

## Re-engaging the Gaza Debate – the impact of Operation Cast Lead

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### Abstract

On 27 December, 2008 Israel launched a military attack code-named “Operation Cast Lead” against the Hamas infrastructure on the Gaza Strip. In January, 2009 as the hostilities drew to a close, the Israeli High Court of Justice addressed whether the IDF had complied with its humanitarian obligations during the hostilities in *Physicians for Human Rights et al v The Prime Minister et al* (2009).<sup>1</sup> In doing so it sought to clarify whether Israeli forces had the ‘potential’ to control the Gaza Strip for the purposes of applying occupation law. Article 42 of the Hague Regulations describes the legal criteria for establishing *de facto* military occupation of foreign territory (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).<sup>2</sup>

Although two tests of ‘actual’ and ‘potential’ control were developed to determine belligerent occupation, the ICJ ruling in *Case Concerning Armed Activities on the Territory of the Congo* (2005) had narrowed this position exclusively in favour of the test of ‘actual’ control. After the disengagement of Israel from the Gaza Strip in 2005, Israel under the narrower ‘actual’ control test could no longer be considered a belligerent occupant there. The *Physicians for Human Rights Case* (2009) in response to Operation Cast Lead was the first significant attempt to address the uncertain position of the ‘potential’ control test in international humanitarian law since the ICJ ruling. In light of these current developments, this paper seeks to re-engage the debate on the status of Gaza in the aftermath of Operation Cast Lead. Does the law of belligerent occupation apply in the Gaza Strip? Is Gaza regarded as occupied territory under international humanitarian law?

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<sup>1</sup> *Physicians for Human Rights v. Prime Minister* H CJ 201/09, 248/09; ILDC 1213 (IL 2009).

<sup>2</sup> Article 42, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

## Introduction

On December 27th, 2008 Israel launched its military offensive Operation Cast Lead on the Hamas controlled Gaza Strip. Following weeks of sporadic military incursions into Gaza the Israeli offensive marked an endeavour to stop Hamas launching rockets into Southern Israel and smuggling weapons through the Rafah tunnels under the Gaza-Egypt border.<sup>3</sup> During the hostilities the deliberate targeting of civilians, high Palestinian casualties, excessive destruction of property and blocked humanitarian efforts prompted international criticism.<sup>4</sup> The scale of the humanitarian catastrophe prompted the *Physicians for Human Rights* group to challenge Israel's humanitarian responsibilities to the inhabitants of the Gaza Strip in the Israeli High Court and whether these humanitarian responsibilities were regulated under occupation law. Interestingly, Operation Cast Lead was the first full scale Israeli invasion into the Gaza Strip since the Disengagement Plan (2005). In September 2005, Israel had dismantled the Gaza settlements, removed Israeli Defence Forces from the territory and unilaterally declared an end to the forty year occupation of the Gaza Strip.<sup>5</sup> However the presence of military troops in Gaza during Operation Cast Lead in addition to the ruling on the test of 'potential' control in the *Physicians for Human Rights Case et al v. Prime Minister et al* (2009) reignites the question of Gaza's status under international law. Does Israel remain obligated to the Gaza Strip under the laws of military occupation? Furthermore, is the Gaza Strip still occupied under international humanitarian law?

## The Article 42 Tests for Effective Control

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<sup>3</sup> Marie Colvin, Uzi Mahnaimi, 'Successful' Israel signals ceasefire, THE SUNDAY TIMES, 18 January 2009. However other reports indicate that planning for Operation Cast Lead began up to six months prior to the attacks. Barak Ravid, *Disinformation, secrecy and lies: How the Gaza offensive came about* <http://www.haaretz.com/hasen/spages/1050426.html> (visited 20 May 2009). Ben White, *Israel wanted a humanitarian crisis* <http://www.guardian.co.uk/commentisfree/2009/jan/20/gaza-israelandthepalestinians> (visited 20 May 2009).

