



Padjajaran Journal of International Law
International Law Department Universitas Padjadjaran

ISSN: 2549-2152, EISSN: 2549-1296

Volume 5, Number 2, June 2021

DOI: <https://doi.org/10.23920/pjil.v5i2.768>

Defining Effective Control Under the Law of Occupation After Israel's Disengagement Plan 2005

Evan Tobias¹

Abstract

During the conflict between Israel and Palestine, Israel had occupied Palestinian territory. In 2005, Israel issued the Disengagement Plan, which led Israel to declare that they no longer had any legal obligation to administer the Gaza area as an Occupying Power. In this regard, Israel's declaration is based on the Plan which governed their withdrawal from Gaza, followed by the recognition of Palestine's authorities. However, the situation regarding Israel's occupation status on the ground said otherwise. This paper will analyze whether the Disengagement Plan revokes the status of Israel as an Occupying Power and thus Israel has no longer obligations toward the Occupied Territory. By analyzing the constitutive elements of belligerent occupation and comparing them with the factual condition, this paper found that Israel should be regarded as an occupying power over the territory of Gaza. Moreover, even though Israel rejects its status as occupying power, Israel is still obligated to comply with the applicable law of armed conflict.

Keywords: Disengagement Plan 2005, Gaza, Occupation Law, Israel, Palestine.

Mendefinisikan Effective Control dalam Hukum Okupasi Setelah Israel Disengagement Plan 2005

Abstrak

Selama periode konflik antara Israel dan Palestina, Israel telah berhasil melakukan okupasi terhadap wilayah di Palestina. Di tahun 2005, Israel menerbitkan *Disengagement Plan*, melalui kebijakan tersebut, Israel menyatakan bahwa mereka tidak memiliki kewajiban hukum apapun sebagai negara okupasi terhadap wilayah di Gaza. Berkaitan dengan hal tersebut, pernyataan Israel dilandaskan pada *Disengagement Plan*, yang mana turut mengakui otoritas Palestina sebagai entitas yang memiliki hak untuk mengatur wilayahnya sendiri. Namun, situasi di lapangan bertolak belakang dengan pernyataan Israel. Oleh sebab itu, artikel ini akan melakukan analisis terkait apakah *Disengagement Plan* mencabut status Israel sebagai negara okupasi yang tidak lagi memiliki kewajiban terhadap wilayah yang didudukinya. Dengan mempertimbangkan elemen konstitutif dari okupasi serta membandingkan dengan kondisi-kondisi faktual di wilayah Palestina, khususnya Gaza, setelah tahun 2005, artikel ini menemukan bahwa Israel sudah seharusnya dianggap sebagai negara okupasi. Selain itu, meskipun Israel menolak statusnya sebagai negara okupasi, Israel tetap memiliki kewajiban untuk tunduk pada hukum-hukum perang yang berlaku.

Kata kunci: Disengagement Plan 2005, Gaza, Occupation Law, Israel, Palestine.

¹ Research Assistant at Indonesian Center for International Law, Indonesia, evan19001@unpad.ac.id

A. INTRODUCTION

Can an occupation end after foreign armed forces depart from an occupied territory? Or are there any other elements required for an occupation to cease to exist? These are two relevant questions that may arise to the issue of Israel's occupation in Palestine.

In 2008, Israel initiated a military operation, namely Operation Cast Lead (OCL). The operation was launched to the territory of Gaza and presumably prompted due to the previous attack from Hamas. Amnesty International found that the operation had caused hundreds of casualties and damaged civilians' property. It is estimated that more than 1300 Palestinian and 13 Israelis were killed.² The 22 days-long conflicts attracted much criticism from several international communities, especially against the action of Israel in Gaza territory.³

In short, the conflict between Israel and Palestine can be traced back to the establishment of the British Mandate in 1917. After World War 1, the League of Nations gave the British authority to manage the territorial division between Arabs and Jewish. There is no final agreement regarding the territorial division until the present day. However, in 1967, the Jewish unilaterally declared their independence and initiated the establishment of the Israel State. On this unilateral declaration, the Arabs became infuriated by such action, as the declared territory had not been agreed upon between the parties. Based on this event, the conflict between Israeli (Jewish) and Palestine (Arabs) remains today.

Many agreements have been made for the past years, and many States have been involved in the peace negotiation round. One of them occurred in 1993, when Israel

initiated the Declaration of Principles of Interim Self Government Arrangements. The agreement affirmed Palestine in administering their territories through Palestinian Authority. In the paper, indeed, Palestine have their control. However, on a factual basis, Israel still controls the area. Moreover, in 2005, Israel enacted the Disengagement Plan, which led to the withdrawal of Israeli troops and left Palestine with its authorities. Nevertheless, despite the physical absence of Israel's armed forces, some events illustrated how Israel still maintains control over the area, particularly Gaza.

According to this situation, the obscurity of Israel's status over Palestine will undoubtedly raise many issues. Because, under International Humanitarian Law, control over foreign territories is classified as Belligerent Occupation, which triggers the applicability of distinct legal regimes. Subsequently, if there is no clean-cut categorization, this condition will lead to vagueness and *legal lacunae* in determining which legal regime should apply.

B. ANALYSIS AND DISCUSSION

1. The Beginning of Occupation: From British Mandate to Disengagement Plan 2005

For the last 50 years, the territorial conflict between Israel and Palestine has caused a harmful impact in many aspects, ranging from economics, politics, or human rights. Predominantly, the Partition Plan provoked the territorial conflict enacted under the British administration after World War 1. The control of the British over the Palestine area derives from the League of Nations mandates in 1922, which obliged the British to issue a delimitation plan for both Jewish

² Amnesty International, "Gaza: Operation Cast Lead," *Amnesty International UK*, <https://www.amnesty.org.uk/gaza-operation-cast-lead>. It was accessed on 20 January 2022.

