein identifies are cumulative or disjunctive;⁸² in other words, whether simply being in a position to effectively control a territory is sufficient to establish an occupation. Despite the enigmatic state of the law on this question, it is of critical importance to determining whether Israel still occupied Gaza after its disengagement.⁸³

The tribunals are also divided on this issue. The ICJ has held that for an army to effectively control a territory it must “substitute [its] own authority for that of the [former sovereign],”⁸⁴ appearing to find the two criteria cumulative.⁸⁵ On the other hand, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) is satisfied that an occupation exists when the occupying power is merely “in a position to

⁷⁸ See Jaber Al-Bassiouni Ahmed v Prime Minister, *supra* note 20, para. 12.

⁷⁹ Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 INT’L REV. OF THE RED CROSS 133, n.20 (2012). See also T.J. LAWRENCE AND PERCY WINFIELD, PRINCIPLES OF INTERNATIONAL LAW 412 (1927).

⁸⁰ Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 43 (2009) (“[D]efining the exact amount of control deemed objectively ‘effective’ is an imponderable problem.”).

⁸¹ *Id.* See Hague Regulations (1907), *supra* note 13, at art. 42 (“The occupation extends only to the territory where such authority *has been established and can be exercised.*”) (emphasis added).

⁸² Compare Hans-Peter Gasser and Knut Dormann, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (2013) (“[T]he capacity to exercise its power in the territory suffices to engage the responsibility of the occupying power.”), with Avi Bell and Dov Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISR. AFF. 268 (2010) (“If the law of occupation transformed potential effective control into occupation, every case of military superiority would make territory occupied...In fact, it is well recognized that the law of occupation requires effective control, rather than the potential for control.”).

⁸³ See Susan Power, *War, Invasion, Occupation? A Problem of Status on the Gaza Strip*, 12 TRINITY C. L. REV. 25, 30 (2009) (“Critically, after the ‘disengagement’ from Gaza, Israel under the traditional ‘actual control’ test does not amount to a belligerent occupant. However, under the second ‘potential control’ test Israel does.”).

⁸⁴ Armed Activities Case, *supra* note 18, ¶ 173.

⁸⁵ *Id.* (“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.”) (emphasis added).

substitute its own authority for that of the occupied authorities,”⁸⁶ so long as troops can be sent “within a reasonable time to make the authority of the occupying power felt.”⁸⁷ The ICC has cited this ICTY jurisprudence with approval.⁸⁸ The U.S. Military Tribunal’s ruling in the Hostages Trial at Nuremberg is in line with the ICTY in requiring only capacity to control by the occupying power so long as the local authority’s control was eliminated.⁸⁹ Therefore, Germany occupied Greece and Yugoslavia despite losing temporary control to the partisans since “the Germans could at any time they desired assume physical control of any part of the country.”⁹⁰

Eyal Benvenisti argues that the distinction between actual and potential control was “not envisioned by the drafters at the time,” because the advantages of being an occupier rendered it “irrational for an invading army which was capable of exercising effective control to refrain from doing so.”⁹¹ However, as those advantages came to be seen as pernicious by the international community and became inextricably linked to extensive obligations to the local population, “hostile armies were less willing to translate their physical control over the territory to controlling the lives of the occupied population, let alone to recognize their role as occupants.”⁹² Therefore, Benvenisti seeks to reconcile these positions by distinguishing between the territory and the population, requiring actual control of the former but only potential control of the latter.⁹³

This resolution is persuasive given its capture of both Article 42’s clear statement that “territory” must be “actually placed under the authority of the hostile army”⁹⁴ and the case law’s reluctance to nullify occupation due to local resistance.⁹⁵ It is also in line with the *travaux préparatoires* of the Hague Regulations, which reveal that the occupying army must have

⁸⁶ Prosecutor v. M. Naletilic and V. Martinovic, Case No. IT-98-34-T, Judgment, Int’l Crim. Trib. for the Former Yugoslavia, ¶ 217 (Mar. 31, 2003).

⁸⁷ *Id.*

⁸⁸ Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶ 1180 (Mar. 7, 2014).

⁸⁹ *United States of America v. Wilhelm List, Case No. 7 (Judgment)*, in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1243 (Feb. 19, 1948).

⁹⁰ *Id.*

⁹¹ Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION 46 (2012).

⁹² *Id.*

⁹³ *Id.* (“The better interpretation of the test for occupation therefore stipulates that occupation begins when the foreign army is in actual control *over enemy territory*, and is *in a position* to establish, if it so wishes, an authority of its own over the population. It is irrelevant whether the army *actually* does so.”) (emphasis in original).

⁹⁴ Hague Regulations (1907), *supra* note 13, at art. 42.

⁹⁵ See Prosecutor v. M. Naletilic and V. Martinovic, Case No. IT-98-34-T, Judgment, ¶ 217 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 31, 2003) (“sporadic local resistance, even successful, does not affect the reality of occupation.”) (emphasis added); *United States of America v. Wilhelm List, Case No. 7 (Judgment)*, in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1243 (Feb. 19, 1948).

“some presence in the occupied territory” sufficient to incapacitate the former sovereign, but “not necessarily [to] have...control [of] every single part of [it].”⁹⁶ Moreover, it is consistent with the broader protection for the occupied population bestowed by the Geneva Conventions.⁹⁷

If an occupation begins upon effective control of territory, scholars agree that this same test, in reverse, is used to determine whether occupation has ended.⁹⁸ This is a faithful interpretation of Article 42 of the Hague Regulations, which does not differentiate between beginning and end of occupation. Although most scholars concur that ground presence by a military must initially exist to establish an occupation,⁹⁹ some consider that once a military has established effective control it could sustain it with limited, perhaps even negligible, presence.¹⁰⁰ It is generally accepted that an army may maintain effective control of a territory so long as its troops can establish authority in the territory within a reasonable time.¹⁰¹

Therefore, IHL treaty law, international jurisprudence, and the scholarly literature give rise to a three-part test for the effective control necessary to establish an occupation: (1) the presence of foreign forces without the consent of the local authority; (2) actual control over the territory by displacement of the local authority from governance; and (3) potential control over the population by having the ability to make its

⁹⁶ Sam Naser, *Applicability of the Laws of Occupation to the 2008 Conflict in Gaza*, (May 2011) (Thesis at Arizona State University) (analyzing the negotiations for the Brussels Declaration of 1874, the Oxford Manual of 1880, and the Hague Peace Conference of 1899 in depth).

⁹⁷ See Uhler et al., *supra* note 74, at 60.

⁹⁸ See, e.g., Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 45 (2009); Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 56 (2012); Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 *INT'L REV. OF THE RED CROSS* 133, 156 (2012); Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INT'L L. & CLASSIFICATION OF CONFLICTS* 24 (Elizabeth Wilmshurst ed., 2012); Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 *Y.B. OF INT'L HUMANITARIAN L.* 68, 13–14 (2006).

⁹⁹ See, e.g., Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 44 (2009); Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 *INT'L REV. OF THE RED CROSS* 133 (2012); Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 *INT'L REV. OF THE RED CROSS* (2009).

¹⁰⁰ G. von Glahn, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 28–29 (1957).

¹⁰¹ See *Prosecutor v. Naletilic and Martinovic*, *supra* note 86. See also, e.g., Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 279 (2009); Shane Darcy and John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 *J. CONFLICT & SEC. L.* 242 (2010); Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 51 (2012); Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 *Y.B. ISLAMIC & MIDDLE E. L.* 14 (2005); Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 *INT'L L. REV. OF THE RED CROSS* 133, 144 (2012).

authority felt within a reasonable time.¹⁰² As a corollary, for an occupation to end, at least one of these three prongs must no longer apply.¹⁰³

B. Israel No Longer Occupied Gaza Upon the Disengagement

As of 7:00 am on September 12, 2005, the State of Israel was no longer the occupying power of the Gaza Strip. One may jump to conclusions and assert that since Israeli troops had withdrawn from Gaza, the first element of the three-part test above does not apply and thus Israel no longer enjoys effective control of the territory.

The simplicity of this argument is deceiving, however, for it overlooks a significant hurdle: is there only a single occupation of Palestine or are there multiple? After all, this cursory analysis is only sound if one views the occupation of the Gaza Strip as separate and distinct from the status of the rest of the Palestinian territory. Yet this conclusion falls apart as this assumption is laid bare. There were not multiple occupations of the Gaza Strip, the West Bank, the Sinai Peninsula, and the Golan Heights. All of these territories were occupied in a single occupation resulting from a single armed conflict—the Six-Day War of 1967.

This has been confirmed by the Israeli Supreme Court, which has held that the transfer of certain West Bank residents to the Gaza Strip does not violate the Fourth Geneva Convention¹⁰⁴ in part because the West Bank and Gaza are “one territory” held under occupation by the State of Israel.¹⁰⁵ Moreover, Israel and Palestine,¹⁰⁶ as well as the international community,¹⁰⁷ have recognized the West Bank and Gaza as a “single territorial unit” since the Oslo Accords.¹⁰⁸ If Palestine is a single territorial unit, for Israel to occupy the territory of Palestine the presence of Israeli

¹⁰² See Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 INT’L REV. OF THE RED CROSS 133, 142 (2012); INT’L COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: REPORT 12 (Dec. 8–10, 2015).

¹⁰³ See, e.g., Lassa Oppenheim, INTERNATIONAL LAW: A TREATISE. VOL. II: DISPUTES, WAR AND NEUTRALITY 453 (1952); Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 INT’L REV. OF THE RED CROSS 133, 156 (2012); International Committee of the Red Cross, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: REPORT 12 (Dec. 8–10, 2015).

¹⁰⁴ See G.C. (IV), *supra* note 13, at arts. 49, 78.

¹⁰⁵ See *Kipah Mahmad Ahmed Ajuri et al. v. IDF Commander in the West Bank*, HCJ 7015/02 (2002), para. 22 (Isr.).

¹⁰⁶ See, e.g., Shane Darcy and John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SEC. L. 241 (2010).