<sup>4</sup> UN Secretary General Ban Ki-Moon condemned the 'excessive use' of violence wrought by Israel and Hamas rockets. Guardian Service, Reuters, *Shelling of three UN sites must be investigated, says Ban*, THE IRISH TIMES, 21 January 2009; John Holmes, UN Undersecretary General for Humanitarian Affairs castigated the systematic destruction of industrial property and its implications for the economic development of Gaza. Michael Jansen, *Shelling of Gaza coast injures four Palestinians*, THE IRISH TIMES, 23 January 2009; Correspondingly, Human Rights Council resolution on "the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip," outlined that the Israeli siege and the cutting of the fuel, food and medicine supply was leading to 'disasterous humanitarian and environmental consequences' in the Gaza Strip. Human Rights Council, The United Nations General Assembly, Resolution, *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip* (12 January 2009) A/HRC/S-9/L.1.

<sup>5</sup> The Disengagement Plan <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan++General+Outline.htm> (visited 25 March 2009).

Article 42 of the Hague Regulations, 1907 determines the requisite control necessary for belligerent occupation (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).<sup>6</sup> Despite its apparent factual simplicity the article is less clear on application. As Murray-Aynsley C.J noted in *Loh Khing Woon v Lai Kong Jin and Another* (1946) “To decide when territory becomes occupied is to decide a difficult and complicated question of fact. It is not merely the question of the presence of forces of the one side and the absence of those on the other; to constitute occupation one must look for a certain element of permanency”.<sup>7</sup> Three conditions must be satisfied to establish the necessary effective control for belligerent occupation of enemy territory. Firstly, the previous government is rendered incapable of exercising governmental authority and the occupying power then must establish its authority over the hostile territory.<sup>8</sup> Secondly, there must be a military presence in the territory and thirdly the invading Power must substitute its authority for that of the previous government. The substitution of authority may be ‘actual’ or ‘potential’.

Under the ‘actual’ control test the authority of the legitimate power is suspended and passed in fact into the hands of the belligerent occupant.<sup>9</sup> For Oppenheim, administrative control was the hallmark of actual authority. The difference between occupation and invasion became “apparent from the fact that an occupant sets up some kind of administration, whereas the invader does not.”<sup>10</sup> Actual control of disputed territory is provisional and merely treated as a ‘settled acquisition’ for the purposes of effective administration.<sup>11</sup> However under an ‘actual control’ reading, the occupier, who maintains a military presence on the occupied territory but refrains or

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<sup>6</sup> Article 42, Annex to the Convention Respecting the Laws and Customs of War on Land, 1907.

<sup>7</sup> *Loh Khing Woon v Lai Kong Jin and Another*, (1946) (Annual Digest and Reports of Public International Law Cases, 1953 (London), Vol. 15 (1948), Case No. 138, p. 449). In a similar vein Adam Roberts has remarked of Article 42 “the core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear.” Adam Roberts, ‘What is Military Occupation?’ (1984) 55 *British Yearbook of International Law* 249.

<sup>8</sup> Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, CA: University of California Press) (1st ed., 1959), 213.

<sup>9</sup> This stems from the earlier military code, the Brussels Code where “the authority of the legitimate *power being suspended and having in fact passed into the hands of the occupants*, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety.” Project of an International Declaration Concerning the Laws and Customs of War, Aug 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & SR. PAPERS 1005 (1873-74).

<sup>9</sup> *Seethalakshmi Achi st al. v V.T. Veerappa Chettiar*, (1951) 11 ILR 576.

<sup>10</sup> L. Oppenheim, *International Law A Treatise, Vol II Disputes War and Neutrality* (London: Longmans) (7<sup>th</sup> ed., 1952), at 434. This was also the view of Lord Kingsdown that the belligerent’s intention to hold the invaded territory was indicated by the establishment of some kind of administration over it. *Cremidi v. Powell (Gerasimo’s Case)*, (1857) 11 MOO. P.C. 88; 14 E.R. 628.