³ Aljazeera, "Operation Cast Lead Five years on: We Are Still Demanding Justice", <https://www.aljazeera.com/opinions/2014/1/19/operation-cast-lead-five-years-on-we-are-still-demanding-justice>. Accessed on 20 January 2022.

and Arab in the territory of Palestine.⁴ In 1947, the plan was successfully formed. However, the Arab opposed and request for another round of negotiation. Despite the refusal, the Jewish in 1948 declared the formation of the Israel State and triggered a prolonged conflict against Arab State (Egypt, Lebanon, Jordan, and Syria).⁵

In response to that, the Arab League initiated the creation of an organization representing the Palestinian people, which is called as Palestinian Liberalization Organization (PLO).⁶ The organization was meant to strengthen diplomatic, political, and economical relations among the Arab states. The PLO received strong support from several States and United Nations, where the United Nations granted non-member observer state status to PLO.⁷ With this, PLO had represented the Palestinians in many conflicts and diplomatic conferences. For example, in 1967, Israel and PLO agreed on Oslo Accord I, which conferred number of rights and obligations to PLO in preparing the interim government of Palestine in the territory of Gaza and Westbank.⁸ Such representation is also well recognized by the international community, especially when PLO declared Palestine as a State in 1988.⁹

In 1993, Palestine and Israel agreed on the Oslo Accord I that arranged the timetable of the peace process and the administration of the Palestine Government in the territory of Gaza and West Bank. In 1995, the Oslo Accord I was followed by Oslo Accord II, which provided Israel'

withdrawal from Palestine's territories. However, the agreements did not conclude the conflict between Israel and Palestine, and rather the conflicts kept erupting between Israel and Palestine.

The failure to reach a peaceful agreement presumably occurred due to the diversity of ideology in Palestine's political landscape, which subsequently resulted in different approaches to conclude the conflict.¹⁰ Such diversities can be seen from Palestine's two main political parties, Fatah and Hamas, where both have different approaches on how to liberate Palestine. On Fatah, they tend to use the diplomatic route, whereas Hamas tend to use armed resistance to Israel to gain the disputed territories.¹¹ Moreover, after Oslo Accord I, Fatah accepted the reconciliation from Israel, but Hamas chose to refuse the existing agreement with Israel. Besides that, Hamas does not recognize Israel as a state, which is different from Fatah, which accepts Israel as a State declared in 1967.¹² Based on this other view, it is not surprising for Hamas and Fatah to have different methods in settling the dispute for Palestinians. The same thing applies to the militaries, where Fatah and Hamas had their proponents in each territory they control.¹³ In 2006, Hamas won the election in the Palestinian Legislative Council and established Hamas government.¹⁴ However, Fatah chose not to join the Hamas government as Hamas refused to satisfy the conditions offered by Fatah. Due to the situation, the conflict clashed between Hamas and Fatah and resulted in dividing two *de facto* governing

⁴ Mustafa Mari, "The Israeli Disengagement from the Gaza Strip: An End of the Occupation?," *Yearbook of International Humanitarian Law*, 2007, pp. 358.

⁵ *Ibid.*

⁶ Avraham Sela, "The PLO at Fifty: A Historical Perspective," *Contemporary Review of the Middle East*, vol. 1, no. 3, 2014, p. 283.

⁷ *Resolution Adopted by the General Assembly on 4 December 2012, Resolution A/RES/67/19* (2012).

⁸ Qandeel, Mais. *Enforcing Human Rights of Palestinians in the Occupied Territory*, Switzerland: Carl Grossmann, 2018, at. 52-56.

⁹ *Ibid.* at. 51-52.

¹⁰ Sher, Gilead and Anat Kurz, *Negotiating in Times of Conflict*, Tel Aviv: Institute for National Security Studies, 2015, at. 81-83.

¹¹ Aljazeera, "Hamas and Fatah: How are the two groups different", *Aljazeera*, <https://www.aljazeera.com/features/2017/10/12/hamas-and-fatah-how-are-the-two-groups-different>, accessed on 20 January 2022.

¹² Aljazeera, "Hamas and Fatah: How Are the Two Groups Different," 2017, <https://www.aljazeera.com/features/2017/10/12/hamas-and-fatah-how-are-the-two-groups-different>.

¹³ *Ibid.*

¹⁴ Qandeel, Mais, *Supra note 8*, pp. 59-60.

areas, Hamas controls Gaza and Fatah controls West bank.¹⁵

In 2004, Israel had issued a Disengagement Plan, which was another agreement after the Oslo Accord I and Oslo Accord II. The plan provides the withdrawal of Israel from the territory. On this basis, Israel declared that they no longer held the status as the Occupying Power in Palestinian territory, which subsequently did not bring any legal obligations for Israel as it is used to be.¹⁶

2. Occupation under International Humanitarian Law

International Humanitarian Law (IHL) is a set of rules governing how war is supposed to be performed.¹⁷ On this notion, it is recorded that human civilization had already recognized the rules of war starting from the Roman Empire, where they had sets of military codes applicable to the Romans in conducting the war against non-Romans. One of the most notable publications can be seen on Strategic, where it directed, among other things, the obligation to repair for injuries or damages that the Roman soldiers caused. The same thing applies to Egypt in 1400 B.C., where they had an agreement with Sumeria regarding the treatment of each state's prisoners.¹⁸

In 1949, humans' awareness to lessen the inhumane impact of war had successfully brought the 4 Geneva Conventions 1949 and its protocols into effect. Under the law, the parties to the conflict must adhere to every provision to create a balance between military necessity and humanitarian needs. Moreover, the parties are not necessarily limited to States,

but it recognizes non-States actors as the Party to the Convention.