¹⁰⁷ See, e.g., G.A. Res. 67/19, Status of Palestine in the United Nations (Dec. 4, 2012) (referring only to a single “Occupied Palestinian Territory” rather than Territories, or otherwise differentiating between the occupations of the West Bank and Gaza); S.C. Res. 2334 (Dec. 23, 2016) (likewise referring to “the occupied Palestinian Territory”).

¹⁰⁸ Oslo II, 28 September 1995, art. XI(1).

troops could be satisfied by their deployment anywhere in its territory. There is no need for Israeli troops to be physically present in Gaza specifically, so long as they are present in the West Bank and retain the ability to deploy to Gaza within a reasonable time to make their authority felt. The first element of effective control thus remains satisfied.

However, there can be no support for the claim that, upon withdrawal, Israel continued to exercise actual control in the Gaza Strip by displacing the local authority from governance and having the capacity to make its authority felt within a reasonable time. To the contrary, facts on the ground convincingly suggest that Israel lacked effective control over the Gaza Strip immediately following the disengagement. The clearest example is that the Palestinian Authority held elections universally regarded as free and fair thereafter, filling the void of authority that Israel left as the former occupying power. The Gazan people ultimately chose to elect Israel's primary adversary, Hamas, to power.¹⁰⁹ Given Israel's sharp response to this result,¹¹⁰ it could be surmised that if Israel were in effective control of Gaza it would not have allowed Hamas to take power following the election. Having left the territory months earlier, however, it had no choice in the matter. Additionally, it is notable that Israel remained unable to secure custody of Gilad Shalit, the Israeli soldier captured by Hamas in June of 2006, despite launching multiple ground operations into the strip in the five months following his capture.

Nevertheless, a number of prominent scholars,¹¹¹ UN Special Rapporteurs John Dugard and Richard Falk,¹¹² and the Israeli human rights organization Gisha¹¹³ maintain that Israel remained the occupying power over the Gaza Strip following its 2005 disengagement. In so arguing, many of these commentators evaluate the legal status of the Gaza Strip based on Israeli actions that occurred much later than September 12, 2005—the day the last Israeli soldier left the Gaza Strip. For instance, Falk

¹⁰⁹ *Likud: Hamas Victory a Direct Result of Disengagement Plan*, HAARETZ, Jan 26, 2006.

¹¹⁰ Israel Ministry of Foreign Affairs, Cabinet Communique (Feb. 19, 2006) (“It is clear that in light of the Hamas majority in the PLC and the instructions to form a new government that were given to the head of Hamas, the PA is—in practice—becoming a terrorist authority. The State of Israel will not agree to this.”).

¹¹¹ See, e.g., Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 277–80 (2009); Shane Darcy and John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SEC. L. 242–3 (2010); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. INT'L HUMANITARIAN L. 366 (2005); Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC & MIDDLE E. L. 14 (2005).

¹¹² John Dugard (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Rep. on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008); Richard Falk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Rep. on Human Rights Situation in Palestine and Other Occupied Arab Territories*, U.N. Doc. A/HRC/10/20 (Feb. 11, 2009).

¹¹³ Gisha, *supra* note 11.

claims that Israel has “completely controlled all entry and exit routes by land and sea” since 2005,¹¹⁴ but as I shall argue below, this was not the case until the summer of the following year. The implicit assumption embedded in these analyses is that there has either existed a continuous Israeli occupation in the Gaza Strip since the disengagement or none at all. This binary is fundamentally flawed; there is no reason that the legal status of Gaza could not have been dynamic as circumstances on the ground evolved. As a result, it is necessary to carefully inspect these circumstances at each relevant point in time following the disengagement to evaluate whether Israel was occupying Gaza.

There exists scant evidence of Israeli effective control over the Gaza Strip immediately after its 2005 disengagement. For the following nine months, Israel’s only control over the Gaza Strip was by way of its airspace and territorial waters, as well as a minor buffer zone near the Israeli border. On September 12, 2005, Israel no longer had a military presence anywhere in the Gaza Strip. It retained control of Gaza’s air and sea subject to the terms of Oslo II,¹¹⁵ but there was no restriction on persons and goods entering the territory by sea until 2007¹¹⁶ and no blockade imposed until 2009.¹¹⁷ Since the second *Intifada* began in 2000, the IDF also exerted control over a small buffer zone of 150-300 meters from its border with Gaza by written and verbal warnings, indirect fire, and use of force if necessary.¹¹⁸

Israel also had limited control of Gaza’s borders at the time. It no longer controlled the Rafah crossing to Egypt, which enabled a few thousand Palestinians to cross the border each day for the first five days following the disengagement.¹¹⁹ The crossing was largely closed thereafter until November of that year.¹²⁰ On November 15, 2005, Israel entered into an agreement with the Palestinian Authority and the European Union, which stated that Israel would not operate the Rafah border but could monitor it by live video footage.¹²¹ According to Gisha, Israel nevertheless retained “substantial control” over Rafah by its authority over the

¹¹⁴ Falk, *supra* note 112, para. 4.

¹¹⁵ Oslo II, Annex I, *supra* note 53, at art. XIII(4), XIV(1)(b)(4).

¹¹⁶ Press release, Prime Minister’s Media Adviser, Security Cabinet Declares Gaza Hostile Territory (Sept. 19, 2007); UN Office for the Coordination of Humanitarian Affairs (“OCHA”), Gaza Strip Humanitarian Fact Sheet (Dec. 2007), <https://www.ochaopt.org/content/gaza-strip-humanitarian-fact-sheet-december-2007>.

¹¹⁷ ISRAEL MINISTRY OF TRANSPORT, No. 1/2009: Blockade of Gaza Strip (Jan. 3, 2009).

¹¹⁸ See, e.g., OCHA, *Between the Fence and a Hard Place* (2010); *Within Range: An Analysis of the Legality of the Land “Buffer Zone” in the Gaza Strip* (Diakonia Aug. 2011), archived at <http://perma.cc/4J2V-5J8U>.

¹¹⁹ Noga Kadman, Gisha, *Rafah Crossing: Who Holds the Keys?* 21 (2009).

¹²⁰ *Id.* at 21–22.

¹²¹ Agreed documents by Israel and Palestinians on Movement and Access from and to Gaza, Nov. 15, 2005.

Palestinian population registry, its veto over the passage of foreigners, and its ability to *de facto* close the crossing by restricting access to either Palestinian Authority border officials or European Union representatives obligated to monitor compliance with the agreement.¹²² However, even Gisha admits that the Rafah crossing opened to Gazan travelers as of November 26, 2005 and operated regularly until June 25, 2006.¹²³

This date—June 25, 2006—is significant because it was the day Hamas captured the IDF soldier, Gilad Shalit,¹²⁴ leading Israel to consolidate control in a manner it had not since the disengagement nine months earlier. First, it closed the Rafah border crossing due to “security risks.”¹²⁵ Second, it froze the transfer of Palestinian taxes as a sanction,¹²⁶ pursuant to its influence under an agreement known as the Paris Protocol.¹²⁷ Third, three days after the kidnapping, Israel launched an operation into Gaza in search of Shalit, known as Operation Summer Rain.¹²⁸

The pertinent question is whether, between Israel’s disengagement on September 12, 2005, and the restrictions it imposed in response to the capture of Gilad Shalit on June 25, 2006, Israel lost effective control of the Gaza Strip such that it was no longer the occupying power. The answer must be in the affirmative. At most, Israel could be said to occupy the minor buffer zone along the border since it effectively controlled that zone, but that is as far as any occupation could stretch.

It cannot be the case that simply controlling Gaza’s airspace and territorial waters is sufficient for effective control of the territory.¹²⁹ If control over airspace rendered the superior air force an occupying power, every imposition of a no-fly zone—such as those imposed on Bosnia in 1993¹³⁰ and Libya in 2011¹³¹—would establish an occupation. No State has

¹²² Kadman, *supra* note 119, at 22–26.

¹²³ *Id.* at 27 (“[F]rom November 25, 2005 to June 24, 2006, Rafah Crossing was operated regularly. During those months, the crossing was open every day for an average of more than 9.5 hours. Every day an average of 1,320 people crossed in both directions, similar to the number of passengers through Rafah Crossing before travel restrictions were imposed during the intifada.”).

¹²⁴ Press Release, Israeli Ministry of Foreign Affairs, Two Soldiers Killed, One Missing in Kerem Shalom Terror Attack (June 25, 2006).

¹²⁵ Kadman, *supra* note 119.

¹²⁶ See Jeremy M. Sharp and Christopher M. Blanchard, CONG. RESEARCH SERV., U.S. FOREIGN AID TO THE PALESTINIANS (June 27, 2006).

¹²⁷ Gaza-Jericho Agreement, Annex IV, Protocol on Economic Relations between the Government of the State of Israel and the P.L.O., representing the Palestinian people, Paris, Apr. 29, 1994.

¹²⁸ Press Release, IDF Spokesman, Operation Summer Rain: IDF enters southern Gaza Strip to secure release of abducted soldier (June 28, 2006).

¹²⁹ See Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 44–8 (2009) (“Supremacy in the air alone does not meet the requirement of actual control...Belligerent occupation is forged by effective control in land areas...Airspace—like the territorial and internal waters—is an appurtenance of the land territory. As such, belligerent occupation of the airspace is inconceivable independently of effective control over the subjacent land.”).

¹³⁰ S.C. Res. 816, UN Doc. S/RES/816 (31 March 1993).

claimed as much. Like airspace, control over the territorial waters of a State is control over an appurtenance of the land territory. But an army that has effective control of a territory's coast is not necessarily capable of establishing its authority on the land itself. Even when combined, control of a territory's air and sea still leaves its occupants free to maintain their authority—to the exclusion of the occupying power—on the land.