<sup>11</sup> (1951) 11 ILR 576.

withdraws from the exercise of actual authority would no longer be regarded as a belligerent occupant. Taking for example, the status of Israel's relationship with the Gaza Strip under the 'actual control' test, Israel after the removal of the armed forces under the 2005 Disengagement Plan would not be considered a belligerent occupant of the Gaza Strip.

The 'potential' control test is more suited to application in contemporary hostilities. The two World Wars exposed the escalating contempt of certain belligerents to their obligations to the occupied State under international humanitarian law. The installation of a puppet government by Japan during the occupation of Manchuria in World War II served as a sophisticated means of evading its administrative responsibilities under the Article 43 of the Hague Regulations.<sup>12</sup> More recently the US/UK as occupying powers in Iraq attempted to evade their responsibilities under international humanitarian law, arguing that Iraq constituted a 'liberation' as opposed to an 'occupation' of territory, a term devoid of meaning in international law.<sup>13</sup>

Earlier strains of the broader 'potential' control test could be identified from the Lieber Code (1863). Article 41 of the Lieber Code states "territory is regarded as occupied when, as a consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and *the invading State is alone in a position to maintain order there*. The limits within which this state of affairs exists determine the extent and duration of the occupation"<sup>14</sup> (emphasis added). The potential control test embodied in the Lieber Code, the Oxford Code and silently carried within the Brussels and the Hague Conventions has been subject to expansive interpretation. Bluntschli writing in 1878 concluded that physical military presence on the occupied territory was not essential so long as control could be maintained without physical force.<sup>15</sup> Pillet believed that one single soldier might be sufficient in certain cases to signify belligerent occupation.<sup>16</sup> The French military manual of 1893 suggested that territory may be occupied if the invading belligerent surrounds the territory, even if there has been no

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<sup>12</sup> Article 43, Annex to the Convention Respecting the Laws and Customs of War on Land, 1907.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

<sup>13</sup> *PM Interview with the BBC World Service*, <http://www.number10.gov.uk/Page3423> (visited 21 May 2009).

<sup>14</sup> Dietrich Schindler and Jiri Toman, The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents (Dordrecht: Martinus Nijhoff) (1988). Reproduction of the 'Instructions for the Government of Armies of the United States in the Field.' The Lieber Instructions were originally developed for use in the American Civil War but were soon reproduced to serve as guidelines for wars of an international character.

<sup>15</sup> Doris Appel Graber, The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey (New York: Columbia University Press) (1949), 52.

<sup>16</sup> *ibid.* 62.

specific act of authority in it.<sup>17</sup> In particular the UK military manual (2004) determines that two conditions be satisfied for an effective belligerent occupation where “the former government has been rendered incapable of publicly exercising its authority in that area: and secondly that the occupying power is in *a position to substitute its own authority* for that of the former government.”<sup>18</sup> In line with earlier writings the manual does not appear to place any limitations on the scope of the test for potential control.

The most authoritative interpretation of the ‘potential’ control test stems from the ruling in *re List and Others (Hostages Trial)* 1948.<sup>19</sup> There the issue arose as to whether parts of Greece and Yugoslavia which had been occupied by the German armed forces under the test of ‘actual’ control but which then fell under the partisan control of members of the Greek and Yugoslav population, could continue to be regarded as occupied territories in the context of Article 42 of the Hague Regulations. The Military Tribunal at Nuremberg found (the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant).<sup>20</sup> Critically this ruling substantially narrows the earlier conceptions of the potential control test, and roots it firmly within the grasp of the actual control test which fundamentally had already established the actual authority of the German Armed Forces in the disputed territory.<sup>21</sup> A temporary disruption in the balance of control by the partisans was not enough to terminate the German occupation of territory. Despite pockets of hostilities there was still military presence and substitution of authority in both Greece and Yugoslavia and the German Armed Forces could potentially extend to the unsettled areas if and when required. As a pre-requisite to the potential control test for belligerent occupation it would appear that substitution of authority and military presence be formerly established on part of the territory. This would expunge the proposition that the armed

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<sup>17</sup> *supra* 56. Manuel de Droit International á l’Usage des Officiers de l’Armée de Terre.