The basic rules that trigger the applicability of IHL may amount to the distinction between International Armed Conflict and Non-International Armed Conflict. Regarding this matter, international armed conflict refers to Common Article 2 of the Geneva Convention. In contrast, Non-International Armed Conflict refers to Common Article 3 of the Geneva Convention. What distinguishes them can be indicated by the parties involved in both conflicts. The international armed conflict is a condition where there is an armed conflict between two or more States. In contrast, non-international armed conflict is defined as a condition where there is an armed conflict between an armed group and the State.¹⁹

However, for this article, non-international armed conflict will not be the focus here. Instead the notion of international armed conflict will be the main issue, especially in the relationship between international armed conflict and occupation. Regarding that, the concept of international armed conflict is laid down in article 2 of the Geneva Convention:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply 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 them.

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.

¹⁵ *Ibid.*

¹⁶ Darcy, Shane and John Reynolds, "An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law," *Journal of Conflict and Security Law*, vol. 15, no. 2, 2010, pp. 227–228.

¹⁷ Kolb, Robert and Richard Hyde, *An Introduction to the International Law of Armed Conflict*, Oxford: Hart Publishing, 2008, p. 8.

¹⁸ Solis, Gary, *The Law of Armed Conflict*, Cambridge: Cambridge University Press, 2010, pp. 4-5.

¹⁹ Article 2 Common Articles of Geneva Convention; Article 3 Common Articles of Geneva Convention.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. Furthermore, they shall be bound by the Convention about the said Power, if the latter accepts and applies the provisions thereof."

In this provision, it is evident that International Armed Conflict occurs between States who exert their armed forces against each other. During a conflict situation, some States may advance and acquire control within the opposing parties' territory, where the position as mentioned earlier is commonly called Occupation.²⁰ Subsequently, all cases of occupation only exist under the context of International Armed Conflict, and it does not occur in Non-International Armed Conflict.²¹

2.1. Beginning of Occupation

Under the law of armed conflict, the situation where a belligerent exercise or can exercise control over an area that it does not belong to is considered as a state of occupation. Article 42 of Hague Regulation stipulates that,

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

Under occupation, different legal regimes may govern other rights and obligations to the party to the conflict or the civilians in the occupied territories.²² In this regard, occupation only prevails if the action is conducted without consent from the States whose territories are occupied.

Because, from several past cases, there are situations that put States occupy another States' territory with their consent. For example, the United States' occupation over Iceland during World War II, wherein this case this is not regarded as occupation as put under Hague Regulation.²³

Furthermore, the governance of occupation can be divided into two sources of international law; they are: (1) Hague Regulations on Land Warfare; and (2) Geneva Convention IV.²⁴ For Hague Regulations, the Convention tends to focus on the rights and obligations of the occupied and occupying power. While, in terms of Geneva Convention IV, they tend to govern the humanitarian aspect of occupation, especially on the protection of civilians.²⁵ Furthermore, many experts also contend that the Geneva Convention becomes the supplementary source of the Hague Regulations.²⁶

From article 42 of the Hague Regulation, occupation may begin after a states' armed forces enter another territory that is not under its sovereignty. On that basis, the existence of such armies needs to be accompanied by their ability to exercise or potentially exercise their control over the area, and this requirement is also called effective control.²⁷

Effective control plays an essential role in determining the beginning and the end of an occupation. In this regard, the notion can be divided into two broad interpretations and they are (1) Actual Authority; and (2) Potential Authority. For the former, actual authority refers to the 'exercised' wording on Article 42 of Hague Regulations. In contrast, for the latter, potential authority

²⁰ Mohamad Lardo, "The Occupying Power According to the International Humanitarian Law: Case Study in Gaza Strip," *Padjajaran Journal of International Law*, vol. 4, no. 2, 2020, pp. 172-174.

²¹ Kolb, *supra* note 17, p. 69.

²² Jamal El-Hindi, "The West Bank Aquifer and Conventions Regarding Laws of Belligerent Occupation," *Michigan Journal of International Law*, vol. 11, no. 4 (1990), pp. 1404-1405.

²³ Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press, 2009, p. 35.

²⁴ *Ibid*, p. 229.

²⁵ *Ibid*, pp. 229-230.

²⁶ El-Hindi, *supra* note 22.

²⁷ Yoram Dinstein, *supra* note 23, pp. 42-45.

refers to the wording of “can be exercised” on Article 42 of Hague Regulations.

From the Article 42 of Hague Regulation, it is clear that the question of occupation is a question of fact and does not fall under subjective declaration of parties to the conflict.²⁸ Subsequently, occupation did not depend on declaration or mere agreement, instead it refers to the existence of control that is established by the parties to the conflict.²⁹ Therefore, effective control cannot be established if the said power only sweep hurriedly or not having enough forces to exert its authorities.³⁰

Effective control is relatively difficult to define as a *conditio sine qua non* of an occupation. Circumstances can be different from each case, considering that a certain control is so much dependent on the geographical conditions, numbers of troops, or the means of warfare.³¹

In the *Naletilic* case, the court defines effective control as the condition where the Occupying Power has sufficient force present or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.³² In detail, the court found five elements of condition that may amount to the state of an occupation, they are:

“a. the occupying power must be in a position to substitute its authority for that of the occupied rules, which must have been rendered incapable of functioning publicly;

b. The enemy's forces have surrendered, been defeated, or

withdrawn. In this respect, battle areas may not be considered occupied territory. However, sporadic local resistance, even thriving, does not affect the reality of occupation;

c. The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying administration felt;

d. A temporary administration has been established over the territory;

e. The occupying power has issued and enforced directions to the civilian population”³³

The International Court of Justice is also taking the same interpretation in *Armed Activities* case. ICJ found that effective control can only be established if there is sufficient evidence that the military powers of another State could intervene and substitute the authorities of another State.³⁴

However, the notion of effective control also brings another question about the use of advanced technology by a belligerent. Using the current technological tools, a hostile army could supervise an area and control it. These technical features may conclude that the physical presence of foreign troops is not necessary for an occupation to exist.³⁵ Rather, the control of a military force may prevail when they are positioned beyond the said occupied areas.³⁶ Conclusively, the effective control could only take into effect if the foreign belligerent could replace the authority over the occupied zone. This can be indicated by

²⁸ US Tribunal at Nuremberg, Hostages trial, Law Reports of Trial of War Criminals, Vol. III, UN War Crimes Commission, 1949, London, p. 55.