UN Special Rapporteur John Dugard marshals several arguments in response. First, he claims that “sonic booms” and “targeted assassinations” in the Gaza Strip serve as evidence of Israel's continued occupation.¹³² Surely, if a no-fly zone is insufficient to establish an occupation, then isolated airstrikes—which, for example, the United States has recently conducted in Afghanistan, Pakistan, Yemen, Syria, Iraq, and Somalia with no State claiming it is occupying these countries—do not meet the threshold for effective control. Second, Dugard relies on Israel's control over the Palestinian population registry, which *inter alia* limits border access into and out of Gaza.¹³³ But, again, the Rafah border crossing was open and operating regularly until June of 2006.¹³⁴ Even if Israel restricted border access to some Palestinians, it strains credulity to argue that control over isolated persons at a border translates into effective control over territory inside the border. Third, Dugard argues that Israel's failure to release Gazan detainees “at the close of occupation” pursuant to Article 77 of the Geneva Conventions is evidence of its continued control.¹³⁵ But, of course, if Israel still considered there to be an IAC in Gaza, it could justify continued detention or internment of certain Gazans until the cessation of hostilities,¹³⁶ or in the case of a non-international armed conflict (“NIAC”), on nearly any grounds permissible under domestic law, without maintaining control over the territory.

Lastly, Dugard asserts that because the West Bank and Gaza are considered a “single territorial unit,”¹³⁷ it “would violate the territorial integrity of Palestine and the substantive law of self-determination” to allow Gaza to rid itself of occupation while the West Bank remained occupied.¹³⁸ The recognition of the West Bank and Gaza as a single territorial unit, however, bears little relation to the touchstone of

¹³¹ S.C. Res. 1973, UN Doc. S/RES/1973 (17 March 2011).

¹³² John Dugard (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Rep. on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, U.N. Doc. E/CN.4/2006/29 (Jan. 17, 2006), para. 8.

¹³³ *Id.*

¹³⁴ Kadman, *supra* note 119.

¹³⁵ Dugard, *supra* note 132.

¹³⁶ See G.C. (IV), art. 133.

¹³⁷ Oslo II, 28 September 1995, art. XI(1) (“The two sides view the West Bank and the Gaza Strip as a single territorial unit.”).

¹³⁸ Dugard, *supra* note 132.

occupation law—effective control. It merely informs the conclusion that Palestine is to be regarded as one entity subject to a single occupation, but it does not and could not mandate that the occupation persist throughout its entire territory absent effective control. After all, occupation of a portion of a territory is permissible under international law.¹³⁹

The final argument some have mustered to support the claim that Israel maintained its occupation of Gaza after the disengagement can only be described as a Hail Mary. Gisha has argued, for instance, that, “[w]hile each...element[] of control might not be enough, by itself, to constitute effective control, the cumulative effect...meets the conditions for applying international humanitarian law protections.”¹⁴⁰ Gisha cites no source for this proposition, for there is no source of law that would support the contention that a State’s control over territory ought to be regarded as more than the sum of its parts. Instead, Gisha argues that the Martens Clause¹⁴¹ and the overarching objective of IHL ought to tip the balance in favor of the existence of an occupation in order to ensure the protection of civilians.¹⁴² However, assertions by humanitarians that the law ought to bend toward civilian protection fall short, just as do those made by military generals asserting that IHL ought to facilitate the necessity to wage war. Both arguments fail to appreciate that the corpus of IHL—including the law of occupation—has already been designed as a delicate balance between military necessity and civilian protection.¹⁴³ The balance cannot be tipped in either direction absent a source of law, as doing so would infringe upon the intricate compromises woven into the legal fabric of IHL by the States that crafted it.

As a result, there appears to be no sound legal argument that Israel retained effective control of Gaza immediately following the

¹³⁹ See, e.g., Prosecutor v. M. Naletilic and V. Martinovic, Case No. IT-98-34-T, Judgment, ¶ 218 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (“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 effectively cut off from the rest of the occupied territory.’”); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 1 (2009) (“Belligerent occupation ordinarily covers only a fraction of the overall territory of the enemy, so that the displaced sovereign loses only a part (or parts) of its land while continuing to exercise full control in the remaining area.”).

¹⁴⁰ See Gisha, *supra* note 11, at 58 (2007).

¹⁴¹ Hague Regulations (1907), *supra* note 13, Preamble (“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”).

¹⁴² See Gisha, *supra* note 11, at 66–9 (2007).

¹⁴³ See generally Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795 (2011).

disengagement. Therefore, as of 7:00 am on September 12, 2005, Israel was no longer the occupying power of the Gaza Strip.

C. Israel Has Re-occupied Nearly All of Gaza Since the Disengagement

Although Israel no longer occupied Gaza as of its 2005 disengagement, it has re-occupied nearly all of the territory since then. This Note will provide a brief overview of the relevant periods of time since the disengagement and show that Israel has, perhaps unwittingly, regained effective control of the vast majority of the Gaza Strip as a result of the persistent armed conflicts in the territory.

1. Summer of 2006

As has already been mentioned, on June 25, 2006 Hamas attacked an IDF military post at the Kerem Shalom crossing into Gaza, killing two soldiers and capturing a third named Gilad Shalit. Israel responded by closing the Rafah border crossing, imposing sanctions on Gaza, and launching two ground operations into the strip that would last through the end of November. The Rafah crossing remained closed most of the time between Shalit's capture and Hamas' takeover of the administration of Gaza in the summer of 2007, allowing only 35% of the traffic that had existed immediately after the disengagement.¹⁴⁴ Gisha estimates that, on average, Israel permitted 468 people to cross and prevented 852 people from crossing the border every day.¹⁴⁵ The organization concludes that,

[t]he gradually tightening closure of Rafah Crossing over the years should be viewed in the context of Israel's simultaneous reduction and cancellation of all other exit and entry options in and out of the Gaza Strip ... therefore, a decision to close Rafah Crossing essentially completes the closure of the Gaza Strip, denying its residents access to the outside world.¹⁴⁶

As of the summer of 2006, however, it remained hyperbolic to claim that Gazan residents were completely denied "access to the outside world." Hundreds were still able to cross Rafah daily; hundreds more were able to travel to Israel and the West Bank monthly;¹⁴⁷ and goods were still steadily being imported and exported with no sanctions imposed.¹⁴⁸

Moreover, neither the sanctions nor the restrictions on the Rafah crossing could, on their own, constitute a re-occupation of the Gaza Strip.

¹⁴⁴ Kadman, *supra* note 119.

¹⁴⁵ *Id.* at 29–30.

¹⁴⁶ *Id.* at 33.

¹⁴⁷ *Id.* at 32.

¹⁴⁸ See, e.g., OCHA SITUATION REPORT: THE GAZA STRIP (June, 7 2006).

First of all, it is unclear why sanctions, which are considered to be permissible¹⁴⁹—in some cases even obligatory¹⁵⁰—non-forceful measures by States to address terrorism emanating from outside their territory, should constitute effective control sufficient for occupation. In fact, a number of countries imposed sanctions on the Palestinian Authority following Hamas' rise to power.¹⁵¹ It would be absurd to suggest that they had all occupied Gaza. Secondly, and more importantly, although it could be argued that these measures sought to displace the local authorities from governance by constricting them from without, neither sanctions nor border restrictions determine whether Israel was in a position to exercise control from within. Consequently, assertions that Israel occupied Gaza by virtue of its control along the border at this time remain unpersuasive.

Israel's ground operation into the strip, Operation Summer Rain, which took place between June 28 and November 26, 2006, is a different story. A full analysis of the operation is beyond the scope of this Note, but it is appropriate to discuss it in broad strokes. In late June, the IDF invaded Gaza along the southeast corridor, up through Khan Younis, and by July 12 soldiers were midway through the strip at Kesofeem road.¹⁵² They later proceeded along the main Gazan thoroughfare, Salah al-Din Road, and entered Maghazi refugee camp near Deir al-Balah.¹⁵³ The IDF also entered through the north, along the western edge in the At Tatra area, in the east near Beit Hanoun, and got as far as eastern Gaza City.¹⁵⁴ Although the ground operation declined in intensity as early as August, Israel continued to conduct strikes across the Gaza Strip, which were often interspersed by search and arrest operations in Gaza City, Khan Younis, Beit Hanoun, Rafah, and other areas.¹⁵⁵ Between November 1 and

¹⁴⁹ See Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, 836 INT'L REV. OF THE RED CROSS 763 (1999).

¹⁵⁰ See S.C. Res. 1373, UN Doc. S/RES/1373 (28 September 2001).

¹⁵¹ See, e.g., Sharp and Blanchard, *supra* note 126.

¹⁵² See, e.g., OCHA, THE GAZA STRIP: SITUATION MAP (July 6, 2006); OCHA, THE GAZA STRIP: SITUATION MAP (July 12, 2006); OCHA, SITUATION REPORT: ESCALATION IN CONFLICT IN THE GAZA STRIP (June 27, 2006); OCHA, SITUATION REPORT: ELECTRICITY, WATER AND FUEL SUPPLIES DWINDLING WITHIN THE GAZA STRIP—CONCERNS OVER DETERIORATING HUMANITARIAN CRISIS (June 30, 2006); OCHA, GAZA STRIP SITUATION REPORT (July 12, 2006); OCHA, SITUATION REPORT: GAZA STRIP (Aug. 7, 2006); OCHA, SITUATION REPORT: GAZA STRIP (Aug. 24, 2006); OCHA, GAZA STRIP SITUATION REPORT (10 Oct. 2006); OCHA, GAZA STRIP SITUATION REPORT (Nov. 9, 2006); OCHA, GAZA STRIP SITUATION REPORT (Dec. 13, 2006).

¹⁵³ See OCHA, SITUATION REPORT: GAZA STRIP (July, 27 2006).

¹⁵⁴ See, e.g., OCHA, SITUATION REPORT: GAZA STRIP (July 4, 2006); OCHA, SITUATION REPORT: GAZA STRIP (July 18, 2006); OCHA, SITUATION REPORT: GAZA STRIP (Aug. 7, 2006).