<sup>18</sup> UK Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford; New York: University Oxford Press) (2004), 11.3.

<sup>19</sup> *re List and Others (Hostages Trial)*, (1948) 15 Ann Dig 632.

<sup>20</sup> (1948) 15 Ann Dig 638.

<sup>21</sup> *ibid.* The powers of government passed into the hands of the German Armed Forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On 22<sup>nd</sup> April, 1941, the Greek Armed Forces, which had since November 1940 managed to launch successfully a protracted counter-attack against the Italian forces in the Albanian front (this being the first victory of the Allies), were forced to surrender, and on 28<sup>th</sup> April, 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing International Law.

forces may potentially exert authority over territory for the purposes of occupation by merely surrounding it, even if there has been no specific act of authority in it.

### **Armed Activities in the Territory of the Democratic Republic of Congo (2005)**

Uncertainty over the use of the potential control test to determine belligerent occupation of territory under Article 42 of the Hague Regulations had arisen since the ICJ ruling in *Armed Activities in the Territory of the Democratic Republic of Congo* (2005).<sup>22</sup> There the ICJ found that Ituri, a region in the Democratic Republic of Congo (DRC) where a governor had been appointed and an administration established by Ugandan armed forces was considered occupied. Appositely, the surrounding regions where Ugandan forces were present and had taken control over specific military targets such as airfields, were not occupied despite the potential for the Ugandan armed forces to exert control. In reaching this conclusion the court relied on the traditional test of ‘actual control’ only. The Court needed to “examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government”.<sup>23</sup>

The court found that despite Uganda’s military presence in certain areas outside the Kibali-Ituri province and control over specific targets such as airfields, there was no evidence in the case file to allow for a broader finding of regional occupation outside Ituri.<sup>24</sup> The need for ‘actual’ evidence of control sidesteps the possibility of ‘potential’ or constructive military control over the region. Unfortunately the judgement did not contain any reason for using the traditional ‘actual’ control test to the exclusion of the test for ‘potential’ control which was a regrettable departure from the customary application of Article 42 of the Hague Regulations to hostilities as outlined in the earlier *Hostages* case.

Arguably the ICJ in *Armed Activities in the Territory of the Democratic Republic of Congo* had silently infused the potential control test into its independent determination of the Ugandan occupation of the entire Ituri/Kibali province outside the capital of Bunia. In his separate opinion Judge Parra-Aranguren diverged from the reasoning of the Court in finding that

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<sup>22</sup> *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgement, I.C.J. Reports 2005.

<sup>23</sup> *Ibid.* para 173.

<sup>24</sup> *Ibid.* “However the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district.”

the Ituri region in the DRC was under the *de facto* authority of the Ugandan armed forces. He outlined: It is also true that the UPDF was in control in Bunia (capital of Kibali-Ituri district), but control over Bunia does not imply effective control over the whole province of Kibali-Ituri, just as control over the capital (Kinsasha) by the Government of the DRC does not inevitably mean that it actually controls the whole territory of the country.<sup>25</sup>

Judge Parra-Aranguren noted that complicating factors such as regional instability and contributing rebel factions made a finding of occupation difficult to ascertain.<sup>26</sup> Moreover the neighbouring state Rwanda had also been identified by the DRC as a belligerent occupant over the same territory before the creation of the Ituri district by Uganda. Critical that these considerations were not examined by the Court he concluded that Uganda had not been an occupying power over the entire Kibali-Ituri province “but over some parts of it and at different times.” The fact that the Court was willing to extend the status of occupied territory to areas beyond Bunia in Ituri where other rebel groups were stationed indicates that although the Court did not adopt the potential control test in arriving at that conclusion, conceivably the court was latently moving in this direction as the surrounding areas were under the *de facto* ‘potential’ control of the Ugandan armed forces. Despite this the singular reference to the ‘actual’ control test to the exclusion of the test for potential control in the *Congo* judgement, placed the issue of effective control in belligerent occupation in an unfamiliar and calamitous position.