²⁹ Georg, Schwarzenberger, *International Law as Applied by International Courts and Tribunals - The Law of Armed Conflict*, London: Stevens & Sons, 1968, p. 194.

³⁰ Yoram Dinstein, *supra* note 23, p. 43.

³¹ Yoram Dinstein, *supra* note 23, p. 44.

³² International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Naletilic (Judgement), IT-98-34-T, 2003, p. 217.

³³ Tristan Ferraro, “Determining the Beginning and End of an Occupation Under International Humanitarian Law,” *International Review of the Red Cross*, vol. 94, no. 885, 2012, pp. 141–142.

³⁴ *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgement of 19 December 2005, [2005], at 173.

³⁵ Tristan Ferraro, *supra* note 33, at 143.

³⁶ *Ibid.*

its ability to issue direction to civilians, administer the territory, or have sufficient troops over the territory.³⁷

How about authority? What is the meaning of “replacing government authorities?” Regarding this, Tristan Ferraro put two helpful questions in his paper to illustrate the problem of authority under the law of occupation. *First*, “Does the Occupying Power’s authority need to be exclusive?” *Two*, “Ability to exert authority versus actual authority: which criterion prevails?”

For the first question, Tristan highlighted that Occupying Power is not required to be the sole authority in the occupied territories. Instead, there might be a case where the authority is shared between the Occupying Power and the local government.³⁸ Concerning these shared authorities, Israel Supreme Court also pointed out the same interpretation that Occupying Power may delegate its head to the former governor of the occupied territories.³⁹

For the second question, the two types of authority (ability to exert authority and actual authority) receive various interpretations. In the case of *DRC v. Uganda*, the International Court of Justice, aside from the understanding that every authority must be established by substituting the said power of the occupied territories, and the Power must be present in the area.⁴⁰ However, this view received many criticisms, as it evades the *lex lata* of Article 42 of Hague Regulations. Article 42 of Hague Regulations explicitly recognizes two types of authority: actual and potential authority.⁴¹ Various scholars still adopt this view because by evading the interpretation of possible authority would encourage

military forces to refrain from doing their obligation by only positioning their position in a particular location. At the same time, they have the ability to exert their control.⁴² Subsequently, the notion of authority must be established by taking the ability of military forces to exercise their power.

When occupation occurs, the party to the conflict has imposed a set of obligations listed under the Hague Regulations and Geneva Conventions. In this regard, the sole purpose of such distinct governance comes from the general idea of the drafters of the Geneva Convention and Hague Regulation to protect civilians and preserve their residence from the harmful effect of belligerent’s existence.⁴³ These rights and duties could be recognized in several forms; they are:

- a. The Occupying Power must maintain the Status Quo in the occupied territories.

Under the law of occupation, the Occupying Power is obligated to maintain the status quo in the occupied territories. As put under Article 43 of the Hague Regulations, “*The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety while respecting, unless prevented, the laws in force in the country.*”

Under this governance, it implies that the law of occupied territories is still applicable during the occupation. The same thing applies to the judicial bodies of the occupied territories.⁴⁴ But, on

³⁷ Hanne Cuyckens, “Is Israel Still an Occupying Power in Gaza,” *Netherlands International Law Review*, vol. 63, 2016, pp. 281–282.

³⁸ Tristan Ferraro, supra note 33, at 148-151.

³⁹ *Ibid.*, p. 50

⁴⁰ Tristan Ferraro, supra note 33, at. 146-147.

⁴¹ Tristan Ferraro, supra note 33, at. 150-151.

⁴² Tristan Ferraro, supra note 33, p.151.

⁴³ Yoram Dinstein, supra note 23, pp. 6-9.

⁴⁴ Article 42 of the Regulations concerning the Laws and Customs of War on Land; Article 64 of Geneva Convention IV.

several cases, the Occupying Power could initiate action that alter the existing law of the occupied territories. For instance, the Occupying Power may establish a Tribunal built upon the intention to adjudicate and punish violators of the law of armed conflict.⁴⁵ Furthermore, another exception can be found as well regarding the public property, where under Article 56 of Geneva Convention IV, buildings that are valued as a public buildings (hospitals, airports, etc.) are not under the governance of the occupied' authorities. Instead, they are under the control of the Occupying Power.⁴⁶

- b. The Occupying Power must protect the civilians' rights in the occupied territories.