¹⁵⁵ See, e.g., OCHA, SITUATION REPORT: GAZA STRIP (Aug. 24, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Sept. 5, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Sept. 12, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Sept. 19, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Sept. 26, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Oct. 3,

7, the IDF also launched a military incursion codenamed Autumn Clouds into Beit Hanoun, controlling all movement in the area and imposing a curfew, as part of the broader operation.¹⁵⁶

In these circumstances, it is plain that Gazan residents were protected under the Geneva Conventions since the treaty applies broadly even to the “invasion phase.”¹⁵⁷ However, it is less clear whether the invasion provided Israel with effective control of the territory. After all, a “mere invasion,” where troops “sweep hurriedly through a region, seeking distant prizes,” does not constitute an occupation.¹⁵⁸ It could be argued that the operation is evidence of Israel’s ability to make its authority felt within Gaza. Israel’s limited control over the territory, however, was not sufficient to allow it to achieve its primary objective of bringing home Gilad Shalit.¹⁵⁹ This failure renders claims of effective control dubious. Moreover, a campaign lasting months is certainly too long to be considered a reasonable time for establishing the requisite authority for occupation, as such delayed control could hardly be regarded as effective.¹⁶⁰

Even if Israel re-occupied portions of Gaza in the midst of the invasion, upon its withdrawal from the territory in November 2006 the situation reverted to its state following Israel’s disengagement. There is limited evidence that the operation facilitated ease of access into Gaza by the IDF. For instance, on December 10, 2006, after the ceasefire, the IDF sent two combat bulldozers and a tank into Khan Younis for a 90-minute operation to level agricultural land.¹⁶¹ However, these minor incursions are a precarious basis upon which to claim that Israel remained in effective control upon withdrawal. Thus, at this stage, it can be concluded with confidence that Israel was not the occupying power in the Gaza Strip following Operations Summer Rain and Autumn Clouds in 2006.

2006); OCHA, *Situation Report: Gaza Strip* (Oct. 10, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Oct. 17, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Oct. 31, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Nov. 14, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Nov. 21, 2006); OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Nov. 28, 2006).

¹⁵⁶ See, e.g., OCHA, PROTECTION OF CIVILIANS—WEEKLY BRIEFING NOTES (Nov. 7, 2006); OCHA, SITUATION REPORT: GAZA STRIP (Nov. 9, 2006).

¹⁵⁷ Uhler et al., *supra* note 74, at 60.

¹⁵⁸ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 43 (2009).

¹⁵⁹ See Ronny Sofer, *PM: We Will Not Recapture Gaza*, YNET NEWS (June 28, 2006), <https://www.ynetnews.com/articles/0,7340,L-3268440,00.html>.

¹⁶⁰ It may be inferred from ICTY jurisprudence that a delay as short as six days may even be ineffective to establish an occupation over territory. See *Prosecutor v. M. Naletilic and V. Martinovic*, Case No. IT-98-34-T, Judgment, Int’l Crim. Trib. for the Former Yugoslavia, ¶ 587 (Mar. 31, 2003) (holding that Croatia did not occupy the villages of Sovići and Doljani in Bosnia despite their “capture” on 17 April 1993 because “[t]he fighting...continued through 19, 20, 21, and 22 April” and “[t]he area was thus under occupation beyond any reasonable doubt only by 23 April 1993”).

¹⁶¹ OCHA, GAZA STRIP SITUATION REPORT (Dec. 13, 2006).

2. *Summer and Fall of 2007*

After Hamas' takeover of the Gaza Strip in June 2007, Israel further tightened its hold over the territory. It imposed sanctions on Gaza that only allowed in goods "vital to the survival of the population"¹⁶² and ensured that the Rafah border crossing remained closed for years.¹⁶³ In September of that year, Israel declared Gaza a "hostile territory" and tightened its restrictions on goods traveling across the border, specifically with respect to fuel and electricity.¹⁶⁴ In effect, Gaza was almost entirely sealed shut, such that only a trickle of people could enter or exit and only scarce goods could (legally) do the same.

In light of these circumstances, the question becomes whether severe restrictions from outside a territory upon life within that territory can constitute effective control of the territory itself. This is the circumstance Eyal Benvenisti envisions in discussing a "virtual occupation."¹⁶⁵ Since States may prefer to avoid placing boots on the ground and incurring the obligations applicable under the law of occupation, they may seek to "remotely control" a territory "to obviate the need for leaving their 'footprint' in foreign territories."¹⁶⁶ Benvenisti concludes that although such circumstances do not amount to occupation within the meaning of Article 42 of the Hague Regulations, protections remain applicable under IHRL.¹⁶⁷ Arguably, there may also be a "duty to occupy" upon the virtual occupant, "to send in ground troops to establish the necessary infrastructure to restore and ensure public order and secure the human rights of the inhabitants."¹⁶⁸ The UN Fact-Finding Mission on the Gaza Conflict takes a different view. It argues that "[g]iven the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip" such that "[t]he ultimate authority over the Occupied Palestinian Territory still lies with Israel."¹⁶⁹

¹⁶² Kadman, *supra* note 119 (citing *al-Bassiouni v. Prime Minister*, Respondents' Response, HCJ 9132/07 (2007), para. 73 (Isr.)). See also Ministry of Defense v. Gisha, AAA3300/11, "Food Consumption in the Gaza Strip—Red Lines," Presentation by the Israel Coordination of Government Activities in the Territories ("COGAT") (2012) (showing that Israel calculated the minimum allotted food for Gazans to be 2,279 calories per person per day), available at <http://www.haaretz.com/resources/Pdf/red-lines.pdf>.

¹⁶³ Kadman, *supra* note 119.

¹⁶⁴ Press release, Prime Minister's Media Adviser, Security Cabinet Declares Gaza Hostile Territory (Sept. 19, 2007).

¹⁶⁵ Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION 53–4 (2012).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 54.

¹⁶⁸ *Id.*

¹⁶⁹ United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and other Occupied Arab Territories ("Goldstone Report"), U.N. Doc. A/HRC/12/48, paras. 278–79, (Sept. 25 2009).

Since effective control of a territory is inextricably linked with military presence,¹⁷⁰ so long as its authority is established within a reasonable time, even the severe restrictions Israel imposed along Gaza's borders during the summer of 2007 do not amount to occupation. Harsh though they may be, these restrictions did not displace the local authority, Hamas, from governance. Rather, halting the movement of goods and persons into a territory resembles a siege more than an occupation.¹⁷¹ Although a siege can precipitate the beginning of an occupation upon the defeat or surrender of local belligerents,¹⁷² it is distinct from occupation under IHL as sieges are mentioned only scarcely in the Hague Regulations and Geneva Conventions and are subject to different regulations from those applicable to occupation.¹⁷³ It is possible that the siege of Gaza was in violation of international law, but it would not trigger the obligations arising upon Israel becoming the occupying power of the territory.

3. *Winter of 2008–2009*

On December 27, 2008, Israel officially launched Operation Cast Lead. Although it only lasted for three weeks, the operation caused a humanitarian crisis.¹⁷⁴ It was during this operation that the IDF expanded the buffer zone along the Gazan border to what the UN Office for the Coordination of Humanitarian Affairs (“OCHA”) has identified as a 500-meter “no-go” zone where access is “totally prohibited” and a 1500-meter “high risk zone” where unpredictable fire occurs.¹⁷⁵

In brief, the operation began upon the Israeli military conducting airstrikes and artillery bombardment across Gaza, with particular emphasis on Gaza City.¹⁷⁶ On January 3, following warning leaflets dropped in the area to warn residents to evacuate,¹⁷⁷ several IDF units invaded the Gaza Strip from different directions: the Paratroopers Brigade entered through

¹⁷⁰ Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 INT'L REV. OF THE RED CROSS 133, 143–47 (2012) (“[I]n principle, the ability to exert authority over occupied territory cannot be separated from the physical military presence of the Occupying Power.”).

¹⁷¹ See generally Sean Watts, *Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations*, Counterterrorism and Humanitarian Engagement Project (2014).

¹⁷² See James Kraska, *Siege*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 1 (2009).

¹⁷³ See Hague Regulations (1907), art. 27; G.C. (I), art. 15; G.C. (II), art. 18; G.C. (IV), art. 17.

¹⁷⁴ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 19, 2009).

¹⁷⁵ United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), *Between the Fence and a Hard Place* (2010).

¹⁷⁶ See OCHA, GAZA HUMANITARIAN SITUATION REP. (Dec. 28 2008); GAZA HUMANITARIAN SITUATION REP. (Jan. 1, 2009).

¹⁷⁷ See OCHA, GAZA HUMANITARIAN SITUATION REP. (Jan. 3 2009); OCHA, GAZA HUMANITARIAN SITUATION REP. (Jan. 7, 2009).

the northwest and remained above Gaza City near the Jabalia refugee camp; the Golani Brigade entered through the northeast by way of Beit Hanoun and Beit Lahiya; the Givati Brigade entered through the center of the strip and flanked the south of Gaza City; and the Nahal Brigade remained in Gaza's southeast in Rafah to Khan Younis.¹⁷⁸ On January 10, the IDF dropped leaflets over Gaza City¹⁷⁹ before entering its southern and northern outskirts the next day.¹⁸⁰ The IDF closed in on the city center by January 15,¹⁸¹ reaching as far as Tel el-Hawa.¹⁸² Finally, on January 18 Israel declared a unilateral ceasefire and began to withdraw,¹⁸³ with the last soldier leaving on January 21.¹⁸⁴

Unlike Operation Summer Rain, the IDF's penetration of Gaza City—a Hamas stronghold—within a matter of weeks is significant evidence of Israel's ability to impose its authority within the Gaza Strip in reasonable time.¹⁸⁵ However, in doing so, the IDF sustained the loss of ten soldiers,¹⁸⁶ with the most perilous fighting taking place in central Gaza City.¹⁸⁷ Although a military's effective control of a territory can be established despite “sporadic local resistance,”¹⁸⁸ if troops are required to “engage in battle to recapture an area” then, just as in an invasion, the territory is not occupied until control is secured.¹⁸⁹ Because of how briefly the IDF entered Gaza City, and how little of it was under Israel's control, it would be difficult to claim that Israel re-occupied the city. This is confirmed by the Israeli government's decision not to initiate a third phase of the operation as a “knockout blow” because “military and intelligence assessments indicat[ed] that shifting the goal to destroying Hamas would

¹⁷⁸ Map of IDF troop deployment in the Gaza Strip, as provided by Israeli human rights organization Breaking the Silence (on file with author).