### **Putting the Tests back in Tandem: The Ruling in *Physicians for Human Rights et al. v. Prime Minister et al.* (2009)**

In a laudable appraisal of Article 42 of the Hague Regulations, the Israeli High Court of Justice specifically addressed the use of the potential control test in *Physicians for Human Rights et al. v. Prime Minister et al.* (2009).<sup>27</sup> Drawing on the precedent set in *Tzemel v. Minister of Defence* (1982),<sup>28</sup> the court held that the law of belligerent occupation is conditional upon the potential to exercise government authority by military forces and not necessarily upon the practical exercise of military authority in the territory. Furthermore, the military could effectively maintain temporary control over the territory for the application of Article 42 of the Hague Regulations

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<sup>25</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *op. cit.*, *supra*, n. 22, Separate Opinion of Judge Parra-Aranguren, p. 7, para 33.

<sup>26</sup> *Ibid.* p. 9, para 39. The 2004 MONUC report highlighted the activities of eleven different armed and political groups involved in the Ituri conflict.

<sup>27</sup> *Physicians for Human Rights et al. v. Prime Minister et al.*, HCJ 201/209, 248/09; ILDC 1213 (IL 2009).

<sup>28</sup> *Tzemel v. Minister of Defence*, P.D. 37(3) 365, HCJ 102/82.

without actually establishing a special military framework for governmental purposes.<sup>29</sup> This resiles the scope of the test for authority back to the settled parametres of the *Hostages Case*. It is particularly significant that the Israeli High Court of Justice reignited the question of potential control in light of the disengagement of Israeli forces from the Gaza Strip in 2005 and the re-entry of Israeli military forces into the Gaza Strip in December 2008, a move that could possibly signify potential de facto Israeli military occupation on the Gaza Strip. Despite this, Israel has illustrated in domestic state practice that the two tests are considered as indispensable tools in gauging the application of occupation law. Consequently, the realignment of the tests places the status of the Gaza Strip in a quandary when examined under the lens of potential Israeli control because the question of potential control can be examined under two separate premises producing divergent results. (1) Whether the territory of the Gaza Strip, the West Bank and Jerusalem constitutes one territorial unit for the purposes of occupation or (2) whether the Gaza Strip should be considered separately from the other occupied territories as an isolated unit.

### **The Gaza Strip, West Bank and East Jerusalem – One Territorial Unit?**

In 2005 under the terms of a unilateral Disengagement Plan, Israel withdrew settlers and troops from the Gaza Strip for the first time since the occupation began in the West Bank, the Gaza Strip and East Jerusalem in 1967 prompting suggestions that the territory was no longer under Israeli belligerent occupation but instead under Palestinian administrative control.<sup>30</sup> Under the terms of the Disengagement Plan Israel retains control over the external perimeter of the Gaza Strip, retains a military presence along the border of Egypt and the Gaza Strip, (otherwise known as the Philadelphi Route), maintains exclusive authority in Gaza airspace and exercises security activity in the sea off the Gaza coast.<sup>31</sup> In addition, B'TSELEM, the Israeli information centre for human rights in the occupied territories report that Israel continues to retain formal authority for administering the Gaza Strip – it is indicative that West Bank population registry determines who is a Palestinian resident and who is a foreigner. Moreover Israel exercises complete control over the movement of goods into the Gaza Strip and in keeping with the terms of the Paris Agreement (1994) between Israel and the Palestinian Authority, Israel continues to control most elements of

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<sup>29</sup> Physicians for Human Rights et al., *op. cit.*, *supra*, n.27, at para 14.

<sup>30</sup> The Disengagement Plan. <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> (visited 25 March 2009).