During the occupation, the Occupying Power must fulfill its obligations in maintaining and respecting civilians' rights in the occupied territories.⁴⁷ This obligation is intended to prevent any abusive behavior from the Occupying Power to the civilian.⁴⁸ Relating to that, several sets of obligations needs to be adhered to by the Occupying Power; they are:

- i. The Occupying Power is not allowed to deport or forcibly transfer individuals in the occupied territories;⁴⁹
- ii. The Occupying Power is not allowed to move its civilian to inhabit the territory of the occupied territories;⁵⁰

- iii. The Occupying Power is not allowed to enlist civilians with force to its troops;⁵¹
- iv. The Occupying Power is not allowed to cause any destruction to private property unless there is a reasonable military necessity;⁵²
- v. The Occupying Power must uphold international human rights values in holding judicial proceedings;⁵³
- vi. The Occupying Power must ensure the distribution and fulfillment of medical food supplies to the territories that they occupied;⁵⁴
- vii. The Occupying Power must maintain the occupied territories' hygiene and public health;⁵⁵
- viii. The Occupying Power must let international humanitarian organization or Protecting Power give their assistance in fulfilling the basic needs of the inhabitant of the occupied territories.⁵⁶

2.2. The End of Occupation

Indicating the end of occupation is undoubtedly a complicated task, considering that war is inherently dynamic. A foreign troop could inevitably withdraw from a territory, but they might re-occupy the same territory at some point. In addition to that, the military forces could pretend to leave the territory, but they might still maintain their control from a distance through military strategies.⁵⁷

Unfortunately, Hague Regulations keep silent on this matter. From several legal

⁴⁵ Article 66 of Geneva Convention IV.

⁴⁶ Article 56 of Geneva Convention IV.

⁴⁷ Robert Kolb, *supra* note 17, p. 233.

⁴⁸ *Ibid.*

⁴⁹ Article 49(1) of Geneva Convention IV.

⁵⁰ Article 49(6) of Geneva Convention IV.

⁵¹ Article 51(1) of Geneva Convention IV.

⁵² Article 53 of Geneva Convention IV.

⁵³ Article 64 of Geneva Convention IV.

⁵⁴ Article 55 of Geneva Convention IV.

⁵⁵ Article 56 of Geneva Convention IV.

⁵⁶ Article 59 of Geneva Convention IV.

⁵⁷ Adam Roberts, "The End of Occupation: Iraq 2004", *International Comparative Law Quarterly*, Vol. 54, No. 1, 2005, pp. 28-33.

writings, the end of occupation is indicated by the same factor that begin the occupation itself, namely the loss of effective control. From several past cases, the absence of control can be demonstrated through several events:

a. Treaty of Peace

Occupation may come to end when the Occupying Power had lost its control over other's belligerent territories. In relation to that, some past events showed the control of an Occupying Power may cease, when both Parties to the conflict concludes a peace treaty. Generally, the agreement itself contains provision that turn the control to the initial power. For example, in 1919, France and Germany concluded Versailles Treaty of Peace which gave the Germans control over the territory of Alsace and Lorraine.⁵⁸

b. Withdrawal from an occupied territory

In most cases, occupation ends when the Occupying Power withdraws its troops from the territory. Such withdrawal is commonly followed by handing over control to the initial power of the territories. However, as stated in section A above, the case of withdrawal is not necessarily equal to the end of the occupation. But it still requires further scrutiny, whether the Occupying Power still controls over the area, despite the fact they are not physically there.⁵⁹ Because there are a number of facts that may retain the control of an Occupying Power while not present in the occupied territories.⁶⁰ This *rationale* derives from various advancements in military strategy, which may range from technological advancement, topographical attributes of the area, or certain types of military strategy.⁶¹ In light of this, the ability to control a site must be seen by considering

all possible factors, not only relying on the physical presence of armed forces.

c. The decision by the United Nations Security Council

The United Nations Security Council (UNSC) could terminate an occupation through its resolution. Occupation is indeed a question of fact. Still, in the context of the UNSC Resolution, various scholars put the formal statement of UNSC as a binding decision that will forcefully demand the military forces to comply with the Resolution. As put by Yoram Dinstein, UNSC Resolution is considered to override the rules of IHL on the subject, where it could use a mere formal statement to end the occupation.

This condition can be illustrated through the enactment of UNSC Resolution 1546, where the UNSC declared the end of the Iraq occupation in 2004. Moreover, the resolution also affirms the status of Iraq as a fully sovereign and independent government.⁶²

After the end of the occupation, the Geneva Convention stipulates a number of obligations to Occupying Power.

*"In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory"*⁶³

In this regard, the provision imposes sets of obligations to the Occupying Power after one year of the general close of military operations. It is listed under Article 6, which ranges to the issue of Protecting Power,⁶⁴ civilian internments,⁶⁵ treatment of protected persons,⁶⁶ enlistments of

⁵⁸ Yoram Dinstein, *supra* note 23, p. 271.

⁵⁹ Cuyckens, *supra* note 37, pp. 281–282.

⁶⁰ Adam Roberts, *supra* note 55, pp. 28–31.

⁶¹ Tristan Ferraro, *supra* note 33, pp. 144–145.

⁶² United Nation Security Council, Resolution 1546 (2004); Dinstein, *supra* note 23, p. 273.

⁶³ Article 6(3) of Geneva Convention IV.

⁶⁴ Article 9 of Geneva Convention IV.

⁶⁵ Article 143 of Geneva Convention IV.