¹⁷⁹ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 11, 2009).

¹⁸⁰ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 12, 2009); OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 13, 2009).

¹⁸¹ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 15, 2009).

¹⁸² See Yaakov Katz, *A Necessary Operation*, THE JERUSALEM POST, Aug. 3, 2009.

¹⁸³ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 18, 2009); OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 19, 2009).

¹⁸⁴ OCHA, FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR (Jan. 21, 2009).

¹⁸⁵ Even a delay of weeks in exercising control may be too long to be effective for establishing an occupation. See Prosecutor v. M. Naletilic and V. Martinovic, *supra* note 160.

¹⁸⁶ *Gaza Crisis: Toll of Operations in Gaza*, BBC, Sept. 1, 2014.

¹⁸⁷ OCHA, *supra* note 181.

¹⁸⁸ Prosecutor v. Naletilic and Martinovic, *supra* note 95.

¹⁸⁹ Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION 51 (2012).

require weeks of deep ground incursions into Gaza's urban areas and refugee camps that would result in heavy casualties on both sides."¹⁹⁰

Israel's ability to impose its authority within much of Gaza suggests that it may have re-occupied the northern Gaza Strip and Rafah, although not central Gaza City. In that case, its withdrawal would not have ended the occupation because the swift pace of the operation indicates that Israel could impose its authority in these areas within a reasonable time. This conclusion is buttressed by UN General Assembly resolutions 64/92 and 64/94, each supported by more than 165 UN Member States, which asserted at the culmination of Operation Cast Lead that Israel was the occupying power of the Gaza Strip.¹⁹¹

4. *Fall of 2012*

The next conflict was brief, taking place during barely more than a week in late November of 2012. Operation Pillar of Defense began with an Israeli airstrike on a vehicle containing Ahmed Jabari, the head of Hamas' military wing, on the afternoon of November 14.¹⁹² Although the operation continued to bombard the strip with artillery and airstrikes, it never engaged in a ground incursion.¹⁹³ As such, Operation Pillar of Defense did not change the legal status of the Gaza Strip.

5. *Summer of 2014*

The most recent outbreak of hostilities in Gaza came in the summer of 2014. Although a full assessment of Operation Protective Edge is beyond the scope of this Note, a brief analysis confirms that it has consolidated further Israel's control of the Gaza Strip.

¹⁹⁰ University of California Press, *The Israeli Arsenal Deployed against Gaza during Operation Protective Edge*, 38 J. OF PALESTINE STUD. 175, 176 (2009).

¹⁹¹ See G.A. Res. 64/92, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories, UN Doc. A/RES/64/92 (Jan. 19, 2010); G.A. Res. 64/94, Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/RES/64/94 (Jan. 19, 2010). See also Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, BRITISH Y.B. INT'L L. 181 (2011) ("While these may be thought of as politically motivated statements made within one of the United Nation's political organs, the attitude of states to such resolutions remains relevant evidence of *opinio juris*. In the present context, such acts cannot be presumed to have no legal significance in assessing what states believe to be the correct interpretation and application of GC IV.").

¹⁹² See Barney Henderson, *Hamas Military Chief Killed in Gaza Air Strike*, THE TELEGRAPH Nov. 14, 2012.

¹⁹³ See OCHA, OCCUPIED PALESTINIAN TERRITORIES: ESCALATION IN HOSTILITIES, GAZA AND SOUTHERN ISRAEL SITUATION REP. (Nov. 21, 2012); OCHA, OCCUPIED PALESTINIAN TERRITORIES: ESCALATION IN HOSTILITIES, GAZA AND SOUTHERN ISRAEL SITUATION REP. (Nov. 22, 2012).

Operation Protective Edge began with airstrikes and mortar shelling directed at targets throughout the Gaza Strip on July 7.¹⁹⁴ As the barrage continued, Gazan residents in Beit Lahiya, Beit Hanoun, Rafah, and the outskirts of Khan Younis received notices to evacuate in anticipation of a ground operation.¹⁹⁵ Israel also extended the “no-go” buffer zone to three kilometers from the border with Israel, encapsulating 44% of the territory of the Gaza Strip—even extending into Gaza City.¹⁹⁶

On July 17, following a foiled attack by Hamas along tunnels leading to southern Israel,¹⁹⁷ the IDF launched a ground incursion into the strip: the Givati Brigade entered Rafah and Kuza’a; the Paratroopers Brigade entered Abasan al-Kabira, near Khan Younis; the 7th Armored Brigade entered Juhar ad-Dik in central Gaza; the Golani Brigade entered eastern Gaza City; the Nahal Brigade entered Beit Lahiya and Beit Hanoun; and the 401st Armored Brigade entered Gaza City from the north.¹⁹⁸ On the third night of the ground operation, troops were deployed deep into the Gaza City neighborhood of Shuja’iyeh, precipitating the war’s “bloodiest battle,” claiming the lives of thirteen IDF soldiers and more than seventy Gazans.¹⁹⁹ The ground incursion continued amidst intense bombing, primarily focused on the eastern and northern Gaza Strip along the enlarged buffer zone.²⁰⁰ This precipitated massive displacement of civilians westward, only to be evacuated once more as the IDF pushed further into Western Gaza.²⁰¹ Israel began withdrawing troops on August 3²⁰² and

¹⁹⁴ See OCHA, OCCUPIED PALESTINIAN TERRITORIES: HOSTILITIES IN GAZA AND ISRAEL SITUATION REPORT (July 9, 2014).

¹⁹⁵ See OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA CRISIS SNAPSHOT (July 10, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA CRISIS SNAPSHOT (July 13, 2014).

¹⁹⁶ See OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 18, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY HUMANITARIAN SNAPSHOT (July 22, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY HUMANITARIAN SNAPSHOT (July 27, 2014).

¹⁹⁷ Israel Ministry of Foreign Affairs, *IDF Thwarts Terror Attack via Tunnel from Gaza* (July 17, 2014).

¹⁹⁸ *Supra* note 178.

¹⁹⁹ Gili Cohen, *IDF: Bloodiest Battle in Gaza could have Been Much Worse*, HAARETZ (July 28, 2014).

²⁰⁰ See, e.g., OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July, 18 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July, 19 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July, 20 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 21, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 22, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 23, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 24, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 24, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 26, 2014); OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 29, 2014).

²⁰¹ See, e.g., OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (July 27, 2014).

completed doing so by August 5, retracting the buffer zone to 500 meters on its way out.²⁰³ The operation continued at a lower intensity and without a ground presence²⁰⁴ until an open-ended ceasefire brokered by Egypt held as of August 26.²⁰⁵

If Operation Cast Lead strengthened the argument that Israel had re-occupied significant portions of the Gaza Strip, Operation Protective Edge cemented it. What took several weeks for the IDF in the winter of 2008–2009 now required just several days before Israel’s ground troops penetrated the heart of Gaza City. This is conclusive evidence that Israel had the ability to exert its authority deep in Gazan territory within a reasonable time in 2014.²⁰⁶

To be sure, the IDF over-extended in the battle in Shuja’iyeh, leading to thirteen of its soldiers being killed and others remaining unaccounted for.²⁰⁷ There is little guidance in drawing the line between sporadic local resistance and engaging in battle to control a territory, so there is room for reasonable debate about whether the heart of Gaza City was occupied as a result. However, the fact that local resistance forces retain control of an isolated, defended location does not render the occupation in the rest of the territory null.²⁰⁸ With that possible exception, it may be concluded that the three major ground operations since Israel’s 2005 disengagement have established actual control over Gaza’s territory and potential control over its population. Therefore, nearly all of Gaza was under Israeli occupation following Operation Protective Edge.

²⁰² OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY HUMANITARIAN SNAPSHOT (Aug. 5, 2014).

²⁰³ OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (Aug. 5, 2014).

²⁰⁴ OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (Aug. 9, 2014).

²⁰⁵ OCHA, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (Aug. 27, 2014).

²⁰⁶ A delay of several days is most likely a reasonable time during which a foreign military may exercise control over a territory’s population. The inference arising from the previously mentioned ICJY jurisprudence does not apply because the time required to exert control over the territory in this instance is shorter than the six days in that case. *See* Prosecutor v. M. Naletilic and V. Martinovic, *supra* note 160.

²⁰⁷ Rep. of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, paras. 259–278, UN Doc. A/HRC/29/CRP.4 (June 22, 2015).

²⁰⁸ See, e.g., United States of America v. Wilhelm List, Case No. 7 (Judgment), in XI Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 757, 1243 (Feb. 19, 1948); U.S. Department of Defense Law of War Manual, June 2015 (Updated December 2016), 11.2.2.1 (“An occupation may be effective despite the existence of areas in the enemy State that are temporarily controlled by enemy forces or pockets of resistance. For example, the fact that a defended location (such as a city or town) still controlled by enemy forces exists within an area declared occupied by the Occupying Power does not render the occupation of the remainder of the area invalid, provided that continued resistance in such place or defended zone does not render the occupier unable to exercise control over the remainder of the occupied territory.”).

6. Present Day

Fortunately, the Gaza Strip has not seen an eruption of hostilities akin to previous wars since the summer of 2014, although some argue that it may be just over the horizon.²⁰⁹ It is thus reasonable to ask whether Israel's occupation of Gaza has continued to the present day.

To reiterate, an occupation ends when one of the three elements of effective control is no longer present: (1) the presence of foreign forces without the consent of the local authority; (2) actual control over the territory by displacement of the local authority from governance; and (3) potential control over the population by having the ability to make its authority felt within a reasonable time. This Note has already established that, because there is but a single occupation of Palestine, Israel cannot claim to have left Palestinian territory simply by withdrawing its troops from Gaza.²¹⁰ Moreover, it has shown that as a result of the armed conflicts in Gaza since the disengagement, Israel could make its authority felt within the territory in a reasonable time.²¹¹ The only element not accounted for to the present day is whether Israel has retained actual control over the territory by continuing its displacement of the local authority from governance.