<sup>31</sup> *ibid.*



the taxation system such as VAT and customs rates on goods intended for consumption in the Gaza Strip.<sup>32</sup>

Arguably, under the 'potential' control test if the Gaza Strip, West Bank and East Jerusalem are considered as one territorial unit and the Israeli military exerts governmental authority over West Bank, then if that authority could potentially be extended to the Gaza Strip regardless of military presence, it would be considered occupied territory under Article 42 of the Hague Regulations. This would remain the case regardless of the Hamas /Fatah divide and the subsequent Hamas victory in the 2006 Palestinian Authority legislative elections.<sup>33</sup>

The Gaza Strip and West Bank (and possibly East Jerusalem) have for some time been considered as one unit territorially for administrative and peace building purposes. A series of international agreements conducted between the Israeli State and Palestinian representatives (Palestinian Liberation Organisation) in pursuit of a peaceful conclusion to the prolonged occupation since 1967 (and also in response to sporadic outbreaks of violence in the territories) have shaped international perspectives on the conflict but have been executed without recourse to the substratum of traditional international humanitarian law. Following negotiations at Oslo in 1993, Chairman of the PLO Yassar Arafat and Israel's Prime Minister, Yitzhak Rabin signed the Declaration of Principles on Interim Self Government Arrangements.<sup>34</sup> The terms of the agreement provided "the two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period."<sup>35</sup> This resulted in the peculiar position of the status of occupation being governed by the content of the agreement rather than by changing realities on the ground as is necessitated by a de facto application of Article 42 of the Hague Regulations.<sup>36</sup> However this position has been internationally recognised in UN Security Council Resolution 1860 "stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian State."<sup>37</sup> Significantly the resolution was drafted in response to the hostilities in the Gaza Strip under Operation Cast Lead and is the first resolution to comment on the relationship of the Gaza

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<sup>32</sup> B'TSELEM, *The Scope of Israeli Control in the Gaza Strip*, [www.btselem.org/english/Gaza\\_Strip/Gaza\\_Status.asp](http://www.btselem.org/english/Gaza_Strip/Gaza_Status.asp) (visited 17 March 2009).

<sup>33</sup> [http://news.bbc.co.uk/2/hi/middle\\_east/1654510.stm](http://news.bbc.co.uk/2/hi/middle_east/1654510.stm) (visited 26 March 2009).

<sup>34</sup> Declaration of Principles on Self-Government Arrangements, 32 International Legal Materials (1993) 557-650.

<sup>35</sup> *Ibid.* at 568.

<sup>36</sup> The reality on the ground after the Oslo process was further complicated by division of the West Bank into zones of various degrees of control shared between the occupier and the PNA. In Gaza the territory was divided into two occupation zones.

<sup>37</sup> S/RES/1860 (2009).

Strip to the West Bank and East Jerusalem since the Disengagement of Israeli troops and settlements in 2005.

The central problem with viewing the Gaza Strip, West Bank and East Jerusalem collectively as one territorial unit is that the law of belligerent occupation was not designed to support such artificial links. Belligerent occupation is a question of fact.<sup>38</sup> Stretching the reach of international humanitarian law under the umbrella of intra state and international agreements to separate areas where there is no *de facto* military presence and no working governing structure may be one step too far. Nevertheless, in the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) the court based an Article 42 assessment of belligerent occupation on a review of the previous UN resolutions on the Middle East in addition to an account of agreements between Israel and the Palestinian Liberation Organisation (PLO) on power sharing.<sup>39</sup> Although the opinion preceded the disengagement process, it indicates the courts willingness to base an Article 42 appraisal of occupation on international instruments rather than substantive temporal facts.<sup>40</sup> Similarly in *Ajuri v IDF Commander* (2002) the Israeli High Court of Justice ruled on the basis of past bilateral agreements and the fact that the two areas were administered in a co-ordinated manner, that the West Bank and the Gaza Strip were considered as one territory under belligerent occupation.<sup>41</sup> Taking the recent UNSC Resolution 1860, (2009) determination of the occupied territories as constituting one unit territorially, this resolution could be regarded as evidence of international consensus that there is continued occupation of the Gaza Strip. Nonetheless, it remains uncertain whether the territories are to be regarded as one unit territorially for the purposes of continued belligerent occupation or for the purposes of peace building or both.