⁶⁶ Article 27 of Geneva Convention IV.

labour,⁶⁷ protection to the civilian property,⁶⁸ and treatment to the person who falls in the hands of the party which they are not nationals.⁶⁹

The issue that may arise in Article 6(3) of Geneva Convention IV may come from the notion of "general close of military operations" (GCM). Most legal writings refer to the record of the Final Diplomatic Conference of Geneva Convention IV 1949, where it defines GCM as the end of all fighting between all those concerned.⁷⁰ Moreover, besides the final conflict between the parties to the conflict, Oppenheim also puts the end of occupation when the Occupying Power withdraws from the occupied territory.⁷¹

3. Occupation After Israel's Disengagement Plan 2005

3.1. Israel Control Over Gaza

When addressing Israel's occupation in Gaza, the concept of effective control is challenged by the fact that Israel had withdrawn its troops from the territory. Israel's withdrawal could be traced back to the unilateral declaration called the Disengagement Plan. Initially, the plan was intended to reaffirm the ongoing peace negotiation between Israel and Palestine. Through this plan, Israel maintains that there is no longer any basis for claiming that the Gaza Strips an occupied territory.⁷² Israel's declaration is also further quoted by the Israel Supreme Court, where it stated, "Since September 2005, Israel no longer has effective control over what takes place within the territory of the Gaza Strip", and

has "no general obligation to care for the welfare of the residents of the Strip."⁷³

However, by having the given nature of the occupation, the fact of control must be considered by scrutinizing the governance held by Israel and not solely relying on the mere declaration.⁷⁴ After the Disengagement Plan, Israel proceeded to withdraw its troops and evacuate their inhabitant from Gaza. Yet, the plan itself did not set aside the control of Israel over Gaza. Through the Goldstone Report, a report from Fact-Finding Mission established by United Nations, it is found that despite the absence of Israeli armed forces, Israel still maintains control over the Gaza area through several kinds of means, which ranges from infrastructure, surveillance, or enforcing Israel's law in Gaza area. That being said, the control of Israel can also be seen from the normative basis of the Disengagement Plan itself, where it stipulates that,

"Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip"⁷⁵

In response to the clause as mentioned above, some scholars argued that every state has the right to keep the border, as it falls under their sovereignty.⁷⁶ Responding to this, it is true that every state may exercise its rights in administering its own border. Nonetheless, from a factual basis, Israel's action in "administering their

⁶⁷ Article 49, 51, and 52 of Geneva Convention IV.

⁶⁸ Article 53 of Geneva Convention IV.

⁶⁹ Article 29-34 of Geneva Convention IV.

⁷⁰ ICRC, "Convention (IV) Relative to the Protection of Civilian Persons in Time of War," *ICRC*, 1958, accessed on <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=030537C0A8EE01DFC12563CD0042A6BE>.

⁷¹ Oppenheim, *International Law: A Treaties Vol 2 Disputes, War and Neutrality*, London: Longmans Green, 1952.

⁷² The Disengagement Plan, 18 April 2004, accessed on <https://mfa.gov.il/mfa/foreignpolicy/peace/mfadocum>

[ents/pages/disengagement%20plan%20%20general%20outline.aspx](https://mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/disengagement%20plan%20%20general%20outline.aspx).

⁷³ Al-Basyuni v. Prime Minister of Israel, Judgement of HCJ 9132/07 30 January 2008, [2008], p. 12.

⁷⁴ Yuval Shanny, "Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement," *Yearbook of International Humanitarian Law*, vol. 8, no. 12-06, 2006, p. 380.

⁷⁵ Israeli Ministry of Foreign Affairs, Section III of The Disengagement Plan 2004.

⁷⁶ Elizabeth Samson, "Is Gaza Occupied?: Redefining the Status of Gaza Under International Law", *American University International Law Review*, Vol. 25, No. 915, p. 936.

border” was not conducted within their own territory nor the border, instead the actions to guard and monitor the land of Gaza had put the citizen of Gaza to be under the supervision or dependencies to Israel’s administration. The reports of UN Special Rapporteur had elucidated this condition, they are:

“(a) Substantial control of Gaza’s six land crossings: the Erez crossing is effectively closed to Palestinians wishing to cross to Israel or the West Bank. The Rafah crossing between Egypt and Gaza, which is regulated by the Agreement on Movement and Access entered into between Israel and the Palestinian Authority on 15 November 2005 (brokered by the United States, the European Union and the international community’s envoy for the Israeli disengagement from Gaza), has been closed by Israel for lengthy periods since June 2006. The main crossing for goods at Karni is strictly controlled by Israel and since June 2006 this crossing too has been largely closed, with disastrous consequences for the Palestinian economy.

(b) Control through military incursions, rocket attacks and sonic booms: sections of Gaza have been declared ‘no-go’ zones in which residents will be shot if they enter.

(c) Complete control of Gaza’s airspace and territorial waters.

(d) Control of the Palestinian Population Registry: the definition of who is ‘Palestinian’ and who is a resident of Gaza and the West Bank is controlled by the Israeli military. Even when the Rafah crossing is open, only holders of Palestinian identity cards can enter Gaza through the crossing; therefore,

control over the Palestinian Population Registry controls who may enter and leave Gaza. Since 2000, Israel has not permitted additions to the Palestinian Population Registry with few exceptions.

(e) Control of the ability of the Palestinian Authority to exercise governmental functions. Israel exercises control over the ability of the Palestinian Authority to provide services to Gaza and West Bank residents and the functioning of its governmental institutions, including control over the transfer of tax revenues which amount to 50 percent of the Palestinian Authority’s operating income. Moreover, Gaza and the West Bank constitute two parts of a single territorial unit, with a unified and undifferentiated system of civilian institutions spread throughout Gaza and the West Bank, funded from the same central budget and run by the same central authority. Therefore, Israel’s continued direct control over the West Bank is a form of indirect control over Gaza.”⁷⁷

In addition to Israel’s control over the Gaza border and Palestine civilian registration, Israel was still able to issue direction against the Gaza people and bring them under Israel’s court scrutiny. It is evident from Israel Criminal Procedure Law 2006, which provides Israel’s law enforcer to imprison Palestinian from Gaza, where until 2009 there were more than 751 Palestinian that Israel incarcerated.⁷⁸ Moreover, Israel’s control over Gaza also extends to how Israel uses Gaza civilian dependencies to Israel, namely by using water, sewage, electricity, health services, and sanitation infrastructure. In this regard, the Palestinians were very dependent on

⁷⁷ Resolutions adopted by the General Assembly on 17 August 2007, GA Res. UN Doc. A/62/275 (2007), at. 10.