The Palestinian Authority has been displaced from governance in the Gaza Strip since Hamas' military wing purged its rival political party, Fatah, from the region in 2007.²¹² Hamas has since become the *de facto* governing authority in the Gaza Strip, while Fatah has held the reins of the Palestinian Authority from the West Bank. Immediately prior to the 2014 Gaza conflict, however, there was a reconciliation attempt between Hamas and Fatah leading to a new government being sworn in on June 2,²¹³ In spite of the war, reconciliation attempts moved forward after a further agreement in Cairo in September, which laid the groundwork for a unity government to take control of the Gaza Strip.²¹⁴ The plans did not come to fruition, however, as the conflict between Fatah and Hamas continued.

²⁰⁹ See, e.g., Stuart Winer, *IDF chief said to warn Gaza war likely if humanitarian crisis persists*, THE TIMES OF ISR. (Feb. 4, 2018); Jack Khoury, *Hamas 'Prepares for Imminent War' with Israel in Gaza*, HAARETZ (Feb. 4, 2018); Noga Tarnopolsky & Rusbi Abu Alouf, *Neither Israel nor Hamas wants another war in Gaza. That might not be enough to stop one*, LA TIMES (Feb. 7, 2018).

²¹⁰ See *supra* Section IV(b).

²¹¹ See *supra* Section IV(c).

²¹² See, e.g., Peter Beaumont et al., *How Hamas Turned on Palestine's 'Traitors'*, THE GUARDIAN, June 17, 2007.

²¹³ See, e.g., Jodi Rudoren & Michael R. Gordon, *Palestinian Rivals Announce Unity Pact, Drawing U.S. and Israeli Rebuke*, N.Y. TIMES Apr. 23, 2014; Peter Beaumont, *Palestinian Unity Government of Fatah and Hamas Sworn In*, THE GUARDIAN (June 2, 2014).

²¹⁴ See Shadi Bushra, *Fatah-Hamas Agreement Gives Unity Government Control Over Gaza*, REUTERS, Sept. 25, 2014.

Palestinian Authority President Mahmoud Abbas of Fatah conducted a unilateral reshuffle of the government's cabinet in 2015,²¹⁵ prompting Hamas to conduct its own reshuffle of cabinet ministers in 2016²¹⁶—effectively shattering the unity government into two fragments in the West Bank and Gaza Strip. As a result of the enduring tensions between these two Palestinian factions, which have continued to vie for power since,²¹⁷ there has been no lawful governing authority in the Gaza Strip. This has left the region with an uphill battle to rebuild Gaza's infrastructure, economy, and public services following the 2014 war.²¹⁸

In October of 2017, tides turned as Fatah and Hamas sought to reconcile once again.²¹⁹ A leaked translation of the agreement signed in Cairo provided that the Palestinian Authority was meant to begin exercising governmental functions in the Gaza Strip on December 1, 2017.²²⁰ However, the transfer of powers failed to materialize as the parties hit a diplomatic impasse.²²¹ The agreement was dealt another blow in March 2018 following a failed assassination attempt against Palestinian Prime Minister Rami Hamdallah while he was traveling in the Gaza Strip.²²² Even if progress is eventually made, there remain considerable roadblocks ahead for implementing the agreement, including substantive disagreements between Fatah and Hamas,²²³ the impending Israeli response,²²⁴ and whether the world will stand behind it.²²⁵

²¹⁵ See Khaled Abu Toameh, *Abbas Takes Aim at Political Enemies with Mass Dismissals, Cabinet Reshuffle*, JERUSALEM POST (Dec. 17, 2015).

²¹⁶ See Adnan Abu Amer, *What's Behind Hamas' latest Cabinet Reshuffle in Gaza*, AL-MONITOR, Oct. 27, 2016.

²¹⁷ See, e.g., Adnan Abu Amer, *Hamas, PA face off on financial front*, AL-MONITOR (Apr. 13, 2016); Tovah Lazaroff, *UN: Fatah-Hamas 'Tug-of-War' Could Lead to Fresh Conflict in Gaza*, JERUSALEM POST, (May 27, 2017); Samuel Osborne, *Israel cuts power supply to Gaza Strip as Palestinian Authority pressures Hamas*, THE INDEPENDENT (June 13, 2017).

²¹⁸ See, e.g., Beth McKernan, *Three Years after the Last Israel-Gaza War, Palestinians Struggle to Rebuild their Lives*, THE INDEPENDENT (Aug. 24, 2017); Sultan Barakat & Firas Masri, *Still in Ruins: Reviving the Stalled Reconstruction of Gaza*, BROOKINGS DOHA CTR. (Aug. 22, 2017), <https://www.brookings.edu/research/reviving-the-stalled-reconstruction-of-gaza/>.

²¹⁹ See BBC, *Palestinian factions Hamas and Fatah end split on Gaza* (Oct. 12, 2017).

²²⁰ See Dov Lieber, *Translation of Leaked Hamas-Fatah Agreement*, THE TIMES OF ISR. (Oct. 15, 2017).

²²¹ See, e.g., *Hamas chief in Gaza says Palestinian unity deal is collapsing*, Reuters (Dec. 21, 2017); Jack Khoury, *Fatah, Hamas Are at an Impasse*, HAARETZ (Jan. 3, 2018); *Palestinian reconciliation deal dying slow death*, THE TIMES OF ISR. (Feb. 2, 2018).

²²² See, e.g., Amos Harel, *Assassination Attempt on Palestinian PM Failed, but Dealt Mortal Blow to Reconciliation*, HAARETZ (Mar. 14, 2018); Nidal al-Mughrabi, *Suspect in Palestinian assassination attempt among four dead in Gaza shootout: Hamas*, REUTERS (Mar. 22, 2018).

²²³ See, e.g., Dov Lieber, *Veneer of Positivity Fades in Palestinian Unity as Tough Issues Surface*, THE TIMES OF ISR. (Oct. 16, 2017); Adnan Abu Amer, *Three Issues That Could Derail the Fatah-Hamas Deal*, AL JAZEERA (Oct. 21, 2017).

²²⁴ See, e.g., Barak Ravid, *Israel Responds with Restraint to Palestinian Unity: 'We'll Follow Developments and Act Accordingly'*, HAARETZ (Oct. 12, 2017); Peter Beaumont, *Israel Will Not Negotiate with Palestinian Unity Government if Hamas is Involved*, THE GUARDIAN (Oct. 17, 2017).

At the time of this writing, it is not known for certain whether the reconciliation agreement will be implemented such that the Palestinian Authority will in fact begin to govern the Gaza Strip. Although prospects appear grim, if the agreement proceeds it is likely that Israel's occupation of the Gaza Strip will come to an end. With the local authorities returning to power in Gaza, the second element of Israel's effective control over the territory will be extinguished. This result is subject to change, of course, if there will be another armed conflict in the territory.

V. IS THERE AN ARMED CONFLICT IN GAZA?

A. *The Law of Armed Conflict*

The Law of Armed Conflict, otherwise known as IHL, was born of the Second World War. Previously, at least since the birth of the nation-state with the Peace of Westphalia, international law had only governed wars between States.²²⁶ At that time, it was only possible for the law of war to apply to civil wars based on the doctrine of belligerency.²²⁷ The doctrine stated that if a nation-state, party to the conflict or not, recognized the belligerent status of an insurgency, then the international law of war would apply as if the war were between two States.²²⁸ The law of war relied on declarations and recognitions by States to determine whether war had begun such that the law of peace should be cast aside.²²⁹

Following the Second World War, the Geneva Conventions precipitated a paradigm shift in the law, moving its focus from belligerency toward what it termed armed conflict, defined on the basis of objective factual criteria rather than formal declarations. In the process, the Conventions bifurcated international law into rules governing IAC and those governing NIAC.

With respect to IAC, Article 2 common to the Geneva Conventions provides that the treaty applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of

²²⁵ See, e.g., BBC, *Hamas Must Disarm to Join Palestinian Unity Government* (Oct. 19, 2017), <http://www.bbc.com/news/world-middle-east-41678217>.

²²⁶ Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INT'L L. & CLASSIFICATION OF CONFLICTS 2* (Elizabeth Wilmshurst ed., 2012).

²²⁷ *Id.*

²²⁸ See, e.g., Iain Scobbie, *Gaza*, in *INT'L L. & CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012); Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, *THE BRIT. Y.B. OF INT'L L.*, 12 May 2011; Kevin Jon Heller, *Blockade*, *International Armed Conflict, and the Palmer Report*, *OPINIO JURIS BLOG* (Sept. 2, 2011), <http://opiniojuris.org/2011/09/02/blockade-international-armed-conflict-and-the-palmer-report/>.

²²⁹ Akande, *supra* note 226 at 11–12.

them.”²³⁰ It also applies to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”²³¹ Although the Geneva Conventions do not define IAC for the purpose of Article 2, the ICTY provided a definition in the renowned *Tadic* case as “a resort to armed force between States.”²³² This is clarified by the official commentary as having quite a low threshold, applying regardless of whether “one of the Parties denies the existence of a state of war...how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.”²³³

The ICTY also defined NIAC as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²³⁴ Unlike IAC, the ICTY required a higher threshold for NIACs that involved a minimum level of intensity of hostilities, above the level of riots or internal disturbances, as well as a sufficient level of organization by the non-state armed groups.²³⁵

B. Israel Was in an IAC with Hamas in Gaza

A superficial analysis of the armed conflict in Gaza would posit that because Israel is a State and Hamas is a non-state actor, the conflict fits plainly in definition of a NIAC between “governmental authorities and organized armed groups.” The circumstances of the present case are made more complicated, however, by critical factors including the renewed occupation, Israel’s extraterritorial conduct, and Hamas’ affiliation with the State of Palestine. As a consequence, there are three compelling arguments for the existence of an IAC in the Gaza Strip—each with a different rationale, ranging from sweeping to narrow.

The broadest argument in favor of an international character to the armed conflict is also the simplest: occupations are, by definition, inextricably bound to the law of IAC. The link between occupation and IAC is born of the Geneva Conventions’ application to “all cases of partial or total occupation of a High Contracting Party.”²³⁶ This intimate relation has been recognized by the jurisprudence of both the ICJ²³⁷ and the

²³⁰ G.C. (IV), *supra* note 14, at art. 2

²³¹ *Id.*

²³² Prosecutor v. Duško Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²³³ Jean Pictet, *Commentary: IV Geneva Convention, Relative to the Protection of Civilian Persons in Times of War*, Int’l Committee of the Red Cross 60 (1958).