### **Separate Control of the Gaza Strip**

Even with the favourable resumption of the ‘potential’ control test in Israeli jurisprudence, it is unlikely that the Gaza Strip could be regarded as occupied territory if considered in a separate

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<sup>38</sup> Hostages Trial, *op. cit.*, *supra*, n. 19, at 638. “Whether an invasion has developed into an occupation is a question of fact.”

<sup>39</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para 78.

<sup>40</sup> More encouragingly in his separate opinion in the *Congo* case, Judge Kooijmans refused to entertain the proposal that the Lusaka Agreement automatically brought an end to Uganda’s status as occupying power in the DRC, since that status was based on control in fact. *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), International Court of Justice, 19<sup>th</sup> December 2005. Separate Opinion of Judge Kooijmans, p. 11, para 53.

<sup>41</sup> *Ajuri v. IDF Commander*, H CJ 7015/02; H CJ 7019/02 at para 22.

capacity to the West Bank and East Jerusalem territories. To satisfy the test for potential control per the *Hostages* case, part of the territory must remain under the traditional actual control of the armed forces who then have the potential to exert influence over the remaining territory when desired. Since the disengagement process and the subsequent victory of Hamas in the 2006 elections, any residual influence Israel retained under the terms of the Disengagement Plan is exercised from beyond the border and absent co-operation with or influence over the Hamas government. Notwithstanding, Israel in withdrawing troops from the occupied territories is in part fulfilling its obligations to withdraw from the occupied territories under UNSC resolution 242 (1967).<sup>42</sup> UNSC resolution 338 (1973) also called for the implementation of all parts of Resolution 242.<sup>43</sup> Recently these resolutions were recalled in UNSC resolution 1850 (2008) in response to peace process developments, just days before Operation Cast Lead.<sup>44</sup> Furthermore, Israel has repeatedly insisted that the Gaza Strip is no longer occupied since the Disengagement in 2005.<sup>45</sup> In *A and B v. Israel* (2008) the Israeli Court of Criminal Appeals ruled that Israeli military authority had ended in the Gaza Strip. Israel had no permanent physical presence and therefore ‘no real ability to control what happens in the Gaza Strip in an effective manner.’<sup>46</sup> Ultimately the issue of control is a question of appraising the facts as they exist on the ground as distinct from pronouncements of control in international instruments where the reality may differ substantially.

### **Does the Law of Belligerent Occupation Apply in the Gaza Strip?**

At certain times during Operation Cast Lead parts of the Gaza Strip would have come temporarily under Israeli control for the purposes of applying occupation law. Adam Roberts has suggested “one might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or

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<sup>42</sup> S/RES/242 (1967). The Situation in the Middle East (22 November) para 1(1).

<sup>43</sup> S/RES/338 (1973). Cease-fire in the Middle East (22 October) para 2.

<sup>44</sup> S/RES/1850 (2008). The situation in the Middle East including the Palestinian Question (16<sup>th</sup> December 2008).

<sup>45</sup> Disengagement Plan <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> (visited 25 March 2009).

H CJ 10265/05, ILDC 160 (IL 2005); *The Regional Council of Gaza Beach v. The Knesset*, H CJ 1661/05; The Israeli High Court of Justice ruled that Israeli withdrawal from Gaza was legal in *Nadia Matar and Ors v. Commander of the Israeli Defence Force in Gaza*, Original Petition, H CJ 6339/05; ILDC 73 (IL 2005) para 12.