⁷⁸ Darcy, Shane, supra note 16 p. 236.

Israel. For example, in 2007, Israel Supreme Court must address the *Gaza Fuel and Electricity* case, where numbers of humanitarian organizations requested Israel to fulfill its obligation to ensure the fulfillment of Gaza's basic necessities. In response, Israel contended that they no longer held the status as an occupying power, which renders Israel not have any obligation to supply fuel or electricity to the Palestinians in Gaza.⁷⁹ The court determined:

*"Since September 2005, Israel no longer has effective control over what happens in the Gaza Strip. The military government that was in force in this territory in the past was ended by the government's decision, and Israeli soldiers are no longer stationed in the territory permanently, nor are they in charge of what happens there. Neither does Israel have any effective ability, in its present position, of enforcing order and managing civilian life in the Gaza Strip"*⁸⁰

3.2. Defining Effective Control After Israel's Disengagement Plan 2005

After taking a short discussion concerning the law of occupation and collecting facts that had occurred in the land of Gaza, now it is time to return to our main question as already put above: Can an occupation end after foreign armed forces depart from an occupied territory? Or are there any other elements required for an occupation to cease to exist?

From the two questions, the occupation status in Gaza indeed gave an excellent challenge for the current legal landscape to determine what an occupation is. Some scholars chose to take the conventional view that occupation only exists when effective control prevails, which can be indicated by the physical presence of foreign troops or the potential it has. Contrary to that, some scholars chose to see

the occupation problem by considering the institutionalized or systemic aspect that could control the occupied inhabitant, such as economic, social, or administrative structure. In other words, both views indicate a different interpretation regarding the meaning of "potential control," which refers to Article 42 of Hague Regulations. The one limits the importance of potential control related only to armed forces control. The other one broadens the purpose by considering the non-military forces to control the occupied territories.

In this paper, the author argued that the case of Israel's occupation must be seen from the latter view, which put the Occupying Power to control the territory by using the established standardized system. Subsequently, military forces don't need to be present in the territory. Still, it could be deemed sufficient if the Occupying details have their control through the systemic aspect of authority.

Regarding the "systemic aspect of authority," Hague Regulations and Geneva Convention do not explicitly mention or refer to this notion. However, this article argued that in case of a prolonged occupation, it is not surprising for Occupying Power to build an established system that forces the inhabitant of the occupied territories to depend on Occupying Power's authorities.⁸¹ For example, during the period of occupation, the Occupying Power will build infrastructures that only favor the Occupying Power itself, where it will create a barrier for the inhabitant of the occupied territories to detach from the said Power's control.

In the case of Israel's protracted occupation in Gaza, which had lasted since the 1970s, Israel had established a number

⁷⁹ Bassiouni Ahmed (et al.) v. Prime Minister (Judgment) HCJ 9132/07 (30 January 2008).

⁸⁰ *Ibid.*

⁸¹ Weinthal, Erika and Jeannie Sowers, "Targeting Infrastructure and Livelihoods in the West Bank and Gaza", *International Affairs*, Vol. 95, Issue 2, 2019, p. 2.

of infrastructures and policies that deliberately put Palestinians dependent on Israel. For example, Israel's policies had centralized the Gaza area's water system to Israel's water system. This is conducted by limiting access for Palestinian Authority to establish its water distribution plant.⁸² Moreover, in 1967, Israel issued Military Order 158, which this long-established policy restricts Palestinian from constructing new water installation unless they acquire the permit from Israel's authorities.⁸³

In the energy sector, Israel's policies during the occupation also create a harsh condition for Palestinians to establish their own energy supply. It is estimated that Gaza's energy sector is still dependent on Israel's supply, namely Israel Electric Corporation. The corporation contributes more than 88% of Gaza's energy consumption.⁸⁴ That being said, the Palestinian dependencies do not derive from their incapability to develop their energy system; rather the prolonged occupation had prevented them from building the infrastructures.⁸⁵

Besides the energy and water sectors, the same thing also applies to other aspects, namely imposing customs duties, restricting the movement of people and goods, altering the demographic composition of the occupied territories, expanding Israel's construction and settlement, or demolition of Palestinian' settlement.⁸⁶ At this side, it is evident that the control of Israel over Gaza is conducted through the mentioned aspects. Despite Israel's refusal on its status

as an Occupying Power, the fact on the ground had led the presence of occupation in the case. This is also acknowledged by several Resolutions adopted by United Nations organs. For example, the Security Council in Resolution 2334 considers Israel as an Occupying Power, even though Israel had withdrawn from the territories. Moreover, Security Council in Resolution 1860 also recognizes Israel as an Occupying Power. In this regard, both Resolutions highlighted Israel's action in controlling the movement of people and goods, deploying and building settlements in Gaza, and administering the water, electricity, and telecommunications, as those actions had caused numbers of humanitarian concerns in Gaza.⁸⁷

Using the established infrastructural system, Israel could retain its control over Gaza. According to this, US Military Tribunal in Nuremberg could illustrate how Israel control over Gaza can be construed as effective control. In the *Hostage* case, the Tribunal provided that:

"The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to exclude the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied"

⁸² *Ibid.*, p. 12-15.

⁸³ Amnesty International, *The Occupation of Water*. Accessed on <https://www.amnesty.org/en/latest/campaigns/2017/11/the-occupation-of-water/>

⁸⁴ World Bank, "Electricity Non-Payment and Arrears destabilize the Palestinian Economy". Accessed on <https://www.worldbank.org/en/news/press-release/2015/04/08/electricity-non-payment-and-arrears-destabilize-the-palestinian-economy>.

⁸⁵ Human Rights Watch, "Turn Gaza's Lights Back On". Accessed on

<https://www.hrw.org/news/2017/06/26/turn-gazas-lights-back>.

⁸⁶ United Nations Security Council, Resolution 2334 (2016). *See Also*, United Nations Security Council, Resolution 1860 (2009).

⁸⁷ United Nations Security Council, Resolution 2334 (2016). *See Also*, United Nations Security Council, Resolution 1860 (2009). *See Also*, International Commission of Jurist, "Under Occupation: Unprotected and Unvaccinated. Israel's Denial of Equitable Access to COVID-19 Vaccines in the Occupied Palestinian Territory", Briefing Paper, 2021, p. 12.

From the passage above, it is clear that the Tribunal acknowledge the type of control that assume "potential control" to be under the definition of effective control. Moreover, the Tribunal also put that it is not necessary for the Occupying Power to always present and administer the area at all times, instead it is sufficient if the Occupying Power could at any time replace the existing government of the occupied territories.

In the same vein, Hostage Case also points out that:

"In case of the occupant evacuates the district or is driven out by the enemy, the occupation ceases. However, it does not cease if the occupant, after establishing its authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district [...] provided the occupant could at any time it desired to assume physical control of any part of the territory. If, however, the power of the occupant is effectively displaced for any length of time, its position towards the inhabitant is the same as before occupation."

From Tribunal's interpretation, the control of an Occupying Power need not be constant, nor must it be maintained by the same amount of force. Instead, as long as they have the potential to control the territories, therefore the occupation shall remain to exist.

Here, despite the withdrawal, Israel could maintain its control through the systems it had built for the last 30 years, supported by the normative basis, such as Oslo Accord I, Oslo Accord II, or Disengagement Plan. The fact on the ground also demonstrates how Israel's long-established policy in Gaza led to some humanitarian crises in Palestinian territories.

Conclusively, the meaning of effective control does not necessarily refer to the

condition where it involves military forces alone. Instead, in the case of prolonged occupation, control can be established through institutionalized or systemic aspects that may range from non-military forces. Here, Israel could issue direction through the established system in the Gaza area, which brings a potential control by Israel in administering the site in and of itself.

C. CONCLUSION

Article 42 of Hague Regulations set two possible factors that may initiate occupation: First, the Occupying Power had established its control. Second, the Occupying Power could establish its control. In the case of Israel occupation, this article provides that Israel still maintains its control over the Area. In particular, the form of control as referred on the latter, namely the potential ability to control the area.

By exercising effective control, this is evident from the numbers of established infrastructure and dependencies of Palestinians in Gaza Area to Israel's authorities. For example, water systems, energy, telecommunication, taxes, civilian registration, or border administration.

Undoubtedly, Israel's systemic control over the area is influenced by the prolonged occupation that had lasted from the 1970s. Therefore, through various policies and infrastructure built by Israel, this condition forced the Palestinian to be under the control and administration of Israel. Subsequently, this brings an obligation to Israel as an Occupying Power under both Geneva Conventions and Hague Regulations.

REFERENCES

Book

Georg, Schwarzenberger, *International Law as Applied by International Courts and Tribunals - The Law of Armed Conflict*, London: Stevens & Sons, 1968.

Resolutions adopted by the General Assembly on 17 August 2007, GA Res. UN Doc. A/62/275 (2007).

The Disengagement Plan, 18 April 2004, accessed on <https://mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/disengagement%20plan%20%20general%20outline.aspx>.

United Nations Security Council, Resolution 1546 (2004).

United Nations Security Council, Resolution 1860 (2009).

United Nations Security Council, Resolution 2334 (2016).

US Tribunal at Nuremberg, Hostages trial, Law Reports of Trial of War Criminals, Vol. III, UN War Crimes Commission, 1949, London.

Other Documents

Aljazeera, " Hamas and Fatah: How Are the Two Groups Different," 2017, <https://www.aljazeera.com/features/2017/10/12/hamas-and-fatah-how-are-the-two-groups-different>.

Aljazeera, " Hamas and Fatah: How are the two groups different," *Aljazeera*, <https://www.aljazeera.com/features/2017/10/12/hamas-and-fatah-how-are-the-two-groups-different>, accessed on 20 January 2022

Aljazeera, "Operation Cast Lead Five years on We Are Still Demanding Justice," <https://www.aljazeera.com/opinions/2014/1/19/operation-cast-lead-five-years-on-we-are-still-demanding-justice>. Accessed on 20 January 2022

Amnesty International, "Gaza: Operation Cast Lead," *Amnesty International UK*, <https://www.amnesty.org.uk/gaza-operation-cast-lead>. Accessed on 20 January 2022

Amnesty International, The Occupation of Water. Accessed on <https://www.amnesty.org/en/latest/campaigns/2017/11/the-occupation-of-water/>

Human Rights Watch, "Turn Gaza's Lights Back On." Accessed on

<https://www.hrw.org/news/2017/06/26/turn-gazas-lights-back>

ICRC, "Convention (IV) Relative to the Protection of Civilian Persons in Time of War," *ICRC*, 1958, accessed on <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=030537C0A8EE01DFC12563CD0042A6BE>.

International Commission of Jurist, "Under Occupation: Unprotected and Unvaccinated. Israel's Denial of Equitable Access to COVID-19 Vaccines in the Occupied Palestinian Territory", Briefing Paper, 2021, p. 12.

World Bank, "Electricity Non-Payment and Arrears destabilize the Palestinian Economy." Accessed on <https://www.worldbank.org/en/news/press-release/2015/04/08/electricity-non-payment-and-arrears-destabilize-the-palestinian-economy>