²³⁴ Tadic, *supra* note 232.

²³⁵ See, e.g., Prosecutor v. Duško Tadic, Case No. IT-94-1-T, Judgment, ¶¶ 561–68 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Fatmir Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 135–70 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

²³⁶ G.C. (I–IV), *supra* note 14, at art. 2.

²³⁷ See, e.g., Armed Activities Case, *supra* note 19,, paras. 218–20; Legal Consequences of the

ICC.²³⁸ Both Courts found that because Uganda occupied the Congolese province of Ituri, the armed conflict there proved to be international despite Uganda's primary targets being non-state actors.²³⁹

This is also the position of Professor Dapo Akande who clarifies that determining what body of law regulates occupation is distinct from what law governs ordinary armed conflicts, as it is less concerned with the parties to the conflict than with the "tense relationship" between the occupying power and the occupied population.²⁴⁰ "[T]he relevant question," Akande explains, "is not what type of conflict exists between the State and the non-state group but what law applies to the act of an occupying power within occupied territory."²⁴¹ This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves in the hands of an occupying power by whatever means.²⁴² Therefore, when an occupation arises as a result of an armed conflict, the applicable law governing both the conflict and the occupation is one and the same—the law of IAC.

With respect to the Gaza conflict, there is a significant complication. It is well accepted that despite the foundational link between occupation and IAC, it is possible for a NIAC to develop in occupied territory that is independent from the original armed conflict leading to the occupation.²⁴³ Therefore, although Palestine is a High Contracting Party to the Geneva Conventions whose territory has been occupied by Israel, Israel's armed conflict with Hamas may be independent of the original armed conflict that captured the Gaza Strip in 1967. If Israel's occupation of the Gaza Strip were to have been uninterrupted by the 2005 disengagement, the question of how to characterize the armed conflict between Israel and Hamas would thus be far more complicated.

However, as Israel terminated its original occupation of the Gaza Strip that began in 1967 and recently imposed a new occupation, there is far less uncertainty. As this Note has shown, the current occupation in Gaza exists

Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., ¶¶ 91–95 (July 9).

²³⁸ See, e.g., Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶¶ 216, 220 (Jan. 29, 2007); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 240 (Sept. 30, 2008).

²³⁹ See *Armed Activities Case*, *supra* note 19, paras. 218–20; Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 220 (Jan. 29, 2007).

²⁴⁰ Akande, *supra* note 226.

²⁴¹ *Id.*

²⁴² See Jean Pictet, *Commentary: IV Geneva Convention, Relative to the Protection of Civilian Persons in Times of War*, Int'l Committee of the Red Cross 47, 60 (1958).

²⁴³ See, e.g., Konstantinos Mastorodimos, *The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-international Armed Conflicts*, 12 INT'L COMMUNITY L. REV. 437, 459 (2010); Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, BRIT. Y.B. INT'L L. 171, 187–91 (2011).

as a result of the hostilities in the territory since the 2005 disengagement. Thus the armed conflict between Israel and Hamas cannot be regarded as independent of Israel's renewed occupation in Gaza, which is governed by IAC law. The armed conflict between Israel and Hamas must, therefore, have an international character as well.

The second argument is related to the first but, rather than making a claim about the character of all armed conflicts in occupied territory, it focuses on the actions of a foreign sovereign without the consent of the occupied State. Specifically, it holds that an extraterritorial armed conflict between a foreign occupying power and a local insurgency without the consent of the occupied State has an international character. Notably, the Israeli Supreme Court has taken this position, citing Professor Antonio Cassese in stating that, “[a]n armed conflict which takes place between an Occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict.”²⁴⁴ The existence of a growing consensus in favor of categorizing extraterritorial conflicts absent the consent of the territorial State as NIACs²⁴⁵ does not necessarily mean this acceptance would extend to occupied territory. The ICC, for instance, has been careful to note that its finding of a NIAC in the occupied Democratic Republic of the Congo (“DRC”) was based on the DRC’s consent to military operations against rebel groups there.²⁴⁶

The final argument fits the facts of the present case most closely. Although Hamas is a non-state actor, if it could be established that it is acting in the capacity of occupied Palestine, then a conflict between Israel and Hamas would also be a conflict between two High Contracting Parties to the Geneva Conventions as required by traditional notions of IAC. The government of Palestine recognized by the international community, however, is the Palestinian Authority led by President Mahmoud Abbas in the West Bank.²⁴⁷ As mentioned earlier, following the 2007 conflict between Hamas and Fatah that ruptured the Palestinian Authority, Hamas established a *de facto* authority in the Gaza Strip that provides public

²⁴⁴ HCJ 769/02 *The Public Committee against Torture in Israel v. Government of Israel*, (13 December 2006) (“*Targeted Killing* case”), para. 18 (citing Antonio Cassese, *INT’L L.* 420 (2nd ed. 2005)).

²⁴⁵ See generally Tristan Ferraro, *The ICRC’s Legal Position on the Notion of an Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict*, *INT’L REV. OF THE RED CROSS* (2015).

²⁴⁶ See *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶ 1225 (7 March 2014).

²⁴⁷ See, e.g., G.C. Res. 67/19 (Nov. 26, 2012) (“[W]elcoming the positive assessments...which determined that the Palestinian Authority is above the threshold for a functioning State in key sectors studied.”).

services to the local population to an equal, if not greater, extent than the Palestinian Authority does in the West Bank.

The Geneva Conventions recognize that an organized armed group can be treated as a belligerent equivalent to a State under IHL provided that it “belong[s] to a Party to the conflict” and fulfills certain conditions in its conduct of hostilities.²⁴⁸ Although the armed group is not in and of itself a party to the conflict, it gains the protection of the Geneva Conventions by virtue of fighting on behalf of a High Contracting Party.²⁴⁹

Unfortunately, the drafters of the Geneva Conventions provided only minimal guidance as to how to determine whether an armed group “belong[s]” to a Party to the conflict. It is irrelevant whether the High Contracting Party expressly authorizes the armed group to act on its behalf, as was previously thought to be required.²⁵⁰ Instead, the drafters contemplated a “*de facto* relationship,” including a “tacit agreement,” “between the resistance organization and the party to international law which is in a state of war.”²⁵¹ The precise contours of this relationship remain ambiguous under IHL. Some clarity may be found, however, by looking to the law of State responsibility.

Although it has not been formally codified into a binding treaty, the law of State responsibility is recognized as having crystallized into customary international law.²⁵² The International Law Commission’s (“ILC”) Draft Articles on Responsibility of States for Internationally Wrongful Acts is generally regarded as reflecting this body of customary law.²⁵³ Article 9 of the ILC draft provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.²⁵⁴

This is an exceptional category of State responsibility expressly intended for the purpose of addressing circumstances in which persons are acting in

²⁴⁸ GC III, art. 4(A)(2).

²⁴⁹ See Jean Pictet, *Commentary: III Geneva Convention, Relative to the Treatment of Prisoners of War*, INT’L COMM. OF THE RED CROSS 57 (1960).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See generally James R. Crawford, *State Responsibility*, in OXFORD PUBLIC INT’L LAW (2006).

²⁵³ *Id.* at para. 31.

²⁵⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), art. 9.

the absence of official authority, which includes cases of “revolution, armed conflict or foreign occupation.”²⁵⁵

It is not difficult to see that Hamas’ authority in the Gaza Strip fits cleanly within the definition for this form of State responsibility and that it occurs in the unique context the drafters intended. In the wake of Israel’s occupation of Gaza until 2005, Hamas began taking over lawful authority of the territory and exercising governmental functions. As a result of the rivalry between Hamas and the Palestinian Authority, all official authority has been absent from the territory since Hamas ousted the Palestinian Authority from the Gaza Strip in 2007.²⁵⁶ Meanwhile, the Gaza Strip faced pervasive destitution, periodic armed conflicts, and a seemingly endless humanitarian crisis. To fill the void, these circumstances called for an organized group, such as Hamas, to form a *de facto* governmental authority that would provide for the local population in Gaza.

The fact that the Palestinian Authority led by Mahmoud Abbas has disapproved of Hamas’ unilateral control in Gaza is immaterial, as an earlier draft of the Articles on State Responsibility makes clear:

The criterion which...should guide international law in this matter is that the nature of the activity performed should be given more weight than the existence of a formal link between the agent and the organization of the State or of one of the entities referred to in article 7.²⁵⁷

Therefore, it was not the intention of the drafters to limit State responsibility to circumstances where a State formally approves of the public conduct of the non-state actor, but rather to extend it to instances where that actor is the *de facto* authority in the State’s absence.

If this definition of State responsibility as part of customary international law is to inform the meaning of an organized armed group “belonging” to a party to the conflict, then Hamas must be regarded as an apparatus of the State of Palestine and its actions are to be attributable to that State. Therefore, by engaging in an armed conflict with Hamas since the disengagement, Israel is likewise in belligerent opposition to the party to the conflict to which Hamas belongs—Palestine. With States represented on either side of the armed conflict, IHL requires that hostilities be governed by the law of IAC.

²⁵⁵ *Id.* at art. 9(1).

²⁵⁶ See Nathan J. Brown, Carnegie Endowment for International Peace, *What Can Abu Mazen Do?* (June 15, 2007) (“The result is likely to be two lawless governments. One will operate under Hamas in Gaza, the other under Fatah in the West Bank...Neither will be accountable to Palestinian society or institutions in any way—the parliament cannot meet and other governmental bodies are moribund. Rather than getting an independent state, Palestinians are finding themselves with two failed ones.”).

²⁵⁷ International Law Commission, *Draft Articles on State Responsibility*, with Commentaries Thereto Adopted by the International Law Commission on First Reading (1997), art. 8(11).