<sup>46</sup> *A and B v. Israel*, Appeal Decision, CrimA 6659/06, 1757/07, 8228/07, 3261/08; ILDC 1069 (IL 2008), para 11; More recently in *Physicians for Human Rights v. Prime Minister* (2009) Israel contended that following its disengagement from the Gaza Strip it no longer had effective control and could not take care of the population there. H CJ 201/09, 248/09; ILDC 1213 (IL 2009).

all of the provisions of the law on occupations are applicable.”<sup>47</sup> However the extent to which the Cast Lead offensive reignited a full scale belligerent occupation of the territory is tentative. The primary factor in this being the type of aerial bombardment accompanied by minor territorial incursions preferred by the Israeli military falling short of the level of control necessary to establish comprehensive occupation status.<sup>48</sup> Since the ruling of the European Court of Human Rights in *Bankovic v Belgium and Others (2001)*, aerial control is not considered effective control for the purposes of belligerent occupation.<sup>49</sup> In that case the applicants whose relatives had been killed during a NATO airstrike on the Federal Republic of Yugoslavia, maintained unsuccessfully that the protection of the European Convention on Human Rights was extended to them because at the time of the attack the Respondent States had effective control over Belgrade’s airspace.<sup>50</sup> It is unfortunate that the question of aerial control sufficient for effective belligerent occupation has remained decidedly against a finding of military occupation. In the meantime international humanitarian law is becoming increasingly ill equipped to counter adapting military techniques of warfare. Should ‘actual control’ be established during the aerial bombardment of territory, then the Gaza Strip considered in isolation would fall under the effective control of the Israeli armed forces during Operation Cast Lead. However, there has been no recent jurisprudence to suggest that the *Bankovic* position has been altered. Therefore regardless of political gesticulating over Gaza’s status as occupied territory, the humanitarian provisions of the Hague Regulations on belligerent occupation continue to apply every time the belligerent exerts *de facto* control over part of the territory or population.

## Conclusion

On January 21, 2009 in the wake of Operation Cast Lead, the Israeli army once again withdrew all it’s troops from the Gaza Strip leaving the status of the territory unsettled.<sup>51</sup> After the

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<sup>47</sup> Roberts, *loc. cit.*, *supra*, n. 7, at 249.

<sup>48</sup> Toni O’Loughlin, Hazem Balousha, Toby Helm, *Air Strikes in Gaza kill 225 as Israel targets Hamas*, THE OBSERVER, 28 December 2008. “A flight of Israeli F-16 fighters fired at least 30 missiles during air strikes against Hamas positions in Gaza.”

In an early work after World War II, Von Glahn suggested “since international law does not contain a rule prescribing the military arm through which an effective belligerent occupation is to be exercised, it might be theoretically possible to maintain necessary control through the occupants air force alone.” However the ruling of the European Court of Human Rights in *Bankovic* has since clarified that air control is not sufficient to maintain effective control for belligerent occupation. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: The University of Minnesota Press) (1957), 28.

<sup>49</sup> *Bankovic v. Belgium and Others* (2001) 123 I.L.R. 94.

<sup>50</sup> *ibid.* at 95.

<sup>51</sup> *Last Israeli Troops ‘Leave’ Gaza*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/7841902.stm](http://news.bbc.co.uk/2/hi/middle_east/7841902.stm) (visited 3 June 2009).

unwarranted departure of ICJ from the ‘potential’ control test in the *Congo* ruling, the Israeli High Court of Justice ruling in *Physicians for Human Rights* marked a return to the normal dual test application in state practice. Despite the initial clarity the resulting application of the potential control test is tainted by two competing interpretations. If the Gaza Strip is regarded as one territorial unit alongside the West Bank and East Jerusalem as the bilateral treaties and international resolutions suggest, then potentially there may be continued Israeli belligerent occupation there. However if the Gaza Strip is considered as an isolated unit distinct from the other occupied territories, as it appears on the facts then potentially the belligerent occupation has come to an end. These competing interpretations in parallel with infused political concerns have continued to impede what should be a straightforward application of the Hague Regulations on the facts.

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The Israeli army says it has completed its withdrawal from the Gaza Strip, following a three-week assault against militants from the Hamas group. Its troops will remain near the border and its spy-planes continue to fly over Gaza, and its navy vessels are still firing sporadically at Gaza's beaches.