C. Israel Remains in an IAC with Hamas in Gaza

As the conflict between Israel and Hamas is of an international character, determining whether it has ended is straightforward. The Geneva Conventions, and case law interpreting them, provide three plausible standards for when IACs may come to an end: the “cessation of active hostilities,”²⁵⁸ the “general close of military operations,”²⁵⁹ or the “general conclusion of peace.”²⁶⁰

The ICRC has concluded, however, that the “general close of military operations” is the “only objective criterion” by which to determine whether an IAC has ended, as any lower threshold would lead to instability.²⁶¹ It cites as support *Prosecutor v. Gotovina*, in which the ICTY favored the general close of military operations as a barometer for the end of IAC out of concern that “otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.”²⁶² Requiring a peace treaty to be signed for an IAC to end would undercut the development of IHL since the Geneva Conventions, which, as previously mentioned, have graduated from reliance on formal declarations to being defined on the basis of objective factual criteria.²⁶³ Marko Milanovic, along with a variety of other scholars,²⁶⁴ is in agreement, noting that the general close of military operations broadly captures the end of “actual combat” by encompassing “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.”²⁶⁵

²⁵⁸ GC III, art. 118.

²⁵⁹ GC IV, art. 6.

²⁶⁰ Tadic, *supra* note 232. *See also* GC I, art. 63; GC II, art. 62; GC III, art. 142; GC IV, art. 158.

²⁶¹ ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 274–84.

²⁶² *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1694 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

²⁶³ Although the ICTY held in Tadic that IHL applies “from the initiation of armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached,” *see* Tadic, *supra* note 232, the UK Ministry of Defence’s *Joint Service Manual of the Law of Armed Conflict* clarifies that the ICTY’s holding “does not necessarily mean on the conclusion of a formal peace treaty.” *See* United Kingdom Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict* (2004), para. 3.10.

²⁶⁴ *See, e.g.*, Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implication for Detention Operations under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 221 (2016); Dustin A. Lewis, Gabriella Blum & Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harv. L. Sch. Program on Int’l Law & Armed Conflict 33–34 (Feb. 2017).

²⁶⁵ Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT’L REV. OF THE RED CROSS 171 (2014) (citing International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), paras. 152–153).

Given this relatively high threshold for the end of IAC, the armed conflict between Israel and Hamas has not come to a halt. As of this writing, the most recent exchange of fire across the border occurred upon the IDF's shooting of unarmed protestors along the Gaza border on March 30, April 6, April 13, and April 20, 2018.²⁶⁶ On April 18, 2018, the IDF also shelled five men allegedly affiliated with Hamas' military wing upon their approach of the border near Khan Younis.²⁶⁷ The day prior, Israeli tanks fired shells at a Hamas post after its gunmen opened fire at IDF troops near the border.²⁶⁸ Meanwhile, it has been discovered that Hamas is building tunnels into Israeli territory in preparation for a future attack.²⁶⁹ Since this conduct constitutes either combat or maneuvers with a view toward combat,²⁷⁰ the IAC is ongoing.

This conclusion may be affected by the Palestinian reconciliation agreement if the Palestinian Authority begins to exercise governmental authority in the Gaza Strip, unlikely though it may seem. As discussed previously, this may end Israel's occupation of Gaza. Whether it also changes the character of the armed conflict between Israel and Hamas will rest on the question of Palestinian Statehood. After all, although the occupation will have ended, determining the character of the armed conflict depends on the status of the two parties to the conflict: Israel and Hamas. Following reconciliation, Hamas will become an organ of the newly unified Palestinian government. If one regards this Palestinian government as representing the nascent State of Palestine properly constituted under international law, the armed conflict will remain an IAC; but if Palestine has not yet become a State, the conflict will transform into one of a non-international character.²⁷¹

²⁶⁶ See, e.g., Isabel Kershner & Iyad Abuhweila, *Israeli Military Kills 15 Palestinians in Confrontations on Gaza Border*, NEW YORK TIMES (Mar. 30, 2018); Hazem Balousha & Peter Beaumont, *Death toll mounts as Palestinians protest at Gaza border*, THE GUARDIAN (Apr. 7, 2018); Yaniv Kubovich & Jack Khoury, *Gaza Protests: One Palestinian Killed, 233 Wounded by Israeli Military Fire, Report Says*, HAARETZ (Apr. 13, 2018); Noa Landau and Jack Khoury, *UN's Middle East Envoy Blasts Israel Over Gaza Deaths: 'Stop Shooting at Children'*, HAARETZ (Apr. 21, 2018).

²⁶⁷ See Stuart Winer, *IDF fires at 5 Palestinians, one of them armed, at Gaza border*, THE TIMES OF ISR. (Apr. 18, 2018).

²⁶⁸ See TOI Staff, *Gaza gunmen fire at Israeli troops, army tank hits Hamas post in response*, THE TIMES OF ISR. (Apr. 17, 2018).

²⁶⁹ See, e.g., Peter Beaumont, *Israeli Military Uncovers First Hamas Tunnel Into Israel Since 2014*, THE GUARDIAN (Apr. 18, 2016); AFP and TO Staff, *2 Hamas Fighters Die in separate Gaza Tunnel Collapses*, THE TIMES OF ISR. (Sept. 15, 2017); Isabel Kershner, *In a Blow to Hamas, Israel Destroys Tunnel from Gaza*, NEW YORK TIMES (Dec. 10, 2017); Yaniv Kubovich, *Israeli Army Destroys 'Longest Ever' Hamas Attack Tunnel Crossing from Gaza Into Israel*, HAARETZ (Apr. 15, 2018).

²⁷⁰ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), paras. 152–53.

²⁷¹ The question of Palestinian statehood is beyond the scope of this Note. For scholarship on this issue, compare Charles F. Whitman, *Palestine's Statehood and Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT'L L. J. 73 (2013) with Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 CHINESE J. OF INT'L L. 19 (2013). See also Office of the Prosecutor, Statement of the

VI. CONCLUSION

This Note has taken a dynamic approach in assessing the legal status of the Gaza Strip since Israel's 2005 disengagement from the territory. Rather than positing a continuous occupation since that time or rejecting it in its entirety, this Note has argued that although Israel lost effective control of Gaza in September 2005, it has gradually regained it as a result of its armed conflict with Hamas. A profound implication of this analysis has been that, in part as a result of Israel's renewed occupation of the Gaza Strip, the armed conflict between Israel and Hamas is international in character. If this Note is correct, there exist significant legal and policy implications for Israel, Palestine, and the international community.

The most dramatic consequence could play out before the ICC. As has previously been mentioned, Israelis and Palestinians are vulnerable to being held responsible for crimes only applicable in IAC, such as attacking civilian objects,²⁷² disproportionate attacks,²⁷³ and using protected persons as shields.²⁷⁴ Since these war crimes would feature prominently in an investigation of the 2014 Gaza conflict, the existence of an IAC in the Gaza Strip renders it more likely that ICC Prosecutor Fatou Bensouda would initiate an investigation into the situation in Palestine.

Other striking implications of this analysis, however, appear more conventional at first glance. As an occupying power with effective control of the Gaza Strip, Israel has obligations under IHL and IHRL that it does not currently recognize. Israel's indifference to these obligations may be the result of its own legal analysis that reaches a different conclusion than the one presented here, yet Israel subjects itself to a substantial risk that its conclusions ultimately will be discredited. In such a case, Israel will have to incur the burden of State responsibility for any violations of international law that have occurred in Gaza since its renewed occupation began.

If Israel hopes to avoid State responsibility for future violations of international law, it has two primary options. It can either take seriously its obligation to maintain public order and safety in the territory by establishing a military administration in Gaza,²⁷⁵ or it can end its occupation as it ostensibly sought to do in 2005. The former option is rife with problems, the clearest being that Israel is having difficulty avoiding violations of international law in the other area where it has already established a military administration—the West Bank.²⁷⁶ Another problem

Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to Know the Truth about the ICC's Jurisdiction over Palestine" (Sept. 2, 2014).

²⁷² See Rome Statute, art. 8(2)(b)(ii).

²⁷³ See Rome Statute, art. 8(2)(b)(iv).

²⁷⁴ See Rome Statute, art. 8(2)(b)(xxiii).

²⁷⁵ Hague Regulations (1907), art. 43.

²⁷⁶ See generally HUMAN RIGHTS WATCH, WORLD REPORT: ISRAEL/PALESTINE, EVENTS OF 2016

is that, in order to establish a governing authority over the population in Gaza, it would have to employ significant force that may cause more harm than it would cure. The latter option, however, is compelling.

Israel cannot withdraw from Gaza to end its occupation, as it did in 2005, because the only permanent military presence it has is its control of Gaza's airspace and territorial waters, which have little bearing on whether the land itself is occupied. This Note has already shown that the IDF has the capacity to make Israel's authority felt by Gaza's population, even deep in the heart of Gaza City, within a reasonable time. Of course, Israel could sit on its hands while allowing the Palestinian Authority to regain actual control of the territory. This option will likely be unattractive to Israel, however, given its concerns about whether a newly constituted authority in Gaza would prove peaceful. Therefore, Israel has no good options for receding from the Gaza Strip, even if it were interested in doing so.

Absent the occupation's end as a result of Palestinian reconciliation, two additional methods for ending an occupation have been proposed by Yoram Dinstein: a binding decision by the UN Security Council or a treaty of peace.²⁷⁷ Since the UN Security Council is unlikely to welcome an end of the occupation, as it did in Iraq,²⁷⁸ until a treaty of peace is concluded, these options appear to be one and the same. This leads to the conclusion that the most likely path for Israel to avoid State responsibility is to conclude a peace treaty with Palestine that truly brings an end to the occupation of the West Bank and Gaza. Unlikely though it may be, this option may be Israel's best hope for avoiding State responsibility for violations of international law in the Gaza Strip going forward.

(2017).

²⁷⁷ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 270–73 (2009). See also *Prosecutor v. M. Naletilic and V. Martinovic*, Case No. IT-98-34-T, Judgment, ¶ 214 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (“Occupation is defined as a transitional period following invasion and preceding the agreement on cessation of hostilities.”).

²⁷⁸ S.C. Res. 1546, S/RES/1546 (8 June 2004).